SUPREME COURT OF INDIA

DIPAK MISRA, C.J.I, A.K.SIKRI, J., A.M.KHANWILKAR, J., DR. D.Y.CHANDRACHUD, J. & ASHOK BHUSHAN, J.

SPECIAL LEAVE PETITION (CIVIL) NO. 25590 OF 2014
WITH BATCH

NATIONAL INSURANCE COMPANY LTD. ……..Petitioner(s)

.Vrs.

PRANAY SETHI & ORS. ……..Respondent(s)

(A) MOTOR VEHICLES ACT, 1988 – Ss. 168, 166, 163-A & Second Schedule

Motor accident case – Just compensation – Standardization of addition to income for future prospects – Where the deceased was self employed or was a person on fixed salary without provision for annual increment etc., what should be the basis for fixation of his future prospects ?

Money cannot substitute a life lost, but an effort has to be made for grant of just compensation having uniformity of approach – It is not acceptable that a self employed person remains on a fixed salary throughout his life as there is an incessant effort to enhance one's income for sustenance in the present society.

Held,

(1) In case the deceased was self employed or on a fixed salary and he was below the age of 40 years an addition of 40% of the established income should be regarded as the necessary method of computation for future prospects – And there will be an addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years. (Established income means the income minus the tax component).

(2) In case the deceased had a permanent job and was below the age of 40 years, an addition of 50% of actual salary to the income of the deceased should be made while determining the income towards future prospects – However, the addition should be 30%, if the age of the deceased was between 40 to 50 years and 15% in case the deceased was between the age of 50 to 60 years. (Actual salary should be read as actual salary less tax).

(3) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and courts shall be guided by paragraphs 30 to 32 of Sarala Verma which are reproduced hereunder.

Where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

Even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.

(4) The selection of multiplier shall be as indicated in the Table in Sarala Verma read with paragraph 42 of that judgment – The multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying *Susamma Thomas, Trilok Chandra* and *Charlie*), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced

by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 Years.

(5) The age of the deceased should be the basis for applying the multiplier.

(6) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years. (Paras 58,59,60,61)

(B) WORDS & PHRASES – "Per incuriam" – A decision or judgment can be *per incuriam* if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench.

In the present case the two-Judge Bench in Santosh Devi [(2012) 6 SCC 421] should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma [(2009) 6 SCC 121], a judgment by a coordinate Bench, because a co-ordinate Bench of the same strength can not take a contrary view than what has been held by another co-ordinate Bench – Held, as Rajesh [2013(9) SCC 54, decided on 12.04.13] has not taken note of the decision in Reshma Kumari [2013(9) SCC 65, decided on 02.04.13], i.e., at earlier point of time, the decision in Rajesh has no binding precedent on the co-equal Bench. (Paras 30, 61)

Case Laws Referred to :-

1. 1 (2013) 9 SCC 65 : Reshma Kumariand others v. Madan Mohan & Anr.[1]
2. (2013) 9 SCC 54 : Rajesh and others v. Rajbir Singh & Ors.[2]
3. (2015) 9 SCC 166 : National Insurance Company Limited v. Pushpa & Ors.[3]
4. (2009) 6 SCC 121 : Sarla Verma & Ors. v. Delhi Transport Corporation & Anr[4]
5. (2009) 13 SCC 422: Reshma Kumari & Ors. v. Madan Mohan & Anr[5]
6. (1996) 3 SCC 179 : Sarla Dixit v. Balwant Yadav[6]
7. (2003) 3 SCC 148 : Abati Bezbaruah v. Dy. Director General, Geological Survey of India.[7]
8. 1970 AC 166 : (1969) 2 WLR 767: Mallett v.McMonagle[8]
9. (1999) 1 AC 345 : Wells v. Wells[9]
10. (2008) 4 SCC 162 : Oriental Insurance Co.Ltd. v. Jashuben [10]
11. (1996) 4 SCC 362 : U.P. State Road Transport Corporation & Ors.v. Trilok Chandra & Ors.[11]

12. (1994) 2 SCC 176: Susamma Thomas[12]
13. (2009) 4 SCC 513: Supe Dei v. National Insurance Company Limited[13]
14. (2002) 6 SCC 281: United India Insurance Co. Ltd v. Patricia Jean Mahajan[14]
15. (2004) 5 SCC 385: Deepal Girishbhai Soni v. United India Insurance Co. Ltd.[15]
16. (2005) 10 SCC 720: New India Assurance Co. Ltd v. Charlie & Anr.[16]
17. 1913 AC 1 : (1911-13) All ER Rep 160 (HL) : Taff Vale Railway Co. v. Jenkins[17]
18. (2012) 6 SCC 421: Santosh Devi v. National Insurance CompanyLtd & Ors.[18]
19. (2003) 5 SCC 448: State of Bihar v. Kalika Kuer alias Kalika Singh & Ors.[19]
20. (2014) 13 SCC 759 : G.L. Batra v. State of Haryana & Ors.[20]
21. (1985) 4 SCC 369 : Union of India v. Godfrey Philips India Ltd. [21]
22. (1989) 3 SCC 396 : Sundarjas Kanyalal Bhatija v. Collector, Thane, Maharashtra[22]
23. AIR 1968 SC 372 :Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel[23]
24. (2015) 8 SCC 583: Madras Bar Association v. Union of India & Anr. [24]
25. (2010) 11 SCC 1 : Union of India v. Madras Bar Association[25]
26. AIR 1962 SC 83 : Jaisri Sahu v. Rajdewan Dubey[26]
27. (2002) 1 SCC 1 : Pradip Chandra Parija and others v. Pramod Chandra Patnaik & Ors.[27]
28. (2002) 4 SCC 234: Chandra Prakash and others v. State of U.P. & anr[28]
29. (1989) 2 SCC 754: Raghubir Singh[29]
30. (2014) 7 SCC 701: Sandhya Educational Society and another v. Union of India and others[30]
31. (2012) 4 SCC 516: Rattiram and others v. State of Madhya Pradesh[31]
32. (1995) 4 SCC 96 : Indian Oil Corporation Ltd. v. Municipal Corporation[32]
33 (2015) 6 SCC 347 : Munna Lal Jain and another v. Vipin Kumar Sharma and others[33]
34 (2014) 16 SCC 623: Sundeep Kumar Bafna v. State of Maharashtra and anr[34]
35 1951 SC 601 : (1951) 2 All ER 448 (PC): Nance v. British Columbia Electric Railway Co. Ltd. [35]
36 1942 AC 601 : (1942) 1 All ER 657 (HL): Davies v. Powell Duffryn Associated Collieries Ltd.[36].
37 (2003) 3 SLR (R) 601: Nirumalan V Kanapathi Pillay v. Teo Eng Chuan[37]
38 (2013) 15 SCC 45 : Puttamma and others v. K.L. Narayana Reddy and anr[38]

For Petitioner(s) : Meera Agarwal
For Respondent(s) :Viresh B. Saharya

Date of Judgment**:** 31.09. 2017

JUDGMENT

DIPAK MISRA, CJI.

Perceiving cleavage of opinion between ***Reshma Kumariand others v. Madan Mohan and another***[1] and ***Rajesh and others v. Rajbir Singh and***

[1] (2013) 9 SCC 65, [2] (2013) 9 SCC 54

others[2], both three-Judge Bench decisions, a two-Judge Bench of this Court in ***National Insurance Company Limited v. Pushpa and others***[3] thought it appropriate to refer the matter to a larger Bench for an authoritative pronouncement, and that is how the matters have been placed before us.

2. In the course of deliberation we will be required to travel backwards covering a span of two decades and three years and may be slightly more and thereafter focus on the axis of the controversy, that is, the decision in ***Sarla Verma and others v. Delhi Transport Corporation and another***[4] wherein the two-Judge Bench made a sanguine endeavour to simplify the determination of claims by specifying certain parameters.

3. Before we penetrate into the past, it is necessary to note what has been stated in ***Reshma Kumari*** (supra) and ***Rajesh's*** case. In ***Reshma Kumari*** the three-Judge Bench was answering the reference made in ***Reshma Kumari and others v. Madan Mohan and another***[5]. The reference judgment noted divergence of opinion with regard to the computation under Sections 163-A and 166 of the Motor Vehicles Act, 1988 (for brevity, "the Act") and the methodology for computation of future prospects. Dealing with determination of future prospects, the Court referred to the decisions in ***Sarla Dixit v. Balwant Yadav***[6], ***Abati Bezbaruah v. Dy. Director General, Geological Surveyof India***[7] and the principle stated by Lord Diplock in ***Mallett v.McMonagle***[8] and further referring to the statement of law in ***Wells v. Wells***[9] observed:-

> "46. In the Indian context several other factors should be taken into consideration including education of the dependants and the nature of job. In the wake of changed societal conditions and global scenario, future prospects may have to be taken into consideration not only having regard to the status of the employee, his educational qualification; his past performance but also other relevant factors, namely, the higher salaries and perks which are being offered by the private companies these days. In fact while determining the multiplicand this Court in ***Oriental Insurance Co.Ltd. v. Jashuben*** [10] held that even dearness allowance and perks with regard thereto from which the family would have derived monthly benefit, must be taken into consideration.

