THE INDIAN LAW REPORTS
(CUTTACK SERIES, MONTHLY)

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

Mode of Citation
2019 (III) I L R - CUT.

SEPTEMBER -2019

Pages : 1 to 208

Edited By

BIKRAM KISHORE NAYAK, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

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

Annual Subscription : ₹ 300/-

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R. BANUMATHI, J & A.S. BOPANNA, J.

CIVIL APPEAL NO. 7544-7545 OF 2019

(Arising out of SLP(C) Nos.35673-74 of 2014)

M/S. CANARA NIDHI LTD. .....Appellant

.Vs.

M. SHASHIKALA & ORS. …….Respondents

ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 – Application under – The question arose as to whether the parties can adduce evidence to prove the specified grounds in sub-section (2) to Section 34 of the Act – Held, No – Reasons indicated.

"The proceedings under Section 34 of the Act are summary in nature. The scope of enquiry in the proceedings under Section 34 of the Act is restricted to a consideration whether any of the grounds mentioned in Section 34(2) or Section 13(5) or Section 16(6) are made out to set aside the award. The grounds for setting aside the award are specific. It is imperative for expeditious disposal of cases that the arbitration cases under Section 34 of the Act should be decided only with reference to the pleadings and the evidence placed before the arbitral tribunal and the grounds specified under Section 34(2) of the Act." *(Para 9)*

Case Laws Relied on and Referred to :-

1. (2009) 17 SCC 796 : Fiza Developers and Inter-Trade Private Limited .Vs. AMCI (India) Private Ltd. & Anr.
2. (2018) 9 SCC 49 : Emkay Global Financial Services Ltd. .Vs. Girdhar Sondhi.

For Appellant : S.N. Bhat
For Respondents : E.R. Sumathy

JUDGMENT Date of Judgment : 23.09.2019

R. BANUMATHI, J.

Leave granted.

2. In the application under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) seeking to set aside the award, whether the parties can adduce evidence to prove the specified grounds in sub-section (2) to Section 34 of the Act, is the question falling for consideration in these appeals.

3. These appeals arise out of the judgment dated 12.09.2014 passed by the High Court of Karnataka at Bangalore in Writ Petition Nos.18374-75 of 2010 (GM-RES) in and by which the High Court set aside the order passed by the District Judge and directed the District Judge to "recast the issues" and permit respondent Nos.1 and 2 to file affidavits of their witnesses and also permitting cross-examination of the witnesses.

4. Brief facts which led to filing of these appeals are as under:-

The appellant is the financial institution and the appellant advanced a loan of Rs.50,00,000/- to respondent No.1 and respondent Nos.2, 4 and 5 to 8 were the guarantors in respect of such loan. The loan was secured by a mortgage with deposit of title deeds and respondent No.1 is also said to have executed a demand promissory note for repayment of the loan. There was an arbitration clause in the agreement to resolve dispute between the parties. It is alleged that the first respondent did not repay the loan and failed to discharge the liabilities arising out of the transaction. The dispute between the appellant and the first respondent was referred to arbitration to the third respondent-Arbitrator. Before the arbitrator, both the parties adduced oral and documentary evidence. The arbitrator passed an award dated 15.12.2007 and directed the respondents to pay an amount of Rs.63,82,802/- with interest on Rs.50,00,000/- at 14% per annum from 11.08.2000 and cost of Rs.52,959/-.

5. Assailing the award, respondent No.1 filed AS No.1 of 2008 under Section 34 of the Act in the Court of District Judge at Mangalore. Before the District Judge, respondent Nos.1 and 2 filed an application under Section 151 CPC to permit the respondents to adduce evidence. The appellant filed objections to the said application. By the order dated 02.06.2010, the learned District Judge dismissed the said application. Holding that the grounds urged in the application can very well be met with by the records of the arbitration proceedings and by perusing the arbitral award, the learned District Judge further held that in any event, there is no necessity of adducing fresh evidence in the application filed under Section 34 of the Act.

6. Aggrieved by the dismissal of their application under Section 151 CPC, respondent Nos.1 and 2 filed writ petitions before the High Court under Articles 226 and 227 of the Constitution of India. The High Court by the impugned judgment allowed the writ petitions and directed the learned District Judge to "recast the issues" and allow respondent Nos.1 and 2 to file affidavits of their witnesses and further allow cross-examination of the witnesses. After referring to the judgment in *Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited and another* **(2009) 17 SCC 796**, the High Court observed that in order to prove the existence of the grounds under Section 34(2) of the Act, respondent Nos.1 and 2 are permitted to file affidavits of their witnesses. In the impugned judgment, the High Court concluded that the reasoning of the District Judge not permitting respondent Nos.1 and 2 to file their own affidavits and affidavits of other witnesses to prove their case is erroneous and opposed to settled principles of

law. As pointed out earlier, the learned District Judge was directed to "recast the issues" and the court below was directed to permit respondent Nos.1 and 2 to file affidavits of their witnesses and extend corresponding opportunity to the appellant to place their evidence by affidavit. Being aggrieved, the appellant has preferred these appeals. This Court ordered notice vide order dated 06.01.2015 and further ordered that there shall be stay of the proceedings in AS No.1 of 2008.

7. Assailing the impugned judgment, Mr. S.N. Bhat, learned counsel appearing for the appellant submitted that it is well settled that proceedings under Section 34 of the Act is summary in nature and the scope of the said proceedings is very limited. It was submitted that the validity of the award has to be decided on the basis of the materials produced before the arbitrator and there is no scope for adducing fresh evidence before the court in the proceedings under Section 34 of the Act. The learned counsel submitted that the High Court, in the present case, misread the ratio of the decision of the Supreme Court in ***Fiza Developers***. It was *inter alia* urged that in any event, in the present case, respondent Nos.1 and 2 did not make out any exceptional grounds for permission to lead fresh evidence in the proceedings under Section 34 of the Act and the learned District Judge rightly rejected the application filed by respondent Nos.1 and 2 for permission to lead evidence. The learned counsel urged that the High Court erred in interfering with the order passed by the trial court in interlocutory application.

8. Reiterating the findings of the impugned judgment of the High Court, Ms. E.R. Sumathy, learned counsel appearing for respondent Nos.1 and 2 submitted that in order to prove the grounds stated in the application filed under Section 34 of the Act adducing additional evidence is necessary. It was submitted that respondent Nos.1 and 2 sought to adduce evidence to prove the grounds enumerated under Section 34(2) (a) of the Act. The learned counsel submitted that the grounds for setting aside the award are specific and therefore, necessarily respondent Nos.1 and 2 will have to plead and prove the grounds mentioned in Section 34(2) of the Act and prove the same and the High Court rightly allowed the writ petitions giving an opportunity to respondent Nos.1 and 2 to adduce evidence in the proceedings under Section 34 of the Act.

9. The proceedings under Section 34 of the Act are summary in nature. The scope of enquiry in the proceedings under Section 34 of the Act is restricted to a consideration whether any of the grounds mentioned in Section 34(2) or Section 13(5) or Section 16(6) are made out to set aside the award.

The grounds for setting aside the award are specific. It is imperative for expeditious disposal of cases that the arbitration cases under Section 34 of the Act should be decided only with reference to the pleadings and the evidence placed before the arbitral tribunal and the grounds specified under Section 34(2) of the Act.

10. The learned counsel for respondent Nos.1 and 2 submitted that in view of Rule 4(b) of the High Court of Karnataka Arbitration (Proceedings before the Courts) Rules, 2001, (Karnataka High Court Arbitration Rules) all the proceedings of the Civil Procedure Code, 1908 shall apply to such proceedings and therefore, the High Court rightly allowed the writ petitions and permitted respondent Nos.1 and 2 to file their own affidavits and also the affidavits of the witnesses. Rule 4(b) of the Karnataka High Court Arbitration Rules provides that all the proceedings of the Civil Procedure Code shall apply to such proceeding/application filed under Sections 14 or 34 of the Act insofar as they could be made applicable. Rule 4(b) of Karnataka High Court Arbitration Rules, in our view, are only procedural. In ***Fiza Developers***, the Supreme Court noticed Rule 4(b) of Karnataka High Court Arbitration Rules and made it clear that there is no wholesale or automatic import of all the provisions of Civil Procedure Code into the proceedings under Section 34 of the Act as that will defeat the very purpose and object of the Arbitration Act, 1996.

11. In ***Fiza Developers***, the question which arose for consideration by the court was whether issues as contemplated under Order XIV Rule 1 of Civil Procedure Code should be framed in the application under Section 34 of the Act. The court held that framing of issues as contemplated under Order XIV Rule 1 CPC is not required in an application under Section 34 of the Act which proceeding is summary in nature. In paras (14), (17), (21) and (24) of ***Fiza Developers***, it was held as under:-

> **"14.** In a summary proceeding, the respondent is given an opportunity to file his objections or written statement. Thereafter, the court will permit the parties to file affidavits in proof of their respective stands, and if necessary permit cross-examination by the other side, before hearing arguments. Framing of issues in such proceedings is not necessary. We hasten to add that when it is said issues are not necessary, it does not mean that evidence is not necessary.
>
> ……..
>
> **17.** The scheme and provisions of the Act disclose two significant aspects relating to courts vis-à-vis arbitration. The first is that there should be minimal interference by courts in matters relating to arbitration. Second is the sense of urgency shown with reference to arbitration matters brought to court, requiring promptness in disposal.

> **21.** We may therefore examine the question for consideration by bearing three factors in mind. The first is that the Act is a special enactment and Section 34 provides for a special remedy. The second is that an arbitration award can be set aside only upon one of the grounds mentioned in sub-section (2) of Section 34 exists. The third is that proceedings under Section 34 requires to be dealt with expeditiously.
>
> ……..
>
> **24.** In other words, an application under Section 34 of the Act is a single issue proceeding, where the very fact that the application has been instituted under that particular provision declares the issue involved. Any further exercise to frame issues will only delay the proceedings. It is thus clear that issues need not be framed in applications under Section 34 of the Act."

12. Though this Court held that the applications under Section 34 of the Act are summary proceedings, an opportunity to the aggrieved party has to be afforded to prove existence of any of the grounds under Section 34(2) of the Act. This court thus permitted the applicant thereon to file affidavits of his witnesses in proof thereof. In para (31) of ***Fiza Developers***, this Court held as under:-

> **31.** Applications under Section 34 of the Act are summary proceedings with provision for objections by the respondent defendant, followed by an opportunity to the applicant to "prove" the existence of any ground under Section 34(2). The applicant is permitted to file affidavits of his witnesses in proof. A corresponding opportunity is given to the respondent-defendant to place his evidence by affidavit. Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Thereafter, the court hears arguments and/or receives written submissions and decides the matter. This is of course the routine procedure. The court may vary the said procedure, depending upon the facts of any particular case or the local rules. What is however clear is that framing of issues as contemplated under Rule 1 of Order 14 of the Code is not an integral part of the process of a proceedings under Section 34 of the Act."

13. After referring to the judgment in ***Fiza Developers***, in the impugned judgment, the High Court held that respondent Nos.1 and 2 are to be afforded an opportunity to file their and their witnesses' affidavits in proof of their case to prove the grounds set out in Section 34(2)(a) of the Act.

14. After the decision in ***Fiza Developers***, Section 34 was amended by Act 3 of 2016 by which sub-sections (5) and (6) of Section 34 were added to the Principal Act w.e.f. 23.10.2015. Sub-sections (5) and (6) to Section 34 of the Act read as under:-

> "**34.** ***Application for setting aside arbitral award***.—
>
> (1)-(4) ……..
>
> (5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

> (6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

15. The judgment in ***Fiza Developers*** was considered by Justice B.N. Srikrishna Committee which reviewed the institutionalisation of the arbitration mechanism and pointed out that opportunity to furnish proof in proceedings under Section 34 of the Arbitration Act has led to inconsistent practices. The said Committee reported as under:-

> "5. *Amendment to Section 34(2)(a) of the ACA*: Sub-section (2) (*a*) of Section 34 of the ACA provides for the setting aside of arbitral awards by the court in certain circumstances. The party applying for setting aside the arbitral award has to furnish proof to the court. This requirement to furnish proof has led to inconsistent practices in some High Courts, where they have insisted on Section 34 proceedings being conducted in the manner as a regular civil suit. This is despite the Supreme Court ruling in *Fiza Developers & Inter-Trade (P) Ltd.* v. *AMCI (India) (P) Ltd.* (2009) 17 SCC 796 that proceedings under Section 34 should not be conducted in the same manner as civil suits, with framing of issues under Rule 1 of Order 14 of the CPC.
>
> In light of this, the Committee is of the view that a suitable amendment may be made to Section 34(2)(*a*) to ensure that proceedings under Section 34 are conducted expeditiously.
>
> *Recommendation*: An amendment may be made to Section 34(2) (*a*) of the Arbitration and Conciliation Act, 1996, substituting the words 'furnishes proof that' with the words 'establishes on the basis of the Arbitral Tribunal's record that'."
>
> [**Report of Justice B.N. Srikrishna Committee quoted in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi (2018) 9 SCC 49***]

16. Based upon Justice B.N. Srikrishna Committee's report, Section 34 of the Principal Act has been amended by Arbitration and Conciliation (Amendment) Act, 2019 as under:-

> "**7. *Amendment of Section 34***.—In Section 34 of the principal Act, in sub-section (2), in clause (*a*), for the words "**furnishes proof that**", the words "**establishes on the basis of the record of the Arbitral Tribunal that**" shall be substituted."

17. After referring to Justice B.N. Srikrishna Committee's report and other judgments and observing that the decision in *Fiza Developers* must be read in the light of the amendment made in Section 34(5) and Section 34(6) of the Act and amendment to Section 34 of the Arbitration Act, 1996, in *Emkay Global Financial Services Limited v. Girdhar Sondhi* **(2018) 9 SCC 49,** it was held as under:-

> **"21.** It will thus be seen that speedy resolution of arbitral disputes has been the reason for enacting the 1996 Act, and continues to be the reason for adding amendments to the said Act to strengthen the aforesaid object. Quite obviously, if

> issues are to be framed and oral evidence taken in a summary proceeding under Section 34, this object will be defeated. It is also on the cards that if Bill No. 100 of 2018 is passed, then evidence at the stage of a Section 34 application will be dispensed with altogether. Given the current state of the law, we are of the view that the two early Delhi High Court judgments in *Sandeep Kumar v. Ashok Hans* 2004 SCC OnLine Del 106, *Sial Bioenergie v. SBEC Systems* 2004 SCC OnLine Del 863, cited by us hereinabove, correctly reflect the position in law as to furnishing proof under Section 34(2)(*a*). So does the Calcutta High Court judgment in *WEB Techniques and Net Solutions (P) Ltd. v. Gati Ltd.* 2012 SCC OnLine Cal 4271. We may hasten to add that if the procedure followed by the Punjab and Haryana High Court judgment in *Punjab SIDC Ltd. v. Sunil K. Kansal* 2012 SCC Online P&H 19641 is to be adhered to, the time-limit of one year would only be observed in most cases in the breach. We therefore overrule the said decision. We are constrained to observe that *Fiza Developers* was a step in the right direction as its ultimate ratio is that issues need not be struck at the stage of hearing a Section 34 application, which is a summary procedure. However, this judgment must now be read in the light of the amendment made in Sections 34(5) and 34(6). So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(*a*), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. We, therefore, set aside the judgment in *Girdhar Sondhi v. Emkay Global Financial Services Ltd.* 2017 SCC On-Line Del 12758 of the Delhi High Court and reinstate that of the learned Additional District Judge dated 22-9-2016. The appeal is accordingly allowed with no order as to costs."

The legal position is thus clarified that Section 34 application will not ordinarily require anything beyond the record that was before the arbitrator and that cross-examination of persons swearing in to the affidavits should not be allowed unless absolutely necessary.

18. The question falling for consideration is whether the present case is such an exceptional circumstance that it was necessary to grant opportunity to respondent Nos.1 and 2 to file affidavits and to cross-examine the witnesses is made out. The affidavit filed by the respondents along with application filed under Section 151 CPC does not indicate as to what point the first respondent intends to adduce except stating that the first respondent intends to adduce additional evidence relating to the subject of dispute. The affidavit does not disclose specific documents or evidence required to be produced except stating that the first respondent intends to adduce additional evidence or otherwise the first respondent will be subjected to hardship in the arbitration suit filed by her under Section 34 of the Act. As rightly contended

by the learned counsel appearing for the appellant that there are no specific averments in the affidavit as to the necessity and relevance of the additional evidence sought to be adduced.

19. By perusal of the award, it is seen that before the arbitrator, respondent No.1 filed her written statement and other respondents also filed separate written statements. It was contended that the documents were forged. Both parties adduced oral and documentary evidence. The appellant led evidence by examining two witnesses Balakrishna Nayak (PW-1) and B.A. Baliga (PW-2) and exhibited documents P1 to P47. Respondent Nos.1 and 2 also examined five witnesses viz. M. Shashikala (RW-1), Mamatha @ Mumtaz Hameed (RW- 2), Latha (RW-3), Chitralekha Umesh (RW-4) and B.R. Nagesh (RW-5). Respondent Nos.1 and 2 also produced documentary evidence Ex.-R1 to R13. As held by the District Judge, the grounds urged in the application can very well be considered by the evidence adduced in the arbitration proceedings and considering the arbitral award. Further, the application filed by respondent Nos.1 and 2 seeking permission to adduce evidence, no ground was made out as to the necessity of adducing evidence and what was the nature of the evidence sought to be led by respondent Nos.1 and 2. The proceedings under Section 34 of the Act are summary proceedings and is not in the nature of a regular suit. By adding sub-sections (5) and (6) to Section 34 of the Act, the Act has specified the time period of one year for disposal of the application under Section 34 of the Act. The object of sub-sections (5) and (6) to Section 34 fixing time frame to dispose of the matter filed under Section 34 of the Arbitration Act, 1996 is to avoid delay and to dispose of the application expeditiously and in any event within a period of one year from the date of which the notice referred to in Section 34(5) of the Act is served upon the other party. In the arbitration proceedings, the parties had sufficient opportunity to adduce oral and documentary evidence. The High Court did not keep in view that respondent Nos.1 and 2 have not made out grounds that it is an exceptional case to permit them to adduce evidence in the application under Section 34 of the Act. The said directions of the High Court amount to retrial on the merits of the issues decided by the arbitrator. When the order of the District Judge dismissing the application filed by respondent Nos.1 and 2 does not suffer from perversity, the High Court, in exercise of its supervisory jurisdiction under Articles 226 and 227 of the Constitution of India, ought not to have interfered with the order passed by the District Judge and the impugned judgment cannot be sustained.

20. In the result, the impugned judgment dated 12.09.2014 passed by the High Court of Karnataka at Bangalore in Writ Petition Nos.18374-75 of 2010 (GM-RES) is set aside and these appeals are allowed. The order of the District Judge dismissing the application filed under Section 151 CPC in AS No.1 of 2008 is affirmed. The learned District Judge shall take up AS No.1 of 2008 and dispose of the same expeditiously in accordance with law. No costs.

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2019 (III) ILR - CUT- 9

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

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

RABI NARAYAN PANDA .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Article 16 read with Article 311 – Provisions under – Petitioner appointed temporarily as a peon in 1989 in the existing vacancy for a period of 89 days or till regular appointment is made – Subsequently the petitioner was disengaged in 2007 – Plea that no opportunity of hearing was given as he has acquired a right under Article 311 of the Constitution – Records show petitioner was never appointed on regular basis and no order of regularization has been filed –Throughout his service period, he had worked on temporary/adhoc basis – Petitioner was never appointed with concurrence of the Finance Department and was appointed in violation of Article 16 of the Constitution of India – So Article 311 of the Constitution is not applicable as the case of the petitioner is not coming under the purview of same as he has neither been removed nor dismissed nor any stigma has been attached to his conduct – Thus, he was a backdoor entrant, who has been rightly shown the door – Writ petition dismissed.

Case Laws Relied on and Referred to :-

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

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

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

JUDGMENT Heard & Decided on 24.01.2019

K.S. JHAVERI, C.J.

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

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

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

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

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

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

> "**311.Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.**-
>
> (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State

> shall be dismissed or removed by an authority subordinate to that by which he was appointed.
>
> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.
>
> Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:
>
> Provided further that this clause shall not apply-
>
> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
>
> (b) where the authority empowered to dismiss or remove a person or to reduce him in rank ins satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or
>
> (c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.
>
> (3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"6. We have considered the submissions made by the learned counsels. We have also perused the documents enclosed. It is a fact that the applicant was appointed as a Peon against an existing vacancy for a period of 89 days or till regular appointment is made by Collector, Ganjam on 20.6.1989. His appointment on ad hoc basis was continued with breaks till he was regularly appointed as a Messenger against a vacant post in order dated 29.1.1999 (Annexure-4). He was disengaged

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

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

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

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

xx xx xx

8. That the submissions made in para-7 of the writ petition is totally misconceived and incorrect. It is a fact that the petitioner was appointed temporarily as Messenger against vacant post vide order No.505 dt. 29.1.1999 by the then General Manager, DIC, Ganjam but the same was not done following any process of law, at least inviting application through either the employment exchange or through open advertisement keeping in view the Rules governing the field and Article 16 of the Constitution of India."

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

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

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

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

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

Similarly, *Umadevi case (supra)* no way helps the cause of the petitioner as it has been made clear there that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee (emphasis supplied).

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

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

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2019 (III) ILR - CUT- 16

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

OJC NO.11033 OF 1996 & OJC NO.11034 OF 1996

ASWINI KUMAR DASPATTANAYAK .....Petitioner

.Vs.

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

DISCIPLINARY PROCEEDING – Petitioner a Judicial Officer – After conclusion of inquiry proceeding, he received an order of compulsory retirement – Whether the order of compulsory retirement is a punishment? – Held, No.

"Taking into consideration the evidence on record, the Full Court while considering the order of compulsory retirement, has taken a sympathetic view taking into account the entire sequence of the events, materials available on record and his confrontation with the then learned District Judge. In our considered opinion the departmental proceeding which were initiated against the petitioner, ultimately culminated compulsory retirement which is not a punishment. In that view of the matter, the Full Court taking into consideration the overall situation and looking into the conduct of the petitioner, has taken a sympathetic view for compulsory retirement. The Full Court while considering the proposed punishment of removal thought it proper that the petitioner should be allowed to retire compulsorily. Looking into the facts available on record, we are of the view that it will not be appropriate to differ the decision of the Full Court and substitute our own. We are in complete agreement with the decision of the Full Court."

Case Laws Relied on and Referred to :-

1. 1988 (II) OLR 97 : Aswini Kumar Das Pattanayak & Ors. .Vs. The High Court of Orissa & Ors.
2. (1999) 7 SCC 409 : Zunjarrao Bhikaji Nagarkar .Vs. Union of India & Ors.
3. 2017 (II) OLR 699 : Pitambar Patra .Vs. Registrar General, High Court of Orissa, Cuttack & Ors.

For Petitioner : M/s. Dr. Ashok Kr. Mohapatra, Sr. Adv. A.K. Hota, A.N. Upadhaya & R. Das, [In both the writ petitions]

For Opp. Parties : Addl. Govt. Adv.

JUDGMENT Date of Judgment : 25.04.2019

K.S. JHAVERI, C.J.

These two writ petitions have been filed with the following prayers:

OJC No.11033 of 1996

"It is therefore, prayed that this Hon'ble Court may be graciously be pleased to issue writ/writs/order/orders/ direction/directions/declarations under article 226 of the Constitution and more particularly may issue;

(i) writ of certiorari calling upon the opp.parties to produce the relevant record along with return,

(ii) writ of certiorari declaring the Departmental proceeding along with the charge, inquiry report and impugned order of removal as bad, illegal and unconstitutional;

(iii) writ of certiorari declaring the Departmental proceeding No.4 of 1992 as illegal and unconstitutional being violative of the principles of Natural Justice and Article 311 (2) of the Constitution as well as Rule 15 of C.C.A. Rule;

(iv) writ of certiorari quashing the impugned order of removal as illegal and unconstitutional;

(v) writ of mandamus directing the opp.parties to reinstate the petitioner with all consequential service benefits;

(vi) Order allowing all or any other relief/reliefs as would be available to the petitioner under law;

(vii) Order allowing the application with costs;

And

pass such other order/orders as deemed fit and proper;

And

For the act of kindness and grace the petitioner shall as in duty bound every pray."

OJC No.11034 of 1996

"It is therefore prayed that this Hon'ble Court may be graciously pleased to issue writ/writs/direction/directions/ order/orders/declarations and more specifically may issue;

(i) writ of certiorari calling upon the opp.parties to produce the relevant record along with return,

(ii) writ of certiorari declaring the impugned order of retirement as bad, illegal and unconstitutional;

(iii) writ of certiorari quashing the impugned order of retirement as illegal and unconstitutional;

(iv) order directing the opp.parties to consider the representation of the petitioner (Anx-11) for voluntary retirement;

(v) writ of mandamus directing the opp.parties to reinstate the petitioner with all consequential service benefits;

(vi) Order allowing all or any other relief/reliefs as would be available to the petitioner under law;

(vii) Order allowing the application with costs;

And

Pass such other order/orders as deemed fit and proper under the facts and circumstances of the case;

And for this act of kindness the petitioner shall as in duty bound ever pray."

2. The sequence of events as revealed from the writ petitions is that the petitioner while practicing as an Advocate at Koraput, appeared in the O.P.S.C. Recruitment test under Orissa Judicial Service, Class-II (Munsif) (Emergency Recruitment) Rules, 1974 in which the petitioner secured 1st position. Consequently, he attended medical examination and police verification etc. prior to appointment. Thereafter, he got appointment as Munsif, Class-II by the Governor of Orissa (under Article 234 of the Constitution). His service was placed with the High Court of Orissa-opposite Party No. 2 under Article 235 of the Constitution for administrative control and vesting of power. As such, to function as Judicial Officer of the State, he joined as J.M.F.C. at Chhatrapur in obedience to the orders of High Court and continued till May, 1978. In the month of June, 1978, he was posted as J.M.F.C., Bhadrak and continued till May, 1979, when he was posted as S.D.J.M.-cum-Munsif, Nayagarh and continued till May, 1982. In June, 1979, he was promoted and posted as S.D.J.M., Balasore and continued till May, 1984, worked as Assistant Commissioner of Endowments, Orissa, Bhubaneswar till June, 1987. While working as Asst. Commissioner, High Court made an unprecedented and illegal endeavour by superseding the petitioner and 27 other Officers of the Batch, allowed promotion to three out of 28 Officers appointed in 1978. Being aggrieved by the same, the petitioner filed a writ petition before this High Court being authorized by all his batch mates. The said writ petition was registered as OJC No. 2254 of 1985. The petitioner was promoted to the rank of O.J.S. Class-I (Sub-Judge) in usual

course and maintained his top position in his batch. In the month of June, 1987, the petitioner posted as Sub-Judge-cum-Asst. Sessions Judge, Aska.

2.1. The writ petition, filed by the petitioner i.e. OJC No. 2254 of 1985 was allowed by a Division Bench of this Court, reported in 1988 (II) OLR 97 (Aswini Kumar Das Pattanayak and others vs. The High Court of Orissa and others) whereby the petitioner and his batch mates were declared senior to opposite party Nos. 3 to 30 therein and the decisions were worked out.

2.2. The opposite parties therein filed Special Leave Petition (Civil) No.11297 of 1988 before the Supreme Court i.e. *Birakishore Mishra and others vs. Orissa High Court & others*; wherein the petitioner was the opposite party No.3. The said SLP was dismissed on 12.7.1995.

2.3. In the month of January, 1990, the petitioner was transferred and posted as Sub-Judge-cum-Asst. Sessions Judge & J.M.F.C., Anandapur and he continued there till 16.08.1990. During such incumbency, Sri M.R. Nanda, Commissioner of Endowment, Orissa, Bhubaneswar vide D.O. Letter No. 641 dated 31.05.1990 informed the Petitioner, Sub-Judge, Anandapur, that on 18.06.1990 he was required to explain and intimate directly to the Law Department, Government of Odisha in the matter of execution of order passed O.A. No.176/85 under Section 19 of O.H.R.E. Act which was passed by the then Commissioner of Endowment-Sri Prahallad Mishra, after expiry of the appeal period of 30 days relating to Bharati Math of Bhubaneswar, to which, the petitioner answered vide letter No.1 dated 19.06.1990 (confidential) to the Law Department enclosing available papers.

2.4. On 22.08.1990, the petitioner was transferred and posted as Sub-Judge-cum-Asst. Sessions Judge, Nayagarh. In Sept, 1991, he got promotion to the cadre of Superior Judicial Service (Junior Branch) as Chief Judicial Magistrate taking into consideration his seniority and suitability by the High Court. The Petitioner joined as Additional Chief Judicial Magistrate-cum-A.S.J.-cum-JMFC-cum-Additional Sub-Judge and Presiding Officer, Juvenile Court at Berhampur where Sri M.R. Nanda was District & Session Judge. On Petitioner's courtesy visit on the day of joining at Berhampur, Sri M.R. Nanda expressed his resentment and displeasure to the petitioner for the act of the petitioner to reply to the Government while he was the Sub-Judge, Anandapur regarding the auction of land relating to Bharati Math, Bhubaneswar with available documents with the Petitioner then for which the said land was declared as 'Green Belt' unfit for conversion to house site for which Sri Nanda allegedly suffered pecuniary loss as he had allegedly

purchased a plot out of that in the name of his only son. Such version of Sri Nanda created panic to the petitioner, who begged his unconditional apology for his unintentional reply to the Law Department but Mr. Nanda was neither persuaded nor satisfied rather he openly threatened to the petitioner to see him out of job. Thus, the petitioner became a victim of the situation for no fault of him. Thereafter, the petitioner was allegedly victimized by the then District Judge taking some plea or other.

2.5. Finding no other alternative, the petitioner on 21.05.1992 made a representation to this Court vide letter No. 846, dated 21.05.1992 for his transfer as per the grounds stated therein. While the matter stood thus, the then District Judge sent another letter dated 01.07.1992 alleging that when he was working as Sessions Judge rejected the prayer for bail on 20.05.1992 under Sec. 439 Cr.P.C. but, subsequently, the petitioner allowed the bail of that accused, when he was kept in charge of S.D.J.M., Berhampur on 12.06.1992. As such, the petitioner was asked to explain the allegation in the D.O. within seven days.

2.6. On 07.07.1992 the petitioner replied to the District & Sessions Judge vide Letter No.2 dated 07.07.1992 that in good-faith, judicious consideration of materials on record, appreciation of prolonged custody of the U.T.P., no sign of progress in investigation, compromise between the informant and accused and there being no objection of the Counsel for the State, the petitioner had allowed the prayer for bail citing the decision of this Court that under changed circumstances bail can be allowed U/s. 437 Cr.P.C. though earlier rejected U/s. 439 Cr.P.C. by the learned Sessions Judge.

2.7. On 14.07.1992 the petitioner received a copy of the order of Sessions Judge, Berhampur in Crl. M.C. No. 391/92 where allegedly the order of (the petitioner) A.C.J.M., Berhampur was up-held and petition under Sec. 439(2) Cr.P.C. was rejected, vide Memo No. 8036 dt. 13.07.1992. On 08.08.1992 at 3 p.m. the petitioner received a copy of confidential letter of the Registrar (Admn.) of this Court addressed to the District & Sessions Judge, Ganjam-Berhampur in Court’s Memo No. 7074 dated 31.07.1992 wherein the petitioner was directed to proceed on leave for a month. The petitioner was informed vide Memo No. 7075 dt. 31.07.1992.

2.8. On 11.9.92 the petitioner, while on leave, received Memo No. 8026/LX-5/89 (confidential) dated 07.09.1992 and annexures (two sheets) showing that on the representation in person before the then Hon'ble Chief Justice on 26.8.1992, the High Court required Mr. Nanda to substantiate his

allegations as per D.O. letter No. 35/274.92(C) addressed to the Court and Mr. Nanda obtained statements of two lawyers, who were enemically deposed of against the petitioner at Berhampur. The petitioner was required to submit his report within 3 days of receipt of the memo. The petitioner presented his explanation in person to the Special Officer explaining everything and enclosed 87 (eighty seven) sheets of documents of showing the medical treatment of his father-in-law for paralysis and other severe ailments ever since 13.07.1989 for perusal of the Hon'ble Court.

2.9. On 14.09.1992, the petitioner received Memo No.70/92C dated 08.09.1992 of the District Judge communicating this Court's Memo No. 7959/XIX-7/92 (confidential/immediate) to extend the leave for 10 days more as the complaint made against the petitioner could not be considered before 08.09.1992 and the leave of the petitioner was extended. Thereafter, the petitioner received D.O. letter No. 74/92-C dated 16.09.1992 of Mr. Nanda, the then District Judge to the effect that the Special Officer directed him over phone to request the petitioner to extend leave till the matter is finalized. Thereafter, on 18.09.1992, the petitioner received Memo No. 78/92C dated 18.9.92 of the then District Judge communicating this Court's Memo No. 8282/LX-5/89 dated 15.09.1992 for extension of leave. The petitioner accordingly applied for extension of leave addressing a letter to Registrar (Admn.) of this vide letter No. 1315/21.9.92 giving his home address during the leave period. The petitioner received D.O. letter No. 80/92-C dt. 5.10.92 of the District Judge, wherein he was required to get examined the physical condition of his father-in-law and to treat the letter to be extremely urgent. Accordingly, at 3 p.m., the petitioner sent a manuscript answer showing that his father-in-law was admitted to the cardiology ward of MKCG Medical College for his serious cardiac trouble on 4.10.92 and on 5.10.92 his father-in-law was admitted to coronary care Unit No. 1 of Cardiology Department of M.K.C.G. Medical College & Hospital, Berhampur for his intensive care.

2.10. The petitioner, however, joined duty on 16.11.1992. Subsequently, the petitioner was transferred as A.C.J. (Special), Orissa, Cuttack. The petitioner joined as Additional Chief Judicial Magistrate (Special), Orissa at Cuttack after being relieved from his place of posting. While the petitioner was continuing as such, he received a confidential letter No.44/18.12.92 of District Judge, Cuttack along with the charge sheet in D.P. No.4 of 1992 initiated against him. On 18.12.92 the petitioner requested the Registrar (Admn.) of this Court through the District Judge to supply copy of the relevant documents having nexus with both the charges and to verify the

records in the Court of S.D.J.M., Berhampur and to extend time to file his explanation. But, the petitioner was only permitted to peruse the records in G.R.- 138/92 & G.R.-317/92. The District Judge, Cuttack vide letter No. 6 (confidential) dated 16.01.1993 intimated the petitioner that this Court was pleased to extend 15 days beyond 16.1.93 for submitting the Written Statement of defence in the proceeding. The petitioner submitted his comprehensive written explanation with 17 (Seventeen) numbers of Annexures i.e. 1 to 17 but during the proceeding those documents were withheld by the High Court at their level without communicating the reasons for the same. On 23.04.1993, the High Court appointed District Judge, Cuttack as the Inquiry Officer and Special Officer (Admn.) of this Court as the Marshalling Officer to present the case in support of the charges before the Inquiry Officer and the same was informed to the petitioner vide Memo No. 4265 dt. 23.4.93/7.5.93. The District Judge, Cuttack intimated the petitioner to the effect that the enquiry proceeding would be taken up on 03.07.1993 and intimated the petitioner to participate therein in his letter No.52 dt. 1.7.93 (confidential). On 3.7.93 the Inquiry was taken up. The G.R. case records in G.R. Case No.317/92 and G.R. Case No.138/92 were allowed to be kept with the Marshalling Officer. The Marshalling Officer prayed to produce records in Crl.M.C. No.329/92 and Crl.M.C. No. 281/92, which was readily allowed by Inquiry Officer and the matter was fixed to 7.8.93 for production of said two records. The Marshalling Officer filed case records in G.R.- 138/92, G.R.- 317/92, Crl. M.C. No. 281/92 and Crl.M.C. No. 329/92 but no copy of any of such record was given to the petitioner. The Marshalling Officer declined to give oral evidence and disclosed besides production of the documents he has nothing to say. The petitioner prayed for granting copies of documents filed by the Marshalling Officer but no copy was supplied asking the petitioner to file the list of documents he needed, although the records were with the Marshalling Officer till that date. Copies prayed for by the petitioner were also not supplied. The Inquiry Officer directed the office to prepare only the Xerox copy of the order sheet within a week and supply the same to the petitioner as if he was representing the Opp. Party No. 2. Accordingly, only illegible xerox copies of order sheets were supplied to the petitioner. Surprisingly, when the petitioner was out on circuit court duty the enquiry was posted to 4.12.93 for evidence by the delinquent.

2.11. On 04.12.1993, the petitioner prayed for copies of documents relied upon by the disciplinary authority and other copies of the proceeding but the I.O. turned down the prayer for supply of copies of documents and evidence admitted, in the enquiry. On 07.01.1994, the proceeding was adjourned as no

Inquiry Officer was available. On 11.02.1994, the District Judge-cum-Inquiry Officer adjourned on the ground that he had joined one week before and was busy in administrative work. On 02.04.1994, the prayer for supply of copies of documents relied on by Opposite Party No.2 was refused and 23 nos of documents that petitioner had filed along with his written statement were suppressed by Opposite Party. On the other hand, the I.O. asked the petitioner to produce the copies of those documents alleged to have been enclosed with his show cause reply, which was against the principles of natural justice. On 07.05.1994, the enquiry resumed/opened. The petitioner was examined as D.W. in part and the inquiry was posted to 25.06.1994. In the meantime, the petitioner was transferred by orders of this Court and directed to join as C.J.M. and Assistant Sessions Judge at Sambalpur where he joined on 8.6.1994 and continued till prematurely retired i.e. 31.5.96 U/R. 71(a), Orissa Service Code.

The petitioner had attended the inquiry conducted by Opp. Party No. 2. The petitioner submitted his preliminary show cause reply to the inquiry report for placement before Disciplinary Authority vide his Office Letter No. 1282 dt. 24.8.95 through the District Judge, Sambalpur comprising 100 (one hundred) pages and requested to submit the final show cause as addenda after receipt of necessary documents in the D.P.-4/92. Disciplinary Authority felt that documents and papers were not provided to defend the allegations at the charges properly and sent Telegram to District Judge, Sambalpur with reference to D.J.'s letter No. 110 dt. 11.8.95 and letter No. 3049 dt. 12.8.95, to allow the petitioner to come to Cuttack and peruse the documents available on record on 18.9.95 in presence of Marshalling Officer of the D.P.-4/92 i.e. Special Officer (Admn.) of this Court and to furnish the second show cause by 31.10.95. District Judge intimated the petitioner vide Memo No. 5159 dt. 16.9.95 and granted permission. Petitioner was allowed to peruse the whole bundle of file of documents kept with Special Officer (Admn.), High Court (Sri S.K. Pradhan) and the petitioner obtained the extracts of necessary documents. Thereafter, the petitioner received letter of District Judge, Sambalpur to file the show cause by 31.10.95. On 20.10.1995 the petitioner submitted his reply to show cause dt. 24.8.95 sent by District Judge, Sambalpur vide Memo No. 3050 dt. 25.8.95. District Judge, Sambalpur forwarded the said Rejoinder (Annexure-14 in OJC-11033/96) vide his Memo No. 151/C dt. 20.10.95. While the petitioner was availing first half of summer vacation at Berhampur, he was served with the notice of compulsory premature retirement by the District Judge, Sambalpur vide Government's Memo No. 26673/H.C. and 26674 dt. 16.5.96- to be relieved on 31.5.96 A.N.

Petitioner was relieved and he handed over charge of his office and left Sambalpur. However, subsequently, the petitioner received the letter of Registrar, Civil Courts, Sambalpur in Memo No. 1972 dt. 26.6.96 wherein he was communicated that he was also removed from service in D.P. No. 4 of 1992 by High Court. No date of removal has been indicated therein specifying as to whether the order of removal was before the premature retirement or after the same. The writ in OJC No. 11033/96 has been filed against the said order of removal from service.

3. By way of the connected writ petition i.e. OJC No. 11034 of 1996, the petitioner has challenged the order of compulsory/ premature retirement.

4. Learned counsel for the petitioner has mainly contended that the dismissal order which came to be passed, was an outcome of victimization and subsequent order of compulsory retirement are required to be quashed and set aside in view of the outstanding service rendered by the petitioner.

5. In support of the submissions, learned counsel for the petitioner has relied upon the decisions of the Hon'ble Supreme Court in the cases of *Zunjarrao Bhikaji Nagarkar vs. Union of India and others, reported in (1999) 7 SCC 409* and the decision of this Court in the cases of *Epari Vasudeva Rao vs. State of Orissa and another (W.P.(C) No.11108 of 2013 disposed of on 15.04.2014), Indramani Sahu vs. State of Orissa and another (OJC No.6601 of 1995, disposed of on 24.10.2017), Subhendra Mohanty vs. High Court of Orissa and other (W.P.(C) No.7398 of 2013, disposed of on 31.07.2017), and Pitambar Patra vs. Registrar General, High Court of Orissa, Cuttack and others, reported in 2017 (II) OLR 699.*

6. We have heard learned counsel for the parties.

7. Taking into consideration the evidence on record, the Full Court while considering the order of compulsory retirement, has taken a sympathetic view taking into account the entire sequence of the events, materials available on record and his confrontation with the then learned District Judge. In our considered opinion the departmental proceeding which were initiated against the petitioner, ultimately culminated compulsory retirement which is not a punishment. In that view of the matter, the Full Court taking into consideration the overall situation and looking into the conduct of the petitioner, has taken a sympathetic view for compulsory retirement. The Full Court while considering the proposed punishment of removal thought it proper that the petitioner should be allowed to retire compulsorily.

8. Looking into the facts available on record, we are of the view that it will not be appropriate to differ the decision of the Full Court and substitute our own. We are in complete agreement with the decision of the Full Court.

9. The decisions relied upon by learned counsel for the petitioner referred to hereinabove are not applicable to the facts and circumstances of the case of the petitioner.

10. Thus, the writ petitions are dismissed being devoid of merit. No order as to costs.

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2019 (III) ILR - CUT-25

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

W.A. NO.103 OF 2017

PRASANNA KUMAR PANDA ……...Appellant

.Vs.

CENTRAL ELECTRICITY SUPPLY & UTILITY OF ORISSA & ORS. …….Respondents

DISCIPLINARY PROCEEDING – Punishment – When can be interfered with in exercise of the power under Article 226 of the Constitution of India? – Indicated.

"The law is well settled that the High Court under Articles 226 of the Constitution cannot re-appreciate or reappraise the finding of the Enquiry Officer unless there has been procedural irregularity or the entire disciplinary proceeding is vitiated on the ground of no evidence.On perusal of the Disciplinary Proceeding file, it appears that there is no procedural irregularities from initiation of disciplinary proceeding till its culmination, but the impugned order of punishment are assailable on the ground that the reply to show cause has not been considered by the Disciplinary Authority in proper perspective. Moreover, the appellate authority has not properly appreciated the points raised by the appellant in the appeal. It would be apposite to refer the decision of the Hon'ble apex Court in (2013) Vol.6 SCC at page 530 relevant para-19 ***(Chairman, Life Insurance Corporation of India & others-vrs.A.Masilamani).***

"19. The word "consider" is of great significance. The dictionary meaning of the same is, " to think over", "to regard as", or "deem to be". Hence, there is a clear connotation to the effect that there must be active application of mind. In other words, the term "consider" postulates consideration of all relevant aspects of a matter. Thus, formation of opinion by the statutory authority should reflect intense application of mind with reference to the material available on record. The order of the authority itself should reveal such application of mind. The appellate authority cannot simply adopt the language employed by the disciplinary authority and proceed to affirm its order.

With regard to imposition of punishment or treatment to be meted out to similarly placed delinquent, it would be profitable to refer to a decision rendered by the Hon'ble Supreme Court in the case of ***Rajendra Yadav vs. State of Madhya Pradesh and others*** *reported in* ***(2013) 3 SCC 73*** *which is quoted herein below:*

"9) The doctrine of equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The disciplinary authority cannot impose punishment which is disproportionate i.e., lesser punishment for serious offences and stringent punishment for lesser offences."

iv) The appellant is a senior citizen and has been running from pillar to post for more than two decades. Though the appellant has been held to be guilty in the Disciplinary proceeding by the Disciplinary Authority but on the very same offences he has been exonerated from the criminal proceeding. Though this court is conscious and cognizant about the fact that both the Disciplinary Proceeding and criminal proceeding stand on the different yardstick i.e., pre-ponderance of probabilities and proof beyond reasonable doubt.

v) Since the genesis of the Disciplinary proceeding originated from the theft of cash and one of the delinquent has been let off there cannot be any justifiable reason to find the present appellant guilty, who has undergone the trauma of litigation for last more than two decades.

Case Laws Relied on and Referred to :-

1. (2013) Vol.6 SCC at page 530 relevant para-19 (Chairman, Life Insurance Corporation of India & Ors .Vs. A.Masilamani.
2. (2013) 3 SCC 73 : Rajendra Yadav Vs. State of Madhya Pradesh & Ors.

For Appellant : Mr.Basudev Pujari
For Respondents : Mr.B.K.Nayak & A.Dash

JUDGMENT Date of Hearing : 07.08.2019 : Date of Judgment: 09.09.2019

P. PATNAIK, J.

This writ appeal is directed against the judgment dated 29.03.2017 passed in W.P.(C) No.16622 of 2014 filed by the petitioner, a septuagenarian, who has been constrained to approach this Court for yet another round praying inter alia for quashing of Annexures-10, 14 and 16 along with all consequential service and financial benefits.

2. The brief facts giving rise to filing of the present appeal is that the appellant joined in service in OSEB, which was subsequently converted to CESU. While the appellant was posted as Revenue Cashier in the Office of

the Executive Engineer, Kendrapara Electrical Division No.I, Kendrapara on 18.12.1992, the Revenue Divisional Accountant lodged F.I.R. in Kendrapara Police Station on the allegation that cash amounting to Rs.67,219.35 was stolen from the cash chest in the office which was reported to him in the morning by the night watchman. After due investigation the police submitted charge-sheet against the appellant which has been registered as G.R. Case No.1219 of 1992 in the court of the Chief Judicial Magistrate, Kendrapara under Section 409 of the Indian Penal Code. The said G.R. case ended in acquittal vide judgment dated 09.08.1996, against which Government Appeal No.18 of 1997 was preferred by the State and the said Government Appeal was dismissed by this Court vide judgment dated 20.03.2001. Again the State went to Hon'ble Supreme Court in Special Leave Petition which was registered as Crl. M.P. No.2601 of 2002 and the same was dismissed vide order dated 18.03.2002.

The appellant was placed under suspension by order dated 21.12.1992 pending drawal of departmental proceeding. The Superintendent Engineer, Electrical Circle, Cuttack on 29.04.1993 issued charge-sheet against the appellant to the effect that he was negligent in duty and committed misconduct, violated the Board's Rule and causing loss to OSEB revenue. In response to the said charge-sheet, the appellant submitted his explanation. An enquiry was conducted against the appellant by Sri K.C. Swain, Executive Engineer, Jagatsinghpur, Electrical Division and held that the appellant and the Revenue Divisional Accountant, Sudarsan Biswal were responsible for the loss caused to the Board.

On 02.03.1996 another charge-sheet was issued against the appellant by the Superintendent Engineer, Electrical Circle, Cuttack on the allegation that he had issued three receipts books in favour of Harihara Moharana, J.E. Electrical Section, Pattamundai-II on three different dates without receiving three M.R. Books from Sri Moharana. Pursuant to the said allegation an enquiry was conducted by the Inquiry Officer, who submitted his report in both the cases of theft and regarding issue of money receipt books. The Disciplinary Authority vide its order dated 20.12.1999 awarded the punishment against the appellant to which the appellant represented to the Managing Director on 24.05.2000. On 29.05.2000 by the order of the respondent no.1-Sri Abakash Mohapatra, Team Leader, AES, CESCO was appointed as the enquiry officer to conduct the re-enquiry into the charges drawn up against the appellant and respondent no.1 on 31.07.2000 instructed the Inquiry Officer to furnish his report with findings within thirty days positively.

The appellant filed OJC No.8424 of 2001 before this Court praying for a direction to the respondent no.1 to complete the proceeding prior to his retirement, i.e., before 30.09.2001. Respondent no.1 when came to know about filing of writ petition, on 26.07.2001 being vindictive passed order confirming the punishment imposed by respondent no.3 without issuing any show cause notice on the re-enquiry report. In spite of preferring appeal before respondent no.1 for exoneration from punishment imposed by respondent no.3, he imposed further punishment of depositing Rs.33,609.70 by the appellant, failing which the same shall be realized from him. The aforesaid OJC No.8424 of 2001 was dismissed by order dated 08.04.2003, against which a review petition has been filed and the same was also dismissed on 22.01.2004. The appellant again went to Supreme Court in Civil Appeal Nos.358-359 of 2005 and those were disposed of on 23.03.2010.

The appellant also filed W.P.(C) No.23161 of 2011 praying to quash all orders of punishment and for all consequential benefits, which was disposed of on 18.07.2013.

Ultimately, the appellant on 28.08.2014 taking all the aforesaid averments filed the writ application before this Court which has been registered as W.P.(C) No.16622 of 2014 with a prayer to quash the order under Annexures-10,14 and 16.

3. Learned counsel for the appellant has assailed the judgment dated 29.03.2017 passed by the learned Single Judge on the ground that the observation of the learned Single Judge is contrary to the order passed by the Hon'ble apex Court and the order passed by the Division Bench of this Court in W.P.(C) No.23161 of 2011 dated 18.07.2013. The learned counsel for the appellant also submits that the Hon'ble Division Bench of this Court vide its order dated 18.07.2013 in W.P.(C) No.23161 of 2011 has taken note of the order passed by the Hon'ble Apex Court in Civil Appeal Nos.358-359 of 2005 dated 23.03.2010 which reads as follows:

> "In view of the facts and circumstances of this case, we set aside the impugned orders as well as order enhancing the punishment on this ground alone. It is now open to the respondents to issue a show cause notice to the appellant and pass a fresh order in accordance with law."

In view of the order passed by the Hon'ble Apex Court, the impugned order of punishment as well as enhancement of punishment have been quashed and the liberty was given to the respondents for issuance of second show cause notice and after affording opportunity to the appellants the writ

petition is disposed of with liberty to the Disciplinary Authority to pass appropriate orders.

In pursuance of the order passed in W.P.(C) No.23161 of 2011 the impugned orders were passed under Annexures-10,14 and 16 of the writ application which are challenged by the appellant in W.P.(C) No.16622 of 2014 which has been dismissed. Being aggrieved by the dismissal of the writ application, the present appeal has been preferred by the appellant.

Learned counsel for the appellant has strenuously urged that the impugned order of the Disciplinary Authority dated 26.09.2013 and the order of the appellate authority dated 15.02.2014 and the order of the Reviewing authority dated 02.05.2014 and the consequential judgment dated 29.03.2017 passed by the learned Single Judge in W.P.(C) No.16622 of 2014 are liable to be set aside, on the ground that the appellant has been subjected to undue harassment though similarly placed employee has been exonerated from the said charge and the appellant is entitled to same treatment in the matter of imposition of punishment on the ground of doctrine of parity of treatment.

Learned counsel for the appellant further submits that the appellant has been exonerated from the criminal case, which was instituted under section 409 of the Indian Penal Code and the genesis of both the criminal and departmental proceedings are same. But to the utter misfortune, no proceeding was initiated against the Divisional Accountant, who along with the appellant was the custodian of the double locking system of the iron chest from which on the preceding night an amount of Rs.67,219.35 P. was stolen which was reported by the Night Watch Man. Learned counsel for the appellant further submits that assuming the theft has taken place but it could not have been possible without involvement of the Divisional Accountant, since he is one of the custodian of the key of the iron chest. The learned counsel for the appellant further submits that the respondents have not properly considered the show cause reply in right prospective and the appellate authority by passing a cryptic order has reiterated the punishment imposed by the Disciplinary Authority which cannot be sustainable in the eye of law.

4. As against the submission of the learned counsel for the appellant, the learned counsel for the respondents has however, defended the action of the respondents on the ground that the appellant has been found guilty by the findings of the Enquiry Officer and the Disciplinary authority by affording all reasonable opportunity and in compliance to the principle of natural justice

passed the impugned order of punishment which has been confirmed by the appellate as well as the reviewing authority which do not warrant any interference.

5. After hearing the learned counsel for the respective parties at length and on perusal of the Disciplinary Proceeding file produced by the learned counsel for the respondents we are of the considered view that the order passed by the learned Single Judge dated 29.03.2017 in W.P.(C) No.16622 of 2014 needs interference due to the following facts, reasons and judicial pronouncement.

i) Admittedly due to theft of revenue cash the appellant who was the Revenue Cashier was placed under suspension pending drawal of Disciplinary proceeding and simultaneously on the basis of lodging of FIR, criminal case was registered and the appellant was ultimately acquitted from the criminal charges under section 409 of the Indian Penal Code, but the appellant has been inflicted with punishment vide order dated 26.09.2013 which has been confirmed by the appellate authority dated 15.02.2014 which are impugned in the W.P.(C) No.16622 of 2014.

ii) Pursuant to the order dated 18.07.2013 passed in W.P.(C) No.23161 of 2011 the earlier punishment of the Disciplinary Authority, appellate authority as well as the order passed by the Chairman-cum-C.E.O., CESU were set aside with a direction to the respondents for issuance of second show cause notice and for passing of the appropriate order within three months. In deference to the aforesaid order, second show cause notice was issued on 04.09.2013 for imposition of proposed punishment i.e. three annual increments will be withheld with cumulative effect, the period of suspension will be treated as such cautioning for the past incident. Pursuant to the second show cause notice the appellant has submitted detailed show cause reply against the proposed punishment. But as it appears from the impugned order dated 29.03.2017, the Disciplinary authority in a very cryptic non-reasoned and facetious manner has imposed the order of punishment, which has been confirmed by the appellate authority dated 15.02.2014 which has also been confirmed by the Reviewing authority dated 02.05.2014.

Law is well settled that the High Court under Article 226 of the Constitution cannot re-appreciate the evidence or reappraise the finding of the Enquiry Officer unless there has been procedural irregularity or the entire disciplinary proceeding is vitiated on the ground of no evidence.

iii) On perusal of the Disciplinary Proceeding file, it appears that there is no procedural irregularities from initiation of disciplinary proceeding till its culmination, but the impugned order of punishment are assailable on the ground that the reply to show cause has not been considered by the Disciplinary Authority in proper perspective. Moreover, the appellate authority has not properly appreciated the points raised by the appellant in the appeal. It would be apposite to refer the decision of the Hon'ble apex Court in (2013) Vol.6 SCC at page 530 relevant para-19 **(Chairman, Life Insurance Corporation of India & others-vrs.A.Masilamani).**

> "19. The word "consider" is of great significance. The dictionary meaning of the same is, " to think over", "to regard as", or "deem to be". Hence, there is a clear connotation to the effect that there must be active application of mind. In other words, the term "consider" postulates consideration of all relevant aspects of a matter. Thus, formation of opinion by the statutory authority should reflect intense application of mind with reference to the material available on record. The order of the authority itself should reveal such application of mind. The appellate authority cannot simply adopt the language employed by the disciplinary authority and proceed to affirm its order.

iii) With regard to imposition of punishment or treatment to be meted out to similarly placed delinquent, it would be profitable to refer to a decision rendered by the Hon'ble Supreme Court in the case of ***Rajendra Yadav vs. State of Madhya Pradesh and others*** reported in ***(2013) 3 SCC 73*** which is quoted herein below:

> "9) The doctrine of equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The disciplinary authority cannot impose punishment which is disproportionate i.e., lesser punishment for serious offences and stringent punishment for lesser offences."

iv) The appellant is a senior citizen and has been running from pillar to post for more than two decades. Though the appellant has been held to be guilty in the Disciplinary proceeding by the Disciplinary Authority but on the very same offences he has been exonerated from the criminal proceeding. Though this court is conscious and cognizant about the fact that both the Disciplinary Proceeding and criminal proceeding stand on the different yardstick i.e., pre-ponderance of probabilities and proof beyond reasonable doubt.

v) Since the genesis of the Disciplinary proceeding originated from the theft of cash and one of the delinquent has been let off there cannot be any justifiable reason to find the present appellant guilty, who has undergone the trauma of litigation for last more than two decades.

In order to give a quitus to the suffering to the appellant and keeping in view the aforesaid decision coupled with the factual scenario, while setting aside the impugned judgment dated 29.03.2017 passed in W.P.(C) No.16622 of 2014, we quash the order of punishment passed by the Disciplinary Authority dated 29.06.2013, by the appellate authority dated 15.02.2014 and by the Reviewing Authority dated 02.05.2014. Resultantly, the writ appeal stands allowed. There shall be no order as to cost.

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2019 (III) ILR - CUT-32

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

W.A. NO. 379 OF 2017

M/S. ODISHA TOURISM DEVELOPMENT CORPORATION LTD. & ANR. .....Appellants

.Vs.

SRI SURENDRA KUMAR MALLICK & ORS. .....Respondents

SERVICE LAW – Retirement age – Enhanced from 58 to 60 years – Petitioners are employees of OTDC, a Public Sector undertaking – OTDC proposed to make applicable the enhanced age of retirement – Govt. approved the proposal on a later date and by that time the petitioners were retired – Writ petition challenging the retirement notice – Allowed relying on a judgment of the High court rendered in (Premalata Panda -Vrs- State reported in 2015 (II) ILR - CUT-538) – Writ appeal – Plea of OTDC that the enhanced age of retirement would be applicable from the date of approval granted by the Govt. and not from the date of Resolution of the Govt. – Not acceptable.

For Appellants : Mr. Banoja Ku. Pattnaik, S.S. Parida, K. Mohanty & S.Pattnaik

For Respondents : Mr. Ashok Kumar Mohapatra & Addl. Govt. Adv.

JUDGMENT Date of Hearing :14.08.2019 : Date of Judgment:11.09.2019

P. PATNAIK, J.

The appellants being State owned undertaking have called in question the legality and propriety of the order dated 09.08.2017 passed by the learned Single Judge in W.P.(C) No.3106 of 2015 inter alia praying for quashing the impugned order vide Annexure-10 to the instant appeal.

2. Shorn of details, the facts as delineated in the writ application is that respondent nos.1 and 2 being the petitioners had preferred the aforesaid writ application seeking quashing of the retirement order vide Annexures-1 and 2 to the writ application inter alia praying for giving to allow the petitioners to continue in service till attaining the age of superannuation.

3. The contentions of respondent nos.1 and 2 to the writ application is that the Odisha Tourism Development Corporation Ltd (OTDC) has been following the Orissa Service Code and OCS (CCA) Rules and Conduct Rules for its employees and the service conditions of the Government servant shall be applicable automatically for its employees. The Government of Orissa, Finance Department, by resolution no.19408 dated 28.06.2014 amended the Rules 71 (a) of the Orissa Service Code enhancing the retirement age of superannuation of the Government servant to 60 years in place of 58 years. Considering the demands of various Service Associations of the State Public Sector undertaking, the Government of Orissa, Department of Public Enterprises vide resolution dated 02.08.2014 allowed enhancement of the retirement age on superannuation of the employees of the State Public Undertaking employees to 60 years subject to fulfillment of the following conditions by the respective Public Sector Undertakings :-

(i) The public sector undertaking must justify its need to retain the present experienced manpower for utilization of their services in achievement of the objectives of the corporation.

(ii) The entity does not have compelling reasons to reduce cost by downsizing manpower.

(iii) The PSU must not have defaulted in payment of salary statutory dues of the employees such as provident Fund and ESI etc in past three years.

(iv) The PSU must not have availed any additional budgetary support during the last three years for payment of salary and other employees dues (excepting the usual level of budgetary support availed by the PSU, if any)

(v) The PSU must not have defaulted in payment of loan to any financial institution or State Government. The PSU must be update in payment of guarantee fee/royalty/dividend to the State Government whichever is application.

(vi) The entity is and will be able to discharge the salary burden out of its own resources and does not depend on additional budgetary grant (excepting any usual budgetary allocation"

The Board of Directors, OTDC in their 90th meeting held on 21.10.2014, resolved the proposal of enhancing the age of superannuation to 60 years subject to approval of the Government. Accordingly, the OTDC submitted the resolution of the Board before the Department of Tourism and Culture (Tourism) for approval vide letter dated 31.10.2014, who returned the proposal to revisit/reconsider on the finding that by enhancement of the age of retirement from 58 to 60 years there could be extension of unproductive human resources in view of the cases and that for extension to take service of particular employees of OTDC could have the mechanism to re-engage a retired employee. Since the State Government turned down the proposal, the Corporation acted under existing procedure and accordingly, the petitioners retired from services.

4. Retirement notice was challenged by respondent no.1 on the ground that when the resolution has been approved by the Public Enterprises Department, it should be taken effect from the date of its resolution not from the date when the State Government approved such benefit, i.e., on 27.06.2015 in the light of the decision rendered in the case of Premalata Panda v. State of Odisha and others in W.P.(C) No.9279 of 2015.

5. The aforesaid contention of the respondents were stoutly resisted by the appellants that the benefit of enhancement of retirement from 58 to 60 years would be made applicable from 27.06.2015, the date on which, the State Government approved the same and it cannot be extended retrospectively. The learned Single Judge vide its order dated 09.08.2017 has been pleased to allow the writ application on the analogy and in the light of the decision rendered in the case of Premalata Panda v. State of Odisha and others (supra).

6. Learned counsel for the appellants by assailing the impugned order dated 09.08.2017 passed by the learned Single Judge has strenuously urged that the decision of the OTDC was subject to approval of the administrative Department, i.e., Department of Tourism and Culture (Tourism), Government of Odisha and PE Department, Government of Odisha. Since the resolution dated 02.08.2014 of P.E. Department, which was subject to fulfillment of the conditions and approval of the Administrative Department, i.e., Department of Tourism and Culture (Tourism), Government of Odisha, the proposal of OTDC for enhancement the age of retirement for superannuation of OTDC

employees was turned down by the Administrative Department at the initial stage. Subsequently, the Government approved the proposal of enhancement of the age of retirement by resolution with effect from the date of issue of the resolution. Consequent upon the approval by the Administrative Department, the OTDC has issued office order allowing enhancement of the age of retirement to 60 years with effect from the date of issue of the resolution by the Department of Tourism and Culture (Tourism), Government of Odisha.

Learned counsel for the appellants further submitted that the issue involved in the case of Premalata Panda v. State of Odisha and others is not applicable to the case in hand since the petitioner in the aforesaid case was an employee of Cuttack Development Authority, which is a statutory body and is not a State Government undertaking. Therefore, the service conditions which are applicable to the employees of Cuttack Development Authority cannot ipso facto be made applicable to the Government owned Corporation.

7. The learned counsel for the respondents, on the other hand, emphatically submitted that in the absence of OTDC service rule for its employees, rules of the State Government have been made applicable by the decision of the Board of OTDC. Since the age of the retirement of the State Government employees stood enhanced to 60 years and the Orissa Service Code and OCS (CCA) Rules and Conduct Rules are applicable to the employees of the OTDC, the resolution of Board of Director of the Corporation is to take effect from the date of this issue not on date of approval of the Government of Orissa. Further contention of the learned counsel for the respondents is that since the resolution of the OTDC has been approved by the State Government, it was beyond its power of the State Government to fix a date for implementation of the resolution and the decision of the State Government in approving the resolution from a later date makes out a case of hostile discrimination being hit under Articles 14 and 16 of the Constitution of India.

Before adverting to the rivalised submissions, it would be apposite to refer to certain documents, which have a bearing to determine the contentious issue. Admittedly, the resolution dated 28th June, 2014 issued by the Government of Orissa, Finance Department was notified for enhancement of retirement age on superannuation of State Government employees whereby the relevant provision under Rule-71 of the Odisha Service Code as well as the provisions in relevant Rule of the OCS (Pension) Rules,1992 have been modified.

8. In pursuance of the decision of the Government of Odisha, Finance Department by resolution amended the rules 71(a) of the Orissa Service Code enhanced the retirement age of superannuation of the Government servant to 60 years in place of 58 years. The demand of various Service Associations of the State Public Sector undertaking, the Government of Orissa vide their resolution dated 02.08.2014 allowed enhancement of the retirement age on superannuation of the employees of the State Public undertaking employees to 60 years subject to fulfillment of the conditions by the respective Public Sector Undertaking mentioned (supra).

On 30.01.2015, the Government of Orissa, Department of Tourism and Culture Tourism vide letter dated 30.01.2015 addressed the appellants-corporation requesting the Board of OTDC to revisit the proposal. Subsequently, vide resolution dated 27.06.2015, Government of Odisha, Department of Tourism and Culture (Tourism) decided the enhancement of age of retirement on superannuation of the employees of the Odisha Tourism Development Corporation Ltd from 58 to 60 years stipulating therein that the same shall take effect from the date of issue of the resolution.

9. On perusal of the Government Resolutions, there is absolutely no ambiguity or confusion that the resolution of the proposal of the Board was subjected to concurrence by the Administrative Department and administrative department was to obtain appropriate government approval before giving effect to enhancement proposal, which has been concurred by the Finance Department.

In pursuance of the direction dated 31.07.2019, the learned Counsel for the State produced the records and the same has been perused by this Court. On perusal of the records, we find that the resolution of the OTDC for enhancement of age 58 to 60 years of services got the approval of the Government of Orissa from 27.06.2015 and respondent nos.1 and 2 though during pendency of the writ applications attained the age of superannuation of 58 years and in view of fortuitous circumstances the benefit of enhancement of 58 to 60 years have not been extended from the date of issuance of resolution dated 02.08.2014.

10. After giving our thoughtful consideration to the rivalised submission and on perusal of the records, we are of the considered opinion that the learned Single Judge has disposed of W.P.(C) No.9279 of 2015 with a direction in the light of the decision rendered in the case of Premalata Panda v. State of Odisha and others (supra) and the said decision has been rendered

taking into consideration the catena of decisions of Hon'ble Apex Court. Therefore, we are in complete agreement with the findings of the learned Single Judge, as there is no infirmity and illegality in the said order warranting our interference. Accordingly, the writ appeal stands dismissed being devoid of any merit.

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2019 (III) ILR - CUT- 37

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

CRLREF NO. 01 OF 2011

STATE OF ORISSA .....Petitioner

.Vs.

RATHLAL DHANWAR @ KUNDA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 318 – Reference to High Court against the order of conviction – Offence u/s 302/34 of IPC – Conviction – Opposite party/Accused (assailant) is a deaf, dumb person & unable to understand the proceeding of the Court – Out of several prosecution witnesses certain witnesses have not been examined in presence of Opp.Party/assailant – There is non availability of Court certificate to the extent that the expert had explained the evidence in sign language to the level of understanding of assailant – Non compliance of mandatory provisions of sections 273,279 & 317 of the Cr.P.C pleaded – Held, when there has been non-compliance of the mandatory provisions of Cr.P.C, we are of the considered view that the same has caused immense prejudice to the Opp.Party in which the trial has been conducted – In the result, the judgment of conviction is set aside. (Para 11 to 14)

Case Laws Relied on and Referred to :-

1. OLR 192 : Bijay Nanda @ Bijaya Kumar Nanda .Vs. State of Orissa 2010 (Vol.2)
2. 2003 CLJ 1775 : Shantaram Dattatraye and Ors. .Vs. The State of Karnataka
3. AIR 1960 Bombay 526 (State .Vs. Radhamal)
4. 2007 CLJ 1522 : State .Vs. Deepak Kumar Sahu
5. (2004) ILR, Karnataka 2828 : Vishwanath .Vs. State of Karnataka
6. 2001(2) Madhya Pradesh Law Journal 318 : State of M.P. .Vs. Parma
7. (1974) 3 SCC 277" : The State of Punjab .Vs. Jagir Singh, Baljit Singh and Karam Singh"

For Petitioner : Mr. J.P. Pattnaik, Addl. Govt. Advt.

For Opp.Party : Mr.R.K. Mohanty, Sr. Adv.

JUDGMENT Date of Hearing :19.09.2019 : Date of Judgment: 30.09.2019

P.PATNAIK, J.

The instant reference under Section 318, Cr.P.C. arises out of judgment and order dated 23.07.2011 passed in Sessions Trial No. 151/35 of 2010 of the Ad hoc Additional Sessions Judge, Sundargarh whereunder the accused Rathlal Dhanwar alias Kunda has been found guilty and convicted for the offence under Section 302 IPC and the proceeding has been forwarded under Section 318 Cr.P.C. for passing order regarding imposition of sentence against him.

02. The case of the prosecution as has been projected which emerges from the perusal of the record needs to be mentioned in disposal of the case.

On 17.02.2010 about 3.30 P.M., the accused, Rathlal Dhanwar alias Kunda who has been found guilty of the offence under Section 302 IPC along with accused Gobinda Dhanwar alias Pachi brought Sukcharan Dhanwar (deceased) from his house by calling. On the way due to some unknown reasons when the said deceased and Gobinda Dhanwar were found scuffling, the accused Rathlal Dhanwar inflicted two blows through a tangia on the neck and head of Sukcharan Dhanwar and then the father of Sukcharan snatched away the tangia from the hand of the Rathlal and thereafter both the accused persons fled away from the spot and Sukcharan died at the spot instantaneously being succumbed to injuries.

The aforesaid incident was witnessed by P.W.1, 2, 3 and 7. Then the father of the deceased lodged the FIR at Hemgiri Police Station. The case was registered and the Investigating Officer held inquest over the dead body of the deceased and the prepared an inquest report and sent the dead body for post mortem examination which was conducted by P.W.4, who upon holding autopsy over the dead body of the deceased found the following injuries.

> (i) oblique incised wound on the right side of neck1" below the angle of mandible of size 4" x 2" x skin depth, and ;
>
> (ii) oblique incised wound on the right of occipital region of the head of size 5" x ½" x skin depth.

After completion of the investigation the Investigating Officer submitted charge sheet against the accused persons, cognizance of the offence as aforesaid was taken and the case was committed to the court of session where the opposite parties were put on trial.

During trial, the prosecution in order to prove its case examined altogether 9 witnesses but the defences examined none on its behalf. Out of the 9 witnesses, P.W.1 is the informant, who is the father of the deceased Sukcharan and also an eye witness to the incident. P.Ws. 2, 3, 5 and 7 belong to the same village of the informant and accused persons and out of P.Ws.2,3 and 7 are the eye witnesses to the alleged incident. P.W.5 is a witness who had accompanied P.Ws.1 and 2 to Hemgiri P.S. for reporting about the incident. P.W.6 is a witness to the inquest. Other witnesses P.Ws. 4, 8 and 9 are official witnesses and out of them, P.W.8 is a Constable who is a witness to the seizure of collected blood sample and nail clippings. P.W.4 is a doctor who conducted Post Mortem examination over the dead body of the deceased.

After closure of the prosecution case, the opposite parties were questioned under Section 313, Cr.P.C. about the incriminating materials appearing against them to which they denied.

3. Learned trial court having placed implicit reliance on the testimony of P.Ws.1, 2, 3 and 7, who were ocular witnesses and whose testimony got corroboration from the medical evidence and also from the objective finding of the Investigating Officer found the opposite party, namely, Rathalal Dhanwar guilty of the offence under Section 302 of the I.P.C. and acquitted the other accused, Gobinda Dhanwar and accordingly recorded judgment of conviction dated 23.07.2011.

4. Before framing of charge when it came to the knowledge of the learned trial court that out of the two accused persons, accused, Rathalal Dhanwar is a deaf and dumb, he will not be able to understand the nature of inquiry, then the enquiry to that effect under Section 318, Cr.P.C. was conducted by examining the experts, i.e., Medical Officer of the District Jail, Sundargarh and Principal and Teacher, School for Deaf, Bandhpali, Sundargarh, as the said accused has no relative to state about his deafness and dumbness and on completion of enquiry the learned court became certain as per the order dated 01.12.2010 that the accused Rathalal Dhanwar is a deaf and dumb and accept communication through experts of deaf and dumb, there is no other mode to make him understand about the nature of the proceeding during trial. Then the trial commenced on 10.12.2010 by framing charge under Section 302/34 of the I.P.C against him indicating the same through interpreter, who are experts, i.e., two teachers of deaf and dumb School, Bandhpali, Sundargarh.

Learned trial court vide judgment dated 23.07.2011 found the accused Rathalal Dhanwar guilty under Section 302 of the I.P.C. and acquitted co-accused Gobind Dhanwar by relying upon the evidence of eye-witnesses, P.Ws.1, 2, 3 and 7 being corroborated by medical evidence of the doctor coupled with the oral dying declaration of deceased before his father, P.W.1 in presence of P.W.2. Accordingly, he has been convicted thereunder.

5. Mr. R.K. Mohanty, learned Senior Advocate during the course of hearing has brought the attention of this Court to the following sequence of events and the orders passed by the trial court during trial.

On 10.11.2010 at the time of framing charge, the learned trial court taking note the ratio laid down by this Court in the case of ***Bijaya Nanda v. State reported in 2010(2) Orissa Law Reviews 192*** regarding the applicability of Section 318, Cr.P.C., held that from the materials available on record and submissions of the learned counsel for the parties and on asking the opposite party, it was found that the opposite party is deaf and dumb. The learned trial court conducted an enquiry and found that the opposite party has no relative and he is living alone being an orphan and accordingly issued summons to the jail doctor and Principal of the Deaf and Dumb School, Bandhapalli, Sundargarh for adducing evidence in the inquiry for ascertaining the physical deficiency and modes of communication.

On 26.11.2010 the learned trial court examined three witnesses, C.W.1-Dr. Niranjan Bhuyan, Jail Medical Officer of District Jail, Sundargarh, C.W.2-Smt. Jayalaxmi Devi, Principal of School for Deaf, Bandhapalli, Sundargarh and C.W.-3-Minakhi Devi, Asst. Teacher for Deaf, Bandhapalli, Sundargarh.

On 01.12.2010 the learned trial court considering the report of the jail doctor and the evidence of Court witnesses held that the opposite party no.1 is a deaf and dumb, who is unable to hear and speak and his mode of communication is only through signs and gestures. It was further held that the accused can be able to understand the proceeding of the Court only on being interpreted by two experts by sign language. Accordingly, the Principal was summoned to send two experts for the purpose.

On 10.12.2010 the charges under Section 302/34 of the I.P.C. were framed in presence of two experts. The opposite parties were explained in sign language and replied to be not guilty in the same manner.

On 07.02.2011 six witnesses, i.e., P.Ws.1 to 6 were examined, but the opposite party was admittedly not present for which the cardinal requirement to make the opposite party understand of the proceeding of that date, particularly the evidence against him, stood conspicuously omitted.

On 05.03.2011/07.03.2011/10.05.2011, P.Ws.7 to 9 were examined in presence of the opposite party, but the order-sheet does not show as to whether the opposite party was explained or made to understand their evidence in sign language with the help of the experts.

On 02.07.2011, the accused statement of the opposite party was taken in sign language with the help of the experts.

On 23.07.2011, the learned trial court convicted the opposite party under Section 302, of the I.P.C. and the same was communicated to him by the experts and he communicated back by raising his hands and turning his head.

6. Mr. Mohanty, learned Senior Advocate during the course of hearing has referred to Section 273, Cr.P.C. which inter alia mandates that the evidence shall be taken in presence of the accused or his pleader. Mr. Mohanty has further referred to Section 279 of the Cr.P.C. which cautions that if the language of the court is not understood by the accused it should be interpreted to him in a language which he understands. Further he has referred to Section 317, Cr.P.C. which prescribes that if the learned trial court is satisfied that the personal attendance of the accused is not necessary or he persistently disturbs the proceeding, the court may dispense with personal attendance and continue with the trial in the absence of the accused. Therefore, the learned counsel submits that the cardinal requirement of law is not an empty formality and the legislative intent is to make the accused known about what is going on in the proceeding against him.

7. Mr. Mohanty, learned Senior Counsel further submits that in view of the legal requirements the deviation which have been made by causing prejudice to the opposite parties which is fatal to the case. Following deviations have been made which have become fatal to the prosecution case.

(a) P.Ws.1 to 6 were examined in the absence of the opposite party for which the evidence adduced against him does not satisfy the requirement of either Section 318 of the Cr.P.C. or 279, Cr.P.C.

(b) P.Ws.7 to 9 have been examined, but there is no Court Certificate that the expert explained the evidence in sign language to the understanding of the opposite party.

(c) The court has granted representation under Section 317, Cr.P.C., but he has not recorded any plausible reasons as to whether such dispensation of personal appearance was at all necessary. This becomes all the more pertinent in as much as the legal requirement of making the accused understand the court proceeding has been given a go bye thereby causing miscarriage of justice.

8. Mr. J.P. Patnaik, learned Additional Government Advocate, however vociferously defended the order of conviction passed by the learned trial court. Learned Counsel for the State by referring to the testimonies of P.Ws.1 to 3 and 7, submits that the eye-witnesses' testimonies being coupled with the medical evidence and the oral dying declaration of the deceased before his father (P.W.1) unerringly point finger regarding the guilt of the opposite party and none other than the opposite party is the perpetrator of the crime. The learned counsel for the State further submits that the evidences against the opposite party are clinching and unimpeachable and beyond reasonable doubt. The opposite party though deaf and dumb cannot be absolved of the crime nor he can be exempted from the punishment since there is no provision in the Indian Penal Code under which a person found to be guilty is exempted from the punishment merely because he is deaf and dumb.

The learned State Counsel, therefore, submits that the learned trial court has rightly convicted the accused under Section 302 of the I.P.C. Hence, the impugned judgment does not warrant any interference by this Court.

9. In order to advert to the contention raised by the learned Senior Counsel Mr. R.K. Mohanty and Mr. J. P. Patnaik, learned Additional Government Advocate, it would be apposite to refer to the following provisions of the Criminal Procedure Code:

"273.Evidence to be taken in presence of accused- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

279. Interpretation of evidence to accused or his pleader-(1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

317. Provision for inquiries and trial being held in the absence of accused in certain cases-(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

318. Procedure where accused does not understand proceedings- if the accused, though not of unsound mind, cannot be made to understand the proceedings, the court may proceed with the inquiry or trial; and in the case of a Court other than a High Court if such proceedings result in a conviction the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

which are bearing to decide such reference.

10. In the case of **Re: Beda** ***reported in AIR 1970 Ori.3,*** it has been held that stage of reference would come only after the trial is over culminating in conviction of an accused. If, however, the court concerned on proper inquiry found that it is possible for the accused to make him understand, the trial has to proceed in ordinary way and the Court if finds the accused guilty, convict him and pass sentence without making a reference to the High Court under Section 318, Cr.P.C. which corresponds to Section 341 of the old Cr.P.C.

In the case of ***Bijay Nanda @ Bijaya Kumar Nanda v. State of Orissa reported in 2010 (Vol.2) Orissa Law Reviews 192,*** it has been held that reference to the High Court would only arise if after conducting necessary inquires and endeavour to find out if the accused can make to understand the proceeding, the Court concerned can come to a definite stand that the accused does not understand the proceedings. It is the Court on proper enquiry finds that it is possible for the accused to be made to understand the proceedings, the trial has to proceed in the ordinary way and the Court, if the accused is found guilty, convict him and pass sentence without making a reference to the High Court under Section 318, Cr.P.C.

In the case of ***Shantaram Dattatraye and Ors. V. The State of Karnataka reported in 2003 Criminal Law Journal 1775***, a Division Bench of Karnataka High Court inter alia held at paragraph-46 that it is permissible for the trial court to secure the services of an expert to communicate with the accused at the expense of the State. The trial court shall also make available to the accused such other necessary facilities in securing a fair trial.

The learned Court relied upon a decision of the Division Bench of Bombay High Court reported in ***AIR 1960 Bombay 526 (State v. Radhamal)*** wherein it has been held that a duty is cast on the part of the trial court to make an enquiry and to find out if the accused can understand the proceeding against him. If it can be shown that such a person has sufficient intelligence to understand the criminal law, he is liable to be punished if convicted by the learned trial court.

Learned trial court further held at paragraphs-53 and 54 that if the court finds that an accused is deaf and dumb, the Court should first enquire into the antecedents of the accused and try and help him to understand the proceedings and render all possible assistance in the trial. When a reference is made under Section 318, Cr.P.C., the High Court has got wide vast powers to enquire a fair trial and make a fair trial of the accused if it decides to proceed against him. The Court trying such an accused can be directed to see that he has the necessary legal assistance and the trial shall proceed on the basis that the accused has pleaded not guilty of the charge and all possible defences open to him in the circumstances of the case should be considered.

In the case of ***State vrs. Deepak Kumar Sahu reported in 2007 Criminal Law Journal 1522***, it is held (para-8) that want of speech and hearing does not imply want of capacity either in the understanding or memory but only a difficulty in the means of communicating knowledge. Therefore, as an extra caution, the Legislature has made the provisions of Section 318 Cr.P.C., so that the High Court can satisfy itself that under the circumstances, it was a fair trial. The language used by the legislature in Section 318 cannot refer a case in the midst of trial before any conviction took place, the Court is required to proceed to the end of the trial and it is only if a trial results in a conviction, then the question of forwarding the proceedings to the High Court under Section 318 Cr.P.C.

In case of ***Vishwanath Vrs. State of Karnataka reported in (2004) ILR NULL 2828 i.e. (2004) ILR, Karnataka 2828***, it is held that as per Section 318 Cr.P.C., it is only when there is a disability on the part of the

accused for understanding the proceedings for any reasons other than unsoundness of mind, the Court can proceed with the trial as per Section 318 Cr.P.C. If the Court finds that the accused is also suffering from unsoundness of mind and as such cannot understand the proceedings, the only course left to the accused is to act under the provisions of Chapter XXV Cr.P.C. Immediately after arriving at the finding of conviction, without passing any sentence, the trial Judge is required to refer the case under Section 318 Cr.P.C. after imposing sentence was held to be erroneous.

In the case of ***State of M.P. v. Parma reported in 2001(2) Madhya Pradesh Law Journal 318*****,** it has been held that the High Court on examining the records of the learned trial court on reference may convict or discharge the accused or direct re-trial or keep him in jail.

In the present case, the reference letter dated 23.07.2011 addressed by the learned trial court to the Registrar (Judicial) of this Court indubitably indicates that the opposite party being a deaf and dumb was not able to understand the proceedings and with the help of interpreter through signs, signals and gestures the trial commenced from the stage of framing of charge dated 10.01.2010. As per the provisions enshrined in the Criminal Procedure Code referred to supra that the accused is suffering from physical infirmity, i.e., deafness and dumbness ought to be given the benefit of assistance of interpreter through sign, signals and gestures so that the accused can be able to understand the proceeding which has been foisted against him since the term cannot be made to understand in the context of Section 318, Cr.P.C. is of utmost importance. Therefore, any deviation or infraction of the said procedure results in miscarriage of justice which enure to the disadvantage of the accused thereby resulting in miscarriage of justice.

11. On perusal of the order dated 07.02.2011 it would reveal that during trial the accused persons were not produced before the learned trial court as escort party were not available but two experts were present in Court and section 317, Cr.P.C. filed on behalf of the accused was allowed without any justifiable, cogent reason and six witnesses, i.e., P.Ws.1 to 6 were examined in absence of the opposite parties and there was no scope for the expert to make the accused understand the proceeding and on perusal of the order dated 05.03.2011 when P.W.7 was examined though in presence of the opposite, parties and two experts, but there is absolutely no communication as to whether the experts made any endeavour to make the opposite party understand or explained the evidence of the witnesses.

Recording of the evidence in course of trial in presence of accused as envisaged under Section 273 of the Cr.P.C. is not an empty formality which has an avowed purpose, i.e., the accused should know what is going on against him and what are the incriminating materials appearing against him so that he can give valuable instruction to his counsel to properly defend his case. In the instant case, the same have not been done due to absence of the accused on the date of examination of star witnesses, P.Ws.1 to 3. Even the order-sheet does not throw any light as to whether the opposite party has been able to understand the testimony of P.W.7. Therefore, the deposition of P.Ws.1, 2, 3 and 7 which has been utilized against the opposite party in handing out order of conviction has resulted in miscarriage of justice since the learned trial Court has committed procedural irregularities which have become fatal to the prosecution.

Similarly, Section 279 of the Cr.P.C. which states that whenever any evidence is given in a language not understood by the accused and he is present in court in person, it shall be interpreted to him in open court in a language understood by him. The documents which are proved during trial are also to be interpreted to the accused in the discretion of the Court. Since the order-sheets dated 05.03.3011, 07.03.2011 and 10.05.2011 as referred to above indicate that one witness on each of such dates was examined in presence of the accused as well as the experts/interpreters, but there is no indication that the interpreters explained the evidence given by the witnesses to the opposite party and that the trial court was satisfied that the opposite party understood the same. But the fact remains that on the said date the accused was not made to understand the proceeding by the expert. Therefore, the irresistible conclusion emerges that the opposite party was not provided with adequate opportunity to understand the evidence/testimony of the prosecution witnesses, P.Ws.1, 2, 3 and 7 resulting in travesty of justice.

12. It needs to mention here that the lacuna in the prosecution case when examined independently may appear to be procedural irregularities but the order of conviction passed by the learned Court discloses complete non-observance of the mandates under Section 273, 279 and 317 of the Cr.P.C.

13. To sum-up; in a case like the present one, where there are serious infraction of statutory provisions and in the facts and circumstances have been proved by the prosecution by recording the order of conviction against the opposite party. The observance in the case of "***The State of Punjab vs. Jagir Singh, Baljit Singh and Karam Singh" reported in (1974) 3 SCC 277***" would be illuminating:-

> "A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures".

14. In the light of the yardstick for scruitinizing and evaluating the evidence as indicated in Jagir Singh case, when we examine the evidence led by the prosecution for sustaining the charge under Section 302 I.P.C. against the opposite party, more particularly when there has been non-compliance of the provision of Section 273, 279 and 317 Cr.P.C., we are of the considered view that the same has caused immense prejudice to the opposite party in which the trial has been conducted.

15. In the result, the judgment of conviction under Section 302 I.P.C. dated 23.07.2011 passed by the learned Ad hoc Additional Sessions Judge, Sundargarh in S.T. Case No. 151/35 of 2010 becomes vulnerable and unsustainable in the eye of law and taking into consideration all the facts and circumstances as discussed in the foregoing paragraphs the impugned order conviction dated 23.07.2011 is set aside and the opposite party is directed to be set at liberty forthwith if his detention is not required in any other case.

16. Accordingly, the reference stands disposed of.

Before parting, we would like to record our deep sense of appreciation for the valuable help and assistance rendered by Mr. R.K. Mohanty, learned Senior Counsel and Mr. J.P.Pattnaik, learned Additional Government Advocate for deciding the aforesaid criminal reference.

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2019(III) ILR - CUT- 48

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

WRIT APPEAL NO. 220 OF 2018

CHAKRADHAR SAHOO ……Appellant.

.Vs.

CENTRAL ELECTRICITY SUPPLY UTILITY, ORISSA & ORS. ……Respondents.

SERVICE LAW – Departmental Examination – Petitioner appeared and declared fail – Writ petition seeking revaluation – Not accepted – Writ appeal – Judgment of the single judge upheld – Reason – Indicated.

"It was observed by the Hon'ble Apex Court in a decision reported in ***AIR, 1984, SC 1543 (Maharashtra State Board of Secondary and Higher Secondary Education and another v. Paritosh Bhupesh Kurmarsheth, etc. etc.,)*** *that:- "the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day today working of educational institution and the departments controlling them." It was further observed that if inspection, verification in the presence of the candidates and revaluation are to be allowed as of right, it may lead to gross and indefinite uncertainty. In the instant case the evaluation has been conducted by an internal process followed by the competent authorities and as stated earlier, except some bald averments alleging against the senior authorities of the appellant, we do not find any convincing material to have even a presumption that any partiality was made towards the petitioner-appellant. It has been the observation of the Hon'ble Apex Court that the principle of natural justice cannot be extended beyond reasonable and rational limits and cannot be carried to such absurd length so as to make it necessary that candidates who have taken a public examination, should be allowed to participate in the process of the evaluation of their performances or to verify the correctness of the evaluation made by the examiner In the given circumstances, we do not find any merit to accede to the contention made by the petitioner-appellant that his answer paper should be called for and reevaluated. In the result of our aforesaid findings, we do not find any merit in the contentions raised by the appellant so as to interfere with the findings reached by the learned Single Judge."* *(Paras 6 to 9)*

Case Laws Relied on and Referred to :-

1. AIR, 1984, SC 1543 : (Maharashtra State Board of Secondary and Higher Secondary Education & Anr .Vs. Paritosh Bhupesh Kurmarsheth, etc.

For Appellant : In person

For Respondent : M/s. B.K.Nayak-I, B.P.Tripathy

JUDGMENT Date of Hearing :16.01.2019 : Date of Judgment :12.02.2019

J.P. DAS, J.

This appeal is directed against the order dated 04.04.2018 passed by the learned Single Judge in Review Petition no.241 of 2017 declining to review the said Court's order dated 12.10.2017 in W.P.(C)No.8091 of 2009 rejecting the writ petition of the present appellant-petitioner. The present appellant filed W.P.(C) No.8091 of 2009 arraying the present respondents as opposite parties with the submission that he joined as a Clerk-B in the Corporate Office, Central Electricity Supply Utility of Orissa (CESU, in brief) and after putting more than thirty years of service earned the eligibility for appearing at the Departmental Test Examination for promotion to the higher post of Divisional Accountant in the said office. He appeared at the examination but was declared fail. He raised his grievances before the concerned authority by submitting representations but since it was not paid heed to, he filed the writ petition pleading inter-alia that the opposite party-CESU considered the candidature of opposite party-Respondent Nos.3 to 5 who according to him were not eligible to be promoted but were given promotions so also one Ananta Charan Debata. Hence, he prayed to hold and declare the selection of the other candidates to the post of Accountant pursuant to the third departmental test examination conducted by CESU in April, 2008 as bad and illegal and to quash the impugned selection and consequential appointment orders to the post of Divisional Accountant with a further direction to hold a fresh selection or to consider the case of the petitioner by allowing a fresh valuation of English Paper-I of the petitioner through an expert in English since he was declared fail only because he secured less than qualifying mark in the said subject.

2. Per contra, it was the submission made on behalf of CESU that there was no illegality in conducting the Departmental Test Examination or selection of the successful candidates. It was their further case that the petitioner had also appeared at the said examination but since he was found failed, he was not granted promotion for the higher post. It was further submitted that so far as one Ananta Charan Debata is concerned, although he was allowed to appear at the alleged Third Departmental Test Examination, but subsequently it was found out by the competent authority that he has been wrongly allowed and hence, his candidature has been rejected, so also he has been denied promotion to the higher post. It was further submitted on behalf of the opposite party that the private opposite-party nos. 3 to 5 had been appointed on contract basis by way of giving relaxation to count the period of service rendered by them and such relaxation was given by the competent

authority in exercise of power conferred upon them under Regulation-17 of the Orissa State Electricity Board Sub-ordinate, Audit and Accounts Service Regulations 1970 (in short, OSEB Service Regulation, 1970). Thus, it was submitted that there was absolutely no illegality in the acts of the opposite party so as to entitle the petitioner for any relief.

3. The contention advanced by the petitioner that the opposite party nos. 3 to 5 had not completed required tenure of service and were wrongly permitted to appear at the examination, has been negatived by the learned Single Judge on the basis of the provisions in the OSEB Service Regulation 1970 which provided that:

> "Where the Board are satisfied that operation of any of the provisions of these regulations causes undue hardship in any particular case, the Board may dispense with or relax the requirements of the said provisions in order to deal with the case in a just and equitable manner."

It was evident from the provision of the said Regulation that the Board has got power to relax the eligibility criteria and hence, there was no illegality committed by the concerned authority. It was also contended on behalf of the petitioner that by office order dated 22.08.2007 the decision of the Managing Board fixing certain eligibility conditions was provided which were not complied with by the successful candidates. On such contention, it has been observed by the learned Single Judge that the office order dated 22.08.2007 did not speak anything in respect of OSEB Service Regulations,1970 and hence, the said Regulation deemed to be in continuance and the subsequent office order would be treated a supplement to the said Regulation. The authorities in exercise of such power, granted relaxation in the meeting held on 16.11.2007 by taking a decision regarding sixteen numbers of Junior Accountants to appear at the Third Departmental Test Examination. The private opposite party nos. 3 to 5 having been granted with such relaxation on due consideration by the concerned authority, no illegality was found in the process of selection as alleged by the petitioner. In that view of the matter, we find no reason to take a different view from what has been taken by the learned Sessions Judge.

4. The petitioner-appellant made his submission before this Court appearing in person and his sole contention before us was that he has been illegally declared fail only because his English Paper-I was evaluated by one of his authorities being an Engineer and hence, his answer paper should be examined by any other competent person or may be verified by this Court,

which would make it evident that he has been intentionally given with less mark on some personal grounds. Out of maximum mark of 150 in English Paper-I, minimum mark required for passing was 60 and the petitioner secured 52 marks for which he was declared fail. The petitioner had alleged in his writ petition that his answer paper was not evaluated properly at the behest and dictates of C.G.M. (H.R & A) with whom he had some personal animosity. He pleaded that since he had made certain allegations of irregularities against the said Officer, at his behest, his answer paper in English Paper-I was not properly evaluated. Hence, it was contended by the petitioner-appellant in person that his answer paper should be called for by the Court and should be properly evaluated. The petitioner also went on to give the instances in which he had made the allegations against the C.G.M.(H.R & A). As it appears from his own pleadings in the writ petition on his representation for revaluation, the A.G.M. (Finance) in his letter dated 27.11.2008 had informed the petitioner that the marks secured by him in English Paper-I has been verified and found correct. It further appears from his pleadings that excepting bald averments regarding the allegations against the C.G.M (H.R & A), no material was brought on record on behalf of the petitioner in support of his contention that his answer paper was wrongly evaluated at the behest of the said Officer. The learned Single Judge has quoted the details furnished on behalf of the opposite party regarding the qualifying mark and has observed that since the petitioner did not obtain qualifying mark in English Paper-I, he has been rightly declared fail.

5. So far as the submissions to call for the answer paper and to examine it or to put it for revaluation, such a practice has been repeatedly deprecated by the Hon'ble Apex Court.

6. It was observed by the Hon'ble Apex Court in a decision reported in ***AIR, 1984, SC 1543 (Maharashtra State Board of Secondary and Higher Secondary Education and another v. Paritosh Bhupesh Kurmarsheth, etc. etc.,)*** that:-

> "the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day today working of educational institution and the departments controlling them."

It was further observed that if inspection, verification in the presence of the candidates and revaluation are to be allowed as of right, it may lead to gross and indefinite uncertainty. In the instant case the evaluation has been

conducted by an internal process followed by the competent authorities and as stated earlier, except some bald averments alleging against the senior authorities of the appellant, we do not find any convincing material to have even a presumption that any partiality was made towards the petitioner-appellant. It has been the observation of the Hon'ble Apex Court that the principle of natural justice cannot be extended beyond reasonable and rational limits and cannot be carried to such absurd length so as to make it necessary that candidates who have taken a public examination, should be allowed to participate in the process of the evaluation of their performances or to verify the correctness of the evaluation made by the examiners.

7. In the given circumstances, we do not find any merit to accede to the contention made by the petitioner-appellant that his answer paper should be called for and reevaluated.

8. In the result of our aforesaid findings, we do not find any merit in the contentions raised by the appellant so as to interfere with the findings reached by the learned Single Judge. Accordingly, the writ appeal stands rejected being devoid of any merit.

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2019 (III) ILR - CUT- 52

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

JCRLA NO. 129 OF 2004

SAMBARIA @ NIRAKAR PATRA …….Appellant

.Vs.

STATE OF ORISSA .....Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction – From the evidence of the Doctor who has conducted post-mortem examination and the sole eye-witness, it is apparent that the occurrence took place in a spur of the moment – Both the accused and deceased were under the influence of liquor – There was quarrel between them and it was the deceased who gave two slap blows to the accused – The accused pushed the deceased on the ground and dashed a stone on his head – It is also borne out from the evidence that the wife of the deceased, the Grama Rakshi and the accused were present which shows that the accused-appellant has no intention of committing murder of the deceased rather the occurrence took

place in a spur of moment which led to the death of the deceased – However, since the appellant dashed the head of the deceased by means of stone and he being a grown-up man has knowledge that his action shall cause bodily injury which may result in death of the deceased, hence, we are of the opinion that the offence U/s.304 (Part-I) of IPC is made out – Ordered accordingly. (Paras 9 & 10)

For Appellant : Mr. Narayan Pihan.
For Respondent : Mr. B.P. Pradhan (Addl. Govt. Adv.)

JUDGMENT Date of Hearing & Judgment: 25.07.2019

S.K. MISHRA, J.

In this appeal, the sole convict Sambaria @ Nirakar Patra assails the judgment of conviction and order of sentence dated 17.08.2004passed in S.T. Case No.82/33 of 2003-2004 by the Ad-hoc Addl. Sessions Judge (Fast Track), Keonjhar. He has been convicted under Section 302 of IPC and has been sentenced to undergo imprisonment for life.

2. Case of the prosecution bereft of unnecessary details is that the deceased-Satyananda @ Dhena Patra, the nephew of the informant-P.W.1, Abhimanyu Patra accompanied the accused Sambaria and others on 26.11.2002 at about 10 A.M. while he was sitting with the couple of Juangas, they proceeded towards the paddy field but after that his nephew did not return to his house. On the next day, the informant found the dead body of the deceased in front of the paddy field of one Rama Patra at about 2 P.M. When he was informed about the fact, informant went to verify the fact and after verifying the dead body to be that of his nephew, he reported the matter to the police. Further the informant disclosed before the police that the wife of the deceased had told him that prior to the incident the deceased was last seen with accused Sambaria.

2.(a) On submissions of the F.I.R., the O.I.C. of Harichandanpur P.S. registered P.S. Case No.68 dated 27.11.2002 and took up investigation. After investigation, he submitted charge-sheet against the accused-appellant for the offence U/s. 302/201 of I.P.C.

The defence took the plea of complete denial and false implication.

3. The prosecution in order to prove its case has examined 14 witnesses in all. Out of these 14 witnesses, the only one witness i.e. P.W.2 is an eye-witness to the occurrence. P.W.8, Dr. Sanjay Ku. Pattnaik is the Medical Officer who has conducted the post-mortem examination of the deceased.

P.W.14-Subhransu Sekhar Mishra is the Police Officer who has investigated into the case and submitted the charge-sheet before the court.

4. In assailing the judgment of conviction, learned counsel for the appellant submits that from the facts of the case as stated by P.W.2, no offence under Section 302 of IPC is made out and even if the statement of the P.W.2 is taken as a gospel truth, at best the offence under Section 304 (Part-I) is to be made out. He urged to convert the conviction for the offence U/s.302 of IPC to 304 (Part-I) of IPC.

5. Learned Addl. Govt. Advocate on the other hand, supported the findings recorded by the learned Addl. Sessions Judge and argued that the appeal should be dismissed and the findings recorded by the learned Addl. Sessions Judge should be confirmed.

6. In order to appreciate the case in hand, it is appropriate to take note of the evidence of the Doctor-P.W.8 who has conducted the autopsy on the dead body of the deceased. P.W.8 has stated that on 28.11.2002, he conducted post-mortem examination on the dead body of the deceased-Satyananda Patra, S/o-Niladri Patra and found the following external injuries:-

i. Abrasion over right shoulder joint anteriorly of size 2 cm. x 2 cm.
ii. Laceration of size 2 cm. x 2 cm. x 1 cm. over fore-head on right side above right eye.
iii. Laceration 3 cm. x 1 cm. x 1 cm. over right mastoid bone and right ear. Mastoid bone fractured.

6.(a) He further stated that on dissection of injury no.(ii) and (iii), he found underlying muscle was lacerated and haematoma present. Extradural haematoma of size 3 cm. x 2 cm. was present below the injury no.(iii). All the injuries were ante-mortem in nature and the age of the injuries were 48 hours. Injury no.(ii) and (iii) were stated to be grievous in nature. He also opined that the death was found due to injury caused to the vital organ like brain. Time of the post-mortem examination was fixed about 48 hours after the death. Injuries found on the deceased was sufficient to cause death in the normal course of nature.

6.(b) On the same day, the Doctor on the query of the O.I.C., Harichandanpur P.S. examined one stone being the weapon of offence and opined that injury on the deceased could be possible by the said weapon of offence. Ext.4 is the post-mortem report and Ext.4/2 is the written opinion given by the Doctor.

7. This above evidence needs to be juxtaposed and appreciated with the evidence of P.W.2 to come to a definite conclusion regarding the submissions made by the learned counsel appearing for the parties in this case.

8. P.W.2-Padmalochan Patra has stated that he knew Sambaria Patra and the deceased. The incident occurred 1 ½ years prior to his depositions in the court. On the relevant Tuesday, while he was cutting paddy crop at his field and after completing the work, he went under the shadow of a jack-fruit tree to take a little rest. Both accused and deceased came along the road accompanied by two other Juanga people. The witness further stated that the deceased invited him to a liquor party. Being invited so he accompanied them and went to a place near village water canal and then they took liquor together from one Kandiri Patra who was selling liquor at that place. After taking liquor they dispersed and thereafter the witness, accused and deceased proceeded towards their village in a row. The witness stated that he was ahead of accused and deceased who were coming together. In course of walking along the road he could hear the quarrel between the accused and the deceased. While they were halfway through he could no more hearing their voice. On turning back, he found the deceased gave two slaps to the accused and in retaliation the accused pushed the deceased to a side for which the deceased fell down on the ground.

8.(a) The witness further stated that the accused picked up a stone lying on the road and dashed it to the head of the deceased. The deceased sustained injuries. Seeing this, the witness fled away from the spot and went towards the village. The accused then came to the village and informed that he has killed the deceased. Thereafter, they parted ways.

8.(b) In the cross-examination, he denied the defence suggestions that he is not in talking terms with the accused and he has not accompanied with accused and deceased for liquor and that he was deposing falsehood.

9. From the total conspectus of the material available on record i.e. the evidence of the Doctor who has conducted post-mortem examination and the sole eye-witness, it is apparent that the occurrence took place in a spur of the moment, while both the accused and deceased were under the influence of liquor. There was quarrel between them and it was the deceased who gave two slap blows to the accused. The accused pushed the deceased on the ground and dashed a stone on his head. As a result of which, the deceased sustained fracture of the mastoid bone and also extradural haematoma was found which led to the death of the deceased.

10. It is also borne out from the evidence of P.W.7 that on the next day at the spot, the wife of the deceased, the Grama Rakshi-P.W.7 and the accused were present which shows that the accused-appellant has no intention of committing murder of the deceased rather the occurrence took place in a spur of moment which led to the death of the deceased. However, since the appellant dashed the head of the deceased by means of stone and he being a grown-up man has knowledge that his action shall cause bodily injury which may resulting death of the deceased, hence, we are of the opinion that the offence U/s.304 (Part-I) of IPC is made out.