47. One of the incidental issues which has also to be taken into consideration is inflation. Is the practice of taking inflation into consideration wholly

[3] (2015) 9 SCC 166, [4] (2009) 6 SCC 121, [5] (2009) 13 SCC 422, [6] (1996) 3 SCC 179, [7] (2003) 3 SCC 148,
[8] 1970 AC 166: (1969) 2 WLR 767,[9] (1999) 1 AC 345 ,[10] (2008) 4 SCC 162

incorrect? Unfortunately, unlike other developed countries in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor.

48. A large number of English decisions have been placed before us by Mr Nanda to contend that inflation may not be taken into consideration at all. While the reasonings adopted by the English courts and its decisions may not be of much dispute, we cannot blindly follow the same ignoring ground realities.

49. We have noticed the precedents operating in the field as also the rival contentions raised before us by the learned counsel for the parties with a view to show that law is required to be laid down in clearer terms."

4. In the said case, the Court considered the common questions that arose for consideration. They are:-

"(1) Whether the multiplier specified in the Second Schedule appended to the Act should be scrupulously applied in all the cases?

(2) Whether for determination of the multiplicand, the Act provides for any criterion, particularly as regards determination of future prospects?"

5. Analyzing further the rationale in determining the laws under Sections 163-A and 166, the Court had stated thus:-

"58. We are not unmindful of the Statement of Objects and Reasons to Act 54 of 1994 for introducing Section 163-A so as to provide for a new predetermined formula for payment of compensation to road accident victims on the basis of age/income, which is more liberal and rational. That may be so, but it defies logic as to why in a similar situation, the injured claimant or his heirs/legal representatives, in the case of death, on proof of negligence on the part of the driver of a motor vehicle would get a lesser amount than the one specified in the Second Schedule. The courts, in our opinion, should also bear that factor in mind."

6. Noticing the divergence of opinion and absence of any clarification from Parliament despite the recommendations by this Court, it was thought appropriate that the controversy should be decided by the larger Bench and accordingly it directed to place the matter before Hon'ble the Chief Justice of India for appropriate orders for constituting a larger Bench.

7. The three-Judge Bench answering the reference referred to the Scheme under Sections 163-A and 166 of the Act and took note of the view expressed by this Court in ***U.P. State Road Transport Corporation and others v. Trilok Chandra and others***[11], wherein the Court had stated:-

> "17. The situation has now undergone a change with the enactment of the Motor Vehicles Act, 1988, as amended by Amendment Act 54 of 1994. The most important change introduced by the amendment insofar as it relates to determination of compensation is the insertion of Sections 163-A and 163-B in Chapter XI entitled 'Insurance of motor vehicles against third-party risks'. Section 163-A begins with a non obstante clause and provides for payment of compensation, as indicated in the Second Schedule, to the legal representatives of the deceased or injured, as the case may be. Now if we turn to the Second Schedule, we find a Table fixing the mode of calculation of compensation for third party accident injury claims arising out of fatal accidents. The first column gives the age group of the victims of accident, the second column indicates
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> The multiplier and the subsequent horizontal figures indicate the quantum of compensation in thousand payable to the heirs of the deceased victim. According to this Table the multiplier varies from 5 to 18 depending on the age group to which the victim belonged. Thus, under this Schedule the maximum multiplier can be up to 18 and not 16 as was held in ***Susamma Thomas***[12] case.
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> 18. We must at once point out that the calculation of compensation and the amount worked out in the Schedule suffer from several defects. For example, in Item 1 for a victim aged 15 years, the multiplier is shown to be 15 years and the multiplicand is shown to be Rs 3000. The total should be $3000 \times 15 = 45,000$ but the same is worked out at Rs 60,000. Similarly, in the second item the multiplier is 16 and the annual income is Rs 9000; the total should have been Rs 1,44,000 but is shown to be Rs 1,71,000. To put it briefly, the Table abounds in such mistakes. Neither the tribunals nor the courts can go by the ready reckoner. It can only be used as a guide.

[11] (1996) 4 SCC 362, [12] (1994) 2 SCC 176

> Besides, the selection of multiplier cannot in all cases be solely dependent on the age of the deceased. For example, if the deceased, a bachelor, dies at the age of 45 and his dependants are his parents, age of the parents would also be relevant in the choice of the multiplier. But these mistakes are limited to actual calculations only and not in respect of other items. What we propose to emphasise is that the multiplier cannot exceed 18 years' purchase factor. This is the improvement over the earlier position that ordinarily it should not exceed 16. We thought it necessary to state the correct legal position as courts and tribunals are using higher multiplier as in the present case where the Tribunal used the multiplier of 24 which the High Court raised to 34, thereby showing lack of awareness of the background of the multiplier system in Davies case."
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> [Underlining is ours]

8. The Court also referred to ***Supe Dei v. National Insurance Company Limited***[13] wherein it has been opined that the position is well settled that the Second Schedule under Section 163-A to the Act which gives the amount of compensation to be determined for the purpose of claim under the section can be taken as a guideline while determining the compensation under Section 166 of the Act.

9. After so observing, the Court also noted the authorities in ***United India Insurance Co. Ltd v. Patricia Jean Mahajan***[14], ***Deepal Girishbhai Soni v. United India Insurance Co. Ltd.***[15], and ***Jashuben*** (supra). It is perceivable from the pronouncement by the three-Judge Bench that it has referred to *Sarla Verma* and observed that the said decision reiterated what had been stated in earlier decisions that the principles relating to determination of liability and quantum of compensation were different for claims made under Section 163-A and claims made under Section 166. It was further observed that Section 163-A and the Second Schedule in terms did not apply to determination of compensation in applications under Section 166. In ***Sarla Verma*** (supra), as has been noticed further in ***Reshma Kumari*** (supra), the Court found discrepancies/errors in the multiplier scale given in the Second Schedule Table and also observed that application of Table may result in incongruities.

10. The three-Judge Bench further apprised itself that in ***Sarla Verma*** (supra) the Court had undertaken the exercise of comparing the multiplier indicated in ***Susamma Thomas*** (supra), ***Trilok Chandra*** (supra), and ***New India Assurance Co.Ltd v. Charlie and another***[16] for claims under

[13] (2009) 4 SCC 513, [14] (2002) 6 SCC 281
[15] (2004) 5 SCC 385, [16] (2005) 10 SCC 720

Section 166 of the Act with the multiplier mentioned in the Second Schedule for claims under Section 163-A and compared the formula and held that the multiplier shall be used in a given case in the following manner:-

> "42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years); reduced by one unit for every five years, that is, M-17 for 26 to 30 years, M- 16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

11. After elaborately analyzing what has been stated in ***Sarla Verma*** (supra), the three-Judge Bench referred to the language employed in Section 168 of the Act which uses the expression "just". Elucidating the said term, the Court held that it conveys that the amount so determined is fair, reasonable and equitable by accepted legal standard and not on forensic lottery. The Court observed "just compensation" does not mean "perfect" or "absolute compensation" and the concept of just compensation principle requires examination of the particular situation obtaining uniquely in an individual case. In that context, it referred to ***Taff Vale Railway Co. v. Jenkins***[17] and held:-

> "36. In *Sarla Verma*, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in *Sarla Verma* that the claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in *Sarla Verma*." [Emphasis is added]

[17] 1913 AC 1 : (1911-13) All ER Rep 160 (HL)

12. And further:-

> "It is high time that we move to a standard method of selection of multiplier, income for future prospects and deduction for personal and living expenses. The courts in some of the overseas jurisdictions have made this advance. It is for these reasons, we think we must approve the Table in *Sarla Verma* for the selection of multiplier in claim applications made under Section 166 in the cases of death. We do accordingly. If for the selection of multiplier, Column (4) of the Table in *Sarla Verma* is followed, there is no likelihood of the claimants who have chosen to apply under Section 166 being awarded lesser amount on proof of negligence on the part of the driver of the motor vehicle than those who prefer to apply under Section 163-A. As regards the cases where the age of the victim happens to be up to 15 years, we are of the considered opinion that in such cases irrespective of Section 163-A or Section 166 under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the Table in *Sarla Verma* should be followed. This is to ensure that the claimants in such cases are not awarded lesser amount when the application is made under Section 166 of the 1988 Act. In all other cases of death where the application has been made under Section 166, the multiplier as indicated in Column (4) of the Table in *Sarla Verma* should be followed."
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> This is how the first question the Court had posed stood answered.

13. With regard to the addition of income for future prospects, this Court in ***Reshma Kumari*** (supra) adverted to Para 24 of the *Sarla Verma's* case and held:-

> "39. The standardisation of addition to income for future prospects shall help in achieving certainty in arriving at appropriate compensation. We approve the method that an addition of 50% of actual salary be made to the actual salary income of the deceased towards future prospects where the deceased had a permanent job and was below 40 years and the addition should be only 30% if the age of the deceased was 40 to 50 years and no addition should be made where the age of the deceased is more than 50 years. Where the annual income is in the taxable range, the actual salary shall mean actual salary less tax. In the cases where the deceased was self-

> employed or was on a fixed salary without provision for annual increments, the actual income at the time of death without any addition to income for future prospects will be appropriate. A departure from the above principle can only be justified in extraordinary circumstances and very exceptional cases."

The aforesaid analysis vividly exposits that standardization of addition to income for future prospects is helpful in achieving certainty in arriving at appropriate compensation. Thus, the larger Bench has concurred with the view expressed by ***Sarla Verma*** (supra) as per the determination of future income.

14. It is interesting to note here that while the reference was pending, the judgment in ***Santosh Devi v. National Insurance Company Limited and others***[18] was delivered by a two-Judge Bench which commented on the principle stated in *Sarla Verma*. It said:-

> "14. We find it extremely difficult to fathom any rationale for the observation made in para 24 of the judgment in *Sarla Verma* case that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc. the courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances. In our view, it will be naïve to say that the wages or total emoluments/income of a person who is selfemployed or who is employed on a fixed salary without provision for annual increment, etc. would remain the same throughout his life.
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> 15. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self-employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put in extra efforts to generate additional income necessary for sustaining their families.
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> 16. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of

[18] (2012) 6 SCC 421

the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of those in higher echelons of service will cross the figure of rupees one lakh.

17. Although the wages/income of those employed in unorganised sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the government employees and those employed in private sectors, but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching clothes. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour like barber, blacksmith, cobbler, mason, etc.

18. Therefore, we do not think that while making the observations in the last three lines of para 24 of *Sarla Verma* judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is selfemployed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30% increase in his total income over a period of time and if he/she becomes victim of an accident then the same formula deserves to be applied for calculating the amount of compensation."

15. The aforesaid analysis in ***Santosh Devi*** (supra) may *prima facie* show that the two-Judge Bench has distinguished the observation made in *Sarla Verma's* case but on a studied scrutiny, it becomes clear that it has really expressed a different view than what has been laid down in ***Sarla Verma*** (supra). If we permit ourselves to say so, the different view has been expressed in a distinctive tone, for the two-Judge Bench had stated that it was extremely difficult to fathom any rationale for the observations made in para 24 of the judgment in *Sarla Verma's* case in respect of self-employed or a

person on fixed salary without provision for annual increment, etc. This is a clear disagreement with the earlier view, and we have no hesitation in saying that it is absolutely impermissible keeping in view the concept of binding precedents.

16. Presently, we may refer to certain decisions which deal with the concept of binding precedent.

17. In ***State of Bihar v. Kalika Kuer alias Kalika Singh and others***[19], it has been held:-

> "10. … an earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. …"
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> The Court has further ruled:-
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> "10. … Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits."

18. In ***G.L. Batra v. State of Haryana and others***[20], the Court has accepted the said principle on the basis of judgments of this Court rendered in ***Union of India v. Godfrey Philips India Ltd.*** [21] , ***Sundarjas Kanyalal Bhatija v. Collector, Thane, Maharashtra***[22] and ***Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel*** [23] . It may be noted here that the Constitution Bench in ***Madras Bar Association v. Union of India and another*** [24] has clearly stated that the prior Constitution Bench judgment in ***Union of India v. Madras Bar Association***[25] is a binding precedent. Be it clarified, the issues that were put to rest in the earlier Constitution Bench judgment were treated as precedents by latter Constitution Bench.

19. In this regard, we may refer to a passage from ***Jaisri Sahu v. Rajdewan Dubey***[26]***:-***

[19] (2003) 5 SCC 448 [20] (2014) 13 SCC 759, [21] (1985) 4 SCC 369, [22] (1989) 3 SCC 396
[23] AIR 1968 SC 372, [24] (2015) 8 SCC 583, [25] (2010) 11 SCC 1, [26] AIR 1962 SC 83

> "11. Law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions, and it is therefore desirable that in case of difference of opinion, the question should be authoritatively settled. It sometimes happens that an earlier decision given by a Bench is not brought to the notice of a Bench hearing the same question, and a contrary decision is given without reference to the earlier decision. The question has also been discussed as to the correct procedure to be followed when two such conflicting decisions are placed before a later Bench. The practice in the Patna High Court appears to be that in those cases, the earlier decision is followed and not the later. In England the practice is, as noticed in the judgment in *Seshamma v. Venkata Narasimharao* that the decision of a court of appeal is considered as a general rule to be binding on it. There are exceptions to it, and one of them is thus stated in Halsbury's Laws of England, 3rd Edn., Vol. 22, para 1687, pp. 799-800:
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> "The court is not bound to follow a decision of its own if given per incuriam. A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a Court of a co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords."
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> In *Virayya v. Venkata Subbayya* it has been held by the Andhra High Court that under the circumstances aforesaid the Bench is free to adopt that view which is in accordance with justice and legal principles after taking into consideration the views expressed in the two conflicting Benches, vide also the decision of the Nagpur High Court in *Bilimoria v. Central Bank of India*. The better course would be for the Bench hearing the case to refer the matter to a Full Bench in view of the conflicting authorities without taking upon itself to decide whether it should follow the one Bench decision or the other. We have no doubt that when such situations arise, the Bench hearing cases would refer the matter for the decision of a Full Court."

20. Though the aforesaid was articulated in the context of the High Court, yet this Court has been following the same as is revealed from the aforestated pronouncements including that of the Constitution Bench and, therefore, we entirely agree with the said view because it is the precise

warrant of respecting a precedent which is the fundamental norm of judicial discipline.

21. In the context, we may fruitfully note what has been stated in ***Pradip Chandra Parija and others v. Pramod Chandra Patnaik and others***[27]. In the said case, the Constitution Bench was dealing with a situation where the two-Judge Bench disagreeing with the three-Judge Bench decision directed the matter to be placed before a larger Bench of five Judges of this Court. In that scenario, the Constitution Bench stated:-

> "6. … In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. …"

22. In ***Chandra Prakash and others v. State of U.P. and another***[28], another Constitution Bench dealing with the concept of precedents stated thus:-

> "22. … The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court. It is in the above context, this Court in the case of *Raghubir Singh*[29] held that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or smaller number of Judges. …"

23. Be it noted, ***Chandra Prakash*** concurred with the view expressed in ***Raghubir Singh*** and ***Pradip Chandra Parija***.

24. In ***Sandhya Educational Society and another v. Union of India and others***[30], it has been observed that judicial decorum and discipline is paramount and, therefore, a coordinate Bench has to respect the judgments and orders passed by another coordinate Bench. In ***Rattiram and others v. State of Madhya Pradesh***[31], the Court dwelt upon the issue what

[27] (2002) 1 SCC 1 [28] (2002) 4 SCC 234 [29] (1989) 2 SCC 754, [30] (2014) 7 SCC 701, [31] (2012) 4 SCC 516,

would be the consequent effect of the latter decision which had been rendered without noticing the earlier decisions. The Court noted the observations in ***Raghubir Singh*** (supra) and reproduced a passage from ***Indian Oil Corporation Ltd. v. Municipal Corporation***[32] which is to the following effect:-

> "8. … The Division Bench of the High Court in *Municipal Corpn., Indore v. Ratnaprabha Dhanda* was clearly in error in taking the view that the decision of this Court in *Ratnaprabha* was not binding on it. In doing so, the Division Bench of the High Court did something which even a later coequal Bench of this Court did not and could not do. …"

25. It also stated what has been expressed in ***Raghubir Singh*** (supra) by R.S. Pathak, C.J. It is as follows:-

> "28. We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. …"

26. In ***Rajesh*** (supra) the three-Judge Bench had delivered the judgment on 12.04.2013. The purpose of stating the date is that it has been delivered after the pronouncement made in *Reshma Kumari's* case. On a perusal of the decision in ***Rajesh*** (supra), we find that an attempt has been made to explain what the two- Judge Bench had stated in ***Santosh Devi*** (supra). The relevant passages read as follows:-

> "8. Since, the Court in *Santosh Devi* case actually intended to follow the principle in the case of salaried persons as laid down in *Sarla Verma* case and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always; it will also have a reference to the age. In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years.