11. Thus, on the basis of the aforesaid discussions, we come to the conclusion that the offence U/s. 302 of IPC is not made out rather offence U/s.304 (Part-I) is made out. Hence, the appeal is allowed in part. Conviction of the appellant for the offence U/s. 302 of IPC is hereby set aside. Instead, we convict the appellant for the offence U/s. 304 (Part-I) of IPC and sentencing him to undergo rigorous imprisonment for 10 (ten) years. We do not impose any fine on the appellant.

12. It is brought to the notice of the court that he is already in custody of 14 years, if that is so, he be released from jail custody immediately after setting off substantive sentence against the period undergone, if he is not required to be detained in any other case.

Accordingly, the JCRLA is partly allowed. LCRs. be returned immediately to the lower court.

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2019 (III) ILR - CUT-56

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

CRA NO.199 OF 2000

BRUNDABAN BAG .....Appellant

.Vs.

STATE OF ORISSA .....Respondent

(A) INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction – Based on circumstantial evidence – Principles of the completion of the chain of circumstances – Indicated.

"While appreciating the evidence in a criminal case based only on circumstantial evidence, the Court should adopt a very sensible and reasonable approach. The Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda –***

vrs.- State of Maharashtra*: reported in AIR 1984 SC 1622, wherein the Hon'ble Supreme Court has laid down the five golden principles that guide the cases based on circumstantial evidence. The Hon'ble Supreme Court in the case of* ***Sharad Birdhichand Sarda*** *(supra) has held that:*

> *"the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established;*
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (3) the circumstances should be of a conclusive nature and tendency;
>
> (4) they should exclude every possible hypothesis except the one to be proved; and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

It is profitable to take note of the aforesaid entire five principles as held by the Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda*** *(supra). One of the most important principle is that the circumstance on which the prosecution relies upon should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty and the same should be of a conclusive nature and tendency."*

(B) INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction – Based on circumstantial evidence – One of the circumstance was that when the informant entered into her house after fetching water from the tube well, she, P.W.1 could see the accused coming out from the room where the deceased was sleeping and soon thereafter the informant could mark the death of the deceased – From a conspectuous of the evidence of P.W.1 read with the evidence of P.W.7 juxtapose the contents of the F.I.R., it is our opinion that the main witness i.e. the informant P.W.1 has been contradicted with respect to her previous statement and such contradictions are material contradictions – So, her evidence cannot be accepted to prove the 3rd incriminating circumstance against the convict/ appellant – Conviction set aside.

Case Laws Relied on and Referred to :-

1. AIR 1984 SC 1622 : Sharad Birdhichand Sarda .Vs.- State of Maharashtra.

For appellant : M/s. D.K. Mishra-1, S.C. Mohanty, G.K. Nayak & R. Mahalik.

For Respondent : Mr. K.K. Mishra, Addl. Govt. Adv.

JUDGMENT Hearing & Judgment: 07.08.2019

S. K. MISHRA, J.

In this CRA, the convict/ appellant (Brundaban Bag) assails the judgment of conviction and order of sentence dated 24.07.2000 passed by the learned Additional District and Sessions Judge, Nuapada in Sessions Case No.4/8 of 1999-2000, whereby he has been convicted and sentenced to undergo imprisonment for life for commission of offence punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity).

02. The gravamen of the prosecution case against the convict/ appellant is that on 20.09.1998 informant (Bija Bag) gave birth to a child through one Dasarath Hans with whom she had love affairs. The said Dasarath Hans happens to be the brother-in-law of the convict/ appellant and the informant is the sister of the convict/ appellant. Prior to the birth of the said child, the informant was persuading the said Dasarath Hans to accept her as his wife, but the same was not approved by the convict/ appellant. On the next day, i.e., on 21.09.1998 at about 6.00 P.M. the informant leaving her newborn baby in her room had been to fetch water to a nearby tube well. Further case of the prosecution is that in the absence of the informant, the convict/ appellant entered into her house, throttled the neck of the newborn baby and killed the child. Having returned from the tube well, the informant came to know about the death of her child and thereafter on the next day i.e. on 22.09.1998, she presented a written report before the Sinapali Police Station, Sinapali. On the basis of the said F.I.R., police registered a case and took up investigation. In course of investigation, by examining the witnesses, conducting inquest over the dead body, conducting post-mortem examination all relevant steps were taken. Upon completion of investigation, the Investigating Officer submitted charge-sheet against the accused/ appellant under Section 302 of the I.P.C.

03. The plea of the accused is of a complete denial to the occurrence and to the false implication.

04. In order to bring home the charge against the accused, prosecution examined eight witnesses and also placed reliance on the documents marked Exts.1 to 8.

Out of eight witnesses, P.W.1 (Bija Bag) is the informant herself, P.W.2 (Ramcharan Sahu) is a post-occurrence witness, P.W.3 (Panchanan Sindhu) is a witness to the inquest, P.Ws.4 and 5 (Badan Bag and Debaki Bag) respectively have not supported the case of the prosecution, P.W.6 (Khesram Meher) has scribed the F.I.R. (Ext.2), P.W.7 (Anirudha Routray) is the Investigating Officer and P.W.8 (Dr. Rama Mohanty) has conducted the post-mortem examination of the dead body of the deceased.

05. Admittedly, the case is based on circumstantial evidence, there being no direct evidence regarding complicity of the accused in commission of the crime. At paragraph 11 of the impugned judgment, learned Additional District and Sessions Judge, Nuapada has mentioned the various circumstances that are appearing against the accused. Those are (i) love affairs of the informant with one Dasarath Hans much prior to the date of occurrence which resulted into the birth of the deceased; (ii) the illicit relationship between Dasarath Hans and the informant was not acceptable to the accused and the proposal of acceptance of the informant by Dasarath Hans (brother-in-law of the accused) was discarded by the accused; (iii) when the informant entered into her house after fetching water from the tube well, she could see the accused coming out from the room where the deceased was sleeping and soon thereafter the informant could mark the death of the deceased; (iv) when the cause of death was enquired by the informant, the accused abused her in filthy language; (v) after the death of the child, the accused did not take care of the informant since last 14 months and (vi) there was no sympathy for the death of the sister's child on the part of the accused.

On the basis of the above six circumstances coupled with the fact that the deceased has met a homicidal death, learned Additional District and Sessions Judge, Nupada proceeded to convict the accused/ appellant and sentenced him to undergo imprisonment for life for commission of offence under Section 302 of the I.P.C.

06. Learned counsel for the appellant, at the outset, does not dispute the homicidal nature of death of the deceased. But, his argument is that the circumstances brought into the evidence in this case by the prosecution do not form a complete chain of events unerringly pointing to the guilt of the accused. Moreover, there are major contradictions in the testimony of the

witness P.W.1 for which a doubt is created. Hence, the appellant/ convict should be acquitted in this case.

07. Learned Additional Government Advocate, on the other hand, supports the findings recorded by the learned Additional District and Sessions Judge, Nuapada and urges this Court to dismiss this appeal.

08. Admittedly, there are six circumstances in this case. First circumstance was that there was love affairs of the informant with one Dasarath Hans. While appreciating the evidence in a criminal case based only on circumstantial evidence, the Court should adopt a very sensible and reasonable approach. The Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda –vrs.- State of Maharashtra**: reported in AIR 1984 SC 1622, wherein the Hon'ble Supreme Court has laid down the five golden principles that guide the cases based on circumstantial evidence. The Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda** (supra) has held that:

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (3) the circumstances should be of a conclusive nature and tendency;
>
> (4) they should exclude every possible hypothesis except the one to be proved; and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

It is profitable to take note of the aforesaid entire five principles as held by the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda** (supra). One of the most important principle is that the circumstance on which the prosecution relies upon should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty and the same should be of a conclusive nature and tendency. So, the love affairs between the informant and one Dasarath Hans itself is not a strong circumstance which can be relied upon heavily in the absence of more stronger circumstances. Similarly, second circumstance of illicit relationship between Dasarath Hans and the informant was not acceptable by the accused and the proposal of acceptance of the informant by Dasarath Hans (brother-

in-law of the accused) was discarded by the accused. This circumstance is also not consistent only with the theory of guilt of the convict/ appellant. This circumstance can also be interpreted as the motive of P.W.1 to falsely implicate the accused in the commission of the crime. In other words, this circumstance is a double-edged sword which can cut both ways. So this is not a circumstance which has much importance in this case. The 3rd circumstance is very important. In fact, that is the only circumstance which is coming forth and is consistent with the guilt of the accused. This circumstance was that when the informant entered into her house after fetching water from the tube well, she could see the accused coming out from the room where the deceased was sleeping and soon thereafter the informant could mark the death of the deceased. We will discuss this circumstance later on after discussion of 4th, 5th and 6th circumstances.

4th circumstance was that when the cause of death was enquired by the informant, the accused abused her in filthy language. A close examination of the evidence of P.W.1 reveals that she has been cross-examined and in her cross-examination she has stated that it is not a fact that she did not state before the police that by seeing the death of her child, when she enquired the matter from the accused, he abused her in filthy language. In a cross reference to the evidence of P.W.7 reveals that P.W.7 has stated that the informant has not stated before him in her statement recorded under Section 161 of the Cr.P.C. that having seen her child dead, when she enquired the matter from the accused, he used filthy language towards her. So, the 4th circumstance has not brought forth conclusively and very affirmatively by the prosecution and the said circumstance is to be discarded.

The 5th circumstance was that after the death of the child the accused did not take care of the informant for about 14 months. This circumstance cannot be one will be consistent only with the hypothesis of the guilt of the accused. Because of the F.I.R. lodged against the accused, he was in custody. Moreover, once there is a estrange relationship, it is but natural the accused will not take care of the informant. So, we are of the opinion that the 5th circumstance relied upon by the learned Additional District and Sessions Judge, Nuapada is also not consistent only with the guilt of the accused and cannot be held to be an incriminating circumstance against the convict/ appellant.

The 6th circumstance relied upon by the learned Additional District and Sessions Judge, Nuapada was that the accused has no sympathy for the death of the sister's child. This circumstance is also not consistent only with

the guilt of the accused, as it is the admitted case of the prosecution that the child was born because of an illicit relationship between the informant P.W.1 and one Dasarath Hans. So, for that reason, the accused has no sympathy for the death of the sister's child. Hence, this circumstance can also be explained away by the defence. So, this is not an incriminating circumstance against the accused/ convict.

Now coming to the incriminating circumstance relied heavily upon by the learned Additional District and Sessions Judge, Nuapada is that when the informant entered into her house after fetching water from the tube well, she could see the accused coming out from the room where the deceased was sleeping and soon thereafter the informant could mark the death of the deceased. On examination of evidence of P.W.1 it reveals that she has not mentioned this fact in the F.I.R., though she has stated that it is not a fact that she did not mention in her F.I.R. that when she came from the well by fetching water, she found the accused coming from the house in which her child was sleeping. However, a cross reference to the F.I.R. which has been exhibited as Ext.2 reveals that the informant stated in the F.I.R. that when she returned from the tube well she could see the death of her child and then raised hulla, for which the villagers came and saw the dead body of the deceased and then she went to lodge the report. No such contradiction is brought out in respect of her statement recorded under Section 161 of the Cr.P.C. A material omission in the F.I.R. also creates a serious doubt regarding this aspect of the case. Moreover, in the F.I.R., the informant has stated that on 21.09.1998 at about 9.00 P.M. she left her child in the house and went to the tube well to collect water. Cross reference to the evidence of P.W.7 further reveals that there are other contradictions in the evidence of P.W.1. At paragraph 4, P.W.7 has stated that P.W.1 has not stated before him that at the first instance Dasarath Hans agreed to accept her, but at the later stage, he refused to accept her at the instance of the accused to accept her as his wife. The Investing Officer further stated that P.W.1 did not state before him that when she had gone to fetch water from the tube well, the accused was present in his house. She did not state before the Investigating Officer that having seen her child dead, when she enquired the matter from the accused, he used filthy language towards her. Another reference to the evidence of P.W.1 further reveals that when she left for the tube well the accused and other persons were present in the house. When she came back she asked his other brother and she was replied that things have been done well.

09. So, from a conspectuous of the evidence of P.W.1 read with the evidence of P.W.7 juxtapose the contents of the F.I.R., it is our opinion that the main witness i.e. the informant P.W.1 has been contradicted with respect to her previous statement and such contradictions are material contradictions. So, her evidence cannot be accepted to prove the 3rd incriminating circumstance against the convict/ appellant.

10. In that view of the matter, we are of the opinion that on the basis of the materials on evidence, the prosecution has not proved its case beyond all reasonable doubt.

11. Hence, the appeal is allowed. The impugned judgment of conviction and order of sentence dated 24.07.2000 passed by the learned Additional District and Sessions Judge, Nuapada in Sessions Case No.4/8 of 1999-2000 convicting the appellant for commission of offence under Section 302 of the I.P.C. and sentencing him to undergo imprisonment for life without imposing separate sentence of fine, are set aside. The appellant is acquitted of the said charge. Since the appellant, namely, Brundaban Bag, is on bail, the bail bond be cancelled in the aforesaid case. The L.C.R. be returned back forthwith.

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2019 (III) ILR - CUT- 63

DR. A.K.RATH, J.

C.M.P. NO. 655 OF 2016

KHEDU CHANDRA BEHERA .....Petitioner

.Vs.

DRAUPADI BEHERA & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 18 Rule 1 – Right to begin – Suit for partition – Some of the defendants pleaded in the written statement that there was prior partition of the suit property – Plaintiff filed application seeking an order to defendants to begin first – Allowed – Writ petition by one of the defendant challenging the order allowing the defendant to begin first – Scope of interference – Held, the plaintiff in all cases has the right to begin, exception being that when the defendant admits the facts and contends either in the point of law or on some additional facts alleged by the defendants the plaintiff is not entitled to any part of the relief which he seeks in the suit and in that event only the defendant is to begin. (*Chittaranjan Das Vrs. Janaranjan Das and others, 84 (1997) CLT 296 followed*)

Case Laws Relied on and Referred to :-

1. AIR 1954 ORISSA 191 : Balakrishna Kar & Anr Vs. H.K.Mahatab.
2. 84 (1997) CLT 296 : Chittaranjan Das Vs. Janaranjan Das & Ors.
3. 1992 (I)OLR 72 : Purastam alias Purosottam Gaigouria & Ors Vs. Chatru alias Chatrubhuja Gaigouria.

For Petitioner : Mr. Amit Prasad Bose
For Opp. Parties: Ms.S.Udgata

JUDGMENT Date of Hearing & Judgment: :25.01.2017

Dr. A.K. RATH, J.

This petition challenges the order dated 22.3.2016 passed by the learned Civil Judge (Sr.Division), Jharsuguda in C.S.No.159 of 2013. By the said order, the learned trial court allowed the application of the plaintiff under Order 18 Rule 1 C.P.C. and directed the defendants to begin first.

2. The opposite party no.1 as plaintiff instituted the suit for partition of the suit land impleading the petitioner and opposite parties 2 to 9 as defendants. Pursuant to issuance of summons, the petitioner/defendant-7 and other defendants 1 to 5, 7 and 8 entered appearance and filed a joint written statement stating therein that there was prior partition of the suit land by metes and bounds. While the matter stood thus, the plaintiff filed an application under Order 18 Rule 1 C.P.C. for a direction to the defendants to begin first. The defendants also filed objection. The learned trial court allowed the same and directed the defendants to begin first. Hence, this petition.

3. Heard Mr.Amit Prasad Bose, learned Advocate for the petitioner and Mr.Sanjeev Udgata, learned Advocate for opposite party no.1.

4. The sole question hinges for consideration before this Court as to whether defendants shall begin first ?

5. Order 18, Rule 1 C.P.C., which is hub of the issue, is quoted hereunder:-

> "**1. Right to begin**- The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."

6. In Balakrishna Kar and another Vrs. H.K.Mahatab, AIR 1954 ORISSA 191, the Division Bench of this Court in paragraph-5 of the said report held as follows:-

> "(5). It should therefore be borne in mind that the right to begin is not the same as the adducing of evidence in support of a party's case. There is a distinction between the two. It is open to the plaintiff to say that although he has the right to begin he may rest content with relying upon the averments made in the written statement and may say that he does not propose to adduce further evidence, but the plaintiff should make this statement before the defendant is called upon to adduce evidence. Unfortunately, the Court below has confused the issue and has called upon the defendant to open his case even before the plaintiff went into the box or testified to the truth of his story. We are clearly of opinion that the order of the learned Subordinate Judge is erroneous and must be set aside."

7. In Chittaranjan Das Vrs. Janaranjan Das and others, 84 (1997) CLT 296, it is held that the plaintiff in all cases has the right to begin, exception being that when the defendant admits the facts and contends either in the point of law or on some additional facts alleged by the defendants the plaintiff is not entitled to any part of the relief which he seeks in the suit and in that event only the defendant is to begin.

8. In Purastam alias Purosottam Gaigouria and others v. Chatru alias Chatrubhuja Gaigouria, 1992 (I)OLR 72, a Division Bench of this Court in para-5 of the report held thus :

> "5. In this case, the plaintiff sought partition alleging that the property was joint family property and had not been decided by metes and bounds. The defendant-petitioners placed a previous partition since 1960-61 to defeat the plaintiff's suit. In view of the plea of the defendants that there was a previous partition, the learned Subordinate Judge called upon the defendants to begin. The plaintiff's plea that the property was joint family property having been admitted by the defendants and the latter having pleaded previous partition, the defendants are to lose if neither party adduced evidence, the burden being on the defendants to prove previous partition. Only when the defendants lead some evidence in proof of previous partition, the plaintiff would be obliged to lead evidence in rebuttal...." (Emphasis laid)

9. In view of the same, the order passed by the learned trial court can not be said to be perfunctory or flawed warranting interference of this Court under Article 227 of the Constitution of India. Accordingly, the petition is dismissed. No costs.

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2019 (III) ILR - CUT-66

DR. A.K.RATH, J.

C.M.P. NO. 540 OF 2018

AMINA BIBI & ORS. ……..Petitioners

.Vs.

SK. MD. HANIF & ORS. …….Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 1 Rule 10 – Application under – Rejected – Petitioners are legal heirs of Proforma Defendant No. 5 – Petition seeking impletion enclosing voter identity and Aadhar card – Held, there is no reason to disbelieve the public documents – Petitioners are proper parties to the suit. (Para 8)

Case Laws Relied on and Referred to :-

1. AIR 1958 SC 886 : Razia Begum Vs. Sahebzadi Anwar Begum & Ors.
2. (2010) 7 SCC 417 : Mumbai International Airport Private Ltd .Vs. Regency Convention Centre and Hotels Private Ltd & Ors.

For Petitioners : Mr. Anupam Dash

For Opp. Parties : None

JUDGMENT Date of Hearing & Judgment : 29.01.2019

Dr. A.K. RATH, J.

By this petition under Article 227 of the Constitution, challenge is made to the order dated 20.11.2017, passed by the learned Civil Judge (Junior Division), Bhadrak, in C.S. No.140 of 2006-I whereby and whereunder, the learned trial Court rejected the application of the plaintiffs under Order 1 Rule 10 CPC for impleadment.

2. Plaintiffs-opposite party nos.1 and 2 along with proforma defendant no.5 have instituted the suit for declaration of title, confirmation of possession and in alternative for recovery of possession, in the event they are dispossessed during pendency of the suit and permanent injunction. During pendency of the suit, the defendant no.5 died, whereafter the plaintiffs filed an application for substitution. The same was allowed. While matter stood thus, the petitioners have filed an application under Order 1 Rule 10 CPC to implead them as defendants stating, inter alia, that they are legal heirs of the defendant no.5. But the plaintiffs had not impleaded them intentionally. To substantiate the case, the intervenors filed voter identity card as well as adhar card. They are proper parties to the suit. Plaintiffs filed objection to the same.

03. Learned trial court rejected the application holding, inter alia, that only submitting the voter identity card and adhara card, it will not strengthen

the claim of the intervenors. The address of the intervenors and the proforma defendant no.5 is different. Held so, it rejected the application.

04. Heard Mr. Anupam Dash, learned counsel for the petitioners. None appears for the opposite parties instead of valid service of notice.

05. Mr. Dash, learned counsel for the petitioners submits that petitioner no.1 is the second wife of proforma defendant no.5. Other petitioners are daughter and sons of proforma defendant no.5. After death of proforma defendant no.5, plaintiffs filed an application for substitution, but they have left out the petitioners. Thereafter the petitioners filed an application for intervention. The petitioners have filed voter identity card as well as adhara card. But then, learned trial court rejected the same on untenable and unsupportable grounds.

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

07. The distinction between a necessary party and a proper party is well known. In Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited and Others, (2010) 7 SCC 417, the apex Court held:-

> "13. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10 (2) of the Code of Civil Procedure ("the Code", for short), which provides for impleadment of proper or necessary parties.
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> xxx xxx xxx
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> 14. The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found tobe a necessary party or proper party.

> 15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.
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> xxx xxx xxx
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> 22. Let us consider the scope and ambit of Order 1 Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the right of a nonparty to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo motu or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice."

08. Reverting to the facts of the case and keeping in view the law laid down by the apex Court in the cases cited supra, this Court finds that the petitioners have filed the voter identity card and adhar card. From the said documents, it is revealed that they are the legal heirs of proforma defendant no.5. They have direct interest in the subject-matter of litigation. There is no reason to disbelieve the voter identity card and adhar card, which are public documents. The petitioners are proper parties to the suit.

09. In the wake of aforesaid, the order dated 20.11.2017 passed by the Civil Judge (Junior Division), Bhadrak, in C.S. No.140 of 2006-I is quashed. The application for impleadment is allowed. Learned trial court shall do well to implead the petitioners as proforma defendants and proceed with the matter. There shall be no order as to costs.

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2019 (III) ILR - CUT- 69

DR. A.K. RATH, J.

FAO NO. 526 OF 2018

SENIOR DIVISIONAL MANAGER,
NATIONAL INSURANCE COMPANY LTD. .....Appellant

.Vs.

SURESH KUMAR BEHERA & ANR. .....Respondents

EMPLOYEES COMPENSATION ACT, 1923 – Section 3(1) read with Section 147 of the Motor Vehicles Act, 1988 – Claimant, a driver of a Truck parked the vehicle and instructed the helper to grease the back side wheel of the truck – At that time another truck came in a high speed and dashed against the driver – Claim of compensation – Commissioner held that the accident arose in course of employment and awarded compensation – Appeal – Points that falls for consideration are (i) What is the true meaning of the expressions "arising out of and in the course of employment" appearing in Sec.3(1) of the Employee's Compensation Act, 1923, and (ii) Whether the doctrine of notional extension can be applied in the facts and circumstances of the case ? – Held, yes – There was casual connection between the employment of the workman and his accident – The doctrine of notional extension is applicable to the facts scenario – Reasons indicated. (***General Superintendent, Talcher Thermal Station v. Smt. Bijuli Naik, 76 (1993) CLT 699, followed)***

"4. The pre-conditions for attracting the provisions of Section 3(1) of the Act are that death or injury must be caused to a workman; the said injury must have been caused by accident; and the accident must have arisen out of and in the course of his employment. A causal connection between the employment and the injury caused by the accident must exist. If after looking at the entire facts, a fair inference can be drawn that the employment caused the injury, then the employer would be liable to pay the compensation. The liability under Section 3(1) of the Act would accrue, if it is established that an injury has been caused to a workman and the accident arose out of and in course of his employment.

xxx xxx xxx

The general principles are that (i) there must be a causal connection between the injury and the accident and the work done in the course of employment; (ii) the onus is upon the applicant to show that it was the work and the resulting strain which contributed to, or aggravated, the injury; (iii) it is not necessary that the workman must be actually working at the time of his death or that death must occur while he was working or had just ceased to work; and (iv) where the evidence is balanced, if the evidence shows a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed. But where the accident involved a risk common to all humanity and did not involve any peculiar or exceptional danger

resulting from the nature of the employment, or where the accident was the result of an added peril to which the workman, by his own conduct, exposed himself and which peril was not involved in the normal performance of the duties of his employment, then the employer will not be liable under Section 3 of the Act."

(Para 17)

Case Laws Relied on and Referred to :-

1. AIR 1964 SC 193 : General Manager, B.E.S.T Undertaking, Bombay .Vs. Mrs. Agnes.
2. (1969) 2 SCC 607 : Mackinnon Machenzie and Co. (P) Ltd. .Vs. Ibrahim Mahmmed Issak
3. (2010) 10 SCC 536 : Mamtaj Bi Bapusab Nadaf & Ors. .Vs. United India Insurance Company & Ors.
4. (2001) 9 SCC 395 : State of Rajasthan .Vs. Ram Prasad & Anr.
5. (2014) 14 SCC 21 : Manju Sarkar & Ors..Vs. Mabish Miah & Ors.
6. (2014) 2 SCC 298 : Saberabibi Yakubbhai Shaikh & Ors. .Vs. National Insurance Co. Ltd. & Ors.
7. 76 (1993) CLT 699 : General Superintendent, Talcher Thermal Station .Vs. Smt. Bijuli Naik,
8. (2012) 12 SCC 540 : Oriental Insurance Company Limited .Vs. Siby George & Ors.
9. (1976) 1 SCC 289 : Pratap Narain Singh Deo .Vs. Srinivas Sabata.
10. (2012) 12 SCC 540 : Oriental Insurance Company Limited .Vs. Siby George & Ors.

For Appellant : Mr. Subrat Satapathy

For Respondent : Mr. Pradeep Kumar Mishra

JUDGMENT Date of Hearing: 08.02.2019 : Date of Judgment :18.02.2019

Dr. A.K. RATH, J.

This appeal by the insurance company is directed against the award dated 20.02.2018 passed by the Commissioner for Employee's Compensation-cum-AssistantL abour Commissioner, Cuttack ('Commissioner') in E.C Case No.21-D/2015, whereby and whereunder the Commissioner awarded an amount of Rs.11,82,784/- as compensation and directed the insurance company to pay the same within thirty days, failing which, the same shall carry interest @ 12% per annum from the date of filing of the case.

2. The brief facts of the case, which are relevant to dispose of the appeal, are :

The claimant-respondent no.1 was the driver of the truck bearing registration number OD-02-N-6303. On 14.6.2014 at about 8 A.M, he parked the truck on the left side of the road near Kalpana Chhak, Cuttack-Puri Road,

Bhubaneswar, got down and instructed the helper to grease the back side wheel of the truck. At that time, another truck bearing registration number OD-02-L-3534 came in a high speed and dashed against him, as a result of which he sustained fracture injury on his right leg femur and other injuries. He was shifted to Capital Hospital, Bhubaneswar for treatment. Thereafter, he was shifted to KIIMS Hospital. His right leg femur fracture was operated and nail was applied. Laxmisagar Police Station Case No.195 of 2014 was registered. With this factual scenario, the claimant filed E.C Case No.21-D of 2015 before the Commissioner for Employee's Compensation-cum-Asst. Labour Commissioner, Cuttack claiming compensation of rupees ten lakhs. It was pleaded that the claimant was 32 years old at the time of accident.

3. Opposite parties 1 and 2 entered appearance and filed separate written statements denying the assertions made in the petition.

4. Stemming on the pleadings of the parties, the Commissioner struck four issues. To substantiate the case, the claimant adduced evidence. No evidence was adduced by the opposite parties. On an anatomy of the pleadings and the evidence, the Commissioner came to hold that the claimant was a workman. He was 32 years old at the time of accident. It assessed the loss of earning capacity of the claimant at 80% and monthly wage at Rs.8000/-. Held so, it awarded an amount of Rs.11,82,784/- and directed the insurer to pay the same to the claimant within thirty days, failing which, the same shall carry interest @ 12% per annum from the date of filing of the case

5. Heard Mr. Subrat Satpathy, learned counsel for the appellant and Mr. Pradeep Kumar Mishra, learned counsel for the respondent no.1.

6. Mr. Satpathy, learned counsel for the appellant submitted that the accident did not arise in course of and out of the employment of the claimant and as such, the insurer is exonerated from its liability. There was no casual connection between the employment and the accident. Under Sec.147(1) of the Motor Vehicles Act (in short, "the M.V Act"), the insurer is not liable to pay any compensation. To buttress the submission, he placed reliance on the decisions of the Apex Court in the case of General Manager, B.E.S.T Undertaking, Bombay v. Mrs. Agnes, AIR 1964 SC 193**,** Mackinnon Machenzie and Co. (P) Ltd. v. Ibrahim Mahmmed Issak, (1969) 2 SCC 607, Mamtaj Bi Bapusab Nadaf and others v. United India Insurance Company and others, (2010) 10 SCC 536 and Leela Bai & another v. Seema Chouhan & another, Civil Appeal No(s). 931 of 2019 arising out of SLP(C) No.5576 of 2017).

7. Per contra, Mr. Mishra, learned counsel for the respondent no.1 submitted that the accident occurred in course of and out of the employment of the claimant. The claimant is entitled to interest @ 12% per annum from the date of accident. He placed reliance on the decisions of the Apex Court in the case of State of Rajasthan v. Ram Prasad and another, (2001) 9 SCC 395, Manju Sarkar and others v. Mabish Miah and others, (2014) 14 SCC 21, Saberabibi Yakubbhai Shaikh and others v. National Insurance Co. Ltd. and others, (2014) 2 SCC 298 and the decision of this Court in the case of the Divisional Manager, M/s. New India Assurance Co. Ltd. v. Smt. Sagarika Bhoi & others (FAO No.135 of 2017 disposed of on 9.8.2017).

8. The seminal points that falls for consideration are (i) What is the true meaning of the expressions "arising out of and in the course of employment" appearing in Sec.3(1) of the Employee's Compensation Act, 1923, and (ii) Whether the doctrine of notional extension can be applied in the facts and circumstances of the case ?

9. Section 3(1) of the Employee's Compensation Act, which is the hub of the issue, is quoted hereunder;

> "If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter."

10. Proviso appended thereto provides for exclusion of the liability of the employer specified therein.

11. Proviso to Sec.147 of the M.V Act was the subject-matter of consideration before the Apex Court in the case of Oriental Insurance Company Ltd. v. Sorumai Gogoi and others, 2008 (2) TAC 5 (SC). The Apex Court held :

> "15. Section 147 of the Motor Vehicles Act, 1988, however, mandatorily provides for obtaining insurance cover by the owner of a vehicle. Proviso appended thereto reads as under :
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> "Provided that a policy shall not be required –
>
> (i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee"
>
> (a) engaged in driving the vehicle, or
>
> (b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

16. The sine qua non for invoking the proviso appended to Section 147 is that the employee must be engaged in driving the vehicle. Death or bodily injury must occur arising out of or in the course of his employment. The 1923 Act or the 1988 Act, therefore, would be applicable only if the conditions precedent laid down thereunder are satisfied."

12. Mrs. Agnes is a locus classicus on the subject. The Apex Court held that under Section 3(1) of the Workmen's Compensation Act (in short, "W.C Act"), the injury must be caused to the workman by an accident arising out of and in the course of his employment. The question, when does an employment begin and when does it cease, depends upon the facts of each case. But the Courts have agreed that the employment does not necessarily end when the "down tool" signal is given or when the workman leaves the actual workshop where he is working. There is a notional extension at both the entry and exit by time and space. The scope of such extension must necessarily depend on the circumstances of a given case. As employment may end or may begin not only when the employee begins to work or leaves his tools but also when he used the means of access and, egress to and from the place of employment. It was further held that though the doctrine of reasonable or notional extension of employment developed in the context of specific workshops, factories or harbours, equally applies to such a bus service the doctrine necessarily will have to be adapted to meet its peculiar requirements.

13. Sec.3(1) of the Employee's Compensation is pari materia to Sec.3(1) of the Workmen's' Compensation Act. Sec.3(1) of the W.C Act was the subject-matter of consideration before the Apex Court in Mackinnon Mackenzie and Co. Pvt. Ltd. The Apex Court held :

"5. To come within the Act the injury by accident must arise both out of and in the course of employment. The words "in the course of the employment" mean "in the course of the work which the workman is employed to do and which is incidental to it." The words "arising out of employment" are understood to mean that "during the course. of the employment, injury has resulted from some risk incidental to the duties of the service, which unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered." In other words there must be a causal relationship between the accident and the employment. The expression "arising out of employment" is again not confined to the mere nature of the employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of these factors the workman is brought within the scene of special danger the injury

> would be one which arises 'out of employment'. To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act. In Lancashire and Yorkshire Railway Co. v. Highley Lord Sumner laid down the following test for determining whether an accident "arose out of the employment":
>
> There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because, what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. To ask if the cause of the workman was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment, that the workman should have acted as he was acting or should have been in the position in which he was, whereby in the course of that employment he sustained injury.
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> 6. In the case of death caused by accident the burden of proof rests upon the workman to prove that the accident arose out of employment as well as in the course of employment. But this does not mean that a workman who comes to court for relief must necessarily prove: it by direct evidence. Although the onus of proving that the injury by accident arose both out of and in the course of employment rests upon the applicant these essentials may be inferred when the facts proved justify the inference. On the one hand the Commissioner must not surmise, conjecture or guess; on the other hand, he may draw an inference from the proved facts so long as it is a legitimate inference."

14. In Ram Prasad, the accident took place on account of lightning. The contention put-forth on behalf of the appellant was that the mishap of death of Smt. Gita due to lightning is an act of God and therefore, the appellant was not liable to pay compensation. The contention was repealed by the Commissioner for Workmen's Compensation. The State of Rajasthan filed appeal before the High Court. Learned Single Judge affirmed the award of the Commissioner. The Division Bench affirmed the judgment. The matter travelled to the Apex Court. Taking a cue from Ibrahim Mohammed Issak, the Apex Court held that the view taken is that the concept of the liability under the Act is wide enough to cover a case of this nature inasmuch as death had taken place arising as a result of accident in the course of employment.

15. In Manju Sarkar, Sajal Sarkar, husband of the appellant no.1 was the driver of the truck bearing registration number TR-01-B-1689 under the employment of respondent nos.1 and 2. On the way the driver noticed some

mechanical trouble in the truck and got down to make arrangement for repair of the vehicle. He met with an accident and sustained grievous injuries. While he was taken to hospital, he succumbed to the injuries. The Apex Court applied the principle of notional extension and held that the Sajal Sarkar met with an accident in course of his employment.

16. In Leela Bai, the deceased was a bus driver of the bus. He met with an accidental death while he was coming down the roof of the bus after taking dinner at about 8.30 p.m. The deceased had returned to bus terminus at 7.30 p.m. The question arose before the Apex Court was whether the death occurred during the course of, and arising out of the employment. Taking a cue from Agnes and Sanju Sarkar, the Apex Court applied the doctrine of notional extension and accordingly compensation was awarded.

17. On a survey of the decisions of the various High Courts and the Apex Court, this Court in the case of the General Superintendent, Talcher Thermal Station v. Smt. Bijuli Naik, 76 (1993) CLT 699, succinctly stated the principles. This Court held :

> "4. The pre-conditions for attracting the provisions of Section 3(1) of the Act are that death or injury must be caused to a workman; the said injury must have been caused by accident; and the accident must have arisen out of and in the course of his employment. A causal connection between the employment and the injury caused by the accident must exist. If after looking at the entire facts, a fair inference can be drawn that the employment caused the injury, then the employer would be liable to pay the compensation. The liability under Section 3(1) of the Act would accrue, if it is established that an injury has been caused to a workman and the accident arose out of and in course of his employment.
>
> xxx xxx xxx
>
> The general principles are that (i) there must be a causal connection between the injury and the accident and the work done in the course of employment; (ii) the onus is upon the applicant to show that it was the work and the resulting strain which contributed to, or aggravated, the injury; (iii) it is not necessary that the workman must be actually working at the time of his death or that death must occur while he was working or had just ceased to work; and (iv) where the evidence is balanced, if the evidence shows a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed. But where the accident involved a risk common to all humanity and did not involve any peculiar or exceptional danger resulting from the nature of the employment, or where the accident was the result of an added peril to which the workman, by his own conduct, exposed himself and which peril was not involved in the normal performance of the duties of his employment, then the employer will not be liable under Section 3 of the Act."

18. In Smt. Sagarika Bhoi, the workman died due to snake bite. This Court held that the accident arose out of and in course of the employment of the deceased.

19. Admittedly the claimant was a driver in the truck bearing registration number OD-02-N-6303. At about 8.00 A.M., the driver parked the vehicle and instructed the helper to grease the back side wheel of the truck. At that time another truck bearing registration number OD-02-L-3534 came in a high speed and dashed against the driver. There was casual connection between the employment of the workman and his accident. The doctrine of notional extension is applicable to the facts scenario. The Commissioner has rightly held that the accident arose in course of employment of the injured.

20. The next question crops up as to whether Commissioner is justified in awarding interest @ 12% per annum ?

21. In Oriental Insurance Company Limited v. Siby George and others, (2012) 12 SCC 540, the short question that arose for consideration before the Apex Court that when the payment of compensation under the Workmen's Compensation Act, 1923 becomes due and consequently what is the point in time from which interest would be payable on the amount of compensation as provided under Section 4-A(3) of the Act ? The Apex Court held :

> "9. Now, coming back to the question when does the payment of compensation fall due and what would be the point for the commencement of interest, it may be noted that neither the decision in Mubasir Ahmed nor the one in Mohd. Nasir can be said to provide any valid guidelines because both the decisions were rendered in ignorance of earlier larger Bench decisions of this Court by which the issue was concluded. As early as in 1975 a four Judge Bench of this Court in Pratap Narain Singh Deo. Vs. Shrinivas Sabata directly answered the question. In paragraphs 7 and 8 of the decision it was held and observed as follows:-
>
> "7. Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section provides that the employer shall be liable to pay compensation if "personal injury is caused to a workman by accident arising out of and in the course of his employment." It was not the case of the employer that the right to compensation was taken away under sub-section (5) of Section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore became liable to pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the Commissioner's order dated May 6, 1969 under Section 19. What the section provides is that if any question arises in any proceeding under the Act as to

> the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation under Section 3, in respect of the injury, was suspended until after the settlement contemplated by Section 19. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary.
>
> 8. It was the duty of the appellant, under Section 4- A(1) of the Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under sub-section (2) of Section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no heed to the respondent's personal approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making an application to the Commissioner for settling the claim, and even there the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement settling the claim for a sum which was so grossly inadequate that it was rejected by the Commissioner. In these facts and circumstances, we have no doubt that the Commissioner was fully justified in making an order for the payment of interest and the penalty."
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> The Apex Court further held :
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> "12. The decisions in Pratap Narain Singh Deo was by a four Judge Bench and in Valsala by a three Judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But the earlier decisions in Pratap Narain Singh Deo and Valsala were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir."

22. In Saberabibi Yakub Bhai Shaikh, the Commissioner awarded compensation of Rs.2,13,570/- with interest 12% per annum from the date of accident and penalty. Aggrieved and dissatisfied with the award the Insurance Company filed first appeal before the High Court. The High Court directed the Insurance Company to pay interest on the amount of compensation from the date of adjudication of claim application. A further direction was issued that the excess amount towards interest, if any, deposited by the Insurance Company be refunded to it. The award of the Commissioner was modified to that extent. The claimants filed SLP before the Apex Court. A contention was raised by the appellant that the judgment of the High Court is contrary to the law laid down by the Apex Court in the case of Oriental Insurance Company Limited v. Siby George and others (2012) 12 SCC 540. Taking a cue from the celebrated judgment in the case of Pratap Narain Singh Deo v. Srinivas Sabata, (1976) 1 SCC 289, the Apex Court held :

"10. We have perused the aforesaid judgment. We are of the considered opinion that the aforesaid judgment relied upon by the learned counsel for the appellants is fully applicable to the facts and circumstances of this case. This Court considered the earlier judgment relied upon by the High Court and observed that the judgments in the case of National Insurance Co. Ltd. v. Mubasir Ahmed [(2007) 2 SCC 349] and Oriental Insurance Co. Ltd. v. Mohd. Nasir [(2009) 6 SCC 280] were per incuriam having been rendered without considering the earlier decision in Pratap Narain Singh Deo v. Srinivas Sabata [(1976) 1 SCC 289]. In the aforesaid judgment, upon consideration of the entire matter, a four-judge Bench of this Court had held that the compensation has to be paid from the date of the accident.

11. Following the aforesaid judgments, this Court in Oriental Insurance Company Limited versus Siby George and others (supra) reiterated the legal position and held as follows:

"11. The Court then referred to a Full Bench decision of the Kerala High Court in United India Insurance Co. Ltd. v. Alavi and approved it insofar as it followed the decision in Pratap Narain Singh Deo.

12. The decision in Pratap Narain Singh Deo was by a four-judge Bench and in Valsala K. by a three-judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But the earlier decisions in Pratap Narain Singh Deo and Valsala K. were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir.

13. In the light of the decisions in Pratap Narain Singh Deo and Valsala K., it is not open to contend that the payment of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made. The decisions in Mubasir Ahmed and Mohd. Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala K. do not express the correct view and do not make binding precedents."

23. In view of the authoritative pronouncements of the Apex Court in the case of Siby George and Saberabibi Yakub Bhai Shaikh, the claimant is entitled to interest @ 12% per annum from the date of accident.

24. The logical sequitur of the analysis made in the preceding paragraphs is that the accident occurred in course of and out of employment of the claimant and the claimant is entitled to interest @ 12% per annum from the date of accident till the date of payment.

25. In view of the discussions made in the preceding paragraphs, the appeal is dismissed since the same does not involve any substantial question of law. There shall be no order as to costs.

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2019 (III) ILR - CUT- 79

DR. A.K.RATH, J.

S.A. NO.130 OF 2001

GANDHARBA SWAIN & ANR. .....Appellants

.Vs.

SUDARSAN LENKA & ORS. .....Respondents

HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937 – Section 3 read with Section 14 of the Hindu Succession Act, 1956 – Provisions under – Devolution of property vis-a-vis- Property of a female Hindu to be her absolute property – Distinction – Sale of property by the widow whose husband died prior to the 1937 Act. – Sale in the year 1969 – Suit for declaration that the sale deed dated 26.12.1969 executed by Maguni Bewa (pre 1937 Act widow) in favour of Gandharb, defendant no.1 is a fraudulent one and confirmation of possession – Suit dismissed – Lower Appellate court reversed the order by holding that the property in question were the joint family properties of Gopi and Maguni – The same was not partitioned – Maguni was a Pre-Act widow – She had no saleable right – Before commencement of 1937 Act, a widow had absolutely no share in the Hindu joint family property, even if she was in possession of the same and thereby reversed the order of dismissal of suit – Second Appeal by defendant – In appeal the High court held that the parties are governed by Mitakshara school of Hindu Law – Admittedly, Jagu, husband of Maguni, died prior to 1931 i.e., before commencement of 1937 Act. Sec.4 of 1937 Act clearly postulates that provision of the Act would not apply to the property of any Hindu dying before commencement of the Act.

Case Laws Relied on and Referred to :-

1. AIR 1974 Orissa 192 : Ganapath Sahu & Anr. .Vs. Smt. Bulli Sahu & Ors.
2. AIR 1977 Orissa 142 : Harabati & Ors. .Vs. Jasodhara Devi & Ors.
3. AIR 1990 Orissa 70 : Bhagabat Prasad Das .Vs. Haimabati Devi & Ors.
4. 2008 (II) OLR 193 : Sudam Charan Panda & Anr. .Vs. State of Orissa & Ors.
5. AIR 1966 SC 1879 : Eramma .Vs. Veerupana & Ors.
6. AIR 2002 SC 637 : Madhukar D. Shende .Vs. Tarabai Aba Shedage.
7. 2014 (Supp.-I) OLR-162 : Maheswar Barik (dead), his L.Rs., Kartik Ch. Barik & Ors. .Vs. Upendra Barik & Ors.
8. AIR 1977 SC 1944 : Vaaddeboyina Tulasamma & Ors.Vs. Vaddeboyina Sesha Reddi (dead) by L.Rs.
9. AIR 1979 SC 993 : Bai Vajia (dead) By Lrs., .Vs. Thakorbhai Chelabhai & Ors.
10. AIR 1998 SC 2401 : Raghubar Singh & Ors.Vs. Gulab Singh & Ors.
11. (2004) 9 SCC 302 : Apex Court in Ram Vishal (dead) By Lrs. & Ors. .Vs. Jagan Nath & Anr.

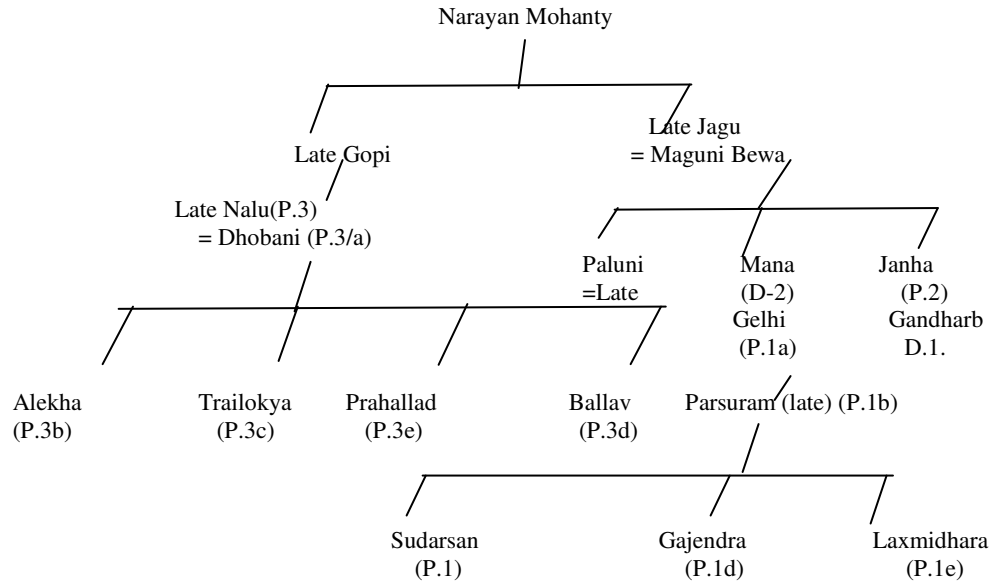
For Appellants : Mr.Anam Charan Panda
For Respondents : Mr.Alok Kumar Mohanty

JUDGMENT Date of Hearing: 07.02.2019 :Date of Judgment:25.02.2019

Dr. A.K. RATH, J.

This appeal at the defendants' instance assails the reversing judgment of the 2nd Additional District Judge, Cuttack in T.A. No.72 of 1994.

2. The following genealogy would show the relation of the parties.



3. Jagu, predecessor-in-interest of plaintiff nos.1 and 2 and Nalu, plaintiff no.3 instituted suit for declaration that the sale deed dated 26.12.1969 executed by Maguni Bewa in favour of Gandharb, defendant no.1 is a fraudulent one and confirmation of possession. Case of the plaintiffs was that the suit properties are the joint family properties of Jagu, father of plaintiff nos.1 & 2 and Nalu, plaintiff no.3. Jagu died while living joint with Nalu. After death of Jagu, Nalu and Maguni, widow of Jagu, continued to remain in joint family. Maguni died in the year 1972. After death of Maguni, her three daughters and Nalu were in joint possession of the suit land. The suit land was recorded jointly in the name of Nalu and Maguni in the settlement as well as consolidation ROR. They used to pay rent. While matter stood thus, defendant no.1 initiated a proceeding under Sec.145 Cr.P.C., which was registered as Criminal Misc. Case No.569 of 1980. In the said case, he disclosed that he had purchased the suit land from Maguni. The suit

properties being the joint family properties, Maguni could not have alienated the same without consent of Nalu. There was no legal necessity for Maguni to sell the suit properties. Defendant no.1 had fraudulently obtained the sale deed dated 26.12.1969 without any valid consideration. The sale deed had not been acted upon. Plaintiffs and defendant no.2 were in joint possession of the suit properties. Jagu died in the year 1931 before the Hindu Women's Right to Property Act, 1937 ('1937 Act') came into force. Maguni had no right to sell the undivided interest of Jagu in the joint family properties. Maguni was an illiterate woman. By playing fraud, defendant no.1 had obtained the sale deed.

4. Defendant no.1 entered appearance and filed written statement pleading, inter alia, that Jagu had separated from his brother, Gopi. The suit property was not the joint family property. There was severance of joint family status. Nalu and Maguni were in separate possession of the lands according to their convenience. In respect of khata no.221, separate note of possession has been recorded. After death of Maguni, her daughters were not in possession of the suit property. Nalu sold a portion of the family property to one Bai Behera whose name has been recorded in the settlement R.O.R. published in the year 1974. Therefore, the joint recording of the names of Nalu and Maguni in respect of 16 dec. of land is wrong. Nalu sold a specific portion of the aforesaid plot from the eastern side with boundaries. Nalu and Jagu were not the members of the joint family. During the life time of Gopi and Jagu, properties of Naran were separated. Both the brothers were living in separate mess prior to 1931 settlement operation. There was prior partition between the co-sharers. Jagu died prior to the year 1931 leaving behind his wife Maguni. The name of Maguni had been recorded in the settlement R.O.R.. Schedule 'ka' property was the property of Jagu. The same was inherited by Maguni prior to 1931 settlement operation. Maguni was a Pre-Act widow. She inherited her husband's property. She was in possession of the same after Hindu Succession Act, 1956 ('1956 Act') came into force. She became absolute owner of the schedule 'ka' property. Her daughters have no semblance of right, title and interest over the same. To press her legal necessity, Maguni sold schedule 'ka' property to him by means of a registered sale deed dated 23.12.1969 for a consideration of Rs.400/- and, thereafter, delivered possession. The suit property is his exclusive property. In the settlement R.O.R. published in the year 1973, names of Nalu and Maguni have been wrongly recorded. By order dated 20.7.1992, the Commissioner, Consolidation of Holdings, Orissa in Revision Case No.106

of 1982 held that he is the absolute owner of the suit property. The order has attained finality. He is in possession of the suit property peacefully, continuously and with the hostile animus for more than twelve years and, as such, perfected title by way of adverse possession.

5. Stemming on the pleadings of the parties, the trial court struck eight issues. Parties led evidence, oral and documentary. The trial court dismissed the suit holding inter alia that Maguni had interest in the property prior to 1931. She was the absolute owner of the property. She had right to alienate the same. The sale deed dated 26.12.1969, Ext.A, had been validly executed. The plaintiffs were not in possession of the suit property. The plaintiffs filed Title Appeal No.72 of 1994 before the Second Additional District Judge, Cuttack. The appellate court held that Maguni was a Pre-Act widow. Her husband died prior to 1931. She had no right to sell property in the year 1969. The sale by Maguni, a Pre-Act widow, in respect of the suit property is void one and the plaintiffs being the descendants of Gopi, are not bound by the said sale. Held so, it allowed the appeal. It is apt to state here that during pendency of this appeal, respondent nos.5 and 6 died, whereafter their names have been deleted.

6. This appeal was admitted on the substantial questions of law enumerated in ground nos.C, D & F of the appeal memo. The same are:-

> "C. For that from the Record of Rights the learned lower Appellate Court should have held that Maguni was in possession of the property as an absolute owner and that the suit properties were the joint properties of Maguni and Gopi and not their joint family properties.
>
> D) For that the learned Lower Appellate Court on the basis of Ext-'B', should have held that Nalu Mohanty, S/o. Jagu Mohanty having sold eastern half of plot no.708, to Bai Behera and had described in the sale-deed that Maguni was the owner in possession of the western half of the said plot which clearly establishes partition between the 2 branches and there was no joint family property.
>
> F) For that assuming for the sake of argument though not admitting that the sale deed dtd.26/12/69 (Ext-A) in favour of defendant No.1, is void, yet the learned Lower Appellate Court should have held that possession of defendant No-1, is adverse from the date of the void document and no relief can be granted to the plaintiffs."