[32] (1995) 4 SCC 96

> 9. In *Sarla Verma* case, it has been stated that in the case of those above 50 years, there shall be no addition. Having regard to the fact that in the case of those self-employed or on fixed wages, where there is normally no age of superannuation, we are of the view that it will only be just and equitable to provide an addition of 15% in the case where the victim is between the age group of 50 to 60 years so as to make the compensation just, equitable, fair and reasonable. There shall normally be no addition thereafter."

27. At this juncture, it is necessitous to advert to another three- Judge Bench decision in ***Munna Lal Jain and another v. Vipin Kumar Sharma and others***[33] . In the said case, the three-Judge Bench commenting on the judgments stated thus:-

> "2. In the absence of any statutory and a straitjacket formula, there are bound to be grey areas despite several attempts made by this Court to lay down the guidelines. Compensation would basically depend on the evidence available in a case and the formulas shown by the courts are only guidelines for the computation of the compensation. That precisely is the reason the courts lodge a caveat stating "ordinarily", "normally", "exceptional circumstances", etc., while suggesting the formula."

28. After so stating, the Court followed the principle stated in *Rajesh*. We think it appropriate to reproduce what has been stated by the three-Judge Bench:-

> "10. As far as future prospects are concerned, in *Rajesh* v. *Rajbir Singh*, a three-Judge Bench of this Court held that in case of self-employed persons also, if the deceased victim is below 40 years, there must be addition of 50% to the actual income of the deceased while computing future prospects."

29. We are compelled to state here that in ***Munna Lal Jain*** (supra), the three-Judge Bench should have been guided by the principle stated in *Reshma Kumari* which has concurred with the view expressed in *Sarla Devi* or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in *Reshma Kumari* being earlier in point of time would be a binding precedent and not the decision in *Rajesh*.

[33] (2015) 6 SCC 347,

30. In this context, we may also refer to ***Sundeep Kumar Bafna v. State of Maharashtra and another***[34] which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the *per incuriam* rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be *per incuriam* any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be *per incuriam* if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a coequal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in ***Rajesh's*** case was delivered on a later date, it had not apprised itself of the law stated in ***Reshma Kumari*** (supra) but had been guided by ***Santosh Devi*** (supra). We have no hesitation that it is not a binding precedent on the co-equal Bench.

31. At this stage, a detailed analysis of ***Sarla Verma*** (supra) is necessary. In the said case, the Court recapitulated the relevant principles relating to assessment of compensation in case of death and also took note of the fact that there had been considerable variation and inconsistency in the decision for Courts and Tribunals on account of adopting the method stated in ***Nance v. British Columbia Electric Railway Co. Ltd***. [35] and the method in ***Davies v. Powell Duffryn Associated Collieries Ltd.***[36]. It also analysed the difference between the considerations of the two different methods by this Court in ***Susamma Thomas*** (supra) wherein preference was given to ***Davies*** method to the ***Nance*** method. Various paragraphs from ***Susamma Thomas*** (supra) and ***Trilok Chandra*** (supra) have been reproduced and thereafter it has been observed that lack of uniformity and consistency in awarding the compensation has been a matter of grave concern. It has stated that when different tribunals calculate compensation differently on the same facts, the claimant, the litigant and the common man are bound to be confused, perplexed and bewildered. It adverted to the observations made in ***Trilok Chandra*** (supra) which are to the following effect:-

> "15. We thought it necessary to reiterate the method of working out 'just' compensation because, of late, we have noticed from the awards made by tribunals and courts that the principle on which the multiplier method was developed has been lost sight of and once again a hybrid method based on the subjectivity of the Tribunal/court has surfaced,

[34] (2014) 16 SCC 623 [35] 1951 SC 601 : (1951) 2 All ER 448 (PC), [36] 1942 AC 601 : (1942) 1 All ER 657 (HL)

introducing uncertainty and lack of reasonable uniformity in the matter of determination of compensation. It must be realised that the Tribunal/court has to determine a fair amount of compensation awardable to the victim of an accident which must be proportionate to the injury caused. …"

32. While adverting to the addition of income for future prospects, it stated thus:-

"24. In *Susamma Thomas* this Court increased the income by nearly 100%, in *Sarla Dixit* the income was increased only by 50% and in *Abati Bezbaruah* the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words "actual salary" should be read as "actual salary less tax"). The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardise the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

33. Though we have devoted some space in analyzing the precedential value of the judgments, that is not the thrust of the controversy. We are required to keenly dwell upon the heart of the issue that emerges for consideration. The seminal controversy before us relates to the issue where the deceased was self-employed or was a person on fixed salary without provision for annual increment, etc., what should be the addition as regards the future prospects. In ***Sarla Verma***, the Court has made it as a rule that 50% of actual salary could be added if the deceased had a permanent job and if the age of the deceased is between 40 – 50 years and no addition to be made if the deceased was more than 50 years. It is further ruled that where deceased was self- employed or had a fixed salary (without provision for annual

increment, etc.) the Courts will usually take only theactual income at the time of death and the departure is permissible only in rare and exceptional cases involving special circumstances.

34. First, we shall deal with the reasoning of straitjacket demarcation between the permanent employed persons within the taxable range and the other category where deceased was self-employed or employed on fixed salary sans annual increments, etc.

35. The submission, as has been advanced on behalf of the insurers, is that the distinction between the stable jobs at one end of the spectrum and self-employed at the other end of the spectrum with the benefit of future prospects being extended to the legal representatives of the deceased having a permanent job is not difficult to visualize, for a comparison between the two categories is a necessary ground reality.It is contended that guaranteed/definite income every month has to be treated with a different parameter than the person who is self-employed inasmuch as the income does not remain constant and is likely to oscillate from time to time. Emphasis has been laid on the date of expected superannuation and certainty in permanent job in contradistinction to the uncertainty on the part of a selfemployed person. Additionally, it is contended that the permanent jobs are generally stable and for an assessment the entity or the establishment where the deceased worked is identifiable since they do not suffer from the inconsistencies and vagaries of self-employed persons. It is canvassed that it may not be possible to introduce an element of standardization as submitted by the claimants because there are many a category in which a person can be self-employed and it is extremely difficult to assimilate entire range of self-employed categories or professionals in one compartment. It is also asserted that in certain professions addition of future prospects to the income as a part of multiplicand would be totally an unacceptable concept. Examples are cited in respect of categories of professionals who are surgeons, sports persons, masons and carpenters, etc. It is also highlighted that the range of self-employed persons can include unskilled labourer to a skilled person and hence, they cannot be put in a holistic whole. That apart, it is propounded that experience of certain professionals brings in disparity in income and, therefore, the view expressed in ***Sarla Verma*** (supra) that has been concurred with ***Reshma Kumari*** (supra) should not be disturbed.

36. Quite apart from the above, it is contended that the principle of standardization that has been evolved in ***Sarla Verma*** (supra) has been criticized on the ground that it grants compensation without any nexus to the actual loss. It is also urged that even if it is conceded that the said view is correct, extension

of the said principle to some of the self-employed persons will be absolutely unjustified and untenable. Learned counsel for the insurers further contended that the view expressed in ***Rajesh*** (supra) being not a precedent has to be overruled and the methodology stood in ***Sarla Verma*** (supra) should be accepted.

37. On behalf of the claimants, emphasis is laid on the concept of "just compensation" and what should be included within the ambit of "just compensation". Learned counsel have emphasized on ***Davies*** method and urged that the grant of pecuniary advantage is bound to be included in the future pecuniary benefit. It has also been put forth that in right to receive just compensation under the statute, when the method of standardization has been conceived and applied, there cannot be any discrimination between the person salaried or self-employed. It is highlighted that if evidence is not required to be adduced in one category of cases, there is no necessity to compel the other category to adduce evidence to establish the foundation for addition of future prospects.

38. Stress is laid on reasonable expectation of pecuniary benefits relying on the decisions in ***Tafe Vale Railway Co.*** (supra) and the judgment of Singapore High Court in ***Nirumalan V Kanapathi Pillay v. Teo Eng Chuan***[37]. Lastly, it is urged that the standardization formula for awarding future income should be applied to self-employed persons and that would be a justifiable measure for computation of loss of dependency.