7. Heard Mr.Anam Charan Panda, learned Advocate on behalf of Mr.Asoke Mukherjee, learned Senior Advocate for the appellants and Mr.Alok Kumar Mohanty, learned Advocate for respondents 1 to 4 & 7 to 12.

8. Mr.Panda, learned Advocate for the appellants submitted that there was partition of joint family properties. Maguni was in possession of the

property prior to 1931. She sold the said property to her grandson-defendant no.1 by means of a registered sale deed dated 26.12.1969 for a valid consideration and, thereafter delivered possession. The description of the property given in Ext.B shows the admission of Nalu with regard to the separate possession of Maguni. The Commissioner, Consolidation passed an order under Ext.F holding that the sale deed dated 26.12.1969, Ext.A, is genuine and defendant no.1 has right, title and interest over the same. In view of the provisions enumerated in Sec. 14(1) of 1956 Act, Maguni was the absolute owner of the suit property and she had right to sell the same. To buttress submission, he placed reliance on the decisions of this Court in the case of Ganapath Sahu and another v. Smt. Bulli Sahu and others, AIR 1974 Orissa 192, Harabati and others v. Jasodhara Devi and others, AIR 1977 Orissa 142, Srinibas Jena (And after him) Madhabananda Jena and others, 1980 ILR-CUT-86, Bhagabat Prasad Das v. Haimabati Devi and others, AIR 1990 Orissa 70 and Sudam Charan Panda and another v. State of Orissa and others, 2008 (II) OLR 193.

9. Per contra, Mr.Mohanty, learned Advocate for respondents 1 to 4 & 7 to 12 submitted that Jagu died prior to 1931 while he was living joint with his brother, Gopi. After death of Jagu, his undivided co-parcenary interest devolved on Gopi. Maguni, widow of Jagu, had no interest in the property of Jagu. The appellate court has rightly held that the property in question were the joint family properties of Gopi and Maguni.The same was not partitioned. Maguni was a Pre-Act widow. She had no saleable right. Before commencement of 1937 Act, a widow had absolutely no share in the Hindu joint family property, even if she was in possession of the same. Defendant no.1 is not in possession of the suit property. He placed reliance on the decisions of the Apex Court in the case of Eramma v. Veerupana and others, AIR 1966 SC 1879, Madhukar D. Shende v. Tarabai Aba Shedage, AIR 2002 SC 637 and this Court in the case of Maheswar Barik (dead) after him his L.Rs., Kartik Ch. Barik and others v. Upendra Barik and others, 2014 (Supp.-I) OLR-162.

10. Before adverting into the contentions raised by the counsel for both parties, it will be necessary to set out the relevant provision of Hindu Women's Right to Property Act, 1937 ('1937 Act') and Hindu Succession Act, 1956 ('1956 Act').

> Sec.3 of 1937 Act reads as follows:
>
> 3. Devolution of property. (1) When a Hindu governed by the Dayabhag School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any

other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner, as a son's son if there is surviving a son or son's son of such predeceased son:

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhag School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, applies.

xxx xxx xxx

Sec.14 of 1956 Act reads as follows:

14. Property of a female Hindu to be her absolute property.—(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.- In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

11. In Mangal Singh and others v. Smt. Rattno (dead) by her legal Representatives and another, AIR 1967 SC 1786, the Apex Court had the occasion to interpret the words "possessed by a female Hindu" appearing in Sec.14 of the Act, 1956. The Apex Court held:

"The Legislature begins S.14(1) with the words "any property possessed by a female Hindu" and not "any property in possession of a female Hindu". If the expression used had been "in possession of" instead of "possessed by", the proper

interpretation would probably have been to hold that, in order to apply this provision, the property must be such as is either in actual possession of the female Hindu or in her constructive possession. The constructive possession may be through a lessee, mortgagee, licensee etc. The use of the expression "possessed by" instead of the expression "in possession of", in our opinion was intended to enlarge the meaning of this expression.

It appears to us that the expression used in S.14(1) of the Act was intended to cover cases of possession in law also, where lands may have descended to a female Hindu and she has not actually entered into them. It would, of course, cover the other cases of actual or constructive possession. On the language of S.14(1), therefore, we hold that this provision will become applicable to any property which is owned by a female Hindu, even though she is not in actual, physical or constructive possession of that property."

12. In the celebrated judgment, the Apex Court in the case of Vaaddeboyina Tulasamma and others v. Vaddeboyina Sesha Reddi (dead) by L.Rs., AIR 1977 SC 1944, held :

"We would now like to summarise the legal conclusions which we have reached after an exhaustive considerations of the authorities mentioned above on the question of law involved in this appeal as to the interpretation of S.14(1) and (2) of the Act of 1956. These conclusions may be stated thus:

(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long needed legislation.

(3) Sub-section (2) of S.14 is in the nature of a proviso and has a field of its own without interfering with the operation of S.14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by S.14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sub-section (2) of S.14 applies to instruments, decrees, awards, gifts etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise preexisting rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-s.(2) and would be governed by Section14(1) despite any restrictions placed on the powers of the transferee.

(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance" "or arrears of maintenance" etc. in the Explanation to S.14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).

(6) The words "possessed by" used by the Legislature in S.14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same: Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

(7) That the words "restricted estate" used in S.14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee."

Vaaddeboyina Tulasamma has been followed by the Apex Court in catena of decisions.

13. In Bai Vajia (dead) By Lrs., v. Thakorbhai Chelabhai and others, AIR 1979 SC 993, the Apex Court held :

"A plain reading of sub-sec (1) makes it clear that the concerned Hindu female must have limited ownership in property which limited ownership would get enlarged by the operation of that subsection. If it was intended to enlarge any sort of a right which could in no sense be described as ownership, the expression "and not as a limited owner" would not have been used at all and becomes redundant, which is against the well recognised principle of interpretation of statues that the Legislature does not employ meaningless language.

It does not in any way confer a title on the female Hindu where she did not in fact possess any vestige of title. It follows, therefore, that the section cannot be interpreted so as to validate the illegal possession of a female Hindu and it does not confer any title on a mere trespasser. In other words, the provisions of section 14(1) of the Act cannot be attracted in the case of a Hindu female who is in possession of the property of the last male holder on the date of the commencement of the Act when she is only a trespasser without any right to property."

14. In Raghubar Singh and others v. Gulab Singh and others, AIR 1998 SC 2401, the Apex Court held :

"It is by force of Section 14(1) of the Act, that the widow's limited interest gets automatically enlarged into an absolute right notwithstanding any restriction placed under the document or the instrument. So far as sub-section (2) of Section 14 is concerned, it applies to instruments, decrees, awards, gifts etc., which create an independent or a new title in favour of the female for the first time. It has no application to cases where the instrument/document either declares or recognises or confirms her share in the property or her "pre-existing right to maintenance" out of that property. As held in Tulasamma's case (supra), sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own, without interfering with the operation of Section 14(1) of the Act."

15. On an interpretation of Sec. 3 of 1956 Act and Sec.14 of 1956 Act, the Apex Court in Ram Vishal (dead) By Lrs. and others v. Jagan Nath and another, (2004) 9 SCC 302, held :

"9. It is an admitted position that the parties are governed by the Mitakshara school of Hindu law. As this is an Act of 1937, Manki could make no claim, under the Act, in the property of Tulsidas who had died in 1930. This is because Section 4 clearly lays down that the provision of this Act would not apply to the property of any Hindu dying before the commencement of this Act. Manki could only claim a right in the property of Sarju (who died in 1952) provided this Act gave her any rights.

10. In respect of persons governed by the Mitakshar school of Hindu law Section 3(1) applies only when a Hindu dies intestate leaving separate property. If a Hindu dies intestate leaving joint family property then Section 3(2) would apply. Under Section 3(2), it is only the widow of that person who gets the same interest as that person would have had. Manki is not the widow of Sarju and can make no claim under Section 3(2). As the property was joint family property she could make no claim under Section 3(1) also.

11. We are unable to accept the submission that a proper reading of Section 3(1) and the proviso thereto would show that Section 3(1) (*sic* applies to joint) family property. In our view a plain reading of Section 3(1) makes it clear that it only applies to separate property. Therefore, the first appellate court was wrong in concluding that Manki acquired rights under this Act.

xxx xxx xxx

> 13. The final question for consideration is whether a right of maintenance which a Hindu female has under the customary law could fructify into full ownership under Section 14 of the Hindu Succession Act.
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> xxx xxx xxx
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> 16. In our view, the authority in Raghubar Singh case can be of no assistance to the respondent. As has been held by this Court, a pre-existing right is a sine qua non for conferment of a full ownership under Section 14 of the Hindu Succession Act. The Hindu female must not only be possessed of the property but she must have acquired the property. Such acquisition must be either by way of inheritance or devise, or at a partition or "in lieu of maintenance or arrears of maintenance" or by gift or by her own skill or exertion, or by purchase or by prescription. In the present matter, it is nobody's case that Manki had got possession of the 1/4th share in lieu of maintenance or in arrears of maintenance. It was also not their case that there was a partition of the property and that in such partition, she had been given the property. A mere right of maintenance without actual acquisition in any manner is not sufficient to attract Section 14." (Emphasis laid)

16. The parties are governed by Mitakshara school of Hindu Law. Admittedly, Jagu, husband of Maguni, died prior to 1931 i.e., before commencement of 1937 Act. Sec.4 of 1937 Act clearly postulates that provision of the Act would not apply to the property in any Hindu dying before commencement of the Act.

17. In Ram Vishal, it was held that Sec.(3) (1) applies only when a Hindu dies intestate leaving separate property. If a Hindu dies intestate leaving joint family property, then Sec.3(2) would apply. Under Sec.3(2), it is only the widow of that person who gets the same interest as that person would have had. Sec.3(1) has no application in case of joint family property. On a reading of Sec.3(1) of 1937 Act, it is crystal clear that it only applies to separate property. As the property was joint family property, Maguni could make no claim under Sec.3(1) of 1937 Act. There is no evidence on record that the property was partitioned between the co-sharers. A pre-existing right is sine qua non for conferment of a full ownership under Sec.14 of 1956 Act. A female Hindu must not only be possessed of the property, but she must have acquired the property. Such acquisition must be either by way of inheritance or devise, or at a partition or "in lieu of maintenance or arrears of maintenance" or by gift or by her own skill or exertion, or by purchase or by prescription. It is not the case of the parties that there was a partition of the property and in such partition, Maguni had been given the property. Without actual acquisition in any manner is not sufficient to attract Sec.14 of 1956 Act.

18. In Eramma, the Apex Court held that Sec.8 must be construed in context of Sec.6. Sec.8 is not retrospective.

19. In Maheswar Barik, this Court held that the provisions of 1937 Act is not applicable to a widow whose husband died prior to coming into force of the said Act. A Pre-Act widow has a right of maintenance in a joint Hindu undivided family and does not have any power of disposition.

20. The decisions cited by Mr.Panda are distinguishable on facts. In Ganapath Sahu, the husband of the widow died in a state of separation. This Court held that she was not a maintenance holder, but had some interest in the property. The case is distinguishable.

21. In Harabati, this Court held that widow who inherited life interest in property of her husband and was in possession of the same on the date of coming into force of Succession Act, she acquires absolute title to the property under Section 14(1) of the Act.

22. In Bhagabat Prasad Das, this Court held that a post Act, 1937 widow succeeds to her husband's estate without being a coparcener. The interest that devolves upon her becomes defined and definable in her hands, though it continues to be a part of the joint family estate. When a property devolves upon the widow on the death of her husband, her interest unlike a coparcener's interest can be predicted with certainty and, therefore, it carries with it the incident of transferability at the hands of the holder either limited or absolute. In the instant case Maguni is a Pre 1937 Act widow.

23. In Sudam Charan Panda, this Court held that any property possessed by a female Hindu whether acquired before or after commencement of the said Act shall be held by her as full owner thereof and not as a limited owner.

24. In Srinibas Jena, the Full Bench of this Court held that a decision of right, title and interest which are matters within their jurisdiction would operate as res judicata.

25. In Madhukar D.Shende, plea of res judicata was raised first time in the Apex Court. The same was not raised in the trial court. No issue was framed. The Apex Court held that res judicata is a mixed question of fact and law. The same cannot be raised before the Apex Court for the first time.

26. In the instant case, no issue was framed with regard to res judicata. The same was not raised either before the trial court or appellate court. The

issue of res judicata cannot be raised for the first time in the second appeal. The substantial questions of laws are answered accordingly.

27. In the result, the appeal fails and is dismissed. There shall be no order as to costs.

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2019 (III) ILR - CUT- 90

BISWAJIT MOHANTY, J.

CRLMP NO. 548 OF 2019

SANTOSH KISAN SAPKALE .....Petitioner

.Vs.

REPUBLIC OF INDIA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 428 – Period of detention – Set off – Benefit under the provision – Petitioner arrested in 1st case and remained in custody in Surat in the State of Gujurat – Again arrested in second case in Bhubaneswar – Pleaded guilty in the second case – Convicted and sentenced – Application seeking setting off of the period undergone in Surat as an under trial prisoner as against the sentence awarded in second case – Whether can be granted? – Held, No, the period of sentence on conviction is to be reduced by the extent of detention already undergone by the convict during investigation, enquiry and trial of the same case and the "UTP" period suffered by the petitioner in another case cannot be counted for the purpose of set off under Section 428 Cr.P.C.

Case Laws Relied on and Referred to :-

1. (2001) 6 S.C.C 311 : State of Maharashtra & Anr Vs. Najakat alias Mubarak Ali.
2. (2010) 45 O.C.R. (SC) 187 : Atul Manubhai Parekh Vs. Central Bureau of Investigation.

For Petitioner : M/s. Arun Kumar Acharya, S. Mishra & S.S. Dash
For Opp. Party: Mr. Anup Kumar Bose, Asst. Solicitor General

JUDGMENT Date of Hearing: 12.09.2019: Date of Judgment: 17.09.2019

BISWAJIT MOHANTY, J.

This is an application filed by the petitioner under Articles 226 and 227 of the Constitution of India praying for setting off his period of detention in Surat Jail from 15.06.2015 to 21.12.2015 against the sentence imposed on him in connection with S.P.E. Case No.2 of 2014 registered in the court of learned Additional Special C.J.M. (C.B.I.), Bhubaneswar under Section 428 Cr.P.C.

2. Mr. Acharya, learned counsel for the petitioner submitted that during the year 2013, D.C.B. C.R. No.3 of 2013 was registered against the petitioner and others under different provisions of the Indian Penal Code and the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 in the State of Gujarat, to be referred hereinafter as "1st case". On 04.06.2014, R.C. Case No.7/S/2014-SCB/KOL corresponding to S.P.E. Case No.2 of 2014 was registered against the petitioner and others under Sections 120-B, 420, 406, 467, 468, 671/34 I.P.C. and Sections 4, 5 & 6 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 by the Central Bureau of Investigation (for short "C.B.I.") to be referred hereinafter as "2nd case". On 04.06.2015, the petitioner surrendered in connection with the "1st case" and there, on completion of police remand, he was remanded to jail custody on 15.06.2015 and lodged at Lajpur Jail, Surat as an under trial prisoner, for short "UTP". On 22.12.2015 while continuing as an "UTP" in Lajpur Jail, he was shown as arrested in connection with "2nd case". On 18.06.2016, the C.B.I. submitted the charge sheet in the "2nd case". On 12.04.2017, the petitioner was produced before the learned trial court in connection with the "2nd case" and on that date, the petitioner filed a memo pleading guilty to the offences charged. On 15.04.2017 vide Annexure-1, the petitioner was convicted for offences under Sections 409/420/120-B of I,P.C. read with Sections 4, 5 & 6 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 in connection with the "2nd case" and was sentenced to undergo R.I. for five years and fine of Rs.10,000/- for the offence under Section 409 I.P.C., in default to pay fine, to further undergo R.I. for two months; R.I. for three years and fine of Rs.5,000/- for the offence under Section 420 I.P.C., in default to pay fine, to further undergo R.I. for one month; R.I. for two years for the offence under Section 120-B I.P.C.; R.I. for two years for offence under Section 4 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978; R.I. for two years for the offence under Section 5 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 and R.I. for one year for offence under Section 6 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 and directed that all the sentences would run concurrently. Further convicts Astha Goat Farming India Private Limited and Astha International Limited were directed to pay compensation amount of Rs.75 Crores.

3. The petitioner being aggrieved by quantum of sentences, approached the learned Sessions Judge in Criminal Appeal No.69 of 2017. The said appeal was also disposed of by the learned Special Judge, C.B.I. Court No.III, Bhubaneswar, wherein the learned judge vide judgment dated

08.08.2018 reduced the sentence passed under Section 409 I.P.C. from five years to four years. Later on, the petitioner filed Criminal Revision No.894 of 2018 against the above noted judgment of the learned Special Judge before this Court which was dismissed on 13.02.2019. While so, the Superintendent, Special Jail, Bhubaneswar (Welfare Services) vide Anenxure-2 has issued a Custody Certificate indicating the period of detention of the petitioner vis-à-vis the "2nd case" to be from 22.12.2015 to 14.04.2017. According to Mr. Acharya, grievance of the petitioner is that though the offences in both "1st case" and "2nd case" in which he has undergone imprisonment as "UTP" are similar in nature, yet the Bhubaneswar Jail Authority while granting the Custody Certificate under Anenxure-2 has only taken into account the "UTP" period from 22.12.2015 to 14.04.2017 of the "2nd case" and has ignored the period of detention he has undergone as an "UTP" from 15.06.2015 to 21.12.2015 at Surat jail in connection with the "1st case" though as per Annexure-3, the petitioner was in Surat jail with effect from 15.06.2015 in connection with "1st case" till his production at Bhubaneswar in connection with "2nd case". Therefore, the petitioner is losing the benefit of "UTP" period from 15.06.2015 to 21.12.2015 for the purpose of set off under Section 428 Cr.P.C. with regard to the "2nd case". Accordingly, the prayer has been made to take into account the above noted period for the purpose of set off in the "2nd case". In this context, Mr. Acharya has relied solely on the judgment of the Hon'ble Supreme Court as rendered in the case of **State of Maharashtra and another v. Najakat alias Mubarak Ali,** *(2001) 6 S.C.C 311,* more particularly on paragraphs 16 & 18 of the said judgment.

4. Mr. Bose, learned Assistant Solicitor General of India for Odisha representing the Republic of India submitted that the language of Section 428 Cr.P.C. is absolutely clear and the detention suffered by the petitioner as an "UTP" in the "1st case" cannot be made use of for the purpose of set off of the substantive sentence awarded to him in the "2nd case". He further submitted that **Najakat alias Mubarak Ali** (supra) nowhere lays down that the detention suffered by a person as an "UTP" in one case can be made use of for setting off substantive sentence awarded to him after conviction in another case. He also submitted that in the said case as "UTP", the respondent had undergone common period of incarceration in jail prior to his conviction in both the sessions cases. Despite direction by the Sessions Courts in both the cases that the respondent therein should be given benefit under Section 428 Cr.P.C., the State Authorities refused to allow him such

benefit as the period of incarceration was mainly common and overlapping. The Bombay High Court deprecated the same and directed that the benefit be given to the respondent separately for two separate cases in which he was convicted as directed by the learned Sessions judges. According to him such direction of Bombay High Court was upheld by the Hon'ble Supreme Court in the above noted case basing on discussions made at para-15, 16 and 19 of that judgment. In the present case, the petitioner has been convicted only in the "2nd case" and since the prayer made by the petitioner pertains exclusively to the period of detention undergone by the petitioner as an "UTP" in the "1st case", such period cannot be counted here. He also relied on the decision of the Hon'ble Supreme Court as rendered in the case of **Atul Manubhai Parekh Vs. Central Bureau of Investigation**, (2010) 45 O.C.R. (SC) 187 in support of his contention that the period of detention undergone by the petitioner as an "UTP" in connection with "1st case" cannot be counted for the purpose of set off of substantive sentence awarded on conviction in the "2nd case". In reply Mr. Acharya while reiterating his earlier submissions submitted that the decision rendered by the Hon'ble Supreme Court in **Atul Manubhai Parekh** (supra) case being a decision rendered by two Honourable Judges, the same cannot override the decision of the Hon'ble Supreme Court as rendered in **Najakat alias Mubarak Ali** (supra) where the Bench consisted of Three Hon'ble Judges notwithstanding the fact the same is a 2:1 majority judgment. To this Mr. Bose contended that the issues in both the above noted cases are completely different and so there exists no contradiction between the two decisions. He further submitted that present case is clearly covered by the decision of the Hon'ble Supreme Court as rendered in **Atul Manubhai Parekh** (supra).

5. In order to understand the controversy in question, first we have to delineate few facts. A perusal of L.C.R. shows that on 22.12.2015, the petitioner was produced in the Court of learned Special C.J.M., (C.B.I.), Bhubaneswar from Siliguri Correctional Home, Siliguri, District-Darjeeling, West Bengal. Details relating to the circumstances under which petitioner was lodged at Siliguri Special Correctional Home are not clear. Further on 22.12.2015 on being produced before the learned Special C.J.M., (C.B.I.), Bhubaneswar, the petitioner was remanded to C.B.I. custody till 28.12.2015. Thus the petitioner cannot be treated as an "UTP" from 22.12.2015 to 27.12.2015. To that extent the Custody Certificate issued by Superintendent, Special Jail, Bhubaneswar (Welfare Services) under Annexure-2 is wrong. Thus the said period cannot be counted for the purpose of set off under

Section 428 Cr.P.C. On 28.12.2015, the learned Special C.J.M. (C.B.I.), Bhubaneswar remanded the petitioner to judicial custody. Later on as per order dated 09.05.2016 passed in "2nd case", it is clear that the petitioner was shifted to Lajpur Central Prison, Surat, Gujarat on 17.04.2016. Again on 10.04.2017, the petitioner was produced before the learned Special C.J.M. (C.B.I.), Bhubaneswar on the strength of production warrant from Lajpur Central Jail, Surat and was remanded to judicial custody. On 12.04.2017, the petitioner pleaded guilty by filing plead guilty memo and ultimately on 13.04.2017, the petitioner was convicted and on 15.04.2017 sentence was pronounced vide Annexure-1. It may not out of place to indicate here that though there exists some discrepancy in the Custody Certificate under Annexure-2, however, in view of the prayer of the petitioner he should be given benefit of the period between 15.06.2015 to 21.12.2015 for the purpose of counting set off in connection with "2nd case" discrepancy may not have any impact vis-à-vis prayer made in this petition.

6. This being the factual backdrop, let us discuss about the case of **Najakat alias Mubarak Ali** case (supra). In that case the respondent was involved in two cases and in both the cases he was arrested on the same day and was convicted and both the cases the learned judges while sentencing him directed that he would be entitled to get set off under Section 428 Cr.P.C. Accordingly, the respondent had sent an intimation to the jail authority that he is entitled to be released since he has already served the sentence imposed on him in both the cases but, the jail authorities refused to release him on the ground that he could not claim the benefit of set off in the second case as he had been given set off in the first case relying on the resolution of Government of Maharashtra. When the respondent challenged the decision of the jail authorities before the High Court, the learned Single Judge directed release of the respondent. In such background, the State of Maharashtra approached the Hon'ble Supreme Court and the Hon'ble Court by a 2:1 majority judgment upheld the judgment of High Court and dismissed the Criminal Appeal. In coming to such conclusion, Hon'ble Supreme Court discussed the principles relating to Section 428 Cr.P.C. mainly in paras 15, 16, 18 & 19 of the judgment as quoted below:

> **"15.** The purpose is therefore clear that the convicted person is given the right to reckon the period of his sentence of imprisonment from the date he was in jail as an undertrial prisoner. In other words, the period of his being in jail as an undertrial prisoner would be added as a part of the period of imprisonment to which he is sentenced. We may now decipher the two requisites postulated in Section 428 of the Code.

(1) During the stage of investigation, inquiry or trial of a particular case the prisoner should have been in jail at least for a certain period.

(2) He should have been sentenced to a term of imprisonment in that case.

16. If the above two conditions are satisfied then the operative part of the provision comes into play i.e. if the sentence of imprisonment awarded is longer than the period of detention undergone by him during the stages of investigation, inquiry or trial, the convicted person need undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded. The words "if any" in the section amplify that if there is no balance period left after such deduction the convict will be entitled to be set free from jail, unless he is required in any other case. In other words, if the convict was in prison, for whatever reason, during the stages of investigation, inquiry or trial of a particular case and was later convicted and sentenced to any term of imprisonment in that case the earlier period of detention undergone by him should be counted as part of the sentence imposed on him.

18. Reading Section 428 of the Code in the above perspective, the words "of the same case" are not to be understood as suggesting that the set off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited towards the period of imprisonment awarded as sentence in that particular case. It is immaterial that the prisoner was undergoing sentence of imprisonment in another case also during the said period. The words "of the same case" were used to refer to the pre-sentence period of detention undergone by him. Nothing more can be made out of the collocation of those words.

19. Various High Courts have expressed on this question. A Division Bench of the Delhi High Court has dissented from a contrary view taken by a Single Judge of that High Court and held in *K.C. Das vs. State* that the statute does not make any distinction between the first case and the second case for application of Section 428 of the Code. A Division Bench of the High Court of *Gauhati in Lalrinfela vs. State of Mizoram* has adopted the same view. Lahiri and Hansaria, JJ, said in the said decision that: "If an accused is simultaneously arrested and detained in two or more cases and on conviction obtains set off for the period of his detention in the first case he is not ineligible to obtain set off for the period in the subsequent cases. In each case the court is to count the number of days the accused was in such detention separately and the liability to undergo imprisonment on conviction should be restricted to the remainder of the terms of the imprisonment imposed on him in that case."

7. A reading of paragraphs 15 to 19 of the Judgment rendered by the Hon'ble Supreme Court in **Najakat alias Mubarak Ali** case (supra) makes it clear that the convict is entitled to the benefit of Section 428 Cr.P.C. in both the cases taking into account the actual period of detention he has suffered as an "UTP" in connection with both the cases. The view of the Division Bench of the High Court of Gauhati quoted in para-19 of the

judgment which has been approved by the Hon'ble Supreme Court makes the position absolutely clear. Though Mr. Acharya relying heavily on paras-16 and 18 submitted that in **Najakat alias Mubarak Ali** case (supra), the Hon'ble Supreme Court has clearly held that the period of detention suffered by the petitioner as an "UTP" in the one case can be made use of to claim set off vis-a-vis substantive sentence awarded to him in another case, however, a holistic reading of paragraphs 15, 16, 18, 19 & 21 does not support such contention raised by Mr. Acharya in the background of facts indicated therein. Rather in the background of discussions made in para-15, 16 & 19 of the judgment, it would be clear that the convict can get the benefit of set off only in connection with the period of detention he has suffered as an "UTP" with regard to the same case in which he has been convicted. The last sentence of para-16 makes the same clear by using the phrases "a particular case" and "in that case". Same thing has also been emphasised in para -18 of the judgment wherein it has been made clear that the period during which the accused was in prison subsequent to the inception of "a particular case" should be credited towards the period of imprisonment awarded as sentence in that "particular case". It is in such background and keeping in mind the factual backdrop of the case, the other observations made in para-18 are to be understood. Further, it is in such background, the Hon'ble Supreme Court upheld the benefit that was allowed to the respondent therein vis-à-vis both the cases where he was convicted separately. Thus ultimately the respondent therein was allowed benefit of set off in both the cases vis-à-vis the "UTP" periods he has suffered in connection with each of the respective cases. There the respondent was never allowed the benefit of the period of detention suffered by him in the first case for setting off of the substantive sentence awarded to him in the other case. It is well settled that a judgment has to be read as a whole and is to be understood in the backgrounds of facts indicated therein. Thus this case would be of no help to the petitioner.

In **Atul Manubhai Parekh** case (supra) the issue was different as indicated in para-2 of the judgment which is quoted hereunder:

> **"2.** The short point involved in this application is whether a person, who has been convicted in several cases and has suffered detention or imprisonment in connection therewith, would be entitled to the benefit of set-off in a separate case for the period of detention or imprisonment undergone by him in the other cases."

This issue has been answered by the Hon'ble Court at paras 9 and 10 of the judgment as quoted hereunder:

> **"9.** The wording of Section 428 is, in our view, clear and unambiguous. The heading of the Section itself indicates that the period of detention undergone by the

> accused is to be set off against the sentence of imprisonment. The Section makes it clear that the period of sentence on conviction is to be reduced by the extent of detention already undergone by the convict during investigation, enquiry or trial of the same case. It is quite clear that the period to be set off relates only to pre conviction detention and not to imprisonment on conviction.
>
> **10.** Let us test the proposition by a concrete example. A habitual offender may be convicted and sentenced to imprisonment at frequent intervals. If the period of pre-trial detention in various cases is counted for set-off in respect of a subsequent conviction where the period of detention is greater than the sentence in the subsequent case, the accused will not have to undergo imprisonment at all in connection with the latter case, which could not have been the intention of the legislature while introducing Section 428 in the Code in 1973. The reference made in the several decisions cited before us to Section 427 Cr.P.C. appears to be a little out of focus since the same deals with several sentences passed in the same case against the same accused on different counts which are directed to run concurrently. Section 428 Cr.P.C. deals with a different situation, where the question of merger of sentence does not arise and the period of set-off is in respect of each separate case and the detention undergone by the accused during the investigation or trial of such case. The philosophy of Section 428 Cr.P.C. has been very aptly commented upon by this Court in **Government of A.P. vs. Anne Venkateswara Rao** (1977) 3 SCC 298, in the following terms:
>
> "Section 428 provides that the period of detention of an accused as an undertrial prisoner shall be set off against the term of imprisonment imposed on him on conviction."

Thus there exists no conflict between the decisions of the Hon'ble Supreme Court as rendered in **Nazakat alias Mubarak Ali** (supra) and **Atul Manubhai Parekh** case (supra). While in **Nazakat alias Mubarak Ali** (supra) the Hon'ble Supreme Court upheld the right of the convict to get the benefit of set off under Section 428 Cr.P.C. in both the cases respectively, in **Atul Manubhai Parekh** case it made it clear that the period of sentence on conviction is to be reduced by the extent of detention already undergone by the convict during investigation, enquiry and trial of the same case and the "UTP" period suffered by the petitioner in another case cannot be counted for the purpose of set off under Section 428 Cr.P.C.

8. In such view of the matter, the prayer as made in this case cannot be allowed because the period as "UTP" covered by the prayer is in connection with the "1st case" and not in connection with the "2nd case" where the petitioner has been convicted. For all these reasons, the present application is without any merit and is accordingly dismissed.

Original L.C.R. be sent back. Copy of this judgment be sent to the Superintendent, Special Jail, Bhubaneswar (Welfare Services).

2019 (III) ILR - CUT- 98

DR. B.R. SARANGI, J.

W.P.(C) NO. 22221 OF 2010

SANJAY KUMAR KAR ……Petitioner

.Vs.

PRINCIPAL-CUM-SECRETARY, BHADRAK INSTITUTE OF ENGINEERING AND TECHNOLOGY & ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 12 – State – Meaning and scope of being amenable to writ jurisdiction against the private body – Held, a private body performing public duty is amenable to writ jurisdiction and writ can be issued to any person or authority for enforcement of any of the fundamental rights or in any other purpose. (Para 20)

Case Laws Relied on and Referred to :-

1. AIR, 1989 SC 1607 : Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust .Vs. R. Rudani.
2. 70 (1990) C.L.T. 642 : Antaryami Rath Vs.State of Orissa.
3. 70 (1991) C.L.T. 127 : Basanti Mohanty Vs.State of Orissa.
4. 1992 (I) O.L.R. 503 : Smt. Susama Patnaik Vs.Managing Committee, Baxi Jagabandhu English Medium School.
5. AIR 1998 SC 295 : K. Krishnamacharyulu Vs.Sri Venkateswara Hindu College of Engineering.
6. A.I.R. 2003 SC 438 : T.M.A. Pai Foundation Vs.State of Karnataka.
7. AIR 2003 SC 355 : Zee Tele Films Ltd. v. Union of India.
8. 2012 (12) SCC 331 : Ramesh Ahluwalia Vs. State of Punjab.
9. 2014 (Supp.-II) OLR 852 : Dr. Uttam Kumar Samanta Vs. KITT University.
10. AIR 2016 SC 73 : Dr. Janet Jeyapaul Vs. SRM University.
11. AIR 2003 SC 355 : T.M.A. Pai Foundation Vs. State of Karnataka.
12. 2005 (5) Supreme 544 : P.A. Inamdar Vs. State of Maharastra.
13. AIR 1962 SC 1621 : Smt Ujjam Bai Vs. State of Uttar Pradesh.
14. (1993) 1 SCC 645 : Unni Krishan Vs. State of Andhra Pradesh
15. AIR 1979 SC 1628 : R.D.Shetty Vs. The International Airport Authority of India
16. AIR 1975 SC 1329 : Sabhaijit Tewary Vs. Union of India.
17. AIR 1981 SC 2198 : Gulam Abbas & Ors vs State of U.P. & Ors.
18. AIR 1981 SC 212 : Som Prakash Vs. Union of India.
19. AIR 1981 SC 487 : Ajay Hasia Vs. Khalid Mujib Sehravardi & Ors
20. AIR 1988 SC 469 : Tekraj Vasandi alias Basandi Vs. Union of India.
21. AIR 1980 SC 840 : U.P.Warehousing Corporatioin Vs. Vijay Narain.
22. (2002) 5 SCC 111: Pradip Kumar Biswas Vs. Indian Institute of Chemical Biology.
23. AIR 2005 SC 411 : Virendra Kumar Srivastava Vs. U.P. Rajya Karmachari Kalyan

24. (1991) 1 SCC 578 : Nigam & Anr. Chandra Mohan Khanna Vs.
National Council of Education Research & Training.
25. AIR 2010 SC 3131 : State of U.P. Vs. Saroj Kumar Sinha.

For Petitioner : Mr. A.K. Mishra, Sr. Advocate
M/s. J.Sengupta, D.K.Panda, G.Sinha & A.Mishra.

For Opp. Parties : M/s A.Pattnaik & B.Baisakh.

JUDGMENT Date of Hearing : 08.02.2019 : Date of Judgment: 19.02.2019

Dr. B.R. SARANGI, J.

Bhadrak Institute of Engineering and Technology (BIET), an unaided private technical institution approved and guided by (AICTE), is registered under the Societies Registration Act, 1860. It is imparting education to the students and thereby discharging a public duty. Initially, it was affiliated to Fakir Mohan University, Balasore and subsequently to the Biju Pattnaik University of Technology (BPUT). It is a constituent unit of Barapada School of Engineering and Technology (BSET) and, as such, a separate entity constituted as per the guidelines of the AICTE.

2. The BIET issued an advertisement for selection of Lecturer in Computer Science and Engineering, pursuant to which the petitioner applied for and following due process of selection was selected. He joined as Lecturer of Computer Science and Engineering, pursuant to letter dated 03.01.1998. Subsequently, he became the Head of the Department of Computer Science and I.T., being a Senior Lecturer. His scale of pay with corresponding D.A. was enhanced with effect from 01.05.1998 as a mark of recognition of his excellent performance, vide office order dated 31.03.1999, but the same was not given effect to. He was appointed as Examiner (Theory) for the Bachelor of Engineering University Examination, vide letter dated 20.07.2006, and also was nominated as a member of the Board of Studies in the subject of Computer Science for the session 2006-07, vide letter dated 05.12.2006, by the Fakir Mohan University, Balasore. As the BIET was affiliated to the BPUT, because of its performance, the petitioner was deputed as Supervisor for semester examinations of B.Tech courses in the years 2008 and 2009, vide letters dated 22.04.2008, 26.11.2008 and 17.12.2009. He was a member of Anti-Ragging Committee to maintain discipline and prevent ragging in the campus, including hostels of the institute, as per office notice dated 27.08.2009 and became the Head of the Department of Computer Science and Engineering.

3. All on a sudden, the petitioner was marked as on leave in the attendance register, while he was very much present in the institute and campus, and consequentially he could not sign in the attendance register, though he was present during the scheduled time. Consequentially, he informed opposite party no.1 by filing application on the very same day seeking permission to attend his duties and corrective steps onwards. But on 31.03.2010, the petitioner was issued with a letter by opposite party no.1 in connection with his involvement in an untoward incident occurred on 23.03.2010 inside the campus by the hostel boarders. On enquiry, it was found that his presence in the campus was undesirable till normalcy was restored. Therefore, on the basis of the verbal order of the competent authority, the petitioner was directed to remain on leave with immediate effect till further information from opposite party no.1 was received. Consequentially, the petitioner had to wait for further information from opposite party no.1. The petitioner, having not received any communication from opposite party no.1, in response to his letter dated 26.05.2010, reminded once again vide letter dated 14.07.2010 and sought for clarification as to the duration of his leave and the date on which he should rejoin his duties. During these periods, the petitioner has neither been paid his legitimate dues nor allowed to discharge his duty, nor was any response made to the correspondence made by him to opposite party no.1. Consequentially, he made a representation on 02.11.2010 and when no response was received, the petitioner approached this Court by filing this writ petition.

4. During pendency of this writ petition, the petitioner was directed to appear on 08.08.2011 before the authorities and when he did so he was handed over a letter dated 04.07.2011. In the said letter, the petitioner was directed to appear before the enquiry committee already constituted by the authorities. Though the petitioner sought for certain documents, the same were not provided to him, but enquiry was continued and on its conclusion enquiry report was submitted to the secretary of the BSET (Society). The same was placed on 14.10.2011 before the General Body, which passed the order of dismissal from service. Accordingly, letter dated 15.10.2011 was communicated to the petitioner by opposite party no.1 terminating him from service, w.e.f. 15.10.2011.

5. Mr. A.K. Mishra, learned Senior Counsel appearing along with Mr. D.K. Panda, learned counsel for the petitioner contended that the entire action terminating the services of the petitioner has been taken without compliance of the principles of natural justice, particularly when the list of documents

and list of witnesses were not supplied to the petitioner along with the charges levelled against him. It is further contended that the enquiry was conducted in a perfunctory manner, meaning thereby the enquiry officer submitted his report, before any explanation was received from the petitioner, and above all, while imposing penalty of termination from service, the petitioner was not supplied with the copy of the enquiry report. It is further contended that since opposite party no.1-institute is discharging public duty, the writ petition is maintainable. Therefore, the petitioner seeks interference of this Court on the order passed by the authority terminating him from services and further seeks direction for reinstatement in service with all consequential benefits as due and admissible to the petitioner in accordance with law.

To substantiate his contention he has relied upon the judgments rendered in ***Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust v. R. Rudani,*** AIR, 1989 SC 1607; ***Antaryami Rath v. State of Orissa,*** 70 (1990) C.L.T. 642; ***Basanti Mohanty v. State of Orissa,*** 70 (1991) C.L.T. 127; ***Smt. Susama Patnaik v. Managing Committee, Baxi Jagabandhu English Medium School,*** 1992 (I) O.L.R. 503; ***K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engineering,*** AIR 1998 SC 295; ***T.M.A. Pai Foundation v. State of Karnataka,*** A.I.R. 2003 SC 438; ***Zee Tele Films Ltd. v. Union of India,*** AIR 2003 SC 355; ***Ramesh Ahluwalia v. State of Punjab,*** 2012 (12) SCC 331; ***Dr. Uttam Kumar Samanta v. KITT University,*** 2014 (Supp.-II) OLR 852; and ***Dr. Janet Jeyapaul v. SRM University,*** AIR 2016 SC 73.

6. Mr. A.K. Pattnaik, learned counsel appearing for opposite party no.1 raised a preliminary objection with regard to maintainability of the writ petition against opposite party no.1 on the ground that the BIET, having been registered under the Societies Registration Act, 1860 and being an unaided educational institution, is not receiving any financial assistance from the Government and, therefore, the writ petition is not maintainable. It is further contended that BIET is approved by AICTE and, as such, the relationship between the employees/staff and management is purely contractual in nature and their service conditions are purely contractual, as per law settled by the apex Court in ***T.M.A. Pai Foundation v. State of Karnataka***, AIR 2003 SC 355 and ***P.A. Inamdar v. State of Maharastra***, 2005 (5) Supreme 544.

It is further contended that since the petitioner could not produce M.Tech certificate, after completion of study leave from 01.11.2002 to

31.10.2004, his salary was withheld on 31.10.2009, pursuant to terms and conditions executed by the petitioner with opposite party no.1 on 27.09.2002. As the petitioner was found to be involved in an untoward incident occurred inside BIET campus by the hostel boarders, he was directed to remain on leave on 31.03.2010 with immediate effect till normalcy was restored. Since the petitioner suppressed the material fact, the action taken against him is well justified. It is further contended that the petitioner has not approached this Court with a clean hand and, therefore, the writ petition is liable to be dismissed in limine.

7. This Court heard Mr. A.K. Mishra, learned Senior Counsel appearing along with Mr.D.K.Panda, learned counsel for the petitioner, and Mr. A.K. Pattnaik, learned counsel for opposite party no.1. Though notice was issued to opposite party no.2 and the same was made sufficient, as A.D. returned after valid service, none has entered appearance for the said opposite party. Since no relief has been sought against opposite party no.2 and main contesting opposite party no.1 has entered appearance and is participating in the proceeding itself and it is a matter of 2010 and in the meantime more than eight years have elapsed, this Court is not inclined to grant further adjournment to enable opposite party no.2 to enter appearance.

8. On the basis of the pleaded facts, this Court deems it proper to frame the following issues, which are germen for just and proper adjudication of the case:-

(1) Is the writ application maintainable against opposite party no.1?
(2) Whether the enquiry conducted against the petitioner was in compliance of principles of natural justice or not?
(3) The relief if any can be granted to the petitioner?

9. **Issue No.(1):** Is the writ application maintainable against opposite party no.1?

Admittedly, BSET is a society registered under the Societies Registration Act, 1860 and the said institution and its Governing Body are approved by the AICTE. The BIET is a sponsoring unit of the Society, i.e. BSET, which is a private unaided technical institution imparting education to the students, though not received any aid or funds from the State Government and as such, is discharging the public duty.

10. To examine whether writ is maintainable against opposite party no.1, it is worthwhile to scrutinize the law laid down by the apex Court. In

Smt Ujjam Bai v. State of Uttar Pradesh, AIR 1962 SC 1621, interpreting the words "other authorities" in Article-12, the apex Court held :-

> *"Again, Article 12 winds up the list of authorities falling within the definition by referring to "other authorities" within the territory of India which cannot obviously be read as ejusdem generis with either the Government and the Legislatures or local authorities. The words are of wide amplitude and capable of comprehending every authority created under a statute and functioning within the territory of India or under the control of the Government of India. There is no characterisation of the nature of the "authority" in this residuary clause and consequently it must include every type of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those laws."*

In ***Unni Krishan v. State of Andhra Pradesh*** (1993) 1 SCC 645, the Hon'ble Supreme Court held

> *"that a private body performing public duty is amenable to writ jurisdiction. The Supreme Court held that under Article 226 writ can be issued to any person or authority for enforcement any of the fundamental rights or for any 'other purpose'."*

In para-79, the Supreme Court further observed that

> *"if the emphasis is on the nature of duty, on the same principle it has to be held that these educational institutions discharge public duties, irrespective of the educational institutions receiving aid it should be held that it is a public duty. The absence of aid does not detract from the nature of duty. "This observation of the Supreme Court with regard to private institutions is indicative of the status the private institutions enjoy.*"

In ***K. Krishnamacharylu*** (supra) while dealing the claim of the teachers of the private institutions for parity of pay the Supreme Court held as follows :-

> **Para-**4
>
> xx xx xx
>
> *"We are of the view that the State has obligation to provide facilities and opportunities to the people to avail of the right to education. The private institutions cater to the needs of the educational opportunities. The teacher duly appointed to a post in the private institution also is entitled to seek enforcement of the order issued by the Government. The question is as to which forum one should approach. The High Court has held that the remedy is available under the Industrial Disputes Act. When an element of public interest is created and the institution is catering to that element, the teacher, the arm of the institution is also entitled to avail of the remedy provided under Article 226; the jurisdiction part is very wide. It would be different position, if the remedy is a private law remedy. So, they cannot be denied the same*

benefit which is available to others. Accordingly we hold that the writ petition is maintainable. They are entitled to equal pay so as to be on par with Government employees under Article 39(d) of the Constitution."

11. The definition of 'State' is not confined to Governmental function and the legislature but extends to any action administrative (whether statutory or non-statutory), judicial or quasi judicial, which may be brought within the fold of State action being the action, which violates fundamental rights. It appears that prima facie protection against infraction of Article 14 is available only against the State and complaint of arbitrariness and denial of equality can therefore, be sustained against the society only if the society can be shown to be State for the purpose of Article 14. The 'State' is defined in Article 12 to include inter alia the Government of India and the Government of each of the States and all local or other authorities within the territory of India or under the control of the Government of India and the question therefore is whether the Society can be said to be 'State' within the meaning of this definition. Obviously the Society cannot be equated with the Government of India or the Government of any State nor can it be said to be a local authority and therefore, it must come within the expression of "other authorities" if it is to fall within the definition of 'State'. Therefore, the question is what are "other authorities" contemplated in the definition of 'State' in Article 12. While considering this question, it is necessary to bear in mind that an authority falling within the expression "other authorities" is, by reason of its inclusion within the definition of 'State' in Article 12, subject to the same constitutional limitations as the Government and is equally bound by the basic obligation to obey the constitutional mandate of the Fundamental Rights enshrined in Part III of the Constitution. Similar question arose when a corporation can be regarded as an 'authority' within the meaning of Article 12 arose for consideration in ***R.D.Shetty v. The International Airport Authority of India***, AIR 1979 SC 1628 and the apex Court though has given wide enlargement of the meaning of "other authorities", but cautioned that it must be tempered by a wise limitation.

12. In ***Sabhaijit Tewary v. Union of India*****,** AIR 1975 SC 1329 the apex Court has held that in no uncertain terms, that a society registered under the Societies Registration Act, 1860 can never be regarded as an 'authority' within the meaning of Article 12.

13. If the Society is an 'authority' and therefore, "State" within the meaning of 'Article 12, it must follow that it is subject to the constitutional obligation under Article 14. The true scope and ambit of Article 14 has

been the subject matter of numerous decisions and it is not necessary to-make any detailed reference to them and it is sufficient to state that the content and reach of Article-14 must be confused with the doctrine of classification because the view taken was that the said Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; (ii) that the differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. Reference can also be made to other judgments of the apex Court in ***Gulam Abbas & Ors vs State Of U.P. & Ors,*** AIR 1981 SC 2198 and ***Som Prakash v. Union of India*****,** AIR 1981 SC 212. But all these questions have been considered by the Constitution Bench of the apex Court in ***Ajay Hasia v. Khalid Mujib Sehravardi and others****,* AIR 1981 SC 487.

14. In ***Tekraj Vasandi alias Basandi v. Union of India*** **,** AIR 1988 SC 469 (paragraphs 17-A and 20), with the approval, the observations of Justice Shah in Uajm Bai case, it is held that the expression 'authority' in its etymological sense means a body invested with power to command or give an ultimate decision, or enforce obedience, or having a legal right to command and be obeyed. But in paragraph 20 the Court observed as follows:-

> *"In a Welfare State, as has been pointed out on more than one occasion by this Court, Governmental control is very pervasive and in fact touches all aspects of social existence in the absence of a fair application of the tests to be made, there is possibility of turning every non-governmental society into agency or instrumentality of the State. That obviously would not serve the purpose and may be far from reality."*

15. In ***Chandra Mohan v. NCERT***, AIR 1992 SC 76, in paragraph-3, the apex Court held as follows:

> *"It must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State control. The State control does not render such bodies as 'State' under Art.12. The State control, however, vast and pervasive is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body and rendering of an important public service being the obligatory functions of the State may largely point out that the body is 'State'."*

16. In ***Ajay Hasia (supra)*** the Constitution Bench summarized the relevant tests gathered from the decision in R.D. Shetty for determining whether an entity is a 'State' or "instrumentality of the State" as follows:-

> *(1) "One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicting that the corporation is an instrumentality or agency or Government.*
>
> *(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.*
>
> *(3) It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.*
>
> *(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.*
>
> *(5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classified the corporation as a instrumentality or agency of Government.*
>
> *(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government. "*

It was held in ***Ajay Hasia*** that if on consideration of the relevant factors, it is found that the Corporation is an instrumentality or agency of Government, it would as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12. The same view has also been taken into consideration by the apex Court in ***U.P.Warehousing Corporatioin v. Vijay Narain***, AIR 1980 SC 840.

17. The tests which have been determined in **Ajay Hasia** (supra) are also held not rigid set of principles so that a body falling within any one of them must be considered to be 'State'. The question in case would be: whether on facts, the body is financially, functionally and administratively dominated by or under the control of Government and such control must be particular to that body and must be pervasive. Therefore, the decision in ***Sabhaijit Tewary*** (supra) has been overruled by the 7 Bench judgment of the apex Court in ***Pradip Kumar Biswas v. Indian Institute of Chemical Biology*****,** (2002) 5 SCC 111 and the apex Court by over-ruling ***Sabhaijit Tewary*** (supra) held as follows:

> *"(1) simply, by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of "other authorities" in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to the*

public. Further, the statute creating the entity should have been vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs or other people- their rights, duties, liabilities or other legal relations. It created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavor and clear indicia of power- constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in Ajay Hasia enable determination of governmental ownership or control. Tests 3, 5 and 6 are "functional" tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Therefore, the question whether an entity is an "authority" cannot be answered by applying Ajay Hasia tests.

(2) The tests laid down in Ajaya Hasia case relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in the positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned."

18. Taking into consideration ***Pradip Kumar Biswas*** (supra), the apex Court in ***Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam and another*****,** AIR 2005 SC 411 has held that the question in each case would be-whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

19. Now, to answer the issue, whether the BIET, being a private technical educational institution, is amenable to writ jurisdiction, it is profitable to note that in ***Chandra Mohan Khanna v. National Council of Education Research and Training,*** (1991) 1 SCC 578 it was urged that the respondent-institution was not amenable to the writ jurisdiction of the High Court

because of the fact that the same cannot be regarded as an instrumentality or other authority of the State within the meaning of Article 12 of the Constitution. It was also contended therein that the respondent-society had been registered under the Societies Registration Act. By going through the various earlier decisions of the apex Court it was held that the society was not a 'State' under Article 12, the objection relating to the maintainability of the writ application has to be upheld as the institution is also registered under the Societies Registration Act. As to this decision, this Court even if it be conceded that the institution in question is not a 'State' within the meaning of Article 12 of the Constitution, that would not clinch the matter in view of what has been held in ***V.R. Rudani***, (supra) inasmuch as it was pointed out in paragraph 19 of that judgment that the term 'authority' used in Article 226 must receive a liberal meaning unlike this term in Article 12, because of which it was opined that the words 'any person or authority' used in Article 226 are not to be confined only to statutory authorities or instrumentalities of the State. In ***Basanti's*** case (supra), reference was made to another decision of this Court in ***Antaryami Rath*** (supra). That decision dealt with the question as to whether private educational institutions are amenable to the writ jurisdiction of this Court. By relying on ***V.R. Rudani's*** case (supra) it was held in paragraph 7 of the judgment rendered in ***Antaryami Rath*** (supra) that private educational institutions would be amenable to the writ jurisdiction of this Court on the ground that they perform public duty. This Court is of the view that the case at hand attracts the ratio of ***Antaryami Rath and Basanti Mohanty*** (supra) rather than that of ***Chandra Mohan (supra)***, and this Court would, therefore, hold that the institution at hand is amenable to the writ jurisdiction of this Court.

20. Applying to the present case the tests laid down in ***Pradip Kumar Biswas***, ***Ajay Hasia, Virendra Kumar Srivastava*** (supra) and also ***Ramesh Ahluwalia*** (supra) and keeping in view the law laid down by the apex Court in ***V.R. Rudani*** and ***Chandra Mohan*** (supra), this Court is of the considered view that a private body performing public duty is amenable to writ jurisdiction and, as held by the apex Court, under Article 226 writ can be issued to any person or authority for enforcement of any of the fundamental rights or in any other purpose. Therefore, taking into consideration the nature of duty discharged by the opposite party no.1 educational institution to be a public duty, this Court holds that the writ application as against the opposite party no.1 institution is maintainable. By holding so, Issue No.(1) is answered in affirmative.

21. **Issue No.(2)**: Whether the enquiry conducted against the petitioner was in compliance of principles of natural justice or not?

It is admitted fact that the petitioner, pursuant to letter dated 03.01.1998, was appointed as a Lecturer under BIET, which is a sponsoring unit of the society, i.e., BSET, by executing a contract followed by terms and conditions of service of the society. The petitioner, while continuing in the said post, availed study leave for higher education for the period from 01.11.2002 to 31.10.2004 at Jadavpur University, Kolkata, subject to execution of a bond with the society. Consequentially, he was relieved from his duty from 01.11.2002, though the relieve order was dated 03.12.2002. Since the petitioner received full salary along with employees' provident fund share for the period from 01.11.2002 to 31.10.2004 for M. Tech Course, he was informed by the Establishment Officer, vide letter dated 12.10.2004, to submit his progress report and mark sheet of M.Tech Course. The said letter was duly communicated to the petitioner through Jadavpur University, Kolkata, as well as his residential address at Cuttack, but no reply was received. The petitioner, after completion of M.Tech.Course by availing the study leave, joined in the institution on 31.10.2004. Opposite party no.1 on 22.09.2009 detected that the petitioner had not produced M.Tech.certificate and accordingly issued a show cause notice on 22.09.2009 calling upon the petitioner to submit M.Tech. certificate without fail, but the petitioner did not respond to the same. After resuming his duty on 31.10.2004 the petitioner also received salary till 22.09.2009. As the petitioner could not produce M. Tech. certificate, opposite party no.1 passed resolution dated 29.10.2009 to withhold his salary from 31.10.2009.

22. The petitioner was then found involved in an untoward incident occurred on 23.03.2010 inside the college campus by instigating and provoking the boarders and non-boarders and basing upon which an FIR was lodged on 28.03.2010. As the petitioner was found involved in the untoward incident causing damage to the institution, which was detrimental to the interest of the institution, he was not allowed to sign the attendance register. Subsequently, on 31.03.2010, he was issued with notice of show cause, pursuant to resolution passed by opposite party no.1 on 27.03.2010, with a direction to remain on leave with immediate effect. The petitioner, while remaining on leave, was called upon to give his explanation/representation with regard to the incident took place on 23.03.2010. In reply thereto, the petitioner claimed his arrear salary,but the same was not acceded to.

23. As the petitioner did not submit his M. Tech. certificate, as requested by the opposite party no.1, following charges were framed calling upon the petitioner to give reply thereof:-

> *"1. Why you have failed to submit the M. Tech certificate despite repeated notice though you have availed the study leave from the period 1st November, 2002 to 31st October, 2004 after receiving full salary of Rs.2m26m491/- including employees provident fund share by executing a bond on 27th September, 2002 which is binding?*
>
> *2. Your conduct seems to be detrimental to the institution as from reliable source it has come to our notice about your involvement in the untoward incident that took place on 23.03.2010 inside the campus by the students."*

Consequentially, an inquiry committee was constituted by the General Body of the society and the petitioner was called upon to provide the date and time of arrival so that the inquiry committee can accordingly be intimated. But, the petitioner, instead of appearing before inquiry committee, filed this writ application claiming arrear salary and other benefits. However, this Court, vide order dated 13.07.2011, directed as follows:-

> *"Put up this matter on 25th August, 2011.*
>
> *In the meantime, petitioner shall appear before the authorities on 08.08.2011 to participate in the personal hearing. On his appearance, the authorities shall fix a date of hearing and complete the same by 22.08.2011.*
>
> *We hope and trust that the petitioner shall cooperate with the Management for personal hearing. The report thereof shall be produced before us by the Management."*

Again on 25.08.2011 this Court passed the following order:-

> *"It is stated that the interview could not be conducted due to the reason that the petitioner is suffering from fever. We direct the petitioner to appear before the Enquiry Committee on 12th of September, 2011 as last chance. On his appearance, the proceeding shall continue day to day and the same shall be completed by end of September, 2011.*
>
> *It is admitted that all the documents have been handed over to the petitioner and the petitioner does not make any grievance for non-receipt of the documents.*
>
> *Put up this matter on 17th of October, 2011."*

Thereafter, the petitioner appeared before inquiry committee and asked for certain documents. Though some of the documents were supplied to the petitioner, but some were not. On the basis of the reply given by the petitioner, the inquiry committee, after considering all the relevant records including the representations, statements forwarded to the society and taking into consideration the seriousness and gravity of misconduct, recommended

on 04.10.2011 for dismissal of the petitioner from service. Consequentially, the society passed resolution on 14.10.2011 for dismissal of the petitioner from service, which was communicated on 15.10.2011. Consequentially, the present writ application was amended challenging the order of dismissal passed by the authority.

24. A perusal of the charge sheet in Annexure-11 would go to show that none of the documents have been provided to the petitioner by the authority along with charge sheet, nor any list of witnesses. As already indicated, when the petitioner asked for, though he was provided with certain documents, some other required documents were not supplied to him and reasons for non-supply of such documents were not indicated. In any case, vide order dated 30.08.2017, this Court observed as follows:-

> *"This case has been argued by the learned senior counsel on behalf of the petitioner on 29.08.2017 but none appeared on behalf of the opposite parties and as such the case has been adjourned to be listed on the very next date, i.e., 30.08.2017. On 30.08.2017 also none represented for the opposite parties.*
>
> *Since learned senior counsel for the petitioner has raised the question of legality and propriety of the order passed by the authority in course of the disciplinary proceeding and as such it would be appropriate to direct the opposite parties to produce the record of the disciplinary proceeding including the enquiry report on the next date.*
>
> *The Registry is directed to communicate this order to the opposite party no.1 forthwith.*
>
> *List the case on 10.10.2017."*

25. In spite of above order passed by this Court, opposite party no.1 did not produce any record for perusal and satisfaction of this Court that the petitioner was supplied with the required documents and given list of witnesses along with charge sheet. Further, the inquiry committee when submitted its inquiry report on 04.10.2011, copy thereof was not supplied to the petitioner to give effective reply, and on the basis of such report and recommendation made by the inquiry committee action for dismissal from service was taken against the petitioner on 14.10.2011.

26. In ***State of U.P. v. Saroj Kumar Sinha***, AIR 2010 SC 3131, the apex Court pointed out that an employee should be treated fairly in any proceeding which may culminate punishment being imposed on him.

27. In view of the law discussed above, this Court is of the considered view that while imposing punishment of termination from service, there was

non-compliance of principles of natural justice. Thereby, the order so passed on 14.10.2011, which was communicated to the petitioner vide letter dated 15.10.2011, cannot sustain in the eye of law and accordingly the same is hereby quashed.

However, taking note of the factual matrix of the case this Court is of the considered view that since the order of termination dated 14.10.2011 was passed without giving opportunity of hearing to the petitioner by the inquiry committee at the stage of inquiry, the matter is relegated to that stage. The inquiry committee shall cause a de novo inquiry by affording opportunity of hearing to the petitioner and make necessary recommendation on compliance of principles of natural justice. Such proceedings shall be concluded as expeditiously as possible. Needless to mention, the petitioner, without taking unnecessary adjournments, shall extend all cooperation by participating in the inquiry proceedings so that the authority can conclude the same without causing any further delay.

28. With the above observations and directions, the writ petition stands disposed of. However, there shall be no order as to cost.

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2019 (III) ILR - CUT-112

DR. B.R.SARANGI, J.

W.P.(C) NO. 23137 OF 2014

CHANDRABHANU MISHRA .....Petitioner

.Vs.

GOVERNING COUNCIL OF INSTITUTE OF PHYSICS, BHUBANESWAR & ORS. .....Opp. Parties

SERVICE LAW – Disciplinary proceeding – Petitioner was serving as 'Registrar' in Institute of Physics, Bhubaneswar – Initiation of departmental proceeding against him for the alleged charges occurred between 2005 to 2011 – Major punishment of compulsory retirement awarded – Punishment challenged on several grounds like non-supply of the relevant documents to the delinquent – Delay in submitting enquiry report – Non examination of all the material witnesses – Procedure adopted in the enquiry proceedings clearly indicate that such procedure is not known to law as the inquiry officer, who conducted the enquiry and submitted his report was inducted as the

member of the governing council, which is the disciplinary authority and could not have been a party to the fresh enquiry conducted by such governing council/disciplinary authority and as such, he was biased – Enquiry report also not provided to the delinquent – The disciplinary authority without following the procedure differs/disagree with the report of the enquiry officer and no opportunity of hearing was provided to the delinquent in case of such disagreement – Illegality/irregularities in the departmental proceeding – Violation of the principle of natural justice pleaded – Held, the entire proceeding initiated against the petitioner is vitiated due to non compliance of the principle of natural justice, and as such, the same is a nullity – Therefore, this court is of the considered view that the proceeding so initiated against the petitioner and the consequential penalty imposed on him cannot sustain in the eye of law and the same is liable to be quashed.

Case Laws Relied on and Referred to :-

1. AIR 1986 SC 2118 : Kasinath Dikshita .Vs. Union of India,
2. AIR 1974 SC 2325 : State of Punjab .Vs. Bhagat Ram.
3. AIR 2010 SC 3131 : State of U.P. .Vs. Saroj Kumar Singha.
4. AIR 1987 SC 2386 : Ranjit Thakur .Vs. Union of India.
5. (2002) 2 SCC 290 : Amar Nath Chowdhury .Vs. Braithwaite and Co. Ltd.
6. (2011) 14 SCC 770 : State of Punjab .Vs. Davinder Pal Singh Bhullar.
7. (2012) 1 SCC 561: Narinder Singh Arora .Vs. State (Government of NCT of Delhi)
8. AIR 2009 SC 1375 : Union of India .Vs. Prakash Kumar Tandon.
9. AIR 2018 SC 4860 : Union of India .Vs. Ram Lakhan Sharma.
10. (2008) 4 SCC 1 : Union of India .Vs. Naman Singh Shekhawat.
11. (2010) 2 SCC 772 : State of Uttar Pradesh .Vs. Saroj Kumar Sinha.
12. AIR 2008 SC 2594 : State Bank of India .Vs. S.N. Goyal.
13. (2014) 5 SCC 172 : Oriental Bank of Commerce .Vs. S.S. Sheokand.
14. (2009) 2 SCC 570 : Roop Singh Negi .Vs. Punjab National Bank.
15. AIR 2011 SC 120 : Punjab National Bank .Vs. K.K. Verma.
16. AIR 1998 SC 2713 : Punjab National Bank .Vs. Kunj Behari Mishra.
17. AIR 1999 SC 3734 : Yoginath D. Bagde .Vs. State of Maharashtra.
18. (2007) 9 SCC 582 : Harjit Singh .Vs. State of Punjab.
19. (1993) 4 SCC 727 : Managing Director, ECIL .Vs. B. Karunakar.
20. (2005) 8 SCC 264 : U.P. State Spinning Co. Ltd. v. R.S. Pandey.
21. AIR 2009 SC 161 : Union of India .Vs. Y.S. Sandhu.
22. (1984) 1 SCC 43 : K.L. Tripathi .Vs. State Bank of India.
23. (1971) 82 ITR 540 : CIT .Vs. Durga Prasad More.
24. AIR 1955 SC 481 : Sahu Madho Das .Vs. Mukand Ram.
25. AIR 1998 SC 2713 : Punjab National Bank .Vs. Kunj Behari Misra.
26. 2005 (6) SCC 636 : P.V. Mahadevan .Vs. MD T.N. Housing Board.
27. Secretary, Ministry of Defence .Vs. Prabhash Chandra Mirdha.
28. (2012) 11 SCC 565 : Mysore Urban Development Authority by its Commissioner .Vs. Veer Kumar Jain, (2010) 5 SCC 791

29. (2009) 7 SCC 104 : Jayendra Vishnu Thakur .Vs. State of Maharashtra & Anr.
30. 108 (2009) CLT 287 : Deo Chand .Vs. Shiv Ram,
31. (1969) 3 SCC 330 : Biswanath Panda .Vs. Sarat Chandra Panda.

For Petitioner : Mr. R.K. Rath, Sr. Counsel
M/s D. Chatarjee & A.K. Mishra.

For Opp.Parties : Mr. B.K. Mohanty, Sr. Counsel,
M/s B. Mohanti, B.K. Sahoo, S.K. Mishra,
P.B. Mohapatra, A. Mohapatra and G. Bera.

JUDGMENT Date of Hearing: 16.07.2019 : Date of Judgment : 01.08.2019

Dr. B.R.SARANGI, J.

The petitioner, who was serving as Registrar in the Institute of Physics (IoP), Bhubaneswar, has filed this application seeking to quash order dated 05.11.2014 in Annexure-26, by which the disciplinary authority/ governing council took unanimous decision to impose penalty of compulsory retirement from service and accordingly the chairman, governing council in exercise of powers conferred by clause-5.3.2 of the Bye-Law of the institute read with Rule 15(4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, imposed major penalty treating the period of suspension as such, and further directed to refund an amount of Rs.5,00,510/- pursuant to charges levelled under Article-I and Rs.6000/- for Article -III, and in case the petitioner failed to refund, the same would be deducted from his applicable gratuity or any other dues payable to him.

2. The factual matrix of the case, in hand, is that Institute of Physics (IoP), Bhubaneswar is an autonomous research institute under the Department of Atomic Energy, Government of India located at Bhubaneswar. The Government of India in the Department of Atomic Energy is the administrative and controlling authority of the Institution, and the Government of India and Government of Odisha, jointly extend all the monetary assistance to run the institute on day to day basis. The IoP, being an autonomous body, is directly managed by governing council of which the nominee of the Secretary of Department of Atomic Energy acts as its chairman.

2.1. The petitioner, as a Graduate Mechanical Engineer, was serving as an Engineer in Paradeep Phosphates Limited, which was a Government of India enterprise. The IoP issued an advertisement published in Odia daily "The Samaj" on 05.03.2001 for the post of Registrar in the scale of pay of Rs. 14300-400- 18,300/- or Rs.12000-375-18000/- plus other allowances,

depending upon the qualification and experience. Pursuant thereto, the petitioner offered his candidature and got selected by following due process of selection. He was issued with offer of appointment to join as Registrar, vide letter dated 11/12.07.2001, which was duly acknowledged by the petitioner on 17.07.2001 with a request to opposite party no.2, the Director of IoP to consider his appointment on deputation basis, as the offer of appointment was on contractual basis for a period of five years. In pursuance of such request, the Director, vide letter dated 20.07.2001, intimated the petitioner to take up the matter with Paradeep Phosphates Limited (PPL), where he was serving, and make it suitable to get relieved from his post at PPL to enable him to join at IoP. As a consequence thereof, the PPL management permitted the petitioner on 31.07.2001 to go on deputation to IoP for a period of five years with certain conditions that the borrowing organization will take approval of the Secretary of their department for the fourth year and the approval of the Ministry for the fifth year of deputation. Following the appointment and grant of due permission to join on deputation, the petitioner joined in the post of Registrar of IoP on 01.08.2001 and accordingly submitted his joining report which was accepted on 08.08.2001 with retrospective effect on the very same day.

2.2 During his continuance as Registrar, the PPL was taken over by a private management, as a result of which the petitioner was directed to come back to his parent organization, i.e., PPL, but IoP was not in a position to relieve him as he was holding a senior most post with responsibility of Administration and Finance. Consequentially, the petitioner opted and sought permission for consideration of his permanent absorption in IoP. When that was pending for consideration, PPL wrote a letter to the Director-opposite party no.2 on 15.04.2002 requesting to release the petitioner latest by 30.04.2002 to enable him to join on 01.05.2002, and subsequently reminder was also issued on 30.04.2002. Since the IoP did not relieve the petitioner to report back at PPL, on 28.05.2002 PPL intimated about striking off the name of the petitioner from the muster roll of the company w.e.f. 21.05.2002.

2.3. The governing council of the IoP resolved on 20.06.2002 that the petitioner would continue on probation for a period of six months w.e.f. 21.05.2002, as PPL revoked deputation from 20.05.2002 and, vide letter dated 30.07.2002, it was intimated to the petitioner that the governing council has taken a decision to continue his appointment on non-deputation basis with extension of the probation period of six months w.e.f. 21.05.2002.

Accordingly, the petitioner addressed to the Director, IoP on 01.08.2002 acknowledging receipt of his letter dated 30.07.2002 offering him appointment in the IoP, Bhubaneswar w.e.f. 21.05.2002. The petitioner submitted a note addressed to the Senior Accounts Officer, with a copy to the Administrative Officer (Estt.), IoP on 06.08.2002 to discontinue payment of deputation allowance and magazine allowance to him w.e.f. 21.05.2002 and to recover at the earliest any amount paid on that head after 06.08.2002, from his salary he being absorbed in IoP w.e.f. 21.05.2002. Accordingly, vide money receipt no.446 dated 06.09.2002, the excess amount of Rs.2980/- was refunded towards excess amount drawn by him as salary for the month of August, 2002.

2.4 On 06.05.2004, the Director, IoP intimated the Chief Controller of Accounts, Department of Atomic Energy, Mumbai regarding permanent absorption of the petitioner in the institute w.e.f. 21.05.2002, as there is clear provision of appointment of Registrar from a CPSU on deputation basis as per bye laws of the institute, and requested to advise for pay fixation of the petitioner. Thereafter, on 01.03.2005, the petitioner also submitted declaration of dependent family members to the Director which was approved. Thereafter, a clarification was submitted by the administrative officer to the Director on 15.04.2011 regarding dependency of the mother of the petitioner asserting eligibility for her consideration as dependant.

2.5. While the petitioner was continuing in service, on the basis of the preliminary inquiry conducted by two officers of Department of Atomic Energy, Mumbai, namely, Sri R.P. Acharya and Sri Pillai, who were junior in grade to the petitioner, a report was submitted behind the back of the petitioner and he was placed under suspension on 24.12.2012. Thereafter, the petitioner asked for copy of the preliminary inquiry report, which was refused to provide before submission of the written defence against the charge of memorandum. On 18.03.2013, the governing council extended the period of suspension for further 90 days. Thereafter, the memorandum containing article of charges was issued to the petitioner on 25.03.2013 directing him to submit written statement of defence within ten days from the date of its receipt. Then, the petitioner requested the Director, IoP, vide e-mail dated 30.03.2013, 01.04.2013 and 04.04.2013, to provide photocopy of the documents to furnish the statement of defence against the article of charges levelled against him, vide letter dated 04.04.2013. The documents, requested to be supplied, were not provided to him and the authority compelled the petitioner to file his statement of defence without the

documents on 04.04.2013. On 08.04.2013, the Director, IoP expressed his inability to supply the documents requested by the petitioner stating them not to be relevant, except the copy of the voucher of Rs.670/-, and further stated that the log book of the staff car being voluminous can be inspected during the course of inquiry, as may be advised by the inquiry authority. It was further stated that for admission or denial of charge, inspection of documents was not necessary.

2.6. Having not satisfied with the written statement submitted by the petitioner, the Chairman of the governing council appointed inquiry officer on 29.05.2013, after a period of 29 days of its approval by the governing council on 01.05.2013. The first preliminary enquiry was conducted on 17.07.2013 at New Delhi, after 48 days of appointment of inquiry officer. On 22.07.2013, after one and half months of appointment of inquiry officer, the governing council was reconstituted, wherein the inquiry officer was inducted as Ex-Officio Member of the governing council. On 03.08.2013, the petitioner again requested the inquiry officer to provide documents, as was requested while submitting the statement of defence, based on which the charges were framed, and also requested to supply the copy of earlier statements made by the witnesses during preliminary inquiry. On 23/24.08.2013, the Director provided the copy of the documents, as requested, except three very relevant and significant documents. Thereafter, the inquiry was conducted on 30.08.2013 for the charges under Articles-I, II and III, on 15.09.2013 for charges under Articles-IV and V. On 19.11.2013, Sri R.K. Nayak, Accounts Officer of IoP and the charged officer himself were examined. On 06.12.2013, after conclusion of the inquiry proceeding on 19.11.2013, the petitioner was directed to submit written note within five days from the date of receipt of presenting officer's brief note. On 30.01.2014, the inquiry officer submitted inquiry report to the disciplinary authority/governing council after eight months of his appointment, against the provision of six months.

2.7 On 19.02.2014, the governing council deliberated on the inquiry report dated 30.01.2014 submitted by Sri K.A.P. Sinha, Joint Secretary/Inquiring Officer in detail and agreed with the findings of the report and resolved that the report be sent to the charged official asking him to submit his representation, if any. Besides that, it was held that the inquiry report be supplied to the CVC for their views, with a copy to the petitioner in order to speed up the process. Consequentially, on 27.02.2014, the inquiry report was served on the petitioner by the Director with an intimation that the

governing council tentatively agreed with the findings of the inquiry officer and to make representation, if any. On 04.03.2014, pursuant to the direction given in memo dated 27.02.2014, the petitioner submitted his written representation on the inquiry report that none of the five charges were proved, but on 13.03.2014, the petitioner was directed to appear in person at New Delhi before the governing council.

2.8 On 10.04.2014, the petitioner appeared in person at New Delhi where he was subjected to further cross-examination. On 12.08.2014, the Director communicated the memorandum enclosing copy of the office memorandum dated 30.07.2014 of CVC wherein the CVC agrees with the recommendation of governing council/disciplinary authority and CVO to impose major penalty on the petitioner and he was directed to make representation to the disciplinary authority within 15 days of receipt of the memorandum latest by 27.08.2014. On 12.10.2014, the petitioner submitted representation before the Chairman, governing council on the decision of the governing council praying to exonerate him from the so called charges. On 19.10.2014, in obedience to the direction of the governing council/disciplinary authority, the petitioner submitted his representation. As directed by the governing council/disciplinary authority, the petitioner appeared before the governing council/disciplinary authority in its meeting held on 27.10.2014 and submitted oral presentation pleading his innocence and also written statement of his oral presentation. But, ultimately on 05.11.2014, the final order of punishment of compulsory retirement was passed with a further direction to the petitioner to refund the amount of Rs.5,00,510/- and Rs.6000/- in lump sum within a period of 15 days of communication of the order, failing which coercive measures would be taken. Hence this application.

3. Mr. R.K. Rath, learned Sr. Counsel appearing along with Mr. D. Chatarjee, learned counsel for the petitioner contended that while a memorandum containing article of charges was issued on 25.03.2013 directing the petitioner to submit written statement of defence, the petitioner, on 30.03.2013, 01.04.2013 and 04.04.2013, requested the Director, opposite party no.2 to provide photo copy of the documents to furnish the statement of defence against the article of charges, but the same was not supplied and on compulsion he submitted his written statement of defence on 04.04.2013. The communication made on 08.04.2013 by the Director expressing his inability to supply the documents, stating them to be not relevant, itself indicates that there is violation of principles of natural justice.

It is contended that by letter dated 29.05.2013, Mr. K.A.P. Sinha, Joint Secretary, Department of Atomic Energy was appointed as inquiry officer to conduct the inquiry under clause-5.3.13 of Bye-Laws of the Institute read with Rule-14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, but after one and half months of appointment of the inquiry officer, i.e., on 22.07.2013, Mr. K.A.P. Sinha, Joint Secretary was inducted as Ex-officio member of the governing council, which is contrary to the department memorandum dated 29.07.1976. Admittedly, the governing council is the disciplinary authority, therefore, Mr. K.A.P. Sinha, being an inquiry officer, could not have been taken into the governing council and allowed him to continue the inquiry. The report, which had been given by him as inquiry officer, was to be examined by the governing council, wherein he himself was inducted as a member, and as such, it also violates the principles of natural justice because no man should be judge of his own cause. Further, Mr. K.A.P. Sinha, Joint Secretary, who was inducted as Ex-officio member of the governing council, while conducting the inquiry, on request made by the petitioner to supply certain documents to submit his statement of defence, except three very relevant documents, others were supplied, and when the inspection of personal file of the petitioner was requested to enable him to identify the required documents to file his defence, the same was also not allowed, as a result of which the principles of natural justice have been grossly violated. Furthermore, while considering the charges levelled against the petitioner under Article -IV, Dr. B.R. Sekhar, who is one of the complainant, was also a witness to the charge, and out of total 13 named PWs, only 9 PWs, including 4 complainants, were examined, thus leaving four others, including one complainant, not examined. So far as the charge under Article-V is concerned, there was only one named PW who was also not examined. As a result, the petitioner has been seriously prejudiced.

It is further contended that the inquiry was not conducted on day to day basis and the inquiry officer has not recorded the reason for not being able to do so, as required by office memorandum no.372/3/2007-AVD-III (Vol.10) dated 19.11.2013, Department of Personnel and Training, Ministry of Personnel, Public Grievance and Pension, Government of India. The inquiry report was submitted on 30.01.2014, after eight months of appointment of the inquiry officer, against the provision of six months, and the governing council deliberated the inquiry report dated 30.01.2014 submitted by Mr. K.A.P. Sinha, Joint Secretary and agreed with the findings in the report and resolved that the report be sent to the charged official

asking him to submit his representation, if any, and the same was done behind the back of the petitioner. In compliance of the same, the inquiry report was served on the petitioner on 27.02.2014 and he was informed that the governing council tentatively agreed with the findings of inquiry officer and he has to make representation. However, the inquiry officer has submitted report in respect of five charges levelled against the petitioner stating that Article-I largely (not wholly or fully) proved, Article-II-not proved, Article -III-at maximum, partially proved, Article-IV- proved and Article-V partially proved. The petitioner, pursuant to the direction given in memo dated 27.02.2014, submitted his written representation on the inquiry report stating that none of the five charges were proved.

It is also contended that in spite of the decision of the governing council in its 87th meeting dated 19.02.2014 in agreeing with the findings of inquiry officer, the Director, vide order dated 13.03.2014, deliberately with ill motive distorted this fact and mentioned about the tentative agreement of the governing council/disciplinary authority on the findings of inquiry officer on the ground that the charges which have been proved are grave in nature involving lack of absolute integrity and misbehavior, and thus he was directed to appear before the governing council for a personal hearing on 10.04.2014 at New Delhi. In addition to the same, the decision of governing council taken in its meeting dated 19.02.2014 was not implemented by sending the inquiry report to CVC immediately till 15.05.2014, but the same was sent on 30.07.2014, and from the said office memorandum it can be seen that Dr. B.R. Sekhar, the CVO, who himself was a PW, besides being a complainant against the charged officer with regard to the charge under Article-IV, was indulged in making recommendation to CVC, along with the disciplinary authority, to impose major penalty, which violates the principles of natural justice.

It is further contended that on 10.04.2014 the petitioner appeared in person at New Delhi before the governing council, but the governing council, in which Mr. K.A.P. Sinha, Joint Secretary, the inquiry officer was one of the members, conducted a fresh inquiry, confronted the petitioner with two additional statements received from staff nurse dated 07.04.2014 and P.A. to Registrar dated 08.04.2014 along with copy of the so called medicine issue register, as both of them were not produced as witnesses and, as such, they were neither examined nor cross-examined by the petitioner, thus the same is violative of principles of natural justice.

It is also contended that neither the copy of the CVC report nor the communication of CVC was provided to the petitioner and, as such, the governing council had conducted de novo inquiry and, as such, the inquiry officer being one of the member of the governing council, the subsequent inquiry conducted by the governing council is contrary to the provisions of law and thus cannot sustain. Further, when the inquiry officer submitted his report, if the disciplinary authority has any disagreement with such report on the view given by the inquiry officer, reason for such disagreement has to be indicated, but in the instant case the same has not been done. Therefore, imposition of penalty of compulsory retirement is not only harsh but also vitiates the inquiry proceeding. It is also contended that the inquiry officer was biased against the petitioner, in view of the fact that he having conducted the inquiry, participated in the subsequent inquiry conducted by the governing council, as one of its member, and cross-examined the petitioner.

To substantiate his contention, Mr. R.K. Rath, learned Senior Counsel has relied upon a plethora of judgments of the apex Court in ***Kasinath Dikshita v. Union of India,*** AIR 1986 SC 2118; ***State of Punjab v. Bhagat Ram,*** AIR 1974 SC 2325; ***State of U.P. v. Saroj Kumar Singha,*** AIR 2010 SC 3131; ***Ranjit Thakur v. Union of India,*** AIR 1987 SC 2386; ***Amar Nath Chowdhury v. Braithwaite and Co. Ltd.,*** (2002) 2 SCC 290; ***State of Punjab v. Davinder Pal Singh Bhullar,*** (2011) 14 SCC 770; ***Narinder Singh Arora v. State (Government of NCT of Delhi),*** (2012) 1 SCC 561; ***Union of India v. Prakash Kumar Tandon,*** AIR 2009 SC 1375; ***Union of India v. Ram Lakhan Sharma,*** AIR 2018 SC 4860; ***Union of India v. Naman Singh Shekhawat,*** (2008) 4 SCC 1; ***State of Uttar Pradesh v. Saroj Kumar Sinha,*** (2010) 2 SCC 772; ***State Bank of India v. S.N. Goyal,*** AIR 2008 SC 2594; ***Oriental Bank of Commerce v. S.S. Sheokand,*** (2014) 5 SCC 172; ***Roop Singh Negi v. Punjab National Bank,*** (2009) 2 SCC 570; ***Punjab National Bank v. K.K. Verma,*** AIR 2011 SC 120' ***Punjab National Bank v. Kunj Behari Mishra,*** AIR 1998 SC 2713; ***Yoginath D. Bagde v. State of Maharashtra,*** AIR 1999 SC 3734; and ***Harjit Singh v. State of Punjab,*** (2007) 9 SCC 582.

4. Mr. B.K. Mohanty, learned Sr. Counsel appearing along with Mr. B.K. Sahoo, learned counsel for the opposite parties at the outset contended that there may be some procedural irregularity, but that itself cannot absolved the petitioner its liability to be visited the penalty imposed on him by the disciplinary authority. It is contended that while considering the

procedural angle of the case in hand, the Court should not have lost sight of the facts, which are very serious in nature on part of the petitioner who was holding the highest post in the administration of the institution, such as, the petitioner has misbehaved one K.C. Tudu, Assistant of Institute of Physics shouting and using abusive language and consequentially he made a complaint before the Director, National Commission for Scheduled Castes and Scheduled Tribes.

It is further contended that using the deed of partition of the property belonging to the mother, wherein the mother (Karta) blends the property to be a joint family and partitions a share to herself and two sons (individual property to be partitioned must go first to the family, and once with the family, can be divided where share can be given to a stranger and relinquishment can be made). But the mother not given a share and makes the partition invalid, and more so the deed is not registered one. Thereby, the petitioner declared in a self serving declaration as the corroboration by an invalid document that his mother wholly dependent upon him, even if his mother having an income of Rs.1,20,000/- per year and there are three sons and there was no corroboration that the mother is not depending on others. Therefore, the petitioner has misrepresented himself by showing a document which is not genuine one.

It is further contended that a complaint was made by one A.K. Biswal to the President, Institute of Physics Employees Association regarding use of unparliamentarily languages to him as was made to Mr. B. Tudu. Further, the petitioner was also opted for T.A. and gave up the facility of use of official car to travel between house and office contravening his option used the official car. A complaint was also made by Sri J.N. Dash, Administrative Officer (Estt.) on 16.04.2010 to the Director against the petitioner for scolding him in filthy and abusive language and threatening him to beat with shoes. Similar complaint was also made by Sri B.K. Mishra, P.A. to Registrar and Sri Prafulla Kumar Senapati, Library in-charge corroborating the statement of Sri B.K. Mishra. Therefore, the cumulative effect of the behavior of the petitioner has to be taken into consideration while adjudicating the matter on merits. It is further contended that on the basis of the charges levelled against him, the petitioner submitted tentatively his written statement of defence on 04.04.2013, which was responded to by the Director by contending that he was given full opportunity to inspect the documents at the time of inquiry.

It is further contended that Mr. K.A.P. Sinha, IAS was appointed as inquiry officer by the Chairman of the governing council, who is the disciplinary authority, and Mr. A. Sukumaran, Under Secretary, Department of Atomic Energy, Mumbai as Presenting Officer to enquire into the allegations. Even if Mr. K.A.P. Sinha, Joint Secretary was the inquiry officer, he became Ex-officio member of the governing council for the reason that due to change of allocation of work, vide order dated 09.06.2013, by the Ministry of Atomic Energy, IoP he came under control of Joint Secretary, Br. Secretary, New Delhi and continued to be the inquiry officer, but the petitioner never challenged the same and continued to take part in the inquiry conducted by Mr. K.A.P. Sinha, Joint Secretary. Having participated in the inquiry proceeding, subsequently the petitioner could not turn round and say that the inquiry officer is biased and, being a member of the disciplinary authority, could not have conducted such inquiry.

It is further contended that pursuant to the request made by the petitioner in his e-mail on 03.08.2013 to submit certain documents, the Director furnished those copies to the inquiry officer, as per direction of inquiry officer on 23.08.2013, basing upon which the petitioner submitted his reply on 30.08.2013. Despite the inquiry officer was a member of the disciplinary authority, the inquiry was conducted on regular basis, which the petitioner did not protest. It is further contended that in 87th meeting of the governing council held on 19.02.2014, where Mr. K.A.P. Sinha, Joint Secretary was present, it was decided to send the inquiry report to the charged officer for his reply, if any, and the same was communicated on 27.02.2014 asking him to represent, if any, to the Chairman, governing council within 15 days of receipt of memorandum. Consequentially, the petitioner submitted his representation on 04.03.2014. On 13.03.2014, the petitioner was directed to appear before the disciplinary authority on 10.04.2014 for personal hearing, but on 07.04.2014, the staff nurse Smt. P. Choudhury gave the statement regarding issuance of medicine in favour of mother of the petitioner, which has been shown in consonance with Rule-14(21)(b) of the Rules. Further, Mr. B.K. Mishra, P.A. to Registrar also gave statement regarding issuance of medicine in favour of mother of the petitioner on 08.04.2014. But on 10.04.2014 when the petitioner appeared before the disciplinary authority, he stated that he will not repeat such mistake in future and will work with full dedication and carry all the people in the institute with him and work peacefully. In view of such admission being made by the petitioner before the disciplinary authority, the action taken is well justified.

It is further contended that challenging the order of suspension dated 24.12.2012, the petitioner had approached this Court by filing W.P.(C) No.8592 of 2014 with a further prayer for extension of order dated 19.03.2014, which was disposed of, vide order dated 08.07.2014, directing the opposite parties to conclude the proceeding within four months giving personal hearing to the petitioner. It is contended that the said order was received on 30.07.2014 and by that time the CVC already advised to impose major penalty. Therefore, the petitioner filed W.P.(C) No.15888 of 2014 challenging the memorandum notice dated 12.08.2014 and the said writ petition was disposed of as withdrawn on 27.08.2014 without leave to re-file. Thereafter, on 27.10.2014, the final hearing took place by the disciplinary authority wherein the petitioner submitted that he had removed the original documents from the file, as proper purchase procedure was not followed and, therefore, took it out to protect himself from audit objections. This shows the conduct of the petitioner and, as such, in the final order passed by the disciplinary authority on 05.11.2014, except the charge under Article-II, all other charges, i.e., charges under Articles-I, III and IV were fully proved and charge under Article-V was proved and, thereby, the disciplinary authority imposed major penalty of compulsory retirement from service and issued direction for recovery of financial loss of Rs.5,00,510/- to the institute. Thereby, no illegality or irregularity has been committed by the authority while imposing major penalty. It is further contended that in the event this Court finds that there was procedural lacune, the matter may be remitted back to the authority concerned for reconsideration by affording opportunity of hearing to the petitioner, instead of quashing the proceeding as a whole.

To substantiate his contention, he has relied upon the judgments of the apex Court in the cases of ***Managing Director, ECIL v. B. Karunakar,*** (1993) 4 SCC 727; ***U.P. State Spinning Co. Ltd. v. R.S. Pandey,*** (2005) 8 SCC 264; ***Union of India v. Y.S. Sandhu,*** AIR 2009 SC 161; ***K.L. Tripathi v. State Bank of India,*** (1984) 1 SCC 43; ***CIT v. Durga Prasad More,*** (1971) 82 ITR 540; ***Sahu Madho Das v. Mukand Ram,*** AIR 1955 SC 481; and ***Bhaskar Chandra Mohapatra v. Disciplinary Authority, UCO Bank***, (W.P.(C) No.5090 of 2010, disposed of on 14.07.2015).

5. This Court heard Mr. R.K. Rath, learned Sr. Counsel appearing along with Mr. D. Chatarjee, learned counsel for the petitioner, and Mr. B.K. Mohanty, learned Sr. Counsel appearing along with Mr. B.K. Sahoo, learned counsel for the opposite parties, and perused the record. Pleadings having

been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. Indisputably, a preliminary enquiry was conducted by two officers of the Department of Atomic Energy, namely, R.P. Acharya and Mr. Pilai, who were junior in grade to the petitioner, and on the basis of the preliminary enquiry report submitted by them action was taken against the petitioner placing him under suspension. Accordingly, a memorandum of charges was submitted on 25.03.2012 framing five articles of charges which read thus:-

"Article-I. During the period 2003-04 to 2012-13 the Charged Officer claimed and got reimbursed to himself an amount of Rs.4,45,225/- towards medical expenses of his mother by furnishing false declaration that his mother is dependent on him w.e.f. 1.3.2005.

The amount includes one bill of Rs.670/- reimbursed in 2003-04, before declaring the mother dependent.

An amount of Rs.55,285/- reimbursed on LTC in respect of mother during the same period to which he was not entitled.

Article-II. During the period from 01.09.2008 to 12.1.2011 the Charged Officer claimed and availed transport allowance amounting Rs.59,106/- although eh was using official car for commutation.

Article-III. In view of the permanent absorption of the petitioner from 1.8.2001 in the institute service, he did not refund the deputation allowance of Rs.6000/- paid during the period 1.8.2001 to 31.7.2002.

Article-IV. Misbehaviour towards many officials of IOP during 2001-2012.

Article-V. Tampering of one official record (by removing the original note-sheet in the file and replacing the same by its Xerox copy) during the period 1.8.2001 to 24.12.2012."

On receipt of such memorandum of charges dated 25.03.2013, the petitioner requested the Director, vide e-mail dated 30.03.2013, 01.04.2013 and 04.04.2013, to provide photo copies of the following documents to furnish the written statement of defence against the article of charges:-

"(1) Copy of the voucher no.1810 dated 21.1.2004 for Rs.670/- along with the supporting pages.

(2) Copy of the log book of the staff car used by him for the period from 01.09.2008 to 12.01.2011. This was required to support his claim that he was using the vehicle for commuting from office to residence not on regular basis but on the days of late sitting during this period.

(3) To support the claim that the petitioner was absorbed in IOP w.e.f. 21.05.2002, i.e. just from the next day his parent organization, Paradeep

Phosphates Ltd (PPL) revoked his lien with PPL service, and not from the day of joining IOP on deputation, i.e. 1.8.2001 as has been charged.

(a) Decision of the Governing council of IOP to extend honorarium to those employees who were putting additional effort for setting up NISER.

(b) Copy of his first representation addressed to Director, IOP regarding fixation of pay after permanent absorption in IOP.

(with a request to allow to see the personal file, so as to identify certain pages for making Xerox copy and submit the same in defence).

(c) Copy of last pay certificate (LPC) issued by IPL in respect of petitioner.

(d) Copy of the resolution of the Governing Council allowing him two additional increments w.e.f. 01.08.2001 as a partial protection of pay.

(e) Copy of the letter received from the DAE conveying approval of Department as well as that of Secretary, DAE concurring the resolution of Governing Council in granting the petitioner two additional increments as a partial pay protection w.e.f. 01.08.2001.

(4) Resolution of the Governing Council in authorizing Director of the institute to take appropriate action against those employees trying to create disturbances in the institute under the banner of Institute of Physics Employees Association.

(5) The copy of the purchase file of NISER, from page 01-17, entitled "Purchase of items for Guest House/Faculty Quarters furnishing/NISER" including copy of the concerned payment voucher.

(6) The copy of the report submitted by the two members committee, (Shri R.P. Acharya and Shri Pillai) who conducted a preliminary enquiry into the alleged allegations against the petitioner and submitted report on 24.05.2012 behind the back of the petitioner.

(7) The Annual report and Audited Statement of Accounts for the financial year 2007-08 & 2008-09 in respect of NISER.

The aforesaid documents requested by the petitioner were not supplied. Consequentially, he submitted his written statement defence on 04.04.2013 under compulsion without such documents being verified. This fact is being admitted in letter of the Director dated 08.04.2013 where he has expressed his inability to supply the documents requested stating that Log Book of the staff car being voluminous can be inspected during the course of enquiry, as may be advised by the enquiry authority. It was further stated that for admission and denial of charges, inspection of documents is not necessary, which is apparent from the said letter itself. Therefore, a prejudice has been caused to the petitioner while preparing a defence statement, which violates principles of natural justice.

7. In ***Kasinath Dikshita*** mentioned supra, the apex Court in paragraphs 9, 10 and 12 held as follows:-

> *"9. This application was unceremoniously rejected by the Board on December 20, 1963. It is thus clear that the appellant's request for supply of copies of relevant documents and statements of witnesses has been refused in no unclear terms. We do not consider it necessary to burden the records by quoting the extracts from the letters addressed by the appellant and the reply sent to him.*
>
> *The extracts quoted hereinabove leave no room for doubt that the disciplinary authority refused to furnish to the appellant copies of documents and copies of statements. When a Government servant is facing a disciplinary proceedings, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. And no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies, how can the concerned employee prepare his defense, cross-examine the witnesses, and point out the inconsistencies with a view to show that the allegations are incredible? It is difficult to comprehend why the disciplinary authority assumed an intransigent posture and refused to furnish the copies notwithstanding, the specific request made by the appellant in this behalf. Perhaps the disciplinary authority made it a prestige issue. If only the disciplinary authority had asked itself the question : "What is the harm in making available the material?" and weighed the pros and cons, the disciplinary authority could not reasonably have adopted such a rigid and adamant attitude. On the one hand there was the risk of the time and effort invested in the departmental enquiry being wasted if the Courts came to the conclusion that failure to supply these materials would be tantamount to denial of reasonable opportunity to the appellant to defend himself. On the other hand by making available the copies of the documents and statements the disciplinary authority was not running any risk. There was nothing confidential or privileged in it. It is not even the case of the respondent that there was involved any consideration of security of State or privilege. No doubt the disciplinary authority gave an opportunity to the appellant to inspect the documents and take notes as mentioned earlier. But even in this connection the reasonable request of the appellant to have the relevant portions of the documents extracted with the help of his stenographer was refused. He was told to himself make such notes as he could. This is evident from the following passage extracted from communication dated 25-7-1962 from. the disciplinary authority to the appellant : -*
>
> *"The Government has been pleased to allow you to inspect all the documents mentioned in Annexure II to the charge-sheet given to you. While inspecting the documents, you are also allowed to take notes or even prepare copies, if you so like, but you will not be permitted to take a stenographer or any other person to assist you. In case you want copies of any specific documents, from out of those inspected by you, the request will be considered on merits in each case by the Government. In case you want to inspect any document, other than those mentioned in Annexure II, you may make a request accordingly, briefly indicating its relevancy to the charge against you, so that orders of the Government could be*

obtained for the same. x x x x x. As pointed out above, if you wish to have copies of any specific documents, from those inspected by you, you should make a request in writing accordingly, mentioning their relevancy to the charge, so that orders of Government could be obtained.

Government, however, maintains that you are not entitled to ask for copies of documents as a condition precedent to your inspection of the same. I am further to add that in case you do not inspect the documents on the date fixed, you will do so at your own risk."

10. And such a stance was adopted in relation to an inquiry whereat as many as 38 witnesses were examined, and 112 documents running into hundreds of pages were produced to substantiate the charges. In the facts and circumstances of the case we find it impossible to hold that the appellant was afforded reasonable opportunity to meet the charges levelled against him. Whether or not refusal to supply copies of documents or statements has resulted in prejudice to the employee facing the departmental inquiry depends on the facts of each case. We are not prepared to accede to the submission urged on behalf. of the respondents that there was no prejudice caused to the appellant, in the facts and circumstances of this case. The appellant in his affidavit page 309 of the SLP Paper book has set out in a tabular form running into twelve pages as to how he has been prejudiced in regard to his defence on account of the non-supply of the copies of the documents. We do not consider it necessary to burden the record by reproducing the said statement. The respondents have not been able to satisfy us that no prejudice was occasioned to the appellant.

12. The appellant relied on Tirlok Nath v. Union of India 1967 Serv LR 759 (SC) in support of the proposition that if a public servant facing an inquiry is not supplied copies of documents, it would amount to denial of reasonable opportunity. It has been held in this case :

"Had he decided to do so, the documents would have been useful to the appellant for cross-examining the witnesses who deposed against him. Again had the copies of the documents been furnished to the appellant he might, after perusing them, well have exercised his right under the rule and asked for an oral inquiry to be held. Therefore, in our view the failure of the Inquiry Officer to furnish to the appellant with copies of the documents such as the FIR and statements recorded at Shidhipura house and during the investigation must be held to have caused prejudice to the appellant in making his defence at the inquiry."

Reliance has also been placed on State of Punjab v. Bhagat Ram (1975) 2 SCR 370 : (AIR 1974 SC 2335) and State of Uttar Pradesh v. Mohd. Sharif (dead) through LRs. (1982) 2 Lab LJ 180: (AIR 1982 SC 937) in support of the proposition that copies of statements of witnesses must be supplied to the Government servant facing a departmental inquiry. It has been emphatically stated in State of Punjab V. Bhagat Ram by this Court as under : -

"The State contended that the respondent was not entitled to get copies of statements. The reasoning of the State was that the respondent was given an opportunity to cross-examine the witnesses and during the cross-examination the

> *respondent would have the opportunity of confronting the witnesses with the statements. It is contended that the synopsis was adequate to acquaint the respondent with the gist of the evidence.*
>
> *The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the Government servant is afforded a reasonable opportunity to defend himself against the charges on which inquiry is held. The Government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the Government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the Government servant. Unless the statements are given to the Government servant he will not be able to have an effective and useful cross-examination.*
>
> *It is unjust and unfair to deny the Government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the Government servant. A synopsis does not satisfy the requirements of giving the Government servant a reasonable opportunity of showing cause against the action proposed to be taken."*
>
> ***(Emphasis Supplied)***

8. The preliminary enquiry report submitted by Sri R.P. Acharya and Sri Pillai, basing upon which the charges were framed, was also not supplied to the petitioner. More particularly, when the petitioner had insisted upon supply of documents for furnishing the effective written statement of defence, non-supply of same has caused grave prejudice to him being violative of the principles of natural justice.

9. In ***Bhagat Ram*** (supra), the apex Court in paragraphs 7 and 8 of the judgment held as follows:-

> "7. *The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the Government servant is afforded a reasonable opportunity to defend himself against charges on which inquiry is held. The Government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. We can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the Government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the Government servant. Unless the statements are given to the Government servant he will not be able to have a effective and useful cross-examination.*
>
> *8. It is unjust and unfair to deny the Government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the Government servant. A synopsis does not satisfy the requirements of giving the Government servant a reasonable opportunity of showing cause against the action proposed to be taken."* *(Emphasis Supplied)*

10. Admittedly, on 29.05.2013, the Chairman, governing council appointed Mr. K.A.P. Sinha, IAS as inquiry officer, after 29 days of its approval by the governing council dated 01.05.2013, and 40 days after the appointment of inquiry officer the first preliminary enquiry was conducted on 17.07.2013. But after one and half month, i.e., on 22.07.2013 Mr. K.A.P. Sinha, IAS, who had been appointed as inquiry officer, on reconstitution of the governing council was inducted as ex-officio member of the governing council, which is contrary to the office memorandum no. 35014/76/Estt.(a) dated 29.07.1976 of Department of Personnel & Administrative Reforms, Government of India. The petitioner again requested the enquiry officer to provide the documents, as had been requested to the Director, for furnishing his statement of defence against the article of charges, as mentioned above, and also the copy of the earlier statement made by the witnesses during the preliminary enquiry, by letter dated 03.08.2013. On 23/24.08.2013, but the Director provided the copy of the documents, as requested, except three very relevant and significant documents, which are as follows:-

> *"(a) Log book of the staff car for the period 1.4.2009 to 31.3.2010 (referred in Article-II), stating not traceable.*
>
> *(b) the file relating to purchase of items for Guest House/NISER (referred in Article-V) along with the copy of the concerned payment vouchers stating those to be not available/traceable in IOP.*
>
> *(c) the copy of earlier statements made by the witnesses during the preliminary enquiry."*

The petitioner also requested for inspection of the personal file, vide mail/letter dated 30.03.2014, 01.04.2014, 04.04.2014 and 02.08.2013, which would enable him to identify the required documents to file in favour of his defence, but the same was not allowed. However, the inquiry officer proceeded with the enquiry so far as enquiry held for charges under Articles-I, II and III on 30.08.2013, where the presenting officer mentioned that for first three articles of charges there are no witnesses and requested to take the first three articles of charges on 30.08.2013. Similarly, on 15.09.2013, the enquiry was held in respect of the charges under Articles-IV and V. Annexure-IV of charge memorandum contains a list of witnesses by whom the articles of charge framed against the petitioner was proposed to be sustained. The named P.Ws. under Article-IV are as follows:-

> *"1. Dr. B.R. Sekhar, Associate Professor, IOP*
> *2. Dr. S.K. Patra, Associate Professor, IOP.*
> *3. Shri M.V. Vanjeeswaran, Adm. Officer, IOP*

4. Shri Prafulla Kumar Senapati, SA/E(now SA/F), IOP
5. Shri Kali Charan Tudu, Assistant, (now Sr Assistant),IOP
6. Shri A.K.Biswal, Sr. Accountant, IOP
7. Shri Baula Tudu, Assistant, IOP
8. Shri J.N.Dash, A.O.(E) (now retired),IOP
9. Shri B.K.Mishra, P.A. to Registrar, IOP
10. Shri J.K.Mishra, Assistant, IOP
11. Shri R.C. Nayak, S.O./D (now retired),IOP
12. Shri P.Acharya, S.O./C (now retired), IOP
13. Shri R.K.Nayak, Tradesman-B, IOP."

On 19.11.2013, Shri R.K. Nayak, Accounts Officer, IOP, one named DW and Charged Officer himself were examined. But fact remains, the enquiry once started has to be concluded on day to day basis. But in the present case, the enquiry once started, was not conducted on day to day basis and the I.O. has not recorded any reason for not being able to do so, as stipulated under provisions of rule-ref. O.M. No. 372/3/2007-ADV-III (Vol-10), Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pension, Govt. of India.

11. The inquiry officer submitted a report on 30.01.2014 with the following findings:-

"ARTICLE-I: LARGELY (NOT WHOLLY OR FULLY) PROVED.

(The IO has stated that:
"I am inclined to agree with the arguments laid by the Charged Officer that the mutation does not confer the title so even if the ownership continues with his mother, the possession over the property stood transferred as a result of family partition effected by his mother in favour of his brothers and sisters. Xxxxx I am using the word largely, not wholly or fully, because the entire blame cannot be apportioned to the Charged Officer in this case. In fact, when it was known to the institute that his mother was a petitioner, the declaration form should ideally have been examined carefully before its acceptance by the then Director, IOP."