39. Before we proceed to analyse the principle for addition of future prospects, we think it seemly to clear the maze which is vividly reflectible from ***Sarla Verma***, ***Reshma Kumari***, ***Rajesh*** and ***Munna Lal Jain***. Three aspects need to be clarified. The first one pertains to deduction towards personal and living expenses. In paragraphs 30, 31 and 32, ***Sarla Verma*** lays down:-

> "30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in *Trilok Chandra*4, the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent

[37] (2003) 3 SLR (R) 601

family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger nonearning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

40. In ***Reshma Kumari***, the three-Judge Bench agreed with the multiplier determined in ***Sarla Verma*** and eventually held that the advantage of the Table prepared in ***Sarla Verma*** is that uniformity and consistency in selection of multiplier can be achieved. It has observed:-

"35. … The assessment of extent of dependency depends on examination of the unique situation of the individual case. Valuing the dependency or the multiplicand is to some extent an arithmetical exercise. The multiplicand is normally based on the net annual value of the dependency on the date of the deceased's death. Once the net annual loss (multiplicand) is assessed, taking into account the age of the deceased, such amount is to be multiplied by a "multiplier" to arrive at the loss of dependency."

41. In ***Reshma Kumari***, the three-Judge Bench, reproduced paragraphs 30, 31 and 32 of *Sarla Verma* and approved the same by stating thus:-

> "41. The above does provide guidance for the appropriate deduction for personal and living expenses. One must bear in mind that the proportion of a man's net earnings that he saves or spends exclusively for the maintenance of others does not form part of his living expenses but what he spends exclusively on himself does. The percentage of deduction on account of personal and living expenses may vary with reference to the number of dependent members in the family and the personal living expenses of the deceased need not exactly correspond to the number of dependants.
>
> 42. In our view, the standards fixed by this Court in *Sarla Verma* on the aspect of deduction for personal living expenses in paras 30, 31 and 32 must ordinarily be followed unless a case for departure in the circumstances noted in the preceding paragraph is made out."

42. The conclusions that have been summed up in ***Reshma Kumari*** are as follows:-

> "43.1. In the applications for compensation made under Section 166 of the 1988 Act in death cases where the age of the deceased is 15 years and above, the Claims Tribunals shall select the multiplier as indicated in Column (4) of the Table prepared in *Sarla Verma* read with para 42 of that judgment.
>
> 43.2. In cases where the age of the deceased is up to 15 years, irrespective of Section 166 or Section 163-A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the Table in *Sarla Verma* should be followed.
>
> 43.3. As a result of the above, while considering the claim applications made under Section 166 in death cases where the age of the deceased is above 15 years, there is no necessity for the Claims Tribunals to seek guidance or for placing reliance on the Second Schedule in the 1988 Act.
>
> 43.4. The Claims Tribunals shall follow the steps and guidelines stated in para 19 of *Sarla Verma* for determination of compensation in cases of death.

> 43.5. While making addition to income for future prospects, the Tribunals shall follow para 24 of the judgment in *Sarla Verma*.
>
> 43.6. Insofar as deduction for personal and living expenses is concerned, it is directed that the Tribunals shall ordinarily follow the standards prescribed in paras 30, 31 and 32 of the judgment in *Sarla Verma* subject to the observations made by us in para 41 above."

43. On a perusal of the analysis made in *Sarla Verma* which has been reconsidered in *Reshma Kumari*, we think it appropriate to state that as far as the guidance provided for appropriate deduction for personal and living expenses is concerned, the tribunals and courts should be guided by conclusion 43.6 of *Reshma Kumari*. We concur with the same as we have no hesitation in approving the method provided therein.

44. As far as the multiplier is concerned, the claims tribunal and the Courts shall be guided by Step 2 that finds place in paragraph 19 of *Sarla Verma* read with paragraph 42 of the said judgment. For the sake of completeness, paragraph 42 is extracted below :-

> "42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying *Susamma Thomas*, *Trilok Chandra* and *Charlie*), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M- 16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

45. In *Reshma Kumari*, the aforesaid has been approved by stating, thus:-

> "It is high time that we move to a standard method of selection of multiplier, income for future prospects and deduction for personal and living expenses. The courts in some of the overseas jurisdictions have made this advance. It is for these reasons, we think we must approve the Table in *Sarla Verma* for the selection of multiplier in claim applications made under Section 166 in the cases of death. We do accordingly. If for the selection of multiplier, Column (4) of the Table in *Sarla Verma* is followed, there is no likelihood of the claimants who have chosen to apply under Section 166 being awarded lesser amount on proof of negligence on the part of the driver of the motor

> vehicle than those who prefer to apply under Section 163-A. As regards the cases where the age of the victim happens to be up to 15 years, we are of the considered opinion that in such cases irrespective of Section 163-A or Section 166 under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the Table in *Sarla Verma* should be followed. This is to ensure that the claimants in such cases are not awarded lesser amount when the application is made under Section 166 of the 1988 Act. In all other cases of death where the application has been made under Section 166, the multiplier as indicated in Column (4) of the Table in *Sarla Verma* should be followed."

46. At this stage, we must immediately say that insofar as the aforesaid multiplicand/multiplier is concerned, it has to be accepted on the basis of income established by the legal representatives of the deceased. Future prospects are to be added to the sum on the percentage basis and "income" means actual income less than the tax paid. The multiplier has already been fixed in *Sarla Verma* which has been approved in *Reshma Kumari* with which we concur.

47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided.

48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In ***Santosh Devi*** (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In *Sarla Verma*, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In *Rajesh*, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socio-economic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in *Santosh Devi* (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also

been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-

> "17. … In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of nonpecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."

49. Be it noted, ***Munna Lal Jain*** (supra) did not deal with the same as the notice was confined to the issue of application of correct multiplier and deduction of the amount.

50. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule of the Act. The said Schedule has been found to be defective as stated by the Court in ***Trilok Chandra*** (supra). Recently in ***Puttamma and others v. K.L. Narayana Reddy and another***[38] it has been reiterated by stating:-

> "… we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

51. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also

[38] (2013) 15 SCC 45

provides for General Damages in case of death. It is as follows:-

"3. General Damages (in case of death): The following General Damages shall be payable in addition to compensation outlined above:-

(i) Funeral expenses - Rs. 2,000/-
(ii) Loss of Consortium, if beneficiary is the spouse – Rs. 5,000/-

(iii) Loss of Estate - Rs. 2,500/-

(iv) Medical Expenses – actual expenses incurred before death supported by bills/vouchers but not exceeding – Rs. 15,000/-"

52. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in ***Trilok Chandra*** (supra) and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs. 1,00,000/- was granted towards consortium in *Rajesh*. The justification for grant of consortium, as we find from *Rajesh*, is founded on the observation as we have reproduced hereinbefore.

53. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in *Rajesh.* It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though ***Rajesh*** refers to ***Santosh Devi***, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses

should be Rs. 15,000/-, Rs. 40,000/- funeral expenses should be Rs. 15,000/-, Rs. 40,000/- And Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

55. Presently, we come to the issue of addition of future prospects to determine the multiplicand.

56. In ***Santosh Devi*** the Court has not accepted as a principle that a self-employed person remains on a fixed salary throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the poor. Emphasis has been laid on the extra efforts made by this category of persons to generate additional income. That apart, judicial notice has been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In ***Rajesh's*** case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just, equitable, fair and reasonable. This addition has been made in respect of self-employed or engaged on fixed wages.

57. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and nonviolation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the apposite multiplier to be applied. The formula relating to multiplier has been clearly stated in ***Sarla Verma*** (supra) and it has been approved in ***Reshma Kumari*** (supra). The age and

income, as stated earlier, have to be established by adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.

58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. ***Sarla Verma*** (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, *per se,* allowed any future prospects in respect of the said category.

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing

capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. *Sarla Verma* thinks it appropriate not to add any amount and the same has been approved in *Reshma Kumari*. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of selfemployed or person on fixed salary, the addition should be 10% between the age of 50

to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in *Santosh Devi* should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in *Sarla Verma*, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As *Rajesh* has not taken note of the decision in *Reshma Kumari*, which was delivered at earlier point of time, the decision in *Rajesh* is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of *Sarla Verma* which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in *Sarla Verma* read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years.

62. The reference is answered accordingly. Matters be placed before the appropriate Bench.

Reference answered.