ARTICLE-II: NOT PROVED.

ARTICLE-III: At maximum, PARTIALLY PROVED.
(The IO has stated that:

"Though there is no provision in the institute for taking an employee from a PSU on deputation basis, the fact remains that the Charged Officer was taken on deputation for a period of five years vide Office Order no 3593/IP dated 3.10.2001, meaning thereby drawal of Deputation Allowance by him was not unauthorized. This should however have been refunded back by him subsequent to it being pointed out categorically by the Department of Atomic Energy clarifying issue in the matter. He has acted thereon to refund the same, but with effect from 21.5.2002, thus the entire charge of misconduct cannot be apportioned to the

Charged Officer. Maximum, it could be held that the charge is PARTIALLY PROVED."

ARTICLE-IV: PROVED

(Inquiry Officer, on the basis of hearsay and ignoring the recorded depositions of all PWs, which clearly and categorically contradict the complainants' version has mentioned that charge no.4 is fully proved.)

ARTICLE-V: PARTIALLY PROVED.

(The IO has stated that:

"Since the Charged Officer has put the Xerox copy of the note sheet in its place and later on admitted on file before the Director for doing so, I cannot impute any malafide against him. Thus the charge is only PARTIALLY PROVED.")"

But the said report dated 30.01.2014 submitted by Shri K.A.P. Sinha, the inquiry officer was placed before the governing council /disciplinary authority on 19.02.2014, on which deliberation was made and the disciplinary authority agreed with all the findings in the report and resolved that the report be sent to the charged officer asking him to submit his representation, if any. Pursuant to the direction given in memorandum dated 27.02.2014, the petitioner submitted his written representation on the enquiry report on 04.03.2014 pleading that none of the five charges were proved. On 13.03.2014, the Director issued an office order to the petitioner to appear before the governing council on 10.04.2014. In response thereto, on 10.04.2014, the petitioner appeared in person at New Delhi, where he was confronted with two additional statements received from staff nurse dated 07.04.2014 and P.A. to Registrar dated 08.04.2014 along with copy of the so called medicine issue register. The said materials were accepted and utilized by the governing council/disciplinary authority in respect of the charge under Article-I without affording an opportunity to the petitioner to test their veracity, which itself is a new charge. More particularly, both the staff nurse and P.A. to the Registrar were not produced as witnesses. They were neither examined nor cross-examined by the petitioner. Despite the fact that enquiry was conducted on 13.11.2013 and enquiry report submitted on 30.01.2014, but surprisingly Mr. K.A.P. Sinha, who was inquiry officer, being ex-officio member of the governing council/disciplinary authority participated in the said proceeding and cross-examined the petitioner. That itself indicates bias against the petitioner.

12. Furthermore, as per the rule, before issuing the charge memorandum, it was incumbent on governing council/ disciplinary authority to first seek advice of the CVC, but it was not done. Such lapses on the part of the

governing council /disciplinary authority is highlighted in the minutes of meeting of the governing council dated 19.02.2014 at para 5.1. The second stage mandates to seek advice of CVC after deliberation on the findings of the enquiry report and after seeking advice thereon, the same was to be forwarded along with the enquiry report to the charged officer. To overcome their gross laches and lapses, after detailed deliberation, the governing council resolved that in order to speed up the process the report be forwarded to the charged officer at the earliest asking him to make his representation. It was further resolved that the matter be taken up with CVC simultaneously, which would save time. Since it was decided in the 86th meeting to give a personal hearing to the petitioner, before a final decision is taken in the matter, the advice of the CVC can be made available to him at that time and he can be allowed to make any further submission thereon during personal hearing. The Council unanimously resolved and advised that the matter should be followed up with CVC in person by the Director and OSD (Officer on Special Duty) with the help of joint Secretary, DAE, who is none other than the inquiry officer in the present case.

13. The sum total of the procedure adopted in the enquiry proceedings, as discussed above, clearly indicate that such procedure is not known to law. Meaning thereby, the inquiry officer, who conducted the enquiry and submitted his report on 30.01.2014, having beeen inducted as member of the governing council, which is the disciplinary authority, cannot and could not have been a party to the fresh enquiry conducted by such governing council/disciplinary authority, and as such, he is biased.

14. In ***Ranjit Thakur*** (supra), the apex Court in paragraph 7 of the judgment held as follows:-

> *"7. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "am I biased?;" but to look at the mind of the party before him.*
>
> *Lord Esher in Allinson v. General Council of Medical Education and Registration (1894) 1 QB 750 at p 758 said :*
>
> *"The question is not, whether in fact he was or was not biased. The Court cannot inquire into that ..... In the administration of justice, whether by a recognised legal court or by persons who, although not a legal public court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration any person who is to take part in it should not be in such a position that he might be suspected of being biased."*

In Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon (1969) 1 QB 577 at p 599 Lord Denning M. R. observed:

> *".....in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be nevertheless if right minded persons would think that in the circumstances there was a real likelihood of bias on his part, then he should not sit ....."*.

Frankfurter, J. in Public Utilities Commission of the District of Columbia v. Pollak, (1951) 343 US 451 at p 466 said :

> *"The judicial process demands that a Judge move within the framework of relevant legal rules and the court covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole Judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are interested. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly lead others to believe they are operating, Judges recuse themselves. They do not sit in judgment ....."*

> *Referring to the proper test, Ackner L.J. in Regina v. Liverpool City Justices, Ex parte Topping (1983) 1 WLR 119 said :*

> *"Assuming, therefore, that the justices had applied the test advised by Mr. Pearson - do I feet prejudiced? - then they would have applied the wrong test, exercised their discretion on the wrong principle and the same result, namely, the quashing of the conviction would follow."*

> *Thus tested the conclusion becomes inescapable that, having regard to the antecedent events the participation of respondent 4 in the Court-Martial rendered the proceedings coram non judice.*

> *7A. Re : contention (b) : The mere circumstance that the appellant was, at the relevant point of time, serving a sentence of imprisonment and could not, therefore, be said to be in 'active service' does not detract from the fact that he was still "a person subject to this Act." This is clear from the second clause of S. 41(2) which refers to offences committed when not in 'active service'. The difference is in the lesser punishment contemplated. We are, therefore, unable to appreciate the appositeness of this contention of Shri Sinha."*

Similar view has also been taken by the apex Court in ***Amar Nath Chowdhury, Davinder Pal Singh Bhullar*** and ***Narinder Singh Arora*** (supra).

15. The conduct of the inquiry officer also can be deduced from its functioning, meaning thereby in one hand he has discharged his duty as inquiry officer, thereafter having inducted to Governing Counsel, who is the disciplinary authority, he participated in the proceeding of causing further enquiry, thereby, it cannot be construed that he has conducted the enquiry in a fair manner.

16. In ***Ram Lakhan Sharma*** (supra), the apex Court in paragraphs 23, 26, 27, 30, 35 and 36 of the judgment held as follows:-

> *"23. The disciplinary proceedings are quasi-judicial proceedings and the Enquiry Officer is in the position of an independent adjudicator and is obliged to act fairly, impartially. The authority exercising quasi-judicial power has to act in good faith without bias, in a fair and impartial manner.*
>
> *26. In State of U.P. v. Saroj Kumar Sinha [State of U.P. v. Saroj Kumar Sinha, (2010) 2 SCC 772 : (2010) 1 SCC (L&S) 675] , this Court had laid down that Enquiry Officer is a quasi-judicial authority, he has to act as an independent adjudicator and he is not a representative of the department/disciplinary authority/Government. In paras 28 and 30 the following has been held: (SCC p. 782)*
>
> *"28. An Enquiry Officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.*
>
> ***
>
> *30. When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The Enquiry Officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."*
>
> *27. When the statutory rule does not contemplate appointment of Presenting Officer whether non-appointment of Presenting Officer ipso facto vitiates the inquiry? We have noticed the statutory provision of Rule 27 which does not indicate that there is any statutory requirement of appointment of Presenting Officer in the disciplinary inquiry. It is thus clear that statutory provision does not mandate appointment of Presenting Officer. When the statutory provision does not require appointment of Presenting Officer whether there can be any circumstances*

where principles of natural justice can be held to be violated is the broad question which needs to be answered in this case. We have noticed above that the High Court found breach of principles of natural justice in Enquiry Officer acting as the prosecutor against the respondents. The Enquiry Officer who has to be independent and not representative of the disciplinary authority if starts acting in any other capacity and proceeds to act in a manner as if he is interested in eliciting evidence to punish an employee, the principle of bias comes into place.

30. A Division Bench of the Madhya Pradesh High Court speaking through R.V. Raveendran, C.J. (as he then was) had occasion to consider the question of vitiation of the inquiry when the Enquiry Officer starts himself acting as prosecutor in Union of India v. Mohd. Naseem Siddiqui [Union of India v. Mohd. Naseem Siddiqui, ILR 2004 MP 821] . In the above case the Court considered Rule 9(9)(c) of the Railway Servants (Discipline and Appeal) Rules, 1968. The Division Bench while elaborating fundamental principles of natural justice enumerated the seven well-recognised facets in para 7 of the judgment which is to the following effect:

"7. One of the fundamental principles of natural justice is that no man shall be a judge in his own cause. This principle consists of seven well-recognised facets: (i) The adjudicator shall be impartial and free from bias, (ii) The adjudicator shall not be the prosecutor,(iii) The complainant shall not be an adjudicator,(iv) A witness cannot be the adjudicator,(v) The adjudicator must not import his personal knowledge of the facts of the case while inquiring into charges,(vi) The adjudicator shall not decide on the dictates of his superiors or others,(vii) The adjudicator shall decide the issue with reference to material on record and not reference to extraneous material or on extraneous considerations. If any one of these fundamental rules is breached, the inquiry will be vitiated."

35. Thus, the question as to whether the Enquiry Officer who is supposed to act independently in an inquiry has acted as prosecutor or not is a question of fact which has to be decided on the facts and proceedings of a particular case. In the present case we have noticed that the High Court had summoned the entire inquiry proceedings and after perusing the proceedings the High Court came to the conclusion that the Enquiry Officer himself led the examination-in-chief of the prosecution witness by putting questions. The High Court further held that the Enquiry Officer acted himself as prosecutor and Judge in the said disciplinary enquiry. The above conclusion of the High Court has already been noticed from paras 9 and 10 of the judgment of the High Court giving rise to Civil Appeal No. 2608 of 2012.

36. The High Court having come to the conclusion that the Enquiry Officer has acted as prosecutor also, the capacity of independent adjudicator was lost while adversely affecting his independent role of adjudicator. In the circumstances, the principle of bias shall come into play and the High Court was right in setting aside the dismissal orders by giving liberty to the appellants to proceed with inquiry afresh. We make it clear that our observations as made above are in the facts of the present cases."

Similar view has also been taken in ***Prakash Kumar Tandon*** (supra).

17. The inquiry officer, being a member of the governing council/disciplinary authority, cannot and could not have cross-examined the charged officer, namely, the petitioner herein.

18. In ***Naman Singh Shekhawat*** (supra), the apex Court in paragraph 27 of the judgment held as follows:

> *"**27.** The bias on the part of the inquiry officer is explicit from the record. Why the inquiry officer cross-examined the respondent is beyond anybody's comprehension. He was not the prosecutor. A presenting officer had been appointed. The inquiry officer could not have taken over the job of the presenting officer, particularly when he was a superior officer. Valid and sufficient reasons have not been assigned by the inquiry officer in this behalf. His finding that the respondent should have informed his superior who was available at the close point, is contrary to the evidence of Mool Singh. According to him, the practice followed by the officers similarly situated was to take the goods found abandoned to the Customs Department and to the police station."*

Similar view has also been taken by the apex Court in ***Saroj Kumar Sinha*** (supra).

19. It has also been made clear that the CVO, namely, Dr. B.R. Sekhar, who was the complainant and also a witness to the charge under Article-IV of the memorandum of charge framed against the petitioner, wrote to CVC for imposing major penalty. On 12.08.2014, the Director communicated, vide memorandum no. IOP/ADMN/2914/1852 dated 12.08.2014, enclosing copy of the Office Memorandum no. 12/ATM.004 dated 30.07.2014 of CVC, wherein CVC agrees with the recommendation of Governing Counsel/disciplinary authority and CVO to impose major penalty on the petitioner. This shows that the Disciplinary Authority, along with CVO, had premeditated to impose major penalty but their intention remained undisclosed to the petitioner till issuance of the Final Order. More particularly, the CVC has committed illegalities in regard to obtaining views of the CVO. As has been discussed above, before framing charge, permission from CVC was not obtained, and further the inquiry report with CVC views had to be forwarded to the charged officer. The same was not duly followed in order to hastily impose the punishment on the petitioner. Therefore, it violates the principle of natural justice.

20. In ***S.N. Goyal*** (supra), the apex Court in paragraphs 26.1 and 26.4 of the judgment held as follows:

> *"26.1. In Nagaraj Shivarao Karjagi vs. Syndicate Bank -1991 (3) SCC 219, this Court considered a case where the employer Bank referred the matter to the Chief*

Vigilance Commissioner (for short 'CVC') for advice and the Commissioner made a specific recommendation that the employee may be compulsorily retired from service by way of punishment. The impugned directive of the Ministry of Finance directed that the disciplinary authority and appellate authority could not impose a lesser punishment than what was suggested by CVC without its concurrence. The Bank accordingly imposed the penalty of compulsory retirement. This Court held that the advice tendered by the CVC was not binding on the punishing authority and it was not obligatory upon the punishing authority to accept the advice of the CVC. This Court held that no third party like CVC or Central Government could dictate the disciplinary authority or the appellate authority as to how they should exercise their power and what punishment they should impose on the delinquent officer. This Court also held that the Finance Ministry directive that a punishment lesser than what was recommended by the CVC could not be imposed, was without jurisdiction and contrary to the statutory regulations governing disciplinary matters. The said decision is of no assistance in this case, as there is no directive that the recommendation of the Vigilance Department is mandatory and should be followed while imposing punishment; nor has the Vigilance Department directed the punishing authority to impose any specific punishment; nor has the appointing authority acted on the dictates of the Vigilance Department.

(Emphasis supplied)

26.2. The next decision relied upon by the respondent is the decision rendered by this Court in State Bank of India vs. D.C. Aggarwal [1993 (1) SCC 13]. In that case, the Enquiry Officer recommended exoneration of the employee. Instead of acting on the recommendation, the Bank directed the Enquiry Officer to submit the report through CVC. The CVC disagreed with the finding of the Enquiry Officer and recorded a finding of guilt and recommended the imposition of major penalty of removal. A copy of the CVC's recommendation was not furnished to the employee. The disciplinary authority acting on the recommendation of the CVC and agreeing with CVC's finding of guilt, passed an order but imposed a punishment lesser than what was directed by CVC. This Court held that the order of the disciplinary authority imposing punishment was vitiated as it violated the principles of natural justice by denying the copy of the recommendation of the CVC which was prepared behind his back. The said decision therefore related to CVC examining the facts of the case and arrived at a finding relating to guilt contrary to the finding of the Enquiry Officer and such finding being accepted by the Disciplinary Authority without giving opportunity to the employee to comment upon the CVC Report finding him guilty. In this case as noticed above, the Enquiry Report relating to guilt was not referred to the opinion of the Vigilance Department at all. The Vigilance Department neither expressed any view in regard to the finding of guilt recorded by the Enquiry Officer nor did it re-assess the evidence or arrive at a finding different from that of the Enquiry Officer. It merely opined that the case was not a fit one for showing leniency while imposing punishment and left it to the Appointing Authority to take his own decision in the matter. Therefore, this decision is also of no assistance. (Emphasis supplied)

26.3. Reference was next made to the decision of this Court in Mohd. Quaramuddin (dead) By LRs. vs. State of AP [1994 (5) SCC 118]. In that case, the

> *Chief Vigilance Commissioner's report which formed part of the report of the enquiry and which was taken into consideration by the disciplinary authority was not supplied to the employee. It was held that the omission has vitiated the order of dismissal. The said decision is also of no assistance.*
>
> *26.4. The last decision relied on by the respondent was UP State Agro Industrial Corporation Ltd. Vs. Padam Chand Jain 1995 SCC (L and S 1011). In that case, the report of the Enquiry Officer was in favour of the employee exonerating him of all charges. The Disciplinary Authority invited the comments of the Accounts Officer and relying on the basis of the adverse comments made by such officer, held the employee guilty and terminated him from service. This Court upheld the view of the High Court that the decision of the Disciplinary Authority was vitiated on account of the same being influenced by some extraneous material in the form of adverse comments of the Accounts Officer. That is not the case here."*

Similar view has also been taken in ***S.S. Sheokand*** (supra).

21. Admittedly, the evidence which has been taken on 07.04.2014 and 08.04.2014 from the Staff-Nurse and also P.A. to Registrar, along with copy of the so called medicine issue registrar, which had been utilized against the petitioner in respect of the charge under Article-I, neither the inquiry officer nor the governing council/disciplinary authority, where the inquiry officer is one of the member, had offered an opportunity to the petitioner to test the veracity of the statements made by such witnesses, and as such, they having not been produced as witnesses, and the evidence collected after the enquiry having been utilized against the petitioner, the principles of natural justice have been violated.

22. In ***Roop Singh Negi*** (supra), the apex Court in paragraphs 14 and 18 of the judgment held as follows:

> ***"14.*** *Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.*
>
> ***18.*** *In Narinder Mohan Arya v. United India Insurance Co. Ltd. [(2006) 4 SCC 713 : 2006 SCC (L&S) 840] whereupon both the learned counsel relied, this Court held: (SCC p. 724, para 26)*

"26. In our opinion the learned Single Judge and consequently the Division Bench of the High Court did not pose unto themselves the correct question. The matter can be viewed from two angles. Despite limited jurisdiction a civil court, it was entitled to interfere in a case where the report of the enquiry officer is based on no evidence. In a suit filed by a delinquent employee in a civil court as also a writ court, in the event the findings arrived at in the departmental proceedings are questioned before it, it should keep in mind the following: (1) the enquiry officer is not permitted to collect any material from outside sources during the conduct of the enquiry. (See State of Assam v. Mahendra Kumar Das [(1970) 1 SCC 709] .) (2) In a domestic enquiry fairness in the procedure is a part of the principles of natural justice. (See Khem Chand v. Union of India [AIR 1958 SC 300 : 1958 SCR 1080] and State of U.P. v. Om Prakash Gupta[(1969) 3 SCC 775] .) (3) Exercise of discretionary power involves two elements—(i) objective, and (ii) subjective and existence of the exercise of an objective element is a condition precedent for exercise of the subjective element. (See K.L. Tripathi v. SBI[(1984) 1 SCC 43 : 1984 SCC (L&S) 62] .) (4) It is not possible to lay down any rigid rules of the principles of natural justice which depend on the facts and circumstances of each case but the concept of fair play in action is the basis. (See Sawai Singh v. State of Rajasthan [(1986) 3 SCC 454 : 1986 SCC (L&S) 662] .) (5) The enquiry officer is not permitted to travel beyond the charges and any punishment imposed on the basis of a finding which was not the subject-matter of the charges is wholly illegal. (See Export Inspection Council of India v. Kalyan Kumar Mitra [(1987) 2 Cal LJ 344] .) (6) Suspicion or presumption cannot take the place of proof even in a domestic enquiry. The writ court is entitled to interfere with the findings of the fact of any tribunal or authority in certain circumstances. (See Central Bank of India Ltd. v. Prakash Chand Jain [AIR 1969 SC 983 : (1969) 1 SCR 735] and Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429].)"

23. The inquiry officer submitted his report on 30.01.2014. The governing council/disciplinary authority deliberated on such enquiry report submitted by inquiry officer, Mr. K.A.P. Sinha and agreed with the finding in the report. Thereafter the same was given to the petitioner on 27.02.2014. Before using the enquiry officer's report, it should have been given to the petitioner, his views should have been obtained, then decision should have been taken whether to accept the report or not, in view of the provisions contained in Rule 15 of Central Civil Services (Classification, Control and Appeal) Rules, 1965.

24. In ***V. K.K. Verma*** (supra), the apex Court in paragraph-28 of the judgment held as follows:

"28. This being the position, in the instant case it is clear that the appellant had not followed their own regulations which clearly require the disciplinary authority to record the reasons where it differed from the inquiry officer. The regulations also clearly lay down that a copy of the inquiry report and the order of disagreement are to be provided to the employee. In the present case, we are concerned with the

stage where the Disciplinary Authority differs with the inquiry officer on his findings. This is prior to arriving at the guilt of the employee. His right to receive the report and defend at that stage before the guilt is established is very much recognized as seen above. Counsel for the appellant submitted that Constitution Bench has held in Union of India and Anr. v. Tulsiram Patel [1985 (3) SCC 398] : (AIR 1985 SC 1416) that after the 42nd Amendment, the employees are not entitled in law to be heard in the matter of penalty. In Karunakar's case (AIR 1994 SC 1074 : 1994 AIR SCW 1050) (supra), another Constitution Bench has referred to Tulsiram Patel in paragraph 4 and then explained the legal position in this behalf in paragraph 7 as follows :-

"While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the 42nd Amendment."

Thus, the right to represent against the findings in the inquiry report to prove one's innocence is distinct from the right to represent against the proposed penalty. It is only the second right to represent against the proposed penalty which is taken away by the 42nd Amendment. The right to represent against the findings in the report is not disturbed in any way. In fact, any denial thereof will make the final order vulnerable."

25. On the factual matrix discussed above, it is made clear that once the report submitted by the inquiry officer has been accepted by the disciplinary authority on 19.02.2014, the disciplinary authority cannot differ with such report unless the procedure to defer, as indicated in the following judgments, is restored to.

26. In ***Yoginath D. Bagde*** (supra), the apex Court in paragraphs, 28, 30, 31, 33, 36, 37 and 39 of the judgment held as follows:-

"28. In view of the provisions contained in the statutory Rule extracted above, it is open to the Disciplinary Authority either to agree with the findings recorded by the Inquiring Authority or disagree with those findings. If it does not agree with the findings of the Inquiring Authority, it may record its own findings. Where the Inquiring Authority has found the delinquent officer guilty of the charges framed against him and the Disciplinary Authority agrees with those findings, there would arise no difficulty. So also, if the Inquiring Authority has held the charges proved, but the Disciplinary Authority disagrees and records a finding that the charges were not established, there would arise no difficulty. Difficulties have arisen in all those cases in which the Inquiring Authority has recorded a positive finding that

the charges were not established and the delinquent officer was recommended to be exonerated, but the Disciplinary Authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officer was liable to be punished. This difficulty relates to the question of giving an opportunity of hearing to the delinquent officer at that stage. Such an opportunity may either be provided specifically by the Rules made under Article 309 of the Constitution or the Disciplinary Authority may, of its own, provide such an opportunity. Where the Rules are in this regard silent, and the Disciplinary Authority also does not give an opportunity of hearing to the delinquent officer and records findings, different from those of the Inquiring Authority that the charges were established, "an opportunity of hearing" may have to be read into the Rule by which the procedure for dealing with the Inquiring Authority's report is provided principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be 'not guilty' by the Inquiring Authority, is found 'guilty' without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not guilty" has already been recorded.

30. Recently, a three-Judge Bench of this Court in Punjab National Bank v. Kunj Behari Mishra (1998) 7 SCC 84 : AIR 1998 SC 2713 : (1998 AIR SCW 2762 : 1998 Lab IC 3012 : 1998 All LJ 2009), relying upon the earlier decisions of this Court in State of Assam v. Bimal Kumar Pandit (1964) 2 SCR 1 : AIR 1963 SC 1612; Institute of Chartered Accountants of India v. L. K. Ratna (1986) 4 SCC 537 : (AIR 1987 SC 71) as also the Constitution Bench decision in Managing Director, ECIL, Hyderabad v. B. Karunakar (1993) 4 SCC 727 : (1994 AIR SCW 1050 : AIR 1994 SC 1074 : 1994 Lab IC 762) and the decision in Ram Kishan v. Union of India (1995) 6 SCC 157 : (1995 AIR SCW 4027 : AIR 1996 SC 255), has held that (AIR 1998 SC 2713 : 1998 AIR SCW 2762 : 1998 Lab IC 3012 : 1998 All LJ 2009, para 17) :

"It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority."

31. The Court further observed as under (AIR 1998 SC 2713 : 1998 AIR SCW 2762 : 1998 Lab IC 3012 : 1998 All LJ 2009, para 18) :

"When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and inequitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed."

33. In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges levelled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter, namely, the Disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the Enquiry Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away in any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution.

36. Along with the show-cause notice, a copy of the findings recorded by the Enquiry Officer as also the reasons recorded by the Disciplinary Committee for disagreeing with those findings were communicated to the appellant but it was immaterial as he was required to show-cause only against the punishment proposed by the Disciplinary Committee which had already taken a final decision

that the charges against the appellant were proved. It was not indicated to him that the Disciplinary Committee had come only to a "tentative" decision and that he could show cause against that too. It was for this reason that the reply submitted by the appellant failed to find favour with the Disciplinary Committee.

37. Since the Disciplinary Committee did not give any opportunity of hearing to the appellant before taking a final decision in the matter relating to findings on the two charges framed against him, the principles of natural justice, as laid down by a Three-Judge Bench of this Court in Punjab National Bank v. Kunj Behari Mishra (1998) 7 SCC 84 : AIR 1998 SC 2713 : (1998 AIR SCW 2762 : 1998 Lab IC 3012 : 1998 All LJ 2009), referred to above, were violated.

39. The contention apparently appears to be sound but a little attention would reveal that it sounds like the reverberations from an empty vessel. What is ignored by the learned counsel is that a final decision with regard to the charges levelled against the appellant had already been taken by the Disciplinary Committee without providing any opportunity of hearing to him. After having taken that decision, the members of the Disciplinary Committee merely issued a notice to the appellant to show-cause against the major punishment of dismissal mentioned in Rule 5 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979. This procedure was contrary to the law laid down by this Court in the case of Punjab National Bank (1998 AIR SCW 2762 : AIR 1998 SC 2713 : 1998 Lab IC 3012 : 1998 All LJ 2009) (supra) in which it had been categorically provided, following earlier decisions, that if the Disciplinary Authority does not agree with the findings of the Enquiry Officer that the charges are not proved, it has to provide, at that stage, an opportunity of hearing to the delinquent so that there may still be some room left for convincing the Disciplinary Authority that the findings already recorded by the Enquiry Officer were just and proper. Post-decisional opportunity of hearing, though available in certain cases, will be of no avail, at least, in the circumstances of the present case." ***(Emphasis supplied)***

Similar view has also been taken in ***Punjab National Bank v. Kunj Behari Misra,*** AIR 1998 SC 2713 (Para -17, 18 & 19).

27. In respect of the charge under Article-I, the inquiry officer gave the finding not holding the petitioner fully guilty of the charge in the enquiry report Annexure-20 at page 197 of the writ petition, but the disciplinary authority completely overturned the finding of inquiry officer in Annexure-26 at page 279 of the brief and held that the petitioner is fully guilty of the charge, and such finding is contrary to the law laid down by the apex Court wherein it has been held that first, the report of the inquiry officer has to be given to the employee before it is utilized in any manner, second, if the disciplinary authority intends to differ, then thereafter he has to propose tentative conclusions in that regard with reasons for disagreement in the said proposal, called upon the employees to submit his views on the same, thereafter the disciplinary authority will have to hear the employee

concerned on the question of proposed difference and then can differ. This procedure has not been followed in the present case.

28. The inquiry officer has lost sight of the fact that the allegation basing upon which the charges has been framed against the petitioner, has been leveled at a belated stage, meaning thereby, on 01.03.2005, consequent upon family partition on 22.02.2005, the petitioner gave declaration about mother being dependent on him, which has been accepted by the Director, which is available on record as Annexure-32 of the rejoinder affidavit. Further, on 15.04.2011, on clarification being sought by Director, Administrative Officer clarified that the petitioner is eligible for reimbursement of medical expenses of his mother. The Director approved on 01.03.2005, but the charges communicated on 25.03.2013 after lapse of eight years.

29. So far as the charge under Article-IV is concerned, it relates to "misbehavior to employees". Five complaints were part of the charge. They relate to the year 2004, 2007, 2010, 2011 and 2012. The petitioner was never confronted with the complaints of the year 2004, 2009, 2010, 2011 and 2012 at the relevant point of time. So far as the complaints of the year 2004, 2007 and 2011 are concerned, the same were not addressed to the office, but such alleged complaints were made by the so called complainants to their Association. Complaints of 2010 and 2012 were addressed to the Director, but no enquiry was conducted on any of the five complaints at the relevant point of time. So far the charge pertaining to NISER is concerned, it relates to the year 2008, which is evident from the charge under Article-V, in respect of that the petitioner was communication in 2013. As such, the same was communicated after five years of so called occurrence. Therefore, on the ground of delay, the charge, as levelled, has to be quashed.

30. In ***P.V. Mahadevan v. MD T.N. Housing Board.,*** 2005 (6) SCC 636 the apex Court in paragraphs 8, 10 and 11 of the judgment held as follows:

> *"8. Our attention was also drawn to the counter-affidavit filed by the respondent Board in this appeal. Though some explanation was given, the explanation offered is not at all convincing. It is stated in the counter-affidavit for the first time that the irregularity during the year 1990, for which disciplinary action had been initiated against the appellant in the year 2000, came to light in the audit report for the second half of 1994-95.*
>
> *10. Section 118 specifically provides for submission of the abstracts of the accounts at the end of every year and Section 119 relates to annual audit of accounts. These two statutory provisions have not been complied with at all. In the instant case the transaction took place in the year 1990. The expenditure ought to*

have been considered in the accounts of the succeeding year. In the instant case the audit report was ultimately released in 1994-95. The explanation offered for the delay in finalising the audit account cannot stand scrutiny in view of the above two provisions of the Tamil Nadu Act 17 of 1961. It is now stated that the appellant has retired from service. There is also no acceptable explanation on the side of the respondent explaining the inordinate delay in initiating departmental disciplinary proceedings. Mr R. Venkataramani, learned Senior Counsel is appearing for the respondent. His submission that the period from the date of commission of the irregularities by the appellant to the date on which it came to the knowledge of the Housing Board cannot be reckoned for the purpose of ascertaining whether there was any delay on the part of the Board in initiating disciplinary proceedings against the appellant has no merit and force. The stand now taken by the respondent in this Court in the counter-affidavit is not convincing and is only an afterthought to give some explanation for the delay.

11. Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary enquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer."

Similar view has also been taken in ***Secretary, Ministry of Defence v. Prabhash Chandra Mirdha,*** (2012) 11 SCC 565. (Para-8).

31. In view of the discussions made above, the enquiry having not been done by following due procedure, the punishment so imposed should not have been inflicted on the petitioner. Therefore, the enquiry must be in conformity with the rules.

32. In ***Harjit Singh*** (supra), the apex Court in paragraphs 12 and 13 of the judgment held as follows:

"12. We are not oblivious of the fact, that it is not necessary to repeat the wordings of the section for the purpose of complying with the principles thereof in the fact situation obtaining in a given case. But departmental proceeding is quasi-criminal in nature. The procedures laid down therefor were required to be complied with, embodying the principles of natural justice.

> *13. Justice Frankfurter in Vitarelli v. Seaton [359 US 535 : 3 L Ed 2d 1012 (1959)] stated: (US pp. 546-47)*
>
> *"An executive agency must be rigorously held to the standards by which it professes its action to be judged. … Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. … This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."*
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> *(See Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489 : AIR 1979 SC 1628] .)"*

33. In view the aforesaid facts and circumstances, since in the instant case there is gross violation of principle of natural justice, the entire proceeding is vitiated, as held by the apex Court in ***Mysore Urban Development Authority by its Commissioner*** **v. Veer Kumar Jain,** (2010) 5 SCC 791, paragraphs 17, 18 and 19 being relevant are extracted hereunder:-

> *"17. We may refer to some of the decisions of this Court having a bearing on the issue. In S.L. Kapoor v. Jagmohan [(1980) 4 SCC 379] this Court rather rigidly and sternly observed: (SCC p. 395, para 24)*
>
> *"24. … In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced."*
>
> *18. In State Bank of Patiala v. S.K. Sharma [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] this Court stated that the aforesaid observation should be understood in the context of the facts of that case and in the light of the subsequent Constitution Bench judgment in ECIL v. B. Karunakar [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] and C.B. Gautam v. Union of India [(1993) 1 SCC 78] . This Court observed: (S.K. Sharma case [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] , SCC pp. 385 & 391, paras 28 & 33)*
>
> *"28. The decisions cited above make one thing clear viz. principles of natural justice cannot be reduced to any hard-and-fast formulae. As said in Russell v. Duke of Norfolk [(1949) 1 All ER 109 (CA)] way back in 1949, these principles cannot be put in a straitjacket. Their applicability depends upon the context and the facts and circumstances of each case. (See Mohinder Singh Gill v. Chief Election Commr. [(1978) 1 SCC 405] .) The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected.*
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> ***
>
> *33. (6) While applying the rule of audi alteram partem (the primary principle of natural justice) the court/tribunal/authority must always bear in mind the ultimate*

and overriding objective underlying the said rule viz. to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them."

19. Ensuring that there is no failure of justice is as important as ensuring that there is a fair hearing before an adverse order is made. This Court in Roshan Deen v. Preeti Lal [(2002) 1 SCC 100 : 2002 SCC (L&S) 97] held: (SCC p. 106, para 12)

"12. … Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of U.P. v. District Judge, Unnao [(1984) 2 SCC 673]). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

34. Since there is gross violation of the principle of natural justice, the entire proceeding is a nullity, in view of the judgment of the apex Court in ***Jayendra Vishnu Thakur v. State of Maharashtra and another,*** (2009) 7 SCC 104, where in paragraph-57 it has been held as follows:-

"57. Mr Naphade would submit that the appellant did not suffer any prejudice. We do not agree. Infringement of such a valuable right itself causes prejudice. In S.L. Kapoor v. Jagmohan[(1980) 4 SCC 379] this Court clearly held: (SCC p. 395, para 24)

"24. … In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

35. Much reliance was placed by Mr. B.K. Mohanty, learned Senior Counsel appearing for the opposite parties on the partition deed of the properties, which is stated to have not been registered and mother not being given a share makes the partition invalid, in view of the judgments of the apex Court in ***Deo Chand v. Shiv Ram,*** (1969) 3 SCC 330 and ***Biswanath Panda v. Sarat Chandra Panda, 108 (2009) CLT 287.*** But this fact is now not necessary to be adjudicated because of the fact that mother is fully dependent upon the petitioner, and that consequent upon the family partition deed dated 28.03.2005, pursuant to which the petitioner gave a declaration on 01.03.2005, about mother being dependent on him, which was accepted

by the Director IoP, pursuant to document in Annexure-32 to the rejoinder affidavit filed by the petitioner. Further, upon clarification sought by the Director on 15.04.2011, the administrative officer clarified that the petitioner is eligible for reimbursement of medical expenses of the mother which was also duly approved by the Director on 01.03.2005, and the charge concerning to the same was communicated on 25.03.2013, after lapse of eight years. Therefore, going into that aspect of the matter at this stage is absolutely unwarranted, because the authorities with their eyes wide open have taken into consideration and accepted that the mother being a dependant the petitioner is entitled to get the benefits, and as such, the said benefits having been extended, after eight years it cannot allowed to be reopened at this stage irrespective of the fact, whether the partition deed is a registered one, and whether the mother is entitled to one share or not, which would be adjudicated in the proper forum only but not in this proceeding.

36. Much emphasis was laid by learned Senior Counsel Mr. B.K. Mohanty on the misbehavior of the petitioner to the employees and in regard to the same reliance has been placed on the complaints, which relate to the years 2004, 2007, 2011 and 2012, and as such, the petitioner was never confronted with the complaints of the year 2004, 2007 and 2011 at the relevant point of time, and more particularly, such complaints of the year 2004, 2007, 2011 were not addressed to the office but were made by so called complainants to their association. The complaints of 2010 and 2012 were although addressed to the Director, but no enquiry was conducted on any of the five complainants at the relevant point of time. Subsequently, on that basis if charges have been framed at a belated stage, without any opportunity being given to the petitioner, the same also cannot sustain in the eye of law.

37. Coming to the judgment of the apex Court in ***B. Karunakar*** (supra), as cited by Mr. B.K. Mohanty, learned Senior Counsel appearing for the opposite parties, there is no dispute with regard to the proposition laid therein, but fact of the said case is quite distinguishable from the present one, and as such, the same has no application to the present case.

38. Reverting back to last contention of learned Senior Counsel Mr. B.K. Mohanty, that in the event this Court finds that there was procedural lacune, in view of the judgment of the apex Court in ***Bhaskar Chandra Mohapatra's*****,** the matter may be remitted back to the authority concerned for reconsideration, instead of quashing the proceeding as a whole, this question

does not arise at this stage, in view of the fact that the petitioner has already been superannuated from service on attaining the age of superannuation.

39. As has been already held, the entire proceeding initiated against the petitioner is vitiated due to non-compliance of principle of natural justice, and as such, the same is a nullity. Therefore, this Court is of the considered view that the proceeding so initiated against the petitioner and the consequential penalty imposed on him in Annexure-26 dated 05.11.2014 cannot sustain in the eye of law and the same are liable to be quashed and are accordingly quashed. As a result thereof, the petitioner shall be entitled to get all the service and financial benefits, as due and admissible to him in accordance with law, which should be granted to him within a period of four months from the date of communication of this judgment.

40. In the result, the writ petition is allowed. There shall be however no order to costs.

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2019 (III) ILR - CUT- 150

D. DASH, J.

CRA NO. 288 OF 1994

NARAHARI DAS @ BABAJI DAS .....Appellant

.Vs.

STATE OF ORISSA .....Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction under section 326 – Deceased died in hospital after four days of the assault – Evidence of prosecution witnesses clearly says the accused gave two lathi blows on the two shoulders of the deceased – Defence plea that the deceased while chasing dashed against an electric pole and fell down – Doctor who initially treated the injured did not say about any fracture – However, the Doctor who conducted post mortem says about presence of fracture on shoulder but prosecution did not produce the X-ray films and the report of Radiologist – Whether fatal to the prosecution case – Held, Yes.

"Now it arises for consideration as to whether the prosecution was under the obligation to produce the X-ray film and prove the Radiologist's report in establishing the fact that the deceased had sustained grievous injuries i.e. fractures on her shoulders which would go to judge the sustainability of the finding of the order of conviction recorded by the trial court for commission of offence under section 326 IPC. Admittedly, the deceased in first had been taken to the nearby

hospital and then to another, finally to the hospital at Bhadrak. P.W. 6 has no doubt stated to have noticed one compound fracture over neck of right humerus and a compound fracture on neck of left humerus of the deceased The post mortem examination was conducted on 29.7.1992 as against the incident which had taken place on 25.7.1992. The prosecution has examined P.W. 7, the doctor who was then attached to Tihidi CHC. He has not deposed anything as to fractures on the shoulders of the deceased; even no suspicion has been raised as to that by him. In view of the above evidence, the prosecution even though has proved that the deceased has two fractures on her shoulders though the doctor conducting post mortem examination, the same cannot be banked upon to say that it had been sustained by her on 25.7.1992 being the direct result of the lathi blow given by the accused. In that view of the mater, the finding of the trial court that the accused is guilty for commission of offence under section 326 IPC cannot sustain and it has to be altered to section 324 IPC. Accordingly, the accused is convicted for offence under section 324 IPC." *(Para 6)*

For Appellants : Mr. D.P. Dhal
For Respondent : Mr. P.Ch. Das, Addl. Standing Counsel.

JUDGMENT Date of Hearing and Judgment : 25.07.2019

D. DASH, J.

The appellant by filing this appeal has challenged the judgment of conviction and order of sentence dated 30.07.1992 passed by the learned Addl. Sessions Judge, Bhadrak in S.T. No. 161/25 of 1993. In the trial held against the appellant (accused) for commission of offence under section 302 IPC, he has been convicted for commission of offence under section 326 IPC and accordingly has been sentenced to undergo rigorous imprisonment for a period of three years and pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for two months.

2. The prosecution case in short is that on 25.7.1992, the informant-P.W.1, his mother (deceased) and P.W.2 were uprooting paddy plants in different paddy fields near their house. It was around 11.00 A.M. the accused arrived there and abused P.W. 1 in filthy language as also accused informant's mother (deceased). P.W. 1 and her mother then protested. So the accused immediately brought a bamboo stick from the bari of one Chaitanya (D.W.1) and rushed at P.W. 1 to assault. Seeing the accused rushing when P.W.1 stepped behind to save himself from the assault, the deceased, came forward to intervene and then accused dealt two blows on her shoulders. It is further stated that the accused gave a violent blow at the abdomen of the deceased. She fell down on the ground holding the abdomen. P.W.1 then raised hullah. The occurrence is said to have been seen by P.Ws.3 and 4 by remaining near their house and they rushed to the spot. The deceased was

removed to the village and thereafter was taken to nearby hospital and ultimately to the hospital at Bhadrak for better treatement. The deceased while undergoing the treatment died.

The report as to the death being made to the police, case was registered and the investigation commenced. On completion of investigation, charge sheet was submitted against the accused for facing trial for commission of offence under section 302 IPC. After closure of the committal proceeding, the accused stood charged for offence under section 302 IPC and faced the trial.

3. Prosecution in the trial has examined in total eight witnesses as against one from the side of the defence. Besides leading the evidence from the lips of those witnesses, the prosecution has proved the FIR (Ext. 1), injury report (Ext.3) and the post mortem report (Ext.2). The seizure list, inquest report and other contemporaneous documents prepared in course of investigation have also been proved. The bamboo lathi which is said to be the weapon of offence and the saree of the deceased have been marked as material objects i.e. M.Os. I and II respectively.

The trial court upon evaluation of evidence of P.Ws. 1, 2, 3 and 4 as to the happening of the incident, the role played by the accused as stated by them has ultimately has come to conclude that the accused is not liable for offence under section 302 IPC. Next having gone to accept the evidence of P.Ws. 1 to 4, it has been held that the accused had assaulted the deceased by lathi on both the shoulders. In that view of the matter returning finding that the deceased had sustained grievous injury by resulting from the blows given by the accused by means of M.O.I on her shoulders, the accused has been convicted for voluntarily causing grievous hurt by dangerous weapon i.e. lathi to the deceased. This has led the trial court to convict the accused for commission of offence under section 326 IPC and impose sentence as aforesaid.

4. Learned counsel for the appellant (accused) submits that in the absence of production of X-ray films and report of the Radiologist establishing the fracture being suffered by the deceased on both her shoulders, the trial court has erred in holding the accused guilty for commission of offence under section 326 IPC. According to him, even accepting version of P.Ws. 1 to 4, the possibility of sustaining the injuries on the shoulders of the deceased on account of fall at a later stage of the incident is not altogether ruled out and therefore authorship of the injury

received by the deceased on her shoulders ought not to have been attributed to this accused. It is his further submission that the trial court has not bestowed its attention in any manner to the case projected by the defence. According to him, the defence through D.W. 1 having proved its case that the deceased while chasing dashed against electric pole fell on the fence of her bari facing towards ground and that has resulted the injuries on her shoulders by coming lastly in contact with bomboo pillars on the fence. It is submitted that the trial court accepting the evidence adduced from the side of the defence ought not to have convicted the accused for the offence. Alternatively, he submits that in the worst case, the conviction is to be recorded for offence under section 324 IPC and appropriate sentence keeping in view the long lapse of time since the case as also the suffering of the accused for long 27 years since the occurrence as well as long pendency of this appeal need be imposed.

5. Learned counsel for the State submits all in favour of the finding of the trial court holding the accused guilty for commission of offence under section 326 IPC. It is his submission that in view of the positive evidence of P.Ws. 1 to 4 that the accused assaulted the deceased by means of lathi on her shoulders causing fractures when the P.W. 1 seeing the accused rushed at him went little behind and the deceased came to intervene, the court below has rightly held the accused guilty of offence under section 326 IPC. He further submits that non-production of the X-ray film or the report of the Radiologist in the case has no significance. According to him, since the doctor conducting the autopsy has clearly noted to have seen the fractures on the shoulders of the deceased, unless the positive evidence of P.Ws. 1 to 4 are kept out of consideration for any such cogent reason, the accused has to face the conviction for offence under section 326 IPC. He further submits that the defence version of the incident as presented on its face value is not acceptable particularly when the evidence of doctor P.W. 6 is taken into account which clearly improbabilies the case that the deceased would be sustaining all those external and internal injuries in the process as suggested.

6. In order to address the rival submission, the evidence of P.W. 1 (informant and son of the deceased) has to be first kept in view. He has stated about the role of the accused in giving two blows on his mother's shoulders by means of lathi resulting her fall. It has also been stated by him that after receiving blows, there was swelling on the left shoulder of his mother. Evidence of P.Ws. 2, 3 and 4 run in the same vein so far as this first part of the incident is concerned. The defence has not been able to shake the

evidence of P.Ws. 1 to 4 except throwing the suggestion that it had happened when the deceased while chasing them received a fall. The defence case in my considered view when tested with the evidence of P.W. 6, the doctor appears to be quite improbable.

For the discussion and reasons as above, the trial court having recorded a factual finding that the deceased had sustained injuries on her shoulders by the assault of the accused by means of lathi cannot be found fault with.

Now it arises for consideration as to whether the prosecution was under the obligation to produce the X-ray film and prove the Radiologist's report in establishing the fact that the deceased had sustained grievous injuries i.e. fractures on her shoulders which would go to judge the sustainability of the finding of the order of conviction recorded by the trial court for commission of offence under section 326 IPC.

Admittedly, the deceased in first had been taken to the nearby hospital and then to another, finally to the hospital at Bhadrak. P.W. 6 has no doubt stated to have noticed one compound fracture over neck of right humerus and a compound fracture on neck of left humerus of the deceased The post mortem examination was conducted on 29.7.1992 as against the incident which had taken place on 25.7.1992. The prosecution has examined P.W. 7, the doctor who was then attached to Tihidi CHC. He has not deposed anything as to fractures on the shoulders of the deceased; even no suspicion has been raised as to that by him.

In view of the above evidence, the prosecution even though has proved that the deceased has two fractures on her shoulders though the doctor conducting post mortem examination, the same cannot be banked upon to say that it had been sustained by her on 25.7.1992 being the direct result of the lathi blow given by the accused.

In that view of the mater, the finding of the trial court that the accused is guilty for commission of offence under section 326 IPC cannot sustain and it has to be altered to section 324 IPC. Accordingly, the accused is convicted for offence under section 324 IPC.

7. Coming to the question of sentence, keeping in view all the relevant factors such as lapse of 27 years since the incident, the age of the accused standing at 65 by now and his suffering for such long period as well as the natural and normal circumstances coming to stand during the period, when it is stated at the Bar that the accused has remained in custody in the case from

28.8.1992 to 26.11.1992, this Court feels that the substantial sentence, if is reduced to the period already undergone, would meet the ends of justice. The order as to the imposition of sentence of fine with default stipulation however stands as it is.

8. With the modification of the judgment of conviction and sentence to the extent as indicated in the foregoing para, the appeal stands disposed of.

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2019 (III) ILR - CUT-155

D. DASH, J.

CRA NO. 234 OF 1988

JAGABANDHU NAYAK ……...Appellant

.Vs.

STATE OF ORISSA ……Respondent

INDIAN PENAL CODE, 1860 – Section 304 – II – Offence under – Conviction – Case and counter case – Two versions as to the occurrence are coming – Prosecution has not explained as to how the mother of the accused sustained the injuries – I.O. (P.W.10) in his evidence does not whisper any word about the case instituted against the members of the prosecution party and submission of charge sheet of the said case by him during examination-in-chief – Effect of – Held, in such state of affair in the evidence, a doubt clearly arises in mind as to how the occurrence began and although the defence has not been able to prove its version as to the occurrence, yet from the evidence on record the very happening of the incident in the manner as suggested by the defence does not get altogether ruled out.

"*In that view of the matter, it has to be said that the prosecution has not been able to establish its case against the accused beyond reasonable doubt in so far as the role of the accused in giving the solitary blow and extending the benefit of doubt, the accused has to be held as not guilty for commission of offence under section 304-II IPC. Therefore, the impugned judgment of the conviction and order of sentence are liable to be set aside.*"

For Appellant : M/s. D. Nayak, D.P. Dhal, R.K.Baliarsingh, S.K. Nayak, S.C. Mohanty & B. Panda

For Respondent: Mr.P.Ch. Das, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment : 29.07.2019

D. DASH, J.

The appellant by filing this appeal has assailed the judgment of conviction recorded against him for commission of offence under section 304-II IPC and the order of sentence directing him to undergo imprisonment for a period of three years.

The accused stood charged for offence under section 304 IPC in the trial before the learned Sessions Judge, Balasore in Sessions Trial No. 15 of 1988. He has been convicted and sentenced as aforestated by the judgment and order dated 26.8.1988.

2. The prosecution case in short is that Nityananda Naik and Chinta Naik are the sons of one Fakir Nayak. This accused is the son of Nityananda and Chinta is his uncle. Chinta Naik and the accused possessed three plots of land jointly. One Panchu @ Panchanan Lenka purchased land measuring Ac. 0.09 decimals from one of those plots leaving Ac. 0.18. He also purchased Ac.0.04 decimals from another plot and Ac.0.10 decimals from the third plot. The land was sold to Panchu by registered sale deed dated 23.12.80. The accused is a signatory to the said sale deed as to have consented to the said sale. Panchu with his family and so also his son (P.W.1) with his family used to stay at Rourkela. In view of that, the maternal uncle of P.W.1, namely Basudeb Swain (P.W.2) and deceased were looking after that landed property in the said village. It is stated that the accused was disturbing in their possession of the land by cutting and removing the standing trees and damaging the fence put around the land. Receiving the information from Basudeb (P.W.2), Panchu (P.W. 1) came to the village for settlement of the dispute.

It is alleged that on 12.8.87 around 3.30 P.M. P.W.1 came to his purchased land with P.W. 2 and deceased and then called the accused. The accused was repeatedly creating disturbance over the land in question. He replied that since the land in his possession is not sufficient for his maintenance, he had cut the trees standing over the land in question. When the deceased challenged as to why he was creating disturbance in their possession, the mother of the accused came and challenged the deceased as to why he was interfering in their affairs. It is stated that the deceased then gave her a push resulting her fall. At that time, the accused brought one piece of wood shaped like a cricket bat and gave blow on the head of the deceased resulting injuries on the left side on his head. The accused then ran away with that wooden piece (M.O.I). The deceased was taken to Nilgiri Police Station by cycle in that injured condition and then to Nilgiri hospital. The

matter being reported by the deceased an entry was made in the Station diary book maintained at the police station. Requisition was sent to the doctor for medical examination of the injured. On 13.8.87 as his health condition deteriorated, on the advice of the doctor of Nilgiri hospital, he was removed to the District Hospital, Balasore wherefrom on 15.8.87, he was shifted to SCB Medical College & Hospital, Cuttack where he succumbed to the injury on 20.8.87.

In the meanwhile on 17.8.87, the OIC, Nilgiri Police Station (P.W. 10) registered Nilgiri P.S. Case No. 56 of 87 for offence under section 325 IPC. Subsequently on getting the information that the deceased has expired, the case was registered for offence under section 325 IPC and section 302 IPC.

In course of investigation, witnesses were examined and several documents have been collected. The accused while in custody has led the police to give recovery of that wooden piece (M.O.I). On completion of investigation, charge sheet having been submitted, the accused faced the trial as stated above.

The case of the accused is that of complete denial. In the statement recorded under section 313 Cr.P.C., he has stated that the deceased accompanied by P.W.1, 2 and 3, namely Niranjan, Basudev and Haramani came over his homestead being armed with lathis and entered inside. They dragged him from the place where he was working. They assaulted his mother for which she fell down. It is stated that while he was going to rescue his mother, P.W.2 raised his lathi with an aim to assault him and as he managed to move little away, the blow fell on the head of the deceased.