2017 (II) ILR - CUT-1029

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

W.P.(C) NO. 3703 OF 2017

M/S. ABHIRAM CARETAKING & EXPERT SERVICES ……..Petitioner

.Vrs.

BHARAT SANCHAR NIGAM LIMITED …….Opp. Party

TENDER – Petitioner became the lowest bidder – Work entrusted to him for the schedule period of one year – His term was extended without request by him – During the extended period show cause notice issued to him as to why his contract shall not be cancelled, the EMD is forfeited and his agency is black listed – Reply submitted that there is no provision for blacklisting either in the tender call notice or in the agreement – Without expressing its discontent with regard to the working of the petitioner, the authority have passed such order after the period of contract had expired without assigning any valid reason – Held, the impugned order is quashed.

(Paras 13,14)

Case Laws Referred to :-

1. AIR 2014 SC 9 : M/s. Kulja Industries Ltd. -V- Chief Gen. Manager, W.T.Proj., BSNL
2. AIR 1974 SC 87 : Union of India -V- Mohan Lal Capoor
3. AIR 1981 SC 1915 : Uma Charan –V- State of Madhya Pradesh
4. 2017 (I) OLR 5 : Patitapaban Pala –V- Orissa Forest Development Corporation Ltd.

5. 2017 (I) OLR 625 : Banambar Parida -V- Orissa Forest Development Corporation Ltd.
6. (1990) 4 SCC 594 : S.N.Mukherjee -V- Union of India
7. AIR 1978 SC 597 : Menaka Gandhi –V- Union of India

For Petitioner : Mr. Asok Mohanty, Senior Advocate,
M/s. Sumit Lal, S.Lal & M.Agrawal

For Opp. Party : Mr. D.C.Mohanty, Senior Advocate,
M/s.R.N.Acharya & A.K.Patra

Date of judgment : 16.10.2017

JUDGMENT

VINEET SARAN,C.J.

The opposite party-Bharat Sanchar Nigam Limited issued a tender call notice on 07.08.2015 inviting sealed tenders for providing security guards. The bid of the petitioner was lowest and thus the contract was awarded in favour of the petitioner for a period of one year with effect from 01.12.2015 to 30.11.2016. There is no dispute about the fact that the petitioner carried out the work under the contract for the scheduled period of one year and thereafter, without there being any request on the part of the petitioner for extension of the period of contract, the opposite party- Bharat Sanchar Nigam Limited, vide order dated 19.12.2016, extended the contract period for a further period of 3 months with effect from 01.01.2017 to 31.03.2017 or till finalization of new tender, whichever was earlier. The extension was on the same terms as per the agreement executed between the parties.

2. After the extension was accorded by the opposite party, on 20.01.2017 the opposite party issued notice to the petitioner to show cause as to why action should not be taken against it for violation of the terms and conditions of the tender, and also as to why the contract be not cancelled and Earnest Money Deposit (EMD) forfeited. It was also mentioned in the said communication that why the petitioner agency be not blacklisted and barred from participating in any kind of tender in future. In response to the same, petitioner submitted its reply on 27.01.2017 and, thereafter on 23.02.2017, the impugned order has been passed, whereby the agreement has been terminated with effect from 01.03.2017 and the petitioner has been blacklisted for a period of 3 years with effect from 01.03.2017. Challenging the same, this writ petition has been filed.

3. Pleadings between the parties have been exchanged and with the consent of learned counsel for the parties the matter is being finally disposed of at the admission stage.

4. The submission of Mr. Asok Mohanty, learned Senior Counsel appearing along with Mr. Sumit Lal, learned counsel for the petitioner is that there was no provision of blacklisting in the agreement executed between the petitioner and the opposite party, nor was there any such provision in the notice inviting tender. It is also contended that there was no complaint with regard to the working of the petitioner during the period of agreement, which expired on 30.11.2016 and the grievance of the opposite party started only after the period of agreement was unilaterally extended by the opposite party, without there being any request for the same made by the petitioner. It is further contended that the impugned order has been passed without considering the reply of the petitioner dated 27.01.2017 and without assigning any reason, except for saying that there has been violation of the terms and conditions of the tender/agreement, and that salary to the security guards has not been paid for several months and certain irregularities found in Employees Provident Fund (EPF)/Employees' State Insurance (ESI) contribution.

4.1 The submission of the learned counsel for the petitioner is that no specific violation of the terms and conditions of the tender/agreement has been mentioned in the impugned order as it was not stated as to for which period the security guards have not been paid by the petitioner or the period for which the EPF/ESI contributions have not been deposited by the petitioner. Learned counsel for the petitioner contends that the impugned order has been passed on general grounds, without assigning any specific reason for cancelling the agreement, and as such neither there was any justification for cancelling the agreement, nor was there any occasion for blacklisting the petitioner, for which there is no provision in the tender call notice or the agreement.

5. Per contra, Mr. D.C. Mohanty, learned Senior Counsel appearing along with Mr. R.N. Acharya, learned counsel for the opposite party has contended that the blacklisting order could be passed even if there was no such provision in the agreement and in support thereof he has relied upon a decision of the apex Court in the case of ***M/s. Kulja Industries Limited v. Chief Gen. Manager, W.T.Proj., BSNL***, AIR 2014 SC 9. It is further stated that though the show-cause notice had been given to the petitioner on

20.01.2015, the reply submitted by the petitioner on 27.01.2017 was unsigned. However, with regard to the reply of the petitioner, in paragraph-6 of the counter affidavit it is further stated that "clarifications made thereunder were not convincing and satisfactory".

6. It is noteworthy that neither in the counter affidavit, nor in the impugned order, has the opposite party explained as to why the clarifications given in the reply were not convincing or unsatisfactory. A perusal of the impugned order dated 23.02.2017 would go to show that general allegations have been made against the petitioner, without specifying as to what violation has been committed by the petitioner. By having granted extension of the contract for a further period of three months (without even being asked for), there would be a presumption that the conduct and work of the petitioner was good and to the satisfaction of the opposite party.

7. In the counter affidavit it is stated that in response to the notice dated 20.01.2017, the reply dated 27.01.2017 was unsigned, and in the same breath it is stated that the clarifications made therein were not convincing or satisfactory. The opposite party seems to be blowing hot and cold at the same time. Once it has taken the reply dated 27.01.2017 into consideration, it cannot turn around and say that same was unsigned and could thus not be considered. Even otherwise, the alleged unsigned letter dated 27.01.2017 said to be submitted by the petitioner has not been filed along with the counter affidavit, even though singed copy of the letter has been filed by the petitioner as Annexure-5 to the writ petition. Further, we are of the opinion that even in case the reply dated 27.01.2017 (which was submitted within 7 days of issuance of notice) was unsigned, the opposite party could have asked the petitioner to submit a proper signed reply, as from the record it is clear that it is not a case where the decision was taken by the opposite party immediately within few days of the submission of the reply, as the impugned order is dated 23.02.2017, which was nearly four weeks after the submission of the reply.

From the above facts, it is clear that the impugned order has been passed without assigning any reason and also without considering the reply of the petitioner given to the show cause notice.

8. As regards blacklisting, it is admitted by the opposite party that there was no provision of blacklisting, either in the tender call notice, or in the agreement. However, the apex Court in the case of **M/s Kulja Industries Limited** (supra) has in paragraph 17 held that there was no need for any such

power being specifically conferred by statute or reserved by contractor because blacklisting simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach.

9. However, even if it is accepted that the opposite party had the power/authority to blacklist the petitioner, but the same could have done after assigning valid reason for doing so in the impugned order, which ought to have been after considering the reply of the petitioner. A perusal of the reply dated 27.01.2017 would show that the petitioner had given response to all the queries raised by the opposite party in the show cause notice, but by the impugned order a general expression has been made that the petitioner has not complied with the terms, and hence the agreement is cancelled. No specific reason for blacklisting has also been assigned in the impugned order.

10. **Franz Schubert said-**
"Reason is nothing but analysis of belief."

In **Black's Law Dictionary**, reason has been defined as a-

"faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions."

It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe.

10.1 In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87 it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in ***Uma Charan v. State of Madhya Pradesh,*** AIR 1981 SC 1915, ***Patitapaban Pala v. Orissa Forest***

Development Corporation Ltd., 2017 (I) OLR 5; and ***Banambar Parida v. Orissa Forest Development Corporation Limited***, 2017 (I) OLR 625.

11. In ***S.N. Mukherjee v. Union of India*** (1990) 4 SCC 594 the apex Court held that keeping in view the expanding horizon of principles of natural justice, the requirement to record reasons can be regarded as one of the principles of natural justice which governs exercise of power by administrative authorities. Except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority is required to record reasons for its decision.

12. In ***Menaka Gandhi v. Union of India,*** AIR 1978 SC 597 the apex Court observed that the reasons, if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order, the refusal to disclose the reasons would equally be open to the scrutiny of the court; or else, the wholesome power of a dispassionate judicial examination of executive orders could, with impunity, be set at naught by an obdurate determination to suppress the reasons.

The above questions were considered by one of us (Dr. Justice B.R. Sarangi), while sitting single, in W.P.(C) No.5147 of 2004 (***Saroj Kumar Mishra v. Chairman, Coal India Ltd.***) disposed of on 02.05.2017; and in W.P.(C) No.5092 of 2008 (***Narottam Pati v. North Eastern Supply Company***) disposed of on 03.05.2017.

13. For the aforesaid reasons, as also for the reason that the opposite party had extended the period of the agreement, without there being any request so made by the petitioner and without expressing its discontent or dissatisfaction with regard to the working of the petitioner, we are of the opinion that after the period of contract had expired, the passing of the impugned order, in the manner as has been done in the present case, cannot be justified.

14. As such, the writ petition stands allowed and the order dated 23.02.2017 passed by the opposite party is quashed. However, passing of this order would not come on the way of the opposite party in passing fresh orders in accordance with law. No order to cost.

Writ petition allowed.

2017 (II) ILR - CUT-1035

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

W.P.(C) NO. 5272 OF 2017

M/S. SICAL LOGISTICS LTD. ……..Petitioner

.Vrs.

MAHANADI COALFIELDS LTD. & ORS. ……..Opp. Parties

TENDER – Petitioner became L1 (Lowest bidder) – Cancellation of tender process and issuance of fresh tender call notice without assigning reasons – Subsequent explanation given by the authority in the counter affidavit that due to the decision taken by the Board of Directors in its 186th meeting held on 28.02.2017 such tender has been cancelled – Further, the bid submitted in the re-tender is lowest than the petitioner – Hence the writ petition.

Validity of the order must be judged by reasons and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise – Moreover the bid in the re-tender should not be accepted simply because it is lowest as the price bid of the petitioner was disclosed and known to all after the reverse bidding was over – Held, cancellation of the tender Dt. 17.03.2017 and re-tender notice Dt. 20.03.2017 are quashed. (Paras 19, 20)

Case Laws Referred to :-

1. AIR 1978 SC 851 : Mohinder Singh Gill -V- The Chief Election Commissioner, New Delhi
2. 2016 (II) OLR 237 : M/s. Shree Ganesh Construction -V-. State of Orissa
3. (2016) 1 SCC 724 : State of Punjab -V- Bandeep Singh
4. (1990) 3 SCC 280 : M/s Star Enterprises -V- City & Industrial Development Corporation of Maharastra Ltd.,.
5. (2016) 4 SCC 716 : State of Uttar Pradesh & Anr -V- AL Faheem Meetex Private Ltd & Anr.
6. (2016) 14 SCC 172 : AIR 2016 SC 3366 : State of Jharkhand & Ors. -V- CWE-SOMA Consortium
7. (2014) 3 SCC 760 : Maa Binda Express Carrier & Ors. -V- North-East Frontier Rly. & Ors.
8. (2015) 15 SCC 545 : South Delhi Municipal Corporation v. Ravinder Kumar & Anr.
9. (2014) 11 SCC 192 : State of Assam & Ors. -V- Susrita Holdings Private Limited,
10. (2007) 1 SCC 477 : Rajasthan Housing Board & Anr. -V- G.S. Investments & Anr.

11. (2015) 13 SCC 233 : Rishi Kiran Logistics Pvt. Ltd. -V- Board of Trustees of Kandla Port Trust & Ors.
12. 2017 (I) OLR 666 : Chandra Sekhar Swain -V- State of Odisha & Ors.
13. AIR 1974 SC 87 : Union of India -V- Mohan Lal Capoor
14. AIR 1981 SC 1915 : Uma Charan -V- State of Madhya Pradesh
15. 2017 (I) OLR 5 : Patitapaban Pala -V- Orissa Forest Development Corporation Ltd. & Anr.
16. 2017 (I) OLR 625 : Banambar Parida -V- Orissa Forest Development Corporation Ltd.
17. AIR 1952 SC 16 : Commissioner of Police, Bombay -V- Gordhandas Bhanji
18. (2008) 4 SCC 144 : Bhikhubhai Vithlabhai Patel & Ors. -V- State of Gujarat & Anr.

For Petitioner : Mr. S.K.Setty & Mr. J. Das (Senior Counsels), M/s. A.N.Das, N.Sarkar, E.A.Das & M.Muduli

For Opp. Parties : Mr. S.D.Das, Senior Counsel, M/s. D.Mohanty, A.Mishra, B.P.Panda, D.Behera, H.K.Behera & H.Mohanty

For Intervenor : M/s. A.Pattnaik, S.Mohapatra, S.Pattnaik, R.Pati, R.P.Mulia, S.P.Maharana & S.Satpathy

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Date of hearing : 23.08.2017
Date of judgment: 08.09.2017

JUDGMENT

DR. B.R. SARANGI, J

M/s. Sical Logistics Limited, a company registered under the Companies Act, 1913, has filed this application challenging the order dated 17.03.2017 cancelling e-tender notice dated 13.10.2016, as well as consequential re-tender notice issued on 20.03.2017 on the ground that the same is arbitrary, discriminatory and mala fide.

2. The factual matrix of the case is that the petitioner is one of the India's leading integrated logistics solutions providers. It has over five decades of experience in providing end to end logistic solutions. As such, the petitioner has made significant investments in logistics elated infrastructure and operates mechanized port terminals (container and bulk), container freight stations, container rakes, rail and road terminals and also undertakes surface mining of coal a nd transportation, removal of overburden and

transportation, and mining development operations. An e-tender notice was floated on 13.10.2016 by opposite party no.1 inviting offers from eligible bidders for "Extraction of coal/coal measure strata by deploying Surface Miners on hiring basis, mechanical transfer of the same by Pay loaders into tipping trucks and transportation from Surface Miner face to different destinations of Hingula OCP, Hingula area for a total quantity of 161,96,655 Cum (267,24,480 Te)." The said notice inviting tender was widely published in private and public portals all over the country. In compliance of` the conditions stipulated in the notice inviting tender, the petitioner submitted its bid on 03.11.2016. The bid of the petitioner, along with other participants to the tender, was opened on 04.11.2016, and four participants were qualified to participate in the reverse auction process, including the petitioner.

3. In the reverse auction process, which took place on 04.11.2016, the petitioner emerged as L1 (lowest bidder) having quoted the lowest price and was declared as L1. As a result, the price quoted by the petitioner in its price bid was made public and published. After being declared L1, the petitioner requested on several occasions to opposite party no.1 to issue letter of acceptance (LOA) in accordance with the terms and conditions of the notice inviting tender. Though assurance was given, but the letter of acceptance was not issued. Since it is a time bound project, the petitioner proceeded to make arrangements recruiting manpower and procuring equipment. The validity of the tender, being for a period of 120 days as per clause-25 of the e-tender notice dated 13.10.2016, opposite party no.2 vide its letter dated 25.02.2017 requested the petitioner to extend the bid validity period up to 30.04.2017, to which the petitioner agreed vide its letter dated 28.02.2017. Even though four months expired from the date of declaration of petitioner as L1, no letter of acceptance was issued. Consequentially, the petitioner vide its letter dated 09.03.2017 requested opposite party no.1 to issue such letter of acceptance at the earliest. But the petitioner received an e-mail on 17.03.2017, wherein it was informed that the tender has been cancelled and the petitioner may visit the portal for further details, if any. Accordingly, the petitioner visited the portal and found that the tender has been cancelled "due to administrative reason". Followed by the same, with identical parameters, quantity and base price as of the original tender dated 13.10.2016, opposite party no.1 issued re-tender notice on 20.03.2017 in its website. Being aggrieved by such cancellation of tender, as well as issuance of re-tender notice, this application has been filed.