3. The trial court having analyzed the evidence of all the witnesses examined by the prosecution numbering ten and upon examination of the documents admitted on behalf of the prosecution such as FIR, post mortem report and seizure lists as well as the documents proved by defence, has held the prosecution to have established its case beyond reasonable doubt against the accused for commission of offence under section 304-II IPC and accordingly, he has been sentenced as aforesaid.

4. Learned counsel for the petitioner submits that in view of the admitted strained relationship between the deceased with his supporters on one hand and the accused on the other, the trial court was obliged to take up the exercise of strict scrutiny of evidence and critically analyse those which have not been done in the case. According to him, the evidence of P.Ws. 1, 2

and 3 do not inspire confidence in the mind for their version to be accepted without corroboration on material particulars. He further submits that the delay in lodging the FIR has not been explained and this matter ought to have been taken note of in view of the fact that bad blood was flowing amongst the parties. It is his submission that the defence having presented a different version of the occurrence for which a counter case has been initiated and the FIR, injury report and charge sheet of that case have been proved as Ext.A, B and D; those have not been taken into account in their proper perspective in judging the veracity of the prosecution version of the occurrence. According to him, the trial court taking all those into consideration ought to have held that the prosecution case as presented is doubtful and even though, the accused has not set up or shown a case of right of private defence of person in that manner as he should have the benefit of doubt ought to have been extended in his favour. In that view of the matter, he submits that the prosecution has failed to establish its case against the accused for commission of offence under section 304-II IPC.

5. Learned counsel for the State submits that on the basis of the clear, cogent and acceptable evidence of P.Ws. 1, 2 and 3, the trial court did commit no mistake in returning the finding of guilt against the accused. According to him, the court below has rightly kept the defence version of the occurrence out of consideration as that has been initiated as a counter blast.

6. Keeping in view the rival submission I have perused the judgment of the trial court as well as the deposition of the witnesses and other documents.

P.Ws. 1, 2 and 3 are the star witnesses for the prosecution. It is the evidence of P.W. 1 that on 12.8.87 around 3.30 P.M. he went to his own purchased land along with Basudeb and Nursingha and being called, accused Jagabandhu came there and he challenged him as to why he was cutting and damaging the tree. He has further stated that accused replied that as the land in his possession was not sufficient for maintaining the family, he has cut the trees. The Nursingha when came to challenge as to why he was creating trouble in the possession of the land, the mother of accused arrived and said as to why they were inferring when she was pushed by Nursingha. He has stated that at that time the accused brought a piece of wood and gave blow on the head of Nursingha. During cross-examination, this witness has stated that by the time they arrived near the suit land, the accused was working in the nearby field with his labourer. He has further stated that by the time of occurrence the disputed land and the field on which the accused was working was under an enclosure with the homestead of the accused. So, it is his

evidence that the land for which the dispute had arisen was not in possession of P.W. 1 and they had never taken possession of the said land same pursuant to the purchase. It is clear stated that the land was still in possession of the accused. The evidence of P.W. 10 is also to the effect that when he had examined P.W. 1 he had stated before him to have not been able to possess the land at any time. He has also not stated before him that the accused cut and damaged the fence and that he possessed the disputed land through his agents after purchase. Rather he had stated that the accused did give up possession of the land for which he could not posses. Thus when the accused was in possession of the land, P.W. 1 and others including the deceased without resorting to due process of law had no business to go over the land and no fault can be found the accused if he challenged that action particularly when he had not done any such damage or caused loss except continuing in in possession as before.

Admittedly a counter case has been initiated at the instance of the accused against the members of the prosecution party. The defence is that P.W. 1 and others armed with lathis entered inside his homestead and assaulted his mother. Injury on the person of mother of the accused has been proved by the doctor who has been examined in the trial as P.W. 6. She had sustained one lacerated wound on left side of upper head, one bruise on left side shoulder region, one bruise with left buttock and abrasion with swelling on the right elbow joint. No doubt the nature of injuries is simple but those are four and at the seats are different. So, it cannot be said that all those injuries come to be sustained by her in one go. The I.O. (P.W.10) has stated that he has filed charge sheet in the counter case (S.T. No. 29 of 1988). The evidence of P.W. 4 is that the accused had lodged the FIR giving rise to the registration of P.S. Case No. 54 of 1987 and it had been lodged on 12.7.87 at 5 P.M. The mother of the accused was medically examined on police requisition. This witness has stated to have seen the mother of the accused with bleeding injury on her head. He has categorically stated that the person accompanying deceased did not make any statement before him although they so asked. That station diary entry made on the oral version of the deceased marked as Ext. 2 shows that he had complained that the deceased had been assaulted on his head by the accused by a piece of wood. It has been indicated that before that; P.S. Case No. 54 of 1987 on the report of the accused against the deceased and other had been registered. The version of the defence is that when accused was going to be assaulted by P.W.2, as he managed to move away to avoid the blow, the same hit on the head of the deceased. P.W. 2 while admitting that the deceased had pushed the mother of

the accused has stated that thereafter Jagabandhu brought that piece of wood from his house and gave a blow on the deceased resulting fell down. His conduct is to the effect that he did not prevent accused when he came with that piece of wood nor did he raise any cry when Jagabandhu gave the blow and he has not disclosed about the occurrence to anybody on that day. He further admits to be the accused in the counter case. Thus, when two versions as to the occurrence are coming, the prosecution has not gone to explain as to how the mother of the accused sustained the injuries. Moreover, the I.O. (P.W.10) in his evidence does not whisper any word about the case instituted against the members of the prosecution party and submission of charge sheet of the said case by him during examination-in-chief.

7. In such state of affair in the evidence a doubt clearly arises in mind as to how the occurrence began and although the defence has not been able to prove its version as to the occurrence, yet from the evidence on record the very happening of the incident in the manner as suggested by the defence does not get altogether ruled out.

In that view of the matter, it has to be said that the prosecution has not been able to establish its case against the accused beyond reasonable doubt in so far as the role of the accused in giving the solitary blow and extending the benefit of doubt, the accused has to be held as not guilty for commission of offence under section 304-II IPC. Therefore, the impugned judgment of the conviction and order of sentence are liable to be set aside.

8. In the result, the appeal stands allowed and the judgment of conviction and order of sentence impugned in this appeal are set aside. The bail bonds executed by accused shall stand discharged. The LCR be sent back immediately.

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2019(III) ILR - CUT- 160

S. PUJAHARI, J.

CRLMC NO. 123 & 197 OF 2019

KALPANA SAHOO & ANR. .....….Petitioners

.Vs.

STATE OF ODISHA ……Opp. party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Quashing – Offence U/s.52 (a) of the Odisha Excise Act, 2008 – Illegal

transportation of liquor – Seizure of the vehicles – Application U/s 457 of Cr.P.C filed before the trial court to release the vehicles – Application rejected on the ground of the bar provided under section 72 of the Act – Order of the trial court challenged before the revisional court & the same was confirmed – Nothing in the record to show that the vehicle was produced before the Collector/Authorised officer & confiscation proceeding has been initiated – Provisions under sections 71 & 72 of the Act interpreted – Held, in view of sub-section(3) of section 71 of the Act, the Collector or the Authorised officer, as the case may be, assumes power to proceed with confiscation of the seized property either where the seizure has been effected by him or where the seized properties are produced before him – That apart, a conjoint reading of sub-section 1(a) and sub-section (3) of section 71 of the Act would make it clear that although seizure can be made when there is reason to believe commission of any offence under the Act, the same reason ipso facto will not suffice an order of confiscation of the seized property – The collector/authorised officer, as the case may be, before passing an order for confiscation has to satisfy himself that an offence under the Act has been committed in respect of the property in question – The bar as contemplated under section 72 of the Act will come into play only when the Collector or the Authorized Officer or the Appellate Authority is seized with the matter of confiscation of any property seized under section 71 of the Act, but not merely because any seizure has taken place – Further, as per sub-section (5) of section 71 of the Act, the owner of the vehicle or conveyance has a right to participate in the confiscation proceeding to prove his ignorance or bonafides to defend his property – Hence the Collector/ Authorised officers concerned cannot be said to have been seized with the matter of confiscation – The vehicles in question cannot be left in a state of damage & decay being exposed to sun, rain & other external hazards – The impugned orders are quashed – Direction to release the vehicles with an under taking to produce the same as and when required in the confiscation proceeding. (Paras 4, 5 & 6)

For Petitioner : M/s. Satya Ranjan Mulia, R.C. Moharana, M. Mulia, R.R. Nayak, H.K. Singh & M/s. Juhu Khans, T.P. Mohapatra.

For Respondent : Addl. Standing Counsel

JUDGMENT Date of Judgment: 05.08.2019

S. PUJAHARI, J.

The issue involved being common to both these cases, both of them on being heard, are disposed of by the common judgment as follows :-

One Aviator Moped bearing registration No.OD-05-S-4907 owned by the petitioner in CRLMC No. 123 of 2019 and one Autorickshaw bearing registration No.OD-17-H-5952 owned by the petitioner in CRLMC No.197 of 2019, have been reportedly seized respectively in connection with Excise P.R. No.20 of 2018-19 of Mobile-II, Excise Station, Cuttack corresponding to 2(a) C.C. Case No.179 of 2018 in the court of the J.M.F.C.(R), Cuttack and Burla P.S. Case No.105 of 2018 corresponding to G.R. Case No.795 of 2018 in the court of the S.D.J.M., Sambalpur. Both the cases before the Courts below have been registered under Section 52(a) of the Orissa Excise Act, and the vehicles named above are alleged to have been used as conveyance for illegal transportation of liquor. There is no dispute on record that the petitioners are the registered owners of the respective vehicles, and they have not been made accused in the concerned cases for commission of offence in question. The petitioners approached the concerned Magistrates with applications under Sections 457 of Cr.P.C. for release of their respective seized vehicles, and as their applications stood rejected at that level, they approached the concerned Sessions Judges by invoking their revisional jurisdiction. Criminal Revision No.24 of 2018 filed by the present petitioner in CRLMC No.197 of 2019 before the learned Sessions Judge, Sambalpur was dismissed on 13.08.2018 and Criminal Revision No.77 of 2018 filed by the present petitioner in CRLMC No.123 of 2019 before the learned Sessions Judge, Cuttack was dismissed as per the order dated 18.12.2018. The aforesaid orders of rejection of the petitions under Section 457 of Cr.P.C. as well as the orders of the concerned Sessions Judge in Criminal Revisions affirming the said orders are now sought to be set-aside by the respective petitioners by invoking the power of this Court under Section 482 of Cr.P.C.

2. I have heard the respective learned counsel appearing for the petitioners in both the cases and the learned Government Advocate, and perused the impugned orders.

3. As already noted, undisputedly, the petitioners are the registered owners of Aviator Moped and Autorickshaw referred to above, and there is no indictment against them under the Orissa Excise Act, 2008 (for short "the Act"). But, for the reported engagement of those vehicles in the alleged commission of offence under the Act, the seizures have been made by the Excise Officer or the Police Officer, as the case may be, purportedly under Section 71 of the Act. As the impugned orders show, the learned Magistrates have declined to entertain the applications under Section 457 of Cr.P.C. in view of the provisions of Sections 71 and 72 of the Act, and especially, the

bar as contemplated under Section 72 of the Act. Those orders were affirmed by the concerned learned Sessions Judges. For sake of ready reference, the relevant parts of Sections 71 and 72 of the Act are extracted herebelow:-

> "**71. Seizure of property liable to confiscation** – (1)(a) When there is reason to believe that any offence under this Act has been committed, the intoxicant, materials, stills, utensils, implements, apparatus, receptacles, package, coverings, animals, carts, vessels, rafts, vehicles, or any other conveyances or articles or materials used in committing any such offence may be seized by the Collector or any officer of the Excise, Police, Customs or Revenue Departments.
>
> (b) ……
>
> (2) Every officer seizing any property under this section shall, except where the offender agrees in writing to get the offence compounded under Section 75, produce the property seized before the Collector, or an officer, not below the rank of a Superintendent of Excise, authorized by the State Government in this behalf by notification (hereinafter referred to as the 'authorized officer').
>
> (3) Where the Collector or the authorized officer seized any property under sub-section (1) or where the property seized is produced before him under sub-section (2) and he is satisfied that an offence under this Act has been committed in respect thereof, he shall, without prejudice to any other punishment to which the offender is liable under this Act, order confiscation of the property so seized or produced together with all other materials, articles, vehicles or conveyances used in committing such offences, whether or not a prosecution is instituted for the commission of such an offence.
>
> (4) xxxxx xxxxxx
>
> (5) Without prejudice to the provisions of Sub-section (4), no order of confiscation under Sub-section (3) of any articles, materials, vehicles or conveyances shall be made if the owner thereof proves to the satisfaction of the Collector or the authorized officer, as the case may be, that it was used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of such property, in committing the offence and that each of them had taken all reasonable and necessary precautions against such use.
>
> xxx xxxxx xxxxx"
>
> **72. Bar of other proceedings during pendency of confiscation proceedings –** Notwithstanding anything contained in the Code of Criminal Procedure 2 of 1974, when the Collector or the authorized officer or the appellate authority is seized with the matter of confiscation of any seized property under Section 71, no Court shall entertain any application in respect of the same property and the jurisdiction of the Collector or the authorized officer or the appellate authority with regard to the disposal of the same shall be exclusive."

4. In the cases at hand, the seizures have been made by the Excise Officer or Police Officer, as the case may be, and there is nothing on record to show that the seized Aviator Moped and Autorickshaw have been produced before the Collector or the Authorized Officer as required under sub-section (1)(a) of Section 71 of the Act. In view of sub-section (3) of Section 71 of the Act, the Collector or the Authorized Officer, as the case may be, assumes power to proceed with confiscation of the seized property

either where the seizure has been effected by him or where the seized properties are produced before him. That apart, a conjoint reading of sub-section (1)(a) and sub-section (3) of Section 71 of the Act would make it clear that although seizure can be made when there is reason to believe commission of any offence under the Act, the same reason ipso facto will not suffice an order of confiscation of the seized property. The Collector or the Authorized Officer, as the case may be, before passing an order for confiscation has to satisfy himself that an offence under the Act has been committed in respect of the property in question. The bar as contemplated under Section 72 of the Act will come into play only when the Collector or the Authorized Officer or the Appellate Authority is seized with the matter of confiscation of any property seized under Section 71 of the Act, but not merely because any seizure has taken place. Further, as per sub-section (5) of Section 71 of the Act, the owner of the vehicle or conveyance has a right to participate in the confiscation proceeding to prove his ignorance or bonafides to defend his property. If a particular officer or authority fails to discharge his duty as assigned to him under the statute, and if such failure on his part is not attributable to the party who on account of such failure is deprived of exercising his own right of defence, the statutory bar cannot be made operative to the prejudice of such party in condonation of the unexplained laches or negligence on the part of the public officer.

5. In the present cases, there is no denial from the side of the learned Addl. Standing counsel appearing for the Government that no confiscation proceeding has been started in respect of the seized vehicles in question. There is also nothing on record to show that the concerned seizing officers have produced the respective vehicles before the concerned Collectors or the Authorized Officers in compliance with sub-section (2) of Section 71 of the Act. Hence, the Collectors or the Authorized Officers concerned cannot be said to have been seized with the matter of confiscation. Consequently, the bar under Section 72 of the Act cannot be said to have come into operation. The vehicles in question cannot be left in a state of damage and decay being exposed to sun, rain and other external hazards.

6. In the facts and circumstances, and for the reasons stated above, both the CRLMCs are hereby allowed. The impugned orders are quashed. The learned Magistrates are directed to release the vehicles in question in the interim custody of the respective applicants on being satisfied about their ownership, and on obtaining appropriate security from them besides an undertaking from them in shape of affidavit that they shall produce their

respective vehicles before the competent authority as and when so required for the purpose of confiscation proceeding, and shall not transfer the same pending closure of the confiscation proceeding and/or trial of the concerned cases, and an endorsement in that regard shall also be made in the respective R.C. Books of the vehicles.

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2019 (III) ILR – CUT- 165

BISWANATH RATH, J.

W.P.(C) NO. 9573 OF 2019

MAITRI MOHANTY & ORS. ……...Petitioners

.Vs.

STATE OF ODISHA & ORS. ……Opp. Parties

REGISTRATION ACT, 1908 – Sections-34, 35, 52 & 61 read with Rules-25, 27, 28, 29, 30, 34, 63, 110(15), 111 & 148 of the Orissa Registration Rules, 1988 – Provisions under – Duty of Registrar/Sub-Registrar while registering instruments – Allegation of not registering the instrument and undertaking an exercise of enquiry involving the allegation beyond his scope of consideration and is acting without jurisdiction – Question arose as to whether the Registering Officer becomes functus officio to entertain any complaint after granting the receipt under Section 52 after compliance of all formalities required in the matter of registration of an instrument ? – Held, Yes.

"Looking to the scope of the Authority of the Registrar under the aforesaid three provisions, further taking into the allegation by Opposite Party no.6 involved herein through Annexure-10, this Court finds, for the nature of allegation involved herein and as the complain does not come under either of the provisions indicated herein above, there is no scope with the Registering Officer entering into any such controversy. It is at this stage, looking to the provision at Section 52 read with Sections 58, 59, 60 & 61 of the Act, 1908, this Court reading through the provision again observes, since the Registering Officer has already issued the final receipt under Section 52 of the Act, he has the only scope through Sections 58, 59, 60 & 61 of the Act. This Court, therefore, answering the questions framed herein above in favour of the petitioners holds, since the nature of complain at Annexure-10 of the brief does not come within the scope of consideration of the Registering Officer, the Sub-Registrar went wrong in withholding the registration of the instrument on the premises of such un-entertainable complain except leaving the complainant to take shelter of the Civil Court to remedy out his difficulty through Civil Court and for already grant of receipt under Section 59(2) of the Act, he had the only duty to register the instrument taking into account the provisions at Sections-58, 59, 60 & 61."

For Petitioners : M/s. B.Baug, M.R.Baug, G.R.Sahoo & R.R.Jethi
For OPP.Parties : Ms. S.Mishra, Addl. Standing Counsel
M/s.M.M.Patnaik & D.R.Sahu
M/s. Dr.A.K.Mohapatra, Sr.Adv.,
A.K.Mohapatra, B.Panda, T.Dash,
S.Sarangi, A.Pati, S.Nath & B.Subudhi

JUDGMENT Date of Hearing : 22.08.2019 : Date of Judgment : 06.09.2019

BISWANATH RATH, J.

This writ petition is filed with the following prayer :-

> "Under the aforesaid facts and circumstances, it is, therefore, prayed that this Hon'ble Court may be graciously pleased to admit this writ petition and issue a 'Rule-Nisi' calling upon the Opposite Parties, more particularly the Opposite Party Nos.4 & 5 to show cause as to why they shall not be directed to deliver the original sale deed to the petitioners or to their nominees as per the ticket within a fixed period after performing the administrative work by the Opposite Party No.4 to complete the registration of the sale deed in all respects and as to why the Annexures-9 and 11 shall not be quashed and further if the sale deed of the petitioners executed and registered on 21.5.2019 in respect of the suit land is cancelled, the said cancellation shall not be quashed and if the opposite parties fail to show cause or show insufficient cause make the said rule absolute."

2. Background involving the case is that a piece of land in Plot No.8846 measuring an area of Ac.0.585 decimals covered under Khata No.322 of Mouza-Ghatikia under Chandaka Police Station in the district of Khurda stood recorded in the name of Smt.Maitri Mohanty, petitioner no.1 and Sri Kedar Nath Nanda, petitioner no.2 as per the finally published settlement R.O.R. dated 14.11.2013. Kedar Nath Nanda, petitioner no.2, in order to manage, sell and deal with his share of property under Annexure-1, gave a General Power of Attorney in favour of Brundaban Nayak on 3.1.2011, who was looking after the land in question for and on behalf of Kedar Nath Nanda, petitioner no.2. In the meantime, Smt. Maitri Mohanty, petitioner no.1, for her legal necessity intended to sell her share of land from the aforesaid plot to one Brundaban Nayak, husband of Smt. Renubala Samantaray, petitioner no.3, and accordingly, entered into an agreement for sale with said Brundaban Nayak on 5.1.2018 and received an advance of Rs.5.00 lakhs by way of Account Payee Cheque dated 5.1.2018. While the matter stood thus, in spite of cut-off relationship between Maitri Mohanty, petitioner no.1 and her husband, Rakesh Kumar Mallick, in collusion with one Manas Ranjan Mohapatra, her husband, Rakesh Kumar Mallick managed to execute and register an agreement to sell the land in the name of petitioner

no.1, in favour of Manas Ranjan Mohapatra on 20.1.2018 thereby completely forging the signature of petitioner no.1 and making false impersonation of petitioner no.1 before the Sub-Registrar. Petitioner no.1 claimed that she has neither signed nor appeared before the Sub-Registrar nor even has been paid with the consideration amount involving the sale agreement dated 20.1.2018. In the meantime, petitioner nos.1 & 2 intended to sell the suit land for due consideration to petitioner no.3. Accordingly, petitioner nos.1 & 2 being represented by their Power of Attorney executed a sale deed in respect of the suit land on 21.5.2019 in favour of petitioner no.3 and received the consideration amount thereof. Consequent upon receipt of consideration amount, they have also handed over the possession of the suit land to the purchaser. As required under law, the sale deed was executed by the parties concerned along with true xerox copies of Hal Settlement R.O.R. and the Encumbrance Certificate in respect of the suit land, which were presented for registration on the basis of assessment. The petitioners also averred that necessary Stamp Duty has also been paid by way of franking. Further on assessment and demand, they have also paid the registration fees and, thereafter, the registration being completed, O.Ps.4 & 5 issued Registration Ticket to Brundaban Nayak, the Power of Attorney Holder of petitioner no.2 and the husband of petitioner no.3 for receiving the sale deed later on the very same date, i.e., 21.5.2019. Opposite Party no.5, who is also acting as Opposite Party no.4 on the date of presentation of the sale deed for registration, has also made his endorsement and attestation involving the sale deed. The petitioners in order to establish the aforesaid developments have filed documents, vide Annexure-4 and ultimately filed the receipt vide Annexure-7. Similarly, they also established the endorsement of the Sub-Registrar on the sale deed vide Annexure-8, even granting receipt clearly indicating therein to release the registered document on 21.5.2019 itself and clearly mentioning therein the expected date of return of document to be 21.5.2019 as appearing at Annexure-5. The instrument was not returned back to the petitioners on being registered constraining the petitioners to file the writ petition in this Court seeking the relief indicated in the pre-amended writ petition.

3. For the subsequent development taking place during pendency of the writ petition, the petitioners also brought the further fact that in a fraudulent attempt of opposite Party no.6 connived with opposite party nos.4 & 5, the petitioners were issued with a show cause notice, vide Annexure-9 asking them to show cause on the allegation of opposite party no.6 in the matter of constraint involving registration of the instrument.

4. Taking this Court to the documents, vide Annexures-9, 10 & 11, Sri B.Baug, learned counsel for the petitioners contended that the letter is a manufactured one and received much subsequent to submission of the instrument for registration and the date of registration of the instrument.

As a consequence of subsequent development, the writ petitioners also made amendment of the writ petition bringing in the documents at Annexures-9 to 11 and also documents at Pages-27-A, 27-B, 27-C, 27-D, 27-E, 27-F, 27-G, 27-H, 27-I & 27-J to the fold of consideration of the writ court along with modified prayer indicated herein in the first paragraph.

5. Challenging the inaction of the Sub-Registrar and the illegal proceeding of the Sub-Registrar involving registration of the instrument involved herein, Sri B.Baug, learned counsel for the petitioners apart from submitting that once formalities for registration of an instrument as required under the Registration Act, 1908 have been complied with and a final receipt has been granted by the registering authority endorsing therein to hand over the document being registered on 21.5.2019, the Sub-Registrar had the only scope of registering the instrument and became functus officio to take into consideration any issue subsequent to issuance of final receipt.

6. To establish his case, Sri B.Baug, learned counsel for the petitioners taking this Court to the provisions of Sections-34, 35, 52 & 61 of the Registration Act, 1908 read with Rules-25, 27, 28, 29, 30, 34, 63, 110(15), 111 & 148 of the Orissa Registration Rules, 1988 attempted to satisfy his case that the Registrar/Sub-Registrar involved herein by not registering the instrument submitted before him and undertaking an exercise of enquiry involving the allegation beyond his scope of consideration is acting without jurisdiction. Further to satisfy his case, Sri Baug, learned counsel, referred to two decisions, one of the Hon'ble apex Court in the case of ***Satya Pal Anand vrs. State of Madhya Pradesh & others,*** reported in (2016)10 SCC 767 and the other decision of this Court in the case of Amulya ***Krushna Rana vrs. Registrar, Jajpur & others*** reported in 2017(I) OLR 683. Taking this Court to the above decisions, Sri B.Baug, learned counsel for the petitioners submitted that above decisions have the direct application to the case of the petitioners and thus requested for allowing the writ petition thereby issuing suitable directions as prayed for.

7. Ms. S.Mishra, learned Additional Standing Counsel appearing for Opposite Party nos.1 to 4 in her opposition taking to the plea involved in the counter affidavit on behalf of Opposite Party nos.1 to 4, while admitting the compliance of the formalities in the matter of registration by the petitioners

up to the stage of grant of receipt in favour of the petitioners on 20.5.2019 clearly indicating therein the date of expectation of return of the document to be 21.5.2019 and formally conceding that the complain of Opposite Party no.6 was though received in the office of the Sub-Registrar on 21.5.2019 but for the observation of the Sub-Registrar and for the allegation brought by way of representation dated 21.5.2019, the Sub-Registrar, Khandagiri was constrained to hold on the registration of the instrument involved therein and issued show cause to the vendor and vendee involved therein for submission of their written statement within seven days from the date of issue of notice as appearing at Annexure-9 for his personal satisfaction before registering the instrument. She also brought to the notice of the Court through the document at Annexure-11 that the allegation involving the registration of the instrument is undertaken by the Sub-Registrar and the matter was though posted to 4.6.2019 but the Sub-Registrar could not proceed to decide such allegation for the status quo order in the writ petition at hand granted by this Court. Resisting the submission of the learned counsel for the petitioners referring to the provisions and the decisions, Ms. Mishra, learned Additional Standing Counsel submitted that for the dispute being raised on the registerability of the instrument on the basis of an existing deed of agreement involving the same property, the Sub-Registrar is duty-bound to take up the issue before registering the instrument and the decisions referred to by the learned counsel for the petitioners are being opposed on the ground of change in the facts and situation involving the case at hand and the cases involved in the citations.

8. Dr.A.K.Mohapatra, learned senior counsel for Opposite Party no.6 similarly taking to his client's stand in the counter affidavit on his behalf, while supporting the stand of the learned Additional Standing Counsel and taking this Court to the existence of an agreement for sale of the disputed land involving Opposite Party no.6 contended that the Sub-Registrar is duty-bound for the circumstance involved to undertake the enquiry process before registering the instrument. Dr.Mohapatra, learned senior counsel, however, taking this Court to the averments in the counter affidavit of this Opposite Party contended that in the meantime apprehending danger to the property, Opposite Party no.6 already instituted a Civil Suit bearing C.S.No.1211 of 2019 on the file of Civil Judge (Jr.Divn.), Bhubaneswar. It is in the above premises, Dr.Mohapatra, learned senior counsel for Opposite Party no.6 prayed for dismissal of the writ petition.

9. Taking into consideration the pleading of the respective parties and the documents appended by the respective parties involving the writ petition,

the counter affidavit and the rejoinder of the respective parties, this Court finds, there is no dispute as to the existence of two deeds of agreement for sale involving the disputed property, one being between petitioner no.1 and petitioner no.3 entered into on 5.1.2018 and the other one alleged to have been executed by the husband of petitioner no.1 with Opposite Party no.6 on 20.1.2018. There is also no dispute that the sale deed involved being presented, there has been assessment of Stamp Duty of Rs.6,08,400/-. The Stamp Duty has been paid on 21.5.2019 appearing at page-26 of the brief. Similarly on assessment of registration fee of Rs.3,04,200/-, this amount has also been paid by way of draft appearing at page-25 and receipt whereof has also been granted, vide Annexure-5. Annexure-8 is the sale deed, which clearly establishes the grant on 21.5.2019, that the sale deed has not only been presented but also attested and endorsed by the Sub-Registrar, Debendra Satapathy, by making his endorsement and attestation at pages-27-C as well as 27-D. It is at this stage of the matter, looking to the document at Annexure-5, this Court again finds, vide the receipt granted under Section 52 Clause (B) of the Act also establishes the completion of formalities on 21.5.2019 and the expected date of return of document also given to be on 21.5.2019. It is at this stage, this Court further taking into account the complain of Opposite Party no.6 available at Annexure-10 finds, the same appears to have been received in the office of the Sub-Registrar on 21.5.2019 as clearly appearing from page-27-M of the brief, copy of which being sent along with a letter to the petitioners asking them to show cause dated 25.5.2019 appearing at page-27-K again appears to have been issued to the petitioners by Speed Post on 28.5.2019 as appearing at page-27-L of the brief. For the submission of the petitioners, the petitioners have received the show cause notice along with the letter accompanied therein on 30.5.2019. Taking into consideration the allegation of the petitioners at this stage that at about 4.30 p.m. to 5 p.m., Opposite Party no.5 telephoned Brundaban Nayak, the Power of Attorney Holder representing petitioner no.2 and directed him to return the Registration Ticket or else the Sub-Registrar will be cancelling the registration and the response of Opposite Party no.5 in his counter in paragraph-12, wherein this Opposite Party admitted as follows :-

> "It is a fact that the O.P.No.5 called Brundaban Nayak, who is the attorney holder of Kedarnath Nanda and husband of petitioner no.3 asking him to return the registration ticket issued in his favour."

10. This Court observes, in the above background of the matter, there is surprise in the behaviour of the Sub-Registrar for the reason that in the event the Sub-Registrar was already in receipt of the complain of Opposite Party

no.5 by this time, then nothing prevented the Sub-Registrar to at least indicate the reason for return of the ticket. This Court, therefore, opines that the Sub-Registrar hatched a conspiracy and in connivance with Opposite Party no.6 anticipating a complaint from Opposite Party no.6 entered into telephonic conversation with the petitioners as made in paragraph-8 of the writ petition. Be that as it may, looking to the controversy raised herein and the contentions of the respective parties, this Court finds, the questions to be decided here are :-

> I) looking to the provision in the Registration Act, 1908 read with the provision in the Orissa Registration Rules, 1988, whether the Registering Officer becomes functus officio to entertain any complaint after a receipt under Section 52 is being granted in favour of the parties involved and compliance of all formalities required in the matter of registration of an instrument ? and
>
> II) further looking to the nature of the complain at the instance of Opposite Party no.6, whether such complain is within the domain of the Sub-Registrar involving Registration of an instrument ?

It is in this background of the matter, looking to the admitted situation disclosed herein above, there is already development taken place up to grant of final receipt under Section 52 Clause (B) of the Act as appearing at Annexure-5. This Court here likes to take into account certain provisions of the Act to resolve the questions framed herein. Provision of Section 34 of the Registration Act, 1908 dealing with enquiry before registration by the Registering Officer reads as follows :-

> **"34. Enquiry before Registration by Registering Officer :-**
>
> Subject to the provisions contained in this Part and in Sections 41, 43, 45, 69, 75, 77, 88 & 89, no document shall be registered under this Act, unless the person executing such document, or their representatives, assigns or agents authorized as aforesaid, appear before the registering officer within the time allowed for presentation under Sections 23, 24, 25 and 26 :
>
> Provided that, if owing to urgent necessity or unavoidable accident all such persons do not so appear, the Registrar, in cases where the delay in appearing does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee, in addition to the fine, if any, payable under Section 25, the document may be registered.
>
> (2) Appearance under Sub-Section (1) may be simultaneous or at different times.
>
> (3) The registering officer shall thereupon –
>
> (a) enquire whether or not such document was executed b the persons by whom it purports to have been executed ;
>
> (b) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document ; and

(c) in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such persons so as to appear.

(4) Any application for a direction under the proviso to Sub-Section (1) may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.

(5) Nothing in this section applies to copies of decrees or orders."

This provision of the Act makes it clear with regard to the scope of enquiry with the Registering Officer.

Provision at Section 35 dealing with procedure on admission and denial of execution respectively reads as follows :-

"35. **Procedure on admission and denial of execution respectively**—(1) (a) If all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the person they represent themselves to be, and if they all admit the execution of the document, or

(b) if in the case of any person appearing by a representative, assign or agent, such representative, assign or agent admits the execution, or

(c) if the person executing the document is dead, and his representative or assign appears before the registering officer and admits the execution, the registering officer shall register the document as directed in sections 58 to 61 inclusive.

(2) The registering officer may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be, or for any other purpose contemplated by this Act, examine any one present in his office.

(3) (a) If any person by whom the document purports to be executed denies its execution, or

(b) if any such person appears to the registering officer to be a minor, an idiot or a lunatic, or

(c) if any person by whom the document purports to be executed is dead, and his representative or assign denies its execution, the registering officer shall refuse to register the document as to the person so denying, appearing or dead:

Provided that, where such officer is a Registrar, he shall follow the procedure prescribed in Part XII:

[Provided further that the 2 [State Government] may, by notification in the 3 [Official Gazette], declare that any Sub-Registrar named in the notification shall, in respect of documents the execution of which is denied, be deemed to be a Registrar for the purposes of this sub-section and of Part XII."

Similarly, Section-35 of the Act provides procedure on admission and denial of execution.

Now at this stage, this Court takes into account the provision at Rule-63 of the Orissa Registration Rules, 1988 dealing with enquiry as to execution, which reads as follows :-

> "63. **Enquiry as to execution.**- (1) The Registering Officer shall decide the admissibility of a document on enquiry under Sub-section (3) of Section 34 of the Act, Confining himself to the fact of execution by the person by whom it purports to have been executed. He is not required to enquire as to the validity of the document.
>
> (2) *Objection to registration* - All applications objecting to registration shall be retained in the office and orders made thereon should be communicated to the object or free of charge.
>
> (3) If registration is objected to by any person on any of the following grounds, namely :
>
> (a) that a person appearing or about to appear before the Registering Officer as an executant or claimant is not the person he professes to be or that he is a minor, an idiot or lunatic; or
>
> (b) that the instrument is forged; or
>
> (c) that the person appearing as a representative, assign or agent has no right to appear in that capacity; or
>
> (d) that the executing party is not really dead, as alleged by the party applying for registration, such objections shall be duly considered by the Registering Officer and if they are substantiated, the document shall be returned to the party without registration.
>
> **\Note** - (1) Registration cannot be refused on the ground that the consideration money has not been paid or the objects of a document are unlawful or immoral.
>
> (2) In the case of Pardanashin executants, the following special precautions shall be observed. The registering officer shall first have the document read over and explained to the *Pardanashin* lady by or in the presence of her identifier, and thereafter the Registering Officer shall point out to the lady, in the presence of her identifier, the nature of the transaction, consideration money, if any, the name or names of the claimant or claimants, and the property (with its extent) affected. Finally when the lady admits execution, the identifier should be required to record a certificate on the document in the following form :
>
> "The document was read over and explained to the lady executant by me (or in my presence) the execution of which she admitted in my presence".

Provision at Rule 63(3) of the Registration Rules, 1988 clears the type of objections required to be enquired into by the Registering Officer. Looking to the scope of the Authority of the Registrar under the aforesaid three provisions, further taking into the allegation by Opposite Party no.6 involved herein through Annexure-10, this Court finds, for the nature of allegation involved herein and as the complain does not come under either of the provisions indicated herein above, there is no scope with the Registering Officer entering into any such controversy. It is at this stage, looking to the provision at Section 52 read with Sections 58, 59, 60 & 61 of the Act, 1908, this Court reading through the provision again observes, since the Registering Officer has already issued the final receipt under Section 52 of the Act, he

has the only scope through Sections 58, 59, 60 & 61 of the Act. This Court, therefore, answering the questions framed herein above in favour of the petitioners holds, since the nature of complain at Annexure-10 of the brief does not come within the scope of consideration of the Registering Officer, the Sub-Registrar went wrong in withholding the registration of the instrument on the premises of such un-entertainable complain except leaving the complainant to take shelter of the Civil Court to remedy out his difficulty through Civil Court and for already grant of receipt under Section 59(2) of the Act, he had the only duty to register the instrument taking into account the provisions at Sections-58, 59, 60 & 61.

11. It is at this stage, this Court takes into account the decisions involving ***Satya Pal Anand*** (supra) for the case of cancellation of registration of extinguishment deed in exercise of power under Section 69 of the Act but however, finds, in paragraph-46 of the said decision, Hon'ble apex Court has held as follows :-

> "46. In our considered view, the decision in Thota Ganga Laxmi was dealing with an express provision, as applicable to the State of Andhra Pradesh and in particular with regard to the registration of an extinguishment deed. In absence of such an express provision, in other State legislations, the Registering Officer would be governed by the provisions in the 1908 Act. Going by the said provisions, there is nothing to indicate that the Registering Officer is required to undertake a quasi-judicial enquiry regarding the veracity of the factual position stated in the document presented for registration or its legality, if the tenor of the document suggests that it requires to be registered. The validity of such registered document can, indeed, be put in issue before a Court of competent jurisdiction.

This Court observes, for the issue no.23(4)(d) involved therein though the decision has no direct application to this case but the observation of the Hon'ble apex Court in paragraph-46 of the said decision has an application to the case at hand and this Court finds, the impugned action of the Sub-Registrar becomes illegal. Other decision since has no application to the case at hand does not require to be dealt with.

12. In the circumstances, this Court allowing the prayer involved in the writ petition issues a Writ of Mandamus directing the Registering Officer involved herein to register the instrument forthwith, since the instrument is obstructed for no reason attributed to the petitioners and the loss of time in the meantime, without insisting upon any further condition and return the registered instrument to the petitioners by completing the entire exercise within three days from the date of receipt of certified copy of this judgment.

13. The writ petition succeeds. However, there is no order as to cost. A free copy of this judgment be supplied to the learned Additional Standing Counsel for necessary compliance.

2019 (III) ILR – CUT-175

BISWANATH RATH, J.

W.P.(C) NO. 4154 OF 2008

BUDHIRAM BARIK & ORS. .....Petitioners

.Vs.

GOPI SATYABHAMA KARUNAKAR JOGASHARMA & ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Arts.226 & 227 – Suit under section 6 of the specific relief Act, 1963 filed for unlawful dispossession from immovable property – Suit dismissed – Challenging the same revision filed – Revision also dismissed – Writ petition filed against the dismissal – Maintainability of both the revision as well as writ petition questioned – Bar in sub-section (3)&(4) of section 6 pleaded – Provisions interpreted – Held, in view of sub-section 3 no revision is maintainable and as per sub-section 4, an aggrieved can challenge by filing the suit for establishing the title in the property & thereby recovering the possession of the property – Hence in view of the above provisions the writ petition is not maintainable. (Paras 7, 8 & 9)

Case Laws Relied on and Referred to :-

1. AIR 1984 Orissa 171: Smt. Sobhabati .Vs. Lakshmi Chand & Ors.
2. 1989 (I) OLR 388 : Mohiuddin Khan & Ors. .Vs. Nimai Charan Das & Ors

For Petitioners : M/s. A.K. Sahoo, R.Khatun & J.K. Dehury.
For Opp. Parties : M/s.B.H. Mohanty, R.Nayak, D. Mohanty, J. Mohanty, P.Swain & M. Pal.

JUDGMENT Date of Hearing & Judgment: 11.09.2019

BISWANATH RATH, J.

Heard Sri A.K. Sahoo, learned counsel for the petitioners and Sri B.H. Mohanty, learned counsel appearing for opposite party nos.1 and 2.

2. This writ petition involves the following prayer :

"Petitioners, therefore, pray that a writ in the nature of certiorari/mandamus or any other appropriate writ or direction be issued :

(I) To quash the decisions under Annexures-5 and 6,
(II) Let it be declared that the suit filed by the Opp. Parties be dismissed with costs.
(III) The writ application be allowed with costs, and
(IV) Any other appropriate/alternative order as deemed fit and proper in the facts and circumstances of this case be also passed."

3. Submissions of learned counsels and the pleadings disclosed the dispute being raised under Section 6 of the Specific Relief Act, 1963 was dismissed by the competent court under Annexure-5. Being aggrieved by the decision of the Addl. Civil Judge (Senior Division), Basudevpur in T.S. No.60/97-I, the petitioners preferred a revision, the revision being dismissed, the present writ petition is filed before this Court.

4. The petitioners have filed this writ petition challenging the order at Annexures-5 and 6 involved therein, taking this Court to the pendency of the writ petition for long years and involving the maintainability of the writ petition, Sri Sahoo, learned counsel for the petitioners submits that the Court should decide the matter on merit.

5. To the contrary, Sri D.P. Mohanty, learned counsel appearing for the opposite party nos.1 and 2, taking this Court to the provision under Section 6 of the Specific Relief Act and also relying on the two decisions of this Court in the case of ***Smt. Sobhabati –vrs.- Lakshmi Chand and others***, reported in AIR 1984 Orissa 171 and in the case of ***Mohiuddin Khan and others –vrs.- Nimai Charan Das and others,*** 1989 (I) OLR 388, contended that for the statutory provision therein not only the revision was not maintainable but the writ petition is also not maintainable. It is in the premises that the only scope for the petitioners was to the civil suit. Sri Mohanty submitted that the writ petition is not maintainable.

6. Considering the rival contentions of the parties and taking into account the statutory provision, this Court finds, the provision at Section 6 of the Specific Relief Act, 1963 reads as follows :

> "6. Suit by person dispossessed of immovable property- (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.
>
> (2) No suit under this section shall be brought-
>
> (a) after the expiry of six months from the date of possession; or
>
> (b) against the Government.
>
> (3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.
>
> (4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof."

7. For the specific provision under Section 6 of Sub-Section-3, of Act 1963, the statute completely bars for filing appeal, this Court finds, the

submission of Sri Mohanty that the revision involving the order at Annexure-5 also not maintainable has force. Further for the provision at sub-section (4) of Section 6 in the statue for there being no provision of appeal, it is made clear that a person aggrieved by the decree under Section 6 can challenge such decree only by filing suit to establish his title to such property and to recover possession thereof. For this statutory provision, this Court also finds, the submission of Sri Mohanty that the only remedy available to the petitioners by way of suit has force.

8. In the circumstances and it is at this stage, this Court taking into consideration the decisions referred to herein above and the decisions in AIR 1984 Orissa 171, this Court has clearly observed no revision in this situation is maintainable involving the decree under Section 6 of the Specific Relief Act. Same is also the view of this Court in the subsequent decision of this Court involving 1989 (I) OLR 388.

9. With the above observations and for the series of judgments of this Court and further keeping in view the statutory provisions involving Section 6 of the Specific Relief Act, this Court finds, the writ petition is not maintainable.

10. Accordingly, the writ petition stands dismissed for having no merit. Interim order passed earlier stands vacated. No cost.

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2019 (III) ILR – CUT- 177

S. K. SAHOO, J.

CRLA NO. 74 OF 2011

NRUSINGHA CHARAN DASH @ BABULU .....Appellant

.Vs.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offence U/s.376 (2) (F) of IPC – Rape of a minor child – Conviction – Ossification test as well as school registers and statement of the victim's mother corroborate each others with regard to age of the victim i.e. 10 years – Medical evidence opined injury on the private part of the victim – Chemical examination does not suggest

any sign of rape as no blood stain & semen stain found on wearing apparels of the victim – Victim stated that, accused/appellant had penetrated in her private part only one occasion & there was no ejaculation or any kind of bleeding from the private part – Testimony of victim examined and found reliable with other P.Ws as well as the medical evidence – Medical examination of accused/appellant – No injuries on his person and private part – Defence pleads that in case of rape to a minor girl aged about 10 to 12 years, there is every possibility of injuries on the private part of accused, which is missing in the present case – Accused/ appellant further pleads that chemical examination report does not support the prosecution case – Sustainability of conviction challenged on the grounds above – Held, it cannot be lost sight of the fact that, the victim stated that the appellant pushed his private part only once inside her private part and in such circumstances, it cannot be said that the non-finding of any injury on the private part of the appellant and non finding any semen or blood stains in the wearing apparels of the victim are factors to disbelief the charge of rape particularly when as per the explanation proved under section 375 of IPC, mere penetration is sufficient to constitute the sexual intercourse, necessary to the offence of rape – Conviction upheld. (Para 8)

For Appellant : Mr. Akash Bhuyan (Amicus Curiae)
For Respondent : Mr. Jyoti Prakash Patra, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 12.09.2019

S. K. SAHOO, J.

A girl child is a divine gift in the life of her parents. She is like a pearl in their hands. God alone makes life in the hiddenness of the womb of the mother. Carrying all hopes and expectations, a girl child comes to this world. She is so simple, so cute and so beautiful. Her eyes are full of sweet dreams. She is like an uncut diamond. As an uncut diamond is shaped in any particular form by a professional cutter and polished whereafter it becomes more valuable, more beautiful; similarly if the girl child gets good environment, good guidance, good education, she grooms up into a better human being. Unfortunately, every girl child does not get such opportunity for which she is not shaped properly. Due to fault in shaping and lack of awareness among parents, family members and guardians that child sexual abuse can occur at any time and in a variety of settings, including home, school or at work place and most often the offenders are relatives of the child, family friends, neighbours, close acquaintances and even the teachers, she becomes a victim of sexual abuse. Non-taking of effective steps at right time

to prevent the situations happening in which such sexual abuse are committed, gives scope to the offender to commit the crime easily and thereby leading the victim to suffer a long-term depression, post-traumatic stress disorder, pain and anxiety. Simplicity is good to certain extent but it should not lead to stupidity in trusting a wrong person who can cause irreparable harm to the victim.

The appellant Nrusingha Charan Dash @ Babulu faced trial in the Court of learned 2nd Additional Sessions Judge, Bhubaneswar in S.T. Case No.02/12 of 2008 for commission of offences punishable under sections 376(2)(f) and 506(II) of the Indian Penal Code on the accusation that on 27.01.2008 at about 7.00 p.m. in Vani Vidya Mandir School, Palasapalli, Bhubaneswar, he committed rape on the victim who was a minor girl under 12 years of age and also committed criminal intimidation by threatening the victim to do away with her life with intent to cause alarm in her mind.

The learned trial Court vide impugned judgment and order dated 14.05.2008, found the appellant guilty of the offences charged and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for one year for the offence under section 376(2)(f) of the Indian Penal Code and to undergo R.I. for one year and to pay a fine of Rs.500/- (rupees five hundred), in default, to undergo rigorous imprisonment for three months for the offence under section 506(II) of the Indian Penal Code and both the substantive sentences were directed to run concurrently.

2. The prosecution case as per the first information report lodged by one Sukanti Sahoo (P.W.5), the mother of the victim on 28.01.2008 before the Inspector in-charge of Khurda Mahila police station is that she was staying with her family in a rented house in Bhoi Sahi of Punama gate, Bhubaneswar and on 27.01.2008 she had been to attend her works and at that time the petitioner took the victim to a school situated at Palasapalli on the pretext of participating in a feast and there he committed rape on the victim and also threatened the victim with dire consequence not to disclose about the occurrence before anybody.

On such report lodged by P.W.5, Khurda Mahila P.S. Case No.16 of 2008 was registered against the appellant under sections 376(2)(f)/506 of the Indian Penal Code by the IIC of Mahila police station, Smt. Bilasini Nayak who directed S.I. of Police namely Smt. Sandhyarani Sahoo (P.W.10) to take up investigation of the case. During course of investigation, P.W.10 seized

the Chadi and Frock of the victim which she was wearing at the time of occurrence as per seizure list (Ext.2) and sent the victim girl for medical examination. She visited the spot which is Vani Vidya Mandir, Palasapalli, prepared the spot map (Ext.8), examined the witnesses including the teachers of the school, arrested the appellant on 28.01.2008 and seized his wearing apparels under seizure list (Ext.6/1) and on the next day, she sent the appellant for medical examination on police requisition. The sample of semen and pubic hair of the appellant were collected by the Medical Officer and it was seized as per seizure list Ext.10. The statement of the victim was recorded under section 164 of Cr.P.C. and the wearing apparels of the victim as well as of the appellant were sent to S.F.S.L., Rasulgarh through the learned S.D.J.M., Bhubaneswar for chemical examination. The I.O. also seized the school admission register of Gosa Gareswar Primary School where the victim was a student in the year 2003 on production by the Headmistress in-charge of the School under seizure list Ext.12 and gave it in the zima of the Headmistress. She also obtained the chemical examination report (Ext.14) and on completion of investigation, submitted charge sheet against the appellant on 31.01.2008 under sections 376(2)(f) and 506 of the Indian Penal Code.

3. After filing of charge sheet, the case was committed to the Court of Session for trial observing due committal procedure where the learned trial Court charged the appellant on 01.03.2008 under sections 376(2)(f)/506(II) of the Indian Penal Code and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. During course of trial, in order to prove its case, the prosecution examined as many as twelve witnesses.

P.W.1 Biswanath Behera was the landlord of the house where the informant and the victim were staying on rent and he stated the age of the victim to be nine years and further stated that he came to know from the informant on 27.01.2008 at about 8 p.m. about the commission of rape on the victim by the appellant.

P.W.2 Smt. Subashini Sahoo though stated the age of the victim was ten years but she did not support the prosecution case for which she was declared hostile.

P.W.3 Dillip Kumar Sahoo is the scribe of the first information report.

P.W.4 Smt. Jagyaseni Pradhan did not support the prosecution case for which she was declared hostile

P.W.5 Smt. Sukanti Sahoo is the informant of the case and happens to be the mother of the victim. She stated that the age of the victim was ten years at the time of occurrence and further stated that the victim disclosed before her about the commission of rape on her by the appellant in the school and that the appellant threatened her with dire consequence. She further stated to have noticed injury on the private part of the victim. According to her, the date of birth of the victim was 10.07.1998. She is also the witness to the seizure of the wearing apparels of the victim under seizure list Ext.2.

P.W.6 Dr. Susama Mishra who was attached to Capital Hospital, Bhubaneswar as Gynecology Specialist examined the victim on police requisition on 28.01.2008 and proved her report (Ext.4). According to her, the age of the victim was below 12 years at the time of her examination. She further noticed a linear abrasion on the lower lip of the victim and injury on both sides of her labia majora which was suggestive of forceful penetration of the male organ.

P.W.7 Santosh Patra was a teacher Vani Vidya Mandir, Pallaspalli, who stated about the farewell feast being organized in the school for the outgoing 10^{th} class students in the school and further stated that the appellant had come to the school at about 5.00 p.m. with a small girl to clean the class room and to take away the surplus food items and that the keys of the school were handed over to the appellant asking him to lock it after taking the food items.

P.W.8 Smt. Mamata Mallick was the constable attached to Mahila police station, Bhubaneswar who took the victim to Capital Hospital for her medical examination on the basis of the command certificate issued by the Investigating Officer and she also produced the Frock and Chadi of the victim before the Investigating Officer after her medical examination which were seized under seizure list Ext.2. She also stated about the seizure of the wearing apparels of the appellant under seizure list Ext.6/1.

P.W.9 is the victim who stated in detail about the occurrence and how the appellant committed rape on her and also threatened her.

P.W.10 Smt. Sandhyarani Sahoo was the S.I. of Police Mahila police station who is the investigating officer.

P.W.11 Dr. Sarbeswar Acharya was the Specialist in F.M.T., Capital Hospital, Bhubaneswar who examined the appellant on police requisition on 29.01.2008 and found no injury on his person but stated that the appellant was capable of sexual intercourse. He proved his report Ext.15.

P.W.12 Smt. Basanti Kumar Dei was the Headmistress in-charge of Gosa Gareswar Primary School where the victim was prosecuting her studies in 2003. She proved the date of birth of the victim as reflected in the school admission register to be 10.07.1998.

The prosecution exhibited sixteen documents. Ext.1 is the written F.I.R., Exts.2, 6/1, 10 and 12 are the seizure lists, Ext.3 is the report of Radiologist, Ext.4 is the medical examination report, Ext.5 is the requisition sent by P.W.6 to Radiologist, Ext.8 is the spot map, Ext.9 is the medical requisition of accused, Ext.11 is the forwarding report, Ext.13 is the zimanama, Ext.14 is the chemical examination report, Ext.15 is the report of P.W.11 and Ext.16 is the admission register.

The prosecution proved four material objects. M.O.I is the Frock of the victim, M.O.II is the Chadi of the victim, M.O.III is the pant of the appellant and M.O.IV is the shirt of the appellant.

5. The defence plea of the appellant is one of denial.

6. The learned trial Court after analysing the evidence on record and relying upon the evidence of the prosecution witnesses which is amply corroborated by the medical evidence and the contemporary document like school admission register came to hold that the age of the victim was about ten years at the time of occurrence which took place on 27.01.2008. The learned trial Court further held that there is no material on record to suggest that the victim was a tutored witness rather other witnesses corroborated her evidence in all material particulars. The learned trial Court further held that the evidence of P.W.5, the informant completely corroborated the evidence of the victim that she accompanied the appellant to the school in the evening hours and also the victim disclosing about the occurrence in details before her. The learned trial Court after analyzing the evidence of the doctors, the medical examination reports and the evidence of other witnesses came to hold that there is complete corroboration to the evidence of the victim in all materials particulars and the presence of the injury on the inner side of her private part and presence of the injury on her lip corroborates her evidence regarding the fact that appellant committed rape on her. Accordingly, the

learned trial Court came to hold that the prosecution has successfully proved a case under sections 376(2)(f)/506(II) of the Indian Penal Code against the appellant beyond all reasonable doubt.

7. When the matter was called in the first hour for hearing, the learned counsel for the appellant was not present. Since it is an appeal of the year 2011 and the appellant is in judicial custody since 29.01.2008, Mr. Akash Bhuyan was engaged as Amicus Curiae and he was supplied with the paper book and given time to prepare the case. He placed the impugned judgment, F.I.R. as well as the evidence of the witnesses. It is the contention of the learned counsel for the appellant that one of the essential ingredients for the offence under section 376(2)(f) of the Indian Penal Code is that the victim should be below twelve years of age but the evidence adduced by the prosecution in that respect is lacking and the conclusion arrived at by the learned trial Court that the victim was aged about ten years at the time of occurrence is not proper. It is further contended that the evidence of the doctor (P.W.11) who examined the appellant on 29.01.2008 indicates that he found no injury on the person of the appellant and his further statement that there was probability of injuries being caused on the private part of the male person if he commits rape on a girl of ten to twelve years of age falsifies that the appellant committed rape on the victim. It is submitted that the chemical examination report indicates no semen stain or blood on the wearing apparels of the victim which also goes against commission of rape. The learned counsel further argued that the teacher of the school who was examined as P.W.7 has stated that the appellant was given the keys of the rooms of the ground floor where the feast was held and the rape is alleged to have been committed in the first floor and the said witness has stated that the keys of the other rooms were the Headmaster. It is argued that since there is no evidence that the keys of the first floor rooms were also handed over to the appellant, the evidence of the victim that rape was committed in one of the rooms of first floor appears to be an improbable story and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Jyoti Prakash Patra, learned Additional Standing Counsel appearing for the State of Odisha on the other hand supported the impugned judgment and submitted that the finding of the learned trial Court relating to the age of the victim to be less than ten years is not only based on the oral evidence of the victim, her mother (P.W.5) and other witnesses like P.W.1 and P.W.2 but it is also based on the entry relating to the date of birth made in the school admission register as well as on the basis of the ossification test

report. It is further submitted that when the age of the victim has not been challenged in the cross-examination of any witnesses, it cannot be said that the learned trial Court has arrived at a wrong finding holding the age of the victim to be ten years at the time of occurrence. Learned counsel for the State further argued that the evidence of the victim is very clear and appears to be trustworthy and nothing has been elicited in the cross-examination to disbelieve her evidence and the immediate disclosure of the occurrence before her mother (P.W.5) by the victim is another feature which strengthens the prosecution case. He further submitted that the victim was examined by the doctor on the next day of occurrence and the doctor has categorically stated that she noticed injury on the labia majora on both sides of the inner surface and further stated that there was also injury on the lower lip of the victim and the injury on the labia majora suggests forcible penetration of the male organ. Learned counsel submitted that even though no semen stain or blood stain was noticed on the wearing apparels of the victim on chemical analysis but there is no evidence of ejaculation and when penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape as per the explanation provided under section 375 of the Indian Penal Code and the evidence of the victim gets corroboration from other material evidence including the medical evidence, it cannot be said that the learned trial Court has committed any illegality in holding the appellant guilty under sections 376(2)(f) and 506(II) of the Indian Penal Code.

8. Adverting to the contentions raised by the learned counsel for the respective parties and coming to the offence under section 376(2)(f) of the Indian Penal Code which prescribes punishment for commission of rape on a woman when she is under twelve years of age, the prosecution in order to prove the charge seems to have relied upon the oral evidence of the victim (P.W.9), her mother (P.W.5) and above all P.Ws. 1 and 2 and documentary evidence like school admission register entry relating to the date of birth deposed to by P.W.12, the Headmistress in-charge of the school as well as the medical examination report of the victim proved by the doctor (P.W.6).

The victim on being examined as P.W.9 has stated her age to be ten years on the date of her deposition which was recorded on 29.04.2008. She stated that the occurrence in question took place on 27.01.2008. The mother of the victim being examined as P.W.5 has stated that the victim was ten years old at the time of occurrence and her date of birth was 10th July 1998. The evidence of the victim as well as her mother relating to the age factor has not been challenged by the defence. P.Ws.1 and 2 have also stated that the

victim was nine years and ten years respectively. Their evidence has also not been challenged by the defence. The Headmistress in-charge of the Primary School where the victim was prosecuting her studies in the year 2003 on being examined as P.W.12 stated that in the school admission register, the date of birth of the victim has been mentioned as 10.07.1988 and she proved the school admission register which was marked as Ext.16 and the same was given in her zima by the police. Though P.W.12 has stated in the cross-examination that she was not the Headmistress when the entry was made but since it is a document which is relevant and admissible under section 35 of the Evidence Act, the entries in the register cannot be ignored on the ground that P.W.12 was not the author of the entries and she had no personal knowledge about the entries. (Ref:-**A.I.R. 2008 S.C.632, Desh Raj -Vrs.- Bodh Raj**). The date of birth of the victim as per the school admission register which was produced in Court and marked as Ext.16 gets corroboration from the evidence of the mother of the victim. Nothing has been elicited in the cross-examination to show any kind of tampering in the school admission register, therefore, the evidence is to be accepted. The doctor (P.W.6) who examined the victim has also stated that she examined the clinical features of the victim and found there were 28 teeth on her two jaws. The breast was not developed and the auxiliary hair and pubic hair were not developed and the victim had not attended the puberty and from the physical features and radiologist report, she opined the age of the victim to be below twelve years of age at the time of her examination. Nothing has been elicited in the cross-examination to disbelieve such finding given by the doctor.

The learned trial Court after careful analysis of the oral, documentary evidence as well as medical evidence has held the age of the victim to be about ten years at the time of occurrence. I find no infirmity in such finding of the learned trial Court relating to the age of the victim. Therefore, the first ingredient of the offence under section 376(2)(f) of the Indian Penal Code that the victim should be below twelve years of age is satisfied in this case.

Coming to the commission of rape on the victim (P.W.9), it appears that prior to the recording of evidence, the victim was questioned by the learned trial Court on various aspects about her friends, class, teachers and some general questions were put to her and the Court found that she was capable of giving rational answers. The victim stated in her evidence that on 27.01.2008 she accompanied the appellant to Palasuni School and on reaching there, she found six students and two teachers were there and on

seeing them, the teacher asked the appellant to clean the rooms of the school and then go back and thereafter the teachers and the students left the school. The victim further stated that she and the appellant cleaned the school rooms of both the floors and thereafter the appellant asked her to accompany to the first floor to switch off the light and then they went to the upstairs and after switching off the lights of the rooms except one room, the appellant asked her to have a play and then the appellant made her lie on the ground and removed his pant, slept over her and inserted his private part inside her private part for which the victim felt pain and cried. The victim further stated that when she told the appellant that she would tell about the occurrence to her mother, the appellant pressed her mouth by his hand and only when she told not to tell about the occurrence, the appellant left her and in that process, she sustained injuries on her lips. The victim further stated that she came back and disclosed about the occurrence before her mother and then they went to the police station and her mother reported the occurrence before police.

The evidence of the victim is corroborated by her mother (P.W.5) who has stated in detail as to how the victim was crying and disclosed before her that the appellant committed rape on her in the school and threatened her not to disclose about the occurrence. P.W.5 further stated that she noticed injury on the private parts of the victim. The immediate disclosure about the occurrence by the victim before her mother is admissible as res gestae under section 6 of the Evidence Act as it is a spontaneous statement connected with the fact in issue and there is no time interval for fabrication. There is no evidence that she had been tutored by anybody to depose against the appellant.

The victim (P.W.9) has stated in the cross-examination that there was no bleeding on her injury places and she denied the suggestion which was given by the defence that she rubbed the pant over her private part as she felt itching for which she sustained some injuries. The victim in the cross-examination specifically stated that the appellant pushed his private part only once inside her private part. It is not the case of the victim that there was any ejaculation or any kind of bleeding from the private part. Therefore, the non-finding of the semen stain and blood stain in the Frock and Chadi of the victim as per the chemical examination report is not fatal to the prosecution case.

The doctor (P.W.6) has categorically stated that when she examined the victim on 28.01.2008, she found one linear abrasion on the lower lip

slightly to the left side from the middle and injury on the labia majora on both sides of the inner surface of size ½ c.m. x ¼ c.m. and the injuries were simple in nature and might have been caused by forceful sexual intercourse. The doctor specifically stated that the injury on the lower lip was possible if the mouth is pressed by the male person while committing rape and the presence of the abrasion on the inner surface of both sides of labia majora suggest forceful penetration of the male organ. Therefore, the evidence of the victim gets corroboration from the medical evidence. The doctor who has examined the appellant no doubt has stated that he did not find any injury on the person of the appellant and further stated that there is possibility of injury on the private part of a male person if there is rape on a girl of ten to twelve years of age but it cannot be lost sight of the fact that the victim stated that the appellant pushed his private part only once inside her private part and in such circumstances, it cannot be said that the non-finding of any injury on the private part of the appellant is a factor to disbelieve the charge of rape against him particularly when as per the explanation proved under section 375 of the Indian Penal Code, penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

The statement of the teacher (P.W.7) indicates that he had given the keys of the rooms of the ground floors to the appellant while leaving the room and the keys of the other rooms were with the Headmaster. Such a statement does not falsify the prosecution case that the rape was committed on the first floor as the victim specifically stated that after switching off the lights of the rooms except one room in the first floor, the appellant asked her to proceed to have a play and then made her lie on the ground and committed rape. No where it has been brought by the defence that all the rooms in the first floor were under lock and key and the keys were with the Headmaster.

The teacher (P.W.7) has specifically stated that on 27.01.2008 at about 5.00 p.m. on being called, the appellant had come to the school with one small girl to take the surplus food items. Even though he has not stated that the small girl was the victim but all the same it lends corroboration to the victim's evidence that she had been with the appellant to the school on the fateful day at the relevant time.

Moreover, in the accused statement, when a question was put to the appellant that as per the evidence of the victim, he along with the victim reached the school and the teacher asked him to clean the school and to take away the surplus food items, the appellant replied as 'true'. Therefore, the

presence of the victim with the appellant on the fateful day in the school has not been disputed.

The evidence of the victim, her mother, the medical examination report which was proved by P.W.6 and the other surrounding circumstances lend corroboration to the prosecution case that the victim was subjected to rape on 27.01.2008 in the school premises by the appellant.

When the prosecution has not only established the age of the victim to be below twelve years but also proved by adducing clinching evidence that she was subjected to rape, I am of the humble view that the learned trial Court is quite justified in convicting the appellant under section 376(2)(f) of the Indian Penal Code.

9. So far as the offence under section 506(II) of the Indian Penal Code is concerned, the victim has specifically stated that when after commission of rape, she felt pain and cried and told that she would tell about the occurrence to her mother, the appellant pressed her mouth by his hand and thereafter, the appellant assaulted her and also threatened her not to tell about the occurrence otherwise he would kill her. She disclosed about this aspect also before her mother (P.W.5) which is also corroborated by P.W.5. Thus, the learned trial Court has rightly held the appellant guilty of the offence under section 506(II) of the Indian Penal Code.

10. Section 376(2)(f) of the Indian Penal Code carries minimum punishment of ten years which has been imposed on the appellant and therefore, the order of conviction and the sentence imposed on the appellant is justified.

In view of the foregoing discussions, I find no illegality or infirmity in the impugned judgment of the learned trial Court in convicting the appellant of the offences charged and imposing the sentence as awarded which is accordingly upheld. In the result, the criminal appeal preferred by the appellant being devoid of merits, stands dismissed.

11. In view of the enactment of the Odisha Victim Compensation Scheme, 2012, keeping in view the age of the victim at the time of occurrence and the nature and gravity of the offence committed and the family and social background of the victim, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Khurda (Bhubaneswar) to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation. Let a

copy of the judgment be sent to the District Legal Services Authority, Khurda (Bhubaneswar) for compliance.

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

Before parting with the case, I would like to put on record my appreciation to Mr. Akash Bhuyan, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.5,000/- (rupees five thousand only).

Accordingly, the Criminal Appeal stands dismissed.

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2019(III) ILR - CUT- 189

S. K. SAHOO, J.

CRLA NO. 24 OF 2011

BENU @ BENUDHAR NAIK .....Appellant

.Vs.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offence U/s.376 (2) (g) of IPC – Gang rape – Appreciation of evidence – Testimony of victim as well as medical examination report corroborate each other – Victim was raped in naked position – Chemical examination report does not indicate any blood & semen stains in the wearing apparels of the victim – Sustainability of conviction questioned on the basis of such chemical report – Held, even though the blood & semen stains could not detected on the wearing apparels of the victim, it is not a ground to reject the prosecution case inasmuch as it is the prosecution case that the victim was raped while she was in complete naked position. (Para 8)

For Appellant : Mr. Abinash Padhi (Amicus Curiae)
For Respondent : Mr. Jyoti Prakash Patra, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 12.09.2019

S. K. SAHOO, J.

"The day a woman can walk freely at midnight on the roads, that day we can say that India achieved independence."

Mahatma Gandhi

Women are playing valuable roles of mothers, sisters, daughters and wives in our lives. They have become educated, self-dependent and strong and occupying various important posts in different fields. So many laws have been enacted to protect the women and their rights. In spite of that when some painful, shameful and shocking incidents concerning sexual abuse on women are heard, it disturbs the conscience of the civilised society and takes one to remind the aforesaid famous quote of the Father of the Nation.

The appellant Benu @ Benudhar Naik faced trial in the Court of learned Adhoc Additional Sessions Judge, Fast Track Court, Champua in S.T. Case No.51/296 of 2009 for offence punishable under section 376(2)(g) of the Indian Penal Code for committing gang rape on the victim on 06.02.2008 evening at about 6.30 p.m. at Balani Basti, Bada Sahi under Barbil Police Station in the district of Keonjhar.

The learned trial Court vide impugned judgment and order dated 18.12.2010, found the appellant guilty of the offence charged and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/-, in default, to undergo simple imprisonment for three months.

2. The prosecution case, as per the First Information Report lodged by one Niranjan Nayak (P.W.13), the husband of the victim on 08.02.2008 before the Inspector-in-charge, Barbil Police Station is that on 06.02.2008 the victim, who is the wife of the informant had been to Badasahi Basti and was returning home at about 6.30 p.m. and while she was on the way, near a railway crossing, all on a sudden eight persons lifted her gagging her mouth and the victim could identify two of the culprits namely, Rintu @ Narottam Naik and the appellant out of the eight culprits. It is further stated in the First Information Report that the culprits committed gang rape on the victim. After returning from his work, the informant could not find the victim in the house and accordingly he proceeded to the house of his elder sister but there he got information that the victim had already left the house. The informant could locate the victim at Patra Sahi in Bolani Basti and found her crying. The victim narrated the incident before the informant and she also fell ill for which there was delay in giving information at the Police Station.

The First Information Report which was lodged at Bolani Out Post was sent to Barbil Police Station for registration and accordingly Barbil P.S. Case No.30 dated 08.02.2008 was registered under section 376(2)(g) of the Indian Penal Code. The Inspector-in-Charge of Barbil Police Station directed P.W.15 Chitta Ranjan Nayak, who was the S.I. of Police attached to Bolani outpost to take up investigation of the case.

During course of investigation, P.W.15 examined the informant, the victim and other witnesses and also seized wearing apparels of the victim i.e. one faded orange colour polyster saree, one earth colour torn saya under seizure list Ext.6. He sent the victim under police requisition to Government Hospital, Barbil for medical examination and accordingly Dr. Ratna Panda (P.W.14) of Government Hospital, Barbil examined the victim. The I.O. seized the collected blood sample, pubic hair, vaginal swab along with command certificate which was produced before him by the escort party under seizure list Ext.7. The co-accused Ritu @ Narottam Naik was arrested on 09.09.2008 and forwarded to Court on the next day. The seized articles were sent to S.F.S.L., Rasulgarh, Bhubaneswar as per the order of the J.M.F.C., Barbil for chemical examination. After completion of investigation, P.W.15 submitted charge sheet on 07.01.2009 under section 376(2)(g) of the Indian Penal Code against the co-accused Rintu @ Narottam Naik and also against the appellant showing the appellant as an absconder for which non-bailable warrant of arrest was issued against him.

The co-accused Rintu @ Narottam Naik faced trial in the Court of learned Adhoc Additional Sessions Judge (Fast Track), Champua in S.T.Case No. 15/62 of 2009 for offence punishable under section 376(2)(g) of the Indian Penal Code and the learned trial Court vide judgment and order dated 24.08.2009 found him guilty of the offence charged and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.3,000/-, in default, to undergo rigorous imprisonment for five months.

Challenging such order of conviction, the co-accused Rintu @ Narottam Naik preferred an appeal before this Court in CRLA No. 474 of 2010 and this Court by judgment and order dated 09.02.2016 confirmed the order of conviction and sentence passed by the learned trial Court.

3. Pursuant to the non-bailable warrant of arrest, the appellant was arrested on 07.11.2009 and faced trial in the Court of Adhoc Additional Sessions Judge, Fast Track Court, Champua in S.T. Case No.51/296 of 2009. The learned Trial Court framed charge against the appellant on 04.02.2010 under section 376(2)(g) of the Indian Penal Code and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. During course of trial, in order to prove its case, the prosecution examined as many as eleven witnesses.

P.W.1 Gopinath Munda is the scribe of the First Information Report.

P.W.2 Dr.Aswini Kumar Das was the doctor attached to Govt. Hospital, Barbil, who examined the co-accused Rintu @ Narottam Naik on police requisition and found that he was well capable of performing sexual intercourse and his clothing were not having any physical clue of recent sexual intercourse and there was no bodily injury suggestive of forcible sexual intercourse and the genitalia did not show any sign and symptoms of recent sexual intercourse.

P.W.3 Padia Naik did not support the prosecution case, for which he was declared hostile.

P.W.4 Smt. Amulya Naik is the aunt of the appellant and she was declared hostile by the prosecution for not supporting its case. After permission was granted by the learned trial Court to put leading questions, on the questions put by the learned Public Prosecutor, she stated that the victim disclosed before her that near the railway line in the night, she was subjected to rape by six to seven persons and she could identify two out of them and they were the appellant and co-accused Rintu Naik. She also stated that due to gang rape on the victim, she was unable to move properly and when the victim felt easy, she went to lodge information along with her husband.

P.W.5 Smt. Kamala Munda stated that one day after the occurrence, the victim disclosed before her and her mother that five persons committed rape on her and out of them, she could identify two persons who were the the present appellant and co-accused Rintu.

P.W.6 Kalei Munda is the husband of P.W.5 Smt. Kamala Munda who came to know from her that two persons, namely, co-accused Rintu and the appellant committed rape on the victim.

P.W.7 Bidyadhar Padhuria was the constable attached to Bolani Out post and he is a witness to seizure of vaginal swab, pubic hair, blood sample etc. of the victim collected by the doctor seized under seizure list Ext.3.

P.W.8 Kaibalya Mohanta was another constable attached to Bolani outpost who stated about the seizure of blood sample, pubic hair, vaginal swab of the victim under seizure list Ext.3.

P.W.9 Chandrabhanu Dehury was the constable attached to Bonai Police Station, who is a witness to the seizure of the report of the doctor vide Ext.4.

P.W.10 Lokanti Naik and P.W. 11 Fagu Mahakud did not support the prosecution case.

P.W.12 is the victim. She stated about the commission of gang rape on her by the appellant and co-accused Rintu.

P.W.13 Niranjan Naik is the husband of the victim and he is also the informant in the case. He stated that while he along with his cousin brother Binod Naik were searching for the victim on the date of occurrence, they found the victim sitting under a tree near the Railway bridge being full naked and also narrated the incident of rape before him.

P.W.14 Dr. Ratna Panda examined the victim on 9.2.2008 at Government Hospital, Barbil and she proved her medical examination report Ext.5.

P.W.15 Chitta Ranjan Nayak was the S.I. of police, Bolani Outpost who is the Investigating Officer in the case.

The prosecution exhibited eight numbers of documents. Ext.1 is the First Information Report, Ext.2 is the report of P.W.2 Dr.A.K. Das, Exts. 3, 4, 6, 7 and 8 are the seizure lists, Ext.5 is the medical examination report of the victim.

5. The defence plea of the appellant was one of denial.

6. When the matter was called for hearing, learned counsel for the appellant was not present and since it is an appeal of the year 2011 and the appellant is in judicial custody since 07.11.2009, therefore, the Court appointed Mr. Abinash Padhi, learned counsel as an amicus curiae to assist the Court. A copy of the paper book was also served on him and he was given time to prepare the case.

The learned amicus curiae appearing for the appellant placed the impugned judgment, F.I.R. as well as the evidence of the witnesses and contended that the impugned judgment and order of conviction is not sustainable in the eye of law and there is delay of two days in lodging the First Information Report and the victim's statement is contradictory and since the victim was pregnant at the time of alleged occurrence and gang rape was alleged to have been committed on her as there was no abortion, the accusation of gang rape is falsified. Learned counsel for the appellant further urged that chemical examination report do not support the prosecution case. The learned counsel further submitted that the sentence imposed by the learned trial Court is excessive and as the petitioner is in jail custody since 07.11.2009, in case the order of conviction is sustained, the sentence be reduced to period already undergone.

Mr. Jyoti Prakash Patra, learned Addl. Standing Counsel on the other hand contended that in a case of this nature, since the evidence of the victim is clear, cogent and trustworthy, that by itself is sufficient to convict the appellant. He urged that the victim has categorically implicated the appellant and two others to have committed rape on her and other persons have participated in dragging her and also committing same other overt acts. He further urged that

the medical evidence clearly corroborates the evidence of the victim and the seizure of torn wearing apparels of the victim is an additional factor which lends support to her statement. The learned counsel further submitted that merely because as per the chemical examination report, blood stain or semen stain could not be detected on the wearing apparels of the victim that would not be a factor to reject the testimony of the victim. He further submitted that the co-accused Rintu @ Narottam Naik was convicted and sentenced by the learned trial Court in S.T. Case No. 15/62 of 2009 and challenging the said order of conviction, he also preferred an appeal before this Court in CRLA No. 474 of 2010 and this Court by judgment and order dated 09.02.2016 confirmed the order of conviction passed by the learned trial Court and therefore, since same set of evidence is available against the appellant, the appeal should be dismissed.

7. Considering the rival contentions raised at the Bar and adverting to the evidence of the victim (P.W.12) who is the star witness of the prosecution, it is found that she has stated that on the date of occurrence while she was coming from Bolani Basti to her house by the side of a railway track, at that time the appellant and co-accused Rintu @ Narottam Naik lifted her and made her lie under the railway bridge. She has further stated that making her naked, first the appellant forcibly raped her and then the co-accused Rintu committed rape on her. The victim further stated that after the occurrence, when she came to a nearby household, she was provided with cloth to cover her body and her husband P.W.13 came there and she narrated the incident before her husband who took her to the police station where the F.I.R. was lodged. The victim in the cross-examination has specifically stated that apart from the appellant and co-accused Rintu @ Narottam Naik, six other accused persons were present at the spot. She has further stated that she had got acquaintance with the appellant but had no enmity with him. She further stated that she was four months pregnant by then and during course of occurrence, she sustained injuries on her breast. Nothing substantial has been elicited in the cross examination of the victim to discard her version.

At this stage, coming to the evidence of the doctor (P.W.14), it is found that she examined the victim on 9.2.2008 at Government Hospital, Barbil and noticed that there were multiple healed abrasions all over her body, especially on the buttocks, lower thigh, arm and legs suggestive of friction on the rough surface and the age of the injuries were within two to five days. The doctor further opined that the victim was 16 to 18 weeks pregnant at the time of her examination and she found there were old hymeneal tears present. She further stated that the symptom suggested that the victim was exposed to sexual intercourse previously. The doctor proved

her medical examination report Ext.5. Thus the evidence of the victim that she was subjected to gang rape is corroborated by the medical evidence.

The victim has also disclosed about the incident before her husband (P.W.13) and accordingly the name of the appellant finds place in the First Information Report which was lodged on 08.02.2008 at Bolani Outpost.

8. The contentions of the learned amicus curiae that there was two days delay in lodging the First Information Report for which the prosecution case should not be believed, is not acceptable. In a case of rape, the delay in lodging the First Information Report is not a factor to disbelieve the prosecution case. The victim of rape and their family members are ordinarily reluctant to approach the police because of family prestige and after making up their mind to fight for the cause of justice, ultimately they decide to take recourse of the law and in the present case when the occurrence has taken place on 6.2.2008 in the evening hours and the F.I.R. was lodged on 8.2.2008, it cannot be said that there was such an inordinate delay which would be sufficient to create doubt about the prosecution case.

The further contention of the learned amicus curiae that the victim was pregnant for 16-18 weeks at the time of occurrence and in that case, had she been subjected to gang rape, there would have been abortion is an hypothetical argument as nothing has been put to the doctor who examined the victim in that respect.

There are some minor contradictions in the statement of the victim made during chief examination vis-a-vis her cross-examination relating to number of persons participating in the crime but since there are no inconsistencies so far as the involvement of the appellant and the co-accused Rintu, in my humble view, the contradictions which are very insignificant do not affect the credibility of the rape victim in any manner.

So far as the chemical examination report is concerned, it appears that the saree, torn saya, blood sample, pubic hair, vaginal swab of the victim were sent for chemical examination. The report indicates that blood and semen stains could not be detected in the wearing apparels of the victim. Even though the blood and semen stain could not be detected on the wearing apparels of the victim, it is not a ground to reject the prosecution case inasmuch as it is the prosecution case that the victim was raped while she was in a complete naked position and she was provided with one cloth from the nearby household. Therefore, as at the time of forcible sexual intercourse, the victim was not wearing any saree and saya and not using those apparels after

the occurrence, the non-finding of the semen stain or blood stain on her wearing apparels is not a factor to disbelieve the prosecution case.

The evidence of the victim is not only clear, clinching, trustworthy, reliable and above board but the same also gets corroboration from the medical evidence. The seizure of torn saya is an additional factor which lends support to her testimony. The disclosure made by the victim immediately after the occurrence before her husband is admissible as res gestae under section 6 of the Evidence Act.

Therefore, I do not find any infirmity or illegality in the impugned judgment and order of conviction of the learned trial Court and accordingly, I am of the view that the learned trial Court has rightly found the appellant guilty under section 376 (2)(g) of IPC.

9. So far as sentence is concerned, the appellant is in custody since 07.11.2009 and he had undergone about nine years and ten months of imprisonment inasmuch as throughout during trial as well as during pendency of the appeal, the appellant was not released on bail.

Section 376(2)(g) of the Indian Penal Code prescribes minimum punishment for ten years which may extend to life and shall also be liable to fine. However, it is provided that the Court may for adequate and special reasons can impose a sentence of imprisonment of either description for a term of less than ten years. Therefore, in a case of gang rape, unless there are any adequate or special reasons, the Court is not empowered to impose any sentence lesser than the minimum as prescribed under the statute.

In the present case, nothing has been brought on record and nothing has also been submitted by the learned amicus curiae to make out any adequate or special reasons to reduce the sentence of imprisonment and since minimum sentence has been imposed, I also find there is no infirmity in the same.

By passing a lenient sentence in a serious offence like gang rape, the punishment would lose its deterrent effect. Passing of appropriate sentence is always in the interest of society. The conduct of the appellant and the defenceless and unprotected state at the victim cannot be lost sight of while awarding sentence in an appropriate manner.

Therefore, I am of the view that the impugned judgment and order of conviction of the appellant under section 376(2)(g) of the Indian Penal Code and sentence as imposed by the learned trial Court vide impugned judgment and order dated 18.12.2010 is legal, proper and justified.

10. In view of the enactment of the Odisha Victim Compensation Scheme, 2012, keeping in view the age of the victim at the time of occurrence and the nature and gravity of the offence committed and the family background, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Keonjhar to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation under the Orissa Victim Compensation Scheme, 2012.

Let a copy of the judgment be sent to the District Legal Services Authority, Keonjhar for compliance.

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

Before parting with the case, I would like to put on record my appreciation to Mr. Abinash Padhi, the learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to his professional fees which is fixed at Rs.5,000/-.

Accordingly, the criminal appeal being devoid of merits, stands dismissed.

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2019(III) ILR - CUT-197

S. K. SAHOO, J.

RPFAM NO. 82 OF 2013

SANGHAMITRA MOHARANA .....Petitioner

.Vs.

BALARAM MOHARANA AND ANR. .....Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 124(4) – Order of maintenance denied by the family court on the ground of refusing to live with her husband without 'sufficient cause' – Order of the family court challenged – Petitioner/wife pleaded that she was subjected to continuous physical & mental torture – Husband/opposite party pleaded that, petitioner was not willing to live with him and performing the matrimonial obligation, left the maternal house on her own volition – Whereas the evidence in contrary to show that, petitioner was tortured and humiliated in her in-laws house, driven out, taken back & the same was repeated again & again – "Sufficient cause" provided as per the provision – Held, a women who is tortured in her in- laws

house physically and mentally cannot be denied of maintenance if she leaves her husband's company for that reason and lives separately – Therefore impugned judgment is perverse and not sustainable in the eye of law and hence herby set aside. (Para 6)

For Petitioner : Mr. Sidhartha Misra-1 & R. N. Mishra
For Opp. Party : Mr. Dusmanta Biswal & S.K. Baral

JUDGMENT Date of Argument and Judgment: 23.09.2019

S. K. SAHOO, J.

In this revision petition under section 19(4) of the Family Courts Act, 1984, the petitioner Sanghamitra Moharana has challenged the impugned judgment and order dated 27.07.2013 of the learned Judge, Family Court, Cuttack in Criminal Proceeding No.217 of 2008 in dismissing her petition for maintenance under section 125 of Cr.P.C.

2. The petitioner and her daughter Lusna Moharana (proforma opposite party) filed the maintenance petition wherein it is stated that the petitioner is the legally married wife of the opposite party Balaram Moharana and their marriage was solemnized in the year 1989 as per Hindu rites and customs and out of their wedlock, Lusna Moharana (proforma opposite party) was born in the year 1990 and since the petitioner was tortured by her husband and in-laws family members, she left her matrimonial house and came to reside at her paternal place with her minor daughter. It is the further case of the petitioner that at the intervention of the Orissa State Legal Aid and Advice Board, the opposite party took back the petitioner and their minor daughter and thereafter the petitioner conceived for the second time but again she was tortured and driven out of her matrimonial house and she came to reside at her paternal place with her minor daughter again and there she delivered her second daughter. Since the opposite party did not provide anything for the maintenance of the petitioner and their two daughters, maintenance petition was filed by the petitioner for herself and her two minor daughters. The opposite party then filed a divorce case against the petitioner but took her and the minor children back by executing an agreement where she was tortured again for which she came back again to her paternal place with two minor daughter. The second daughter while prosecuting her studies in class-VII died on 23.04.2006 on account of her illness. The opposite party being a Govt. servant did not provide any maintenance even if the minor daughter (proforma opposite party) prosecuted her studies in Ravenshaw College, Cuttack and the petitioner was taking all her care for which the maintenance application out of which the impugned judgment arises, was filed.

3. During course of hearing of the maintenance proceeding, the petitioner examined herself as P.W.1 and her mother was examined as P.W.2.

The opposite party denying the allegations of torture to the petitioner and dismissing his liability to pay maintenance examined himself as O.P.W. No.1 and one witness namely G. Venka Prasad was examined as O.P.W.2.

4. The learned Judge, Family Court, Cuttack after analyzing the evidence adduced by both the sides came to hold that the case of the petitioner-wife is substantiated by her evidence adduced in the form of the affidavit which is getting support from the evidence of her mother (P.W.2) adduced in the form of affidavit which has remained unchallenged being not cross-examined by the opposite party no.1-husband. However, taking into account the provision under sub-section (4) of section 125 of Cr.P.C., the learned Court held that the wife is not willing to go back to her husband's house and to live with him along with her daughter on the ground that on three occasions he had taken her back and again ousted her. It was further held that the petitioner was not tortured or driven out by the opposite party-husband from his house rather she out of her on own volition left the matrimonial house and started living separately from her husband at her maternal place at Cuttack along with her daughter to avoid discharging her matrimonial obligation. It was further held that the petitioner-wife having refused to live with her husband without any sufficient reason is not entitled to get maintenance from the opposite party-husband more particularly when the opposite party is ready and willing to maintain her properly if she joins his company.

5. Mr. Siddhartha Mishra-1, learned counsel appearing for the petitioner contended that the findings of the learned Court below are perverse and contrary to the evidence appearing on record. It is submitted that when a finding has been given by the learned Court that the evidence of the petitioner is getting corroboration from her mother's evidence who has been examined as P.W.2 and the mother's evidence has remained unchallenged being not cross-examined by the opposite party and there was no such material that without any sufficient reasons, the petitioner is staying separately from the opposite party, the learned Court should not have deprived the petitioner from getting the maintenance dues. It is submitted that the evidence on record indicates that on number of occasions, the petitioner-wife was tortured for which she left the company of the opposite party-husband and she was again and again taken back but the same thing was repeated by the opposite party-husband and therefore, the finding that there was no sufficient reason on the part of the petitioner-wife to leave the company of her husband is an error of record. It is further submitted that since maintenance proceeding under section 125 of Cr.P.C. is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who

is unable to maintain herself and her children, the learned Court should not have refused maintenance.

Mr. Dusmanta Biswal, learned counsel appearing for the opposite party on the other hand contended that the evidence adduced by the opposite party is clear that the petitioner-wife was not shouldering the burden of taking care of old and ailing parents-in-laws for which she left the company of the opposite party and in view of sub-section (4) of section 125 of Cr.P.C., since without any sufficient cause, the petitioner-wife left the company of her husband, she is not entitled to receive any maintenance and therefore, rightly the learned Family Court has passed the impugned judgment.

6. Considering the submissions made by the learned counsel for the respective parties and after going through the evidence adduced by both the sides, it is apparent that the petitioner right from the beginning has made out a case that she was tortured by her husband (opposite party) for which she left his company again and again. She has narrated in detail how at different phases of her matrimonial life, she was tortured and humiliated in her in-laws house, driven out and again taken back and how the same thing was repeated again and again. It cannot be said that there was no sufficient reason for the petitioner-wife to leave the company of the opposite party-husband. A woman who is tortured in her in-laws house physically and mentally cannot be denied of maintenance if she leaves her husband's company for that reason and lives separately. Therefore, I am of the view that the findings of the Court in impugned judgment are perverse and not sustainable in the eye of law and hence hereby set aside.

It is submitted by the learned counsel for the petitioner that in pursuance of the interim orders passed by this Court in Misc. Case No.340 of 2015 on 22.12.2015 and in Misc. Case No.28 of 2016 on 15.02.2016, the petitioner was getting maintenance of Rs.5,000/- (rupees five thousand) every month from the salary of the opposite party which was stopped since January 2019. It is submitted by the learned counsel for the opposite party that the petitioner has filed a writ petition before this Court which is also subjudiced and in that case notice has been issued for which the authorities are not disbursing the full pensionary benefits to the opposite party. It is further submitted that another proceeding has been instituted by the petitioner before the learned Judge, Family Court which is also subjudiced. Learned counsel for the petitioner submitted that if suitable order of maintenance amount is passed in favour of the petitioner then the petitioner shall withdraw not only the writ petition which is subjudiced before this Court but also the civil

proceeding which is subjudiced before the learned Judge, Family Court, Cuttack.

Considering the submissions made by the learned counsel for the respective parties and taking into account the necessity of the petitioner to sustain a decent living and the fact that the opposite party has retired from Government service, I think it proper to fix the maintenance amount @ Rs.5,000/- per month from the date of impugned judgment. The outstanding dues since January 2019 as per the quantum of maintenance fixed today is Rs.45,000/- (rupees forty five thousand). The opposite party shall deposit a sum of Rs.25,000/- on or before 30th September 2019 in the account of the petitioner and the balance amount of Rs.20,000/- shall be deposited on or before 31st October 2019. The current monthly maintenance dues shall be paid by the 10th of the every succeeding month. On receipt of the arrear maintenance dues of Rs.45,000/- as stated above, the petitioner shall take steps for withdrawal of the writ petition pending before this Court as well as the civil proceeding which is subjudiced before the learned Judge, Family Court, Cuttack.

The arrear maintenance dues starting from the date of the impugned judgment passed on 27.07.2013 @ Rs.5,000/- per month till December 2015 comes to Rs.1,50,000/-(rupees one lakh fifty thousand). This amount shall be paid by the opposite party to the petitioner in fifteen equal monthly installments i.e. Rs.10,000/- per month which would commence from November 2019 onwards in addition to the payment of current maintenance dues as directed above. With the aforesaid observation, the RPFAM is disposed of.

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2019 (III) ILR - CUT- 201

K.R. MOHAPATRA, J.

W.P.(C) NO. 2477 OF 2007

BINAPANI JENA & ORS. .....Petitioners

.Vs.

CUTTACK MUNICIPAL CORPORATION & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order XVIII Rule 01 – Right to begin – When the defendant is liable to begin – Held: - (1) the defendant has admitted all the material facts alleged by the plaintiff in the plaint. (2) the defendant contends that either in point of law or on some other

additional facts stated in the written statement, the plaintiff is not entitled to the whole or any part of the relief, which he seeks. (Para 7)

For Petitioner : Mr.Bhakta Hari Mohanty, Sr.Adv.
M/s. D.P.Mohanty, M.Pal, R.K.Nayak,P.K.Swain, & T.K.Mohanty

For Opp. Parties : Mr.S.K.Nayak,-1 (Sr. Adv.)
M/s B.K.Sahoo, D.Nayak, A.K.Baral & S.Biswal
M/s Darpahari Dhal, K.M.Dhal, A.Das. M.K.Sahu
M/s Y.S.P.Babu, P.S. Acharya, B.P.Pattnaik

ORDER Heard and Disposed of on 27.09.2019

K.R. MOHAPATRA, J.

This writ petition has been filed assailing the order dated 19.01.2007 (Annexure-5) passed by learned Civil Judge (Junior Division), 1st Court, Cuttack allowing an application filed by the plaintiff under Order XVIII Rule 1 CPC praying therein to direct the defendant Nos.2 and 3 to begin hearing of the suit.

2. Mr.D.P.Mohanty, learned counsel for the petitioners- the successors of defendant No.3-submits that Title Suit No.34 of 1987 has been filed by one Bhagabata Sahoo, (the husband of opposite party No.2 and father of opposite party Nos. 3 to 9 herein) before learned Munsif, 1st Court, Cuttack praying therein for declaration of easementary right over schedule C-2 property and defendant Nos.2 and 3 have acquired no title in pursuance of void resolution dated 27.07.1963 passed by defendant No.1. The plaintiff also prayed for mandatory and permanent injunction along with other consequential reliefs. After completion of the pleadings, the plaintiff filed a petition under Order XVIII Rule 1 CPC, praying *inter alia* to direct the defendant Nos.2 and 3 to begin hearing of the suit and adduce evidence ahead of plaintiff. In the said petition, the plaintiff claimed that the defendant Nos. 2 and 3 have set forth a claim of acquisition of title from the defendant No.1, namely, Cuttack Municipality (now Cuttack Municipal Corporation) by way of exchange and in the process, they have denied right of the plaintiff over the suit property. In that view of the matter, the defendant Nos.2 and 3 should prove their title first and they have right to begin in terms of Order XVIII Rule 1 CPC and they should be allowed to adduce evidence first ahead of plaintiff.

3. The defendant No.3 (late husband of the present petitioner No.1) filed objection contending *inter alia* that the petition is misconceived as the grounds on which the plaintiff seeks relief does not satisfy the requirements of Order XVIII Rule 1 CPC. In order to prove his easementary right, the plaintiff has to adduce evidence to show that the land belonged to defendant No.1 and by way of a resolution that Cuttack Municipality (as it then was)

exchanged the same with defendant Nos. 2 and 3, but the plaintiff has acquired the easementary right over C-2 property. When neither the defendant No.2 nor the defendant No.3 has admitted the case of the plaintiff in their written statement, the prayer of the plaintiff cannot be granted. Learned Civil Judge, however, by misconstruing the provision of law, allowed the petition under Order XVIII Rule 1 CPC and passed the order under Annexure-5, which is not sustainable in the eyes of law. He, therefore, prays for setting aside the order under Annexure-5.

4. During pendency of the suit, the plaintiff died and his legal heirs have been substituted, who are opposite party Nos.2 to 9 in this writ petition.

5. Learned counsel for the plaintiffs-opposite party Nos. 2 to 9, however, supported the impugned order under Annexure-5 and submitted that the defendant Nos.2 and 3 have admitted, the ownership of the defendant No.1 over the suit schedule land, but they claimed that they have got the suit land by way of exchange. Thus, in view of the admitted fact that the defendant No.1 is still recorded as owner of the suit land and the plaintiff is only claiming the easementary right over the same and prayed to declare the impugned exchange to be illegal and inoperative, learned Civil Judge has rightly held that the defendant Nos.2 and 3 have to begin hearing of the suit and thus, the impugned order under Annexure-5 needs no interference.

6. The rival contentions of learned counsel for the parties needs consideration keeping in mind the principles laid down in ***Sankar Ram And Co. Vs. Kasi Naicker And Others***, reported in (2003) 11 SCC 699, wherein it is held as follows:

> *"7. It is a cardinal rule of construction that normally no word or provision should be considered redundant or superfluous in interpreting the provisions of a statute. In the field of interpretation of statutes, the courts always presume that the legislature inserted every part thereof with a purpose and the legislative intention is that every part of the statute should have effect. It may not be correct to say that a word or words used in a statute are either unnecessary or without any purpose to serve, unless there are compelling reasons to say so looking to the scheme of the statute and having regard to the object and purpose sought to be achieved by it. A Constitution Bench of this Court in Jaipur Zila Sahakari Bhoomi Bank Ltd. Vikas vs. Shri Ram Gopal Sharma and Ors. [JT 2002 (1) SC 182] while interpreting and considering the effect of proviso to Section 33(2)(b) of the Industrial Disputes Act, 1947 in para 13 observed –*
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> *"The proviso to Section 33(2)(b) as can be seen from its very unambiguous and clear language, is mandatory..... Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats*

the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer..... The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it."……."

6.1 In order to understand the scope and purpose of introducing such a provision, i.e., Order XVIII Rule 1 of Code of Civil Procedure reading of the provision itself is necessary, which is reproduced hereunder for ready reference.

*"**ORDER – XVIII***
HEARING OF THE SUIT AND
EXAMIANTION OF WITNESSES

***1. Right to begin –** The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."*

7. In order to get a relief under Rule 1 of Order XVIII, CPC, the applicant has to satisfy the Court the following:

i. The defendant has admitted all the material facts alleged by the plaintiff in the plaint;

ii. The defendant contends that either in point of law or on some other additional facts stated in the written statement, the plaintiff is not entitled to the whole or any part of the relief, which he seeks.

If the applicant satisfies the Court about the existence of above two ingredients, then the Court may direct the defendant to begin.

8. The above provision has been introduced to get rid of certain cumbersome procedure in the trial of the suit, which is not necessary in the facts and circumstances of the case. It also saves precious judicial time of the Court. It is based on the principles of 'facts admitted need not be proved' (Section 58 of the Evidence Act). Proviso to Section 58 of the Evidence Act provides that the Court may in its discretion require the facts admitted to be proved otherwise than by such admission. Thus, it is the discretion of the Court in the given facts and circumstances of the case to require an admitted fact to be proved otherwise than such admission. Rule 5(1) of Order VIII CPC provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under disability. Further Rule-6 of Order XII CPC provides that the Court has the power to pronounce judgment on the basis of admission made. Thus, on a conspectus of the aforesaid provisions makes it

clear that purpose behind insertion of Rule 1 of Order XVIII CPC is to require the defendant, only to prove those additional facts or state the law on the basis of which he claims that the plaintiff is not entitled to the relief claimed, even though the facts alleged in the plaint is admitted. In such a contingency only, the defendant can be asked to begin.

9. Plaintiff to begin the hearing of the suit is the rule and direction to the defendant to begin is an exception. Thus, the Court while exercising its judicial discretion to direct the defendant to begin, has to be very careful and scrutinize the matter in all perspectives.

9.1 In the case of ***Anil Rishi Vs. Gurubaksh Singh***, reported in (2006) 5 SCC 558, the Hon'ble Supreme Court held as follows:

> *"8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:*
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> *"101. Burden of proof.— Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
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> *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*
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> *9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.*
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> *xx xx xx*
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> *18. Difficulties which may be faced by a party to the lis can never be determinative of the question as to upon whom the burden of proof would lie. The learned trial Judge, therefore, posed unto himself a wrong question and arrived at a wrong answer. The High Court also, in our considered view, committed a serious error of law in misreading and misinterpreting Section 101 of the Evidence Act. With a view to prove forgery or fabrication in a document, possession of the original sale deed by the defendant, would not change the legal position. A party in possession of a document can always be directed to produce the same. The plaintiff could file an application calling for the said document from the defendant and the defendant could have been directed by the learned trial Judge to produce the same.*
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> *19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same."*

10. In the case at hand, the defendants do not admit the case of the plaintiff in toto. On the other hand, the defendant No.3 has disputed the pleadings by filing his written statement as well as additional written statement. In that view of the matter, in the instant case, the ingredients of Order XVIII Rule 1, CPC are not satisfied and the plaintiffs have to discharge the burden of proof of the facts alleged in the plaint. Merely because, some facts, and not all materials facts, alleged by the plaintiff have been admitted by the defendants in their respective written statements, they cannot be directed to begin.

11. On scrutiny of records, it appears that learned Civil Judge was swayed away by the solitary pleadings of the defendant No.1 that the land originally belonged to it and by virtue of a resolution the same was exchanged with defendant Nos. 2 and 3. The same cannot be sacrosanct to exercise power under Order XVIII Rule 1, CPC. As such, the impugned order under Annexure-5 is not sustainable in the eyes of law and is accordingly set aside.

12. Since the suit is of the year 1987 and is pending on such a trivial issue, learned trial Court is directed to take steps for expeditious disposal of the suit. The parties are directed to cooperate for disposal of the suit. If possible, learned trial Court shall try to dispose of the suit as expeditiously as possible, preferably within a period of six months from the date of first appearance of the parties if there is no legal impediment. Learned Trial Court shall act upon production of certified copy of this order. Interim order dated 13.03.2007 passed in Misc. Case No.2423 of 2007 stands vacated.

13. The writ petition is allowed to the aforesaid extent.

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2019 (III) ILR - CUT- 206

DR. A. K. MISHRA, J.

CRLMC NO. 4097 OF 2011

ASHISH KUMAR ROUT .....Petitioner

.Vs.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Quashing of the criminal proceeding – Offence U/s-498(A),406 IPC r/w section 4 of D.P Act & section 3(1)(xi) of the SC/ST(PA) Act, 1989 – Settlement of dispute between the parties – Divorce obtained through mutual consent – Prayer to quash the proceeding in view of the settlement – Held, there is no other legal impediment between the parties, this court feels justified to quash the proceeding to prevent oppression & prejudice. (Para 6)

Case Laws Relied on and Referred to :-

1. (2017) 9 SCC 641 : Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & Ors Vs. State of Gujarat & Anr

Counsel for Petitioner : M/s. Samir Ku. Mishra, J. Pradhan, P. Prusty, D.K. Pradhan & D. Samal

Counsel for Opp. Parties : Ms. S. Pattnaik, A.G.A. M/s. P. K. Mishra, N. K. Mohanty, A. R. Mishra, A. Panda, S.S. Mishra.

JUDGMENT Date of Hearing & Judgment : 02.07.2019

Dr. A. K. MISHRA, J.

Heard learned counsel for the petitioner, learned counsel for opposite party no.2 and the learned Addl. Government Advocate, Ms. S. Pattnaik.

2. In this CRLMC, prayer has been made to quash the proceeding in G.R. Case No.720 of 2009 including the cognizance order dated 7.2.2011 passed by learned SDJM, Bhubaneswar on the ground of the settlement between the parties.

3. The impugned order dated 7.2.2011 at Annexure-2 reveals that the learned SDJM on police report took cognizance under section 498(A)/406 of IPC read with section 4 D.P. Act and under section 3 (1)(xi) of the SC/ST(PA) Act, 1989 and found sufficient ground to proceed against the present petitioner.

4. The husband is now the petitioner in this case and wife is O.P. No.2 who had appeared through advocate. Learned Addl. Government Advocate does not dispute the fact of settlement between the parties.

5. It is found from the copy of joint memorandum filed in the FCMOP No.10 of 2009 of the Court of the Judge, Family Court, Srikakulam that while making amicable settlement for divorce and in order to maintain amity it was agreed vide clause 4 that wife should take all necessary effective steps to dispose of or withdraw the Criminal Case No.720 of 2009 arising out of Bhubaneswar Mahila P.S. Case 37 of 2009.

It is admitted by both parties that parties have already availed the divorce by mutual consent vide order dated 6.10.2010.

6. In that view of the matter, as the parties have already settled their marital dispute and there is no other legal impediment between the parties, this court feels justified to quash the above proceeding to prevent oppression and prejudice.

7. In this regard, the Hon'ble Supreme Court in the case of **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others vrs. State of Gujarat and another**, reported in (2017) 9 SCC 641, has held as follows:-

*"**15**. The broad principles which emerge from the precedents on the subject, may be summarized in the following propositions:*

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial of economic system will weigh in the balance."

8. In the light of above discussion and the principle laid down by the Hon'ble Apex Court, the CRLMC is allowed. The proceedings in G.R. Case No.720 of 2009 including the cognizance order dated 7.2.2011 passed by learned SDJM, Bhubaneswar are quashed.

9. The CRLMC is accordingly allowed.

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