4. Mr. S.K. Setty, learned Senior Counsel and Mr. J. Das, learned Senior Counsel appearing along with Mr. A.N. Das, learned counsel for the petitioner contended that the communication dated 17.03.2017 in Annexure-5 intimating the cancellation of tender does not contain any reason, save and except to visit the official portal for further details. On visiting the official portal, as would be evident from Annexure-6, it was found that "due to administrative reason" the tender has been cancelled. It is contended that the order cancelling the tender, having been passed without assigning any reason, cannot sustain in the eye of law. It is further contended that any explanation given in the counter affidavit subsequent to filing of the writ petition cannot also be taken into consideration. Therefore, while seeking interference of this Court, it is prayed that the order of cancellation dated 17.03.2017 in Annexures-5 and 6 of the writ petition be quashed. It is also contended that the re-tender notice dated 20.03.2017, having been issued for the selfsame quantity of works with similar terms and conditions, there was no valid and justifiable reason to cancel the tender where petitioner was declared as L1 pursuant to reverse auction held on 04.11.2016, as its price bid was made public and published. Therefore, the subsequent action taken by the authority in issuing re-tender notice, cannot sustain in the eye of law. It is contended that the contention of learned counsel for the opposite parties, that due to financial implication the cancellation has been made, is an afterthought, and as such, reduction of financial implication pursuant to subsequent tender cannot be a ground to cancel the tender in which the petitioner was declared as L1, and that itself amounts to arbitrary and unreasonable exercise of power by the authority. Therefore, in exercise of power of judicial review, this Court can interfere with such decision of the authority concerned and quash the order of cancellation of tender dated 17.03.2017 and consequential issuance of re-tender dated 20.03.2017, as the authorities have exercised the power arbitrarily, unreasonably and malafidely. To substantiate the contention, learned Senior Counsel for the petitioner relied upon the judgments of the apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi,*** AIR 1978 SC 851; ***M/s. Shree Ganesh Construction v. State of Orissa***, 2016 (II) OLR 237; ***State of Punjab v. Bandeep Singh***, (2016) 1 SCC 724; and ***M/s Star Enterprises v. City and Industrial Development Corporation of Maharastra Ltd.***, (1990) 3 SCC 280.

5. Mr. S.D. Das, learned Senior Counsel appearing along with Mr. S.K. Behera and Mr. H. Mohanty, learned counsel for the opposite parties

admitted the factual contention raised by learned Senior Counsel for the petitioner, but stated that in view of 186th Board of Directors' meeting held on 28.02.2017 decision has been taken to cancel the existing tender. Consequentially, the petitioner was intimated that its tender has been cancelled and to visit the portal for the reasons for cancellation of such tender. It is contended that in view of the decision taken by the Management for cancellation of the tender "due to administrative reason", as a consequential follow up action, the cancellation order was passed on 17.03.2017 and accordingly fresh re-tender notice was issued for giving wide publication. Thereby, the authorities have not committed any illegality or irregularity in cancelling the tender of the petitioner. To substantiate his contention, he has relied upon the judgments of the apex Court in ***State of Uttar Pradesh and another v. AL Faheem Meetex Private Limited and another***, (2016) 4 SCC 716; ***State of Jharkhand and others v. CWE-SOMA Consortium***, (2016) 14 SCC 172 : AIR 2016 SC 3366; ***Maa Binda Express Carrier and another v. North-East Frontier Railway and others***, (2014) 3 SCC 760; ***South Delhi Municipal Corporation v. Ravinder Kumar and another***, (2015) 15 SCC 545; ***State of Assam and others v. Susrita Holdings Private Limited***, (2014) 11 SCC 192; ***Rajasthan Housing Board and another v. G.S. Investments and another***, (2007) 1 SCC 477; ***Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and others***, (2015) 13 SCC 233; and ***Chandra Sekhar Swain v. State of Odisha and others***, 2017 (I) OLR 666.

6. Mr. A. Pattnaik, learned counsel, though filed an application, being Misc. Case No.8369 of 2016, for intervention on behalf of M/s JRMS UH NKBPL JV, the same was not allowed, but he was given opportunity of hearing. He contended that pursuant to re-tender notice the intervenor company participated in the tender process and was declared as L1 in reverse auction and accordingly qualified to enter into an agreement with the opposite parties to execute the work as per the terms and conditions of the re-tender notice dated 20.03.2017. It is further contended that, though vide order dated 28.03.2017 this Court directed that till the next date of listing, the e-tender process might go on, but no contract would be finanlized in favour of any party in pursuance of the e-tender notice dated 20.03.2017. It was however made clear that the petitioner would be at liberty to participate in the fresh tender call notice without prejudice to its rights. After the e-tender process, since the intervenor became L1 and eligible to make contract with the opposite parties, in the event any further order is passed, it will cause

prejudice to the intervenor. Therefore, he has filed the intervention application to be impleaded as a party to the proceeding.

7. Having heard learned counsel for the parties and after perusing the records, since pleadings between the parties have been exchanged, with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

8. The undisputed fact is that pursuant to tender call notice dated 13.10.2016, the petitioner was the lowest bidder in the tender process, which was conducted by following due procedure. In the reverse auction process which took place on 04.11.2016, the petitioner emerged as L1, having quoted lowest price, and was waiting for letter of acceptance in accordance with the notice inviting tender. As finalization the same was delayed, opposite party no.1 vide letter dated 25.02.2017 requested the petitioner to extend the bid validity period up to 30.04.2017, to which the petitioner agreed by its letter dated 28.02.2017. By this process, four months elapsed. Consequentially, the petitioner made a request on 09.03.2017 to issue necessary letter of acceptance so as to execute the work. But all on a sudden, the petitioner received an e-mail on 17.03.2017 in Annexure-5 that its tender has been cancelled and for further details it may visit the portal. On perusal of the official portal the order dated 17.03.2017 cancelling the tender was found, which is marked as Annexure-6, in which the reason for cancellation has been assigned as "due to administrative reason".

9. It is well settled principle of law laid down by the apex Court time and again that the authority should pass reasoned order. Reasons being a necessary concomitant to passing an order, the authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference.

In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87, it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in ***Uma Charan v. State of Madhya Pradesh,*** AIR 1981 SC 1915 and in ***Patitapaban Pala v. Orissa Forest Development Corporation Ltd. & another***, 2017 (I) OLR 5 and in ***Banambar Parida v. Orissa Forest Development Corporation Limited,*** 2017 (I) OLR 625.

10. As it appears from the counter affidavit, in paragraph-6 details of steps taken by the opposite parties in respect of tender notice dated 13.10.2016 have been indicated. In paragraph-7 it is contended that after due deliberation, the Board of Directors in its 186th meeting held on 28.02.2017 directed to cancel the existing tender, as the tender documents were not published due to non-finalization of the Directorate of Advertising and Visual Publicity (DAVP) rates and these were simply uploaded. As the matter regarding DAVP rates has since been resolved, the Board was of the view that such tenders may be advertised to give wide publicity in compliance of the directive of Coal India Limited (CIL). In paragraph-8 of the counter affidavit, the opposite parties have admitted as follows;

> *"……The one most suitable and appropriate reason was indicated. Ultimately it was informed that the tender has been cancelled. You may kindly visit the portal for further details, if any, wherein the reasons for cancellation was due to the "administrative reason", which term is available in the portal has been indicated."*

Corroborative statements have been made by the opposite parties in paragraphs-11 and 12, which are extracted below:

> "*That in view of the decision taken by the Management, which indicates the reason for cancellation of the tender, i.e. due to administrative reason, as a consequential follows of action the cancellation order was passed on 17.03.2017, which is as per Annexure-5 and 6 to the writ application. As the Tender Notices were not published print media due DAVP rates as stated in the preceding paragraphs the Tender was cancelled.*
>
> *That though the order has been challenged to be cryptic one as would be clear from the entire process as has been indicated above, the Tender Committee has suggested steps and also requested the petitioner to extend the validity period, but ultimately accepting authority, i.e. the Management of the Company which is evidently the Board of Directors of the Company having taken a decision to*

cancel the tender process, the tender was cancelled as per the direction and observation of the Board of Directors quoted above."

The sequence of events, as mentioned in the counter affidavit, clearly indicate that admittedly the petitioner was not communicated with the reasons for cancellation of tender in Annexure-5 dated 17.03.2017, save and except to visit the portal. On perusal of the portal, the cancellation order dated 17.03.2017, which is annexed as Annexure-6, was found and it was mentioned therein that "due to administrative reason" the tender has been cancelled. In order to justify the administrative reason, in the counter affidavit subsequent explanation has been given that due to the decision taken by the Board of Directors in its 186th meeting held on 28.02.2017 the tender has been cancelled, but however admitted the fact of issuance of letter dated 17.03.2017 in paragraphs-11 and 12 of the counter affidavit.

11. It is well settled principle of law laid down by the Apex Court in ***Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others***, AIR 1978 SC 851 that :

"*When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise an order bad in the beginning may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out."*

In ***Commissioner of Police, Bombay v. Gordhandas Bhanji***, AIR 1952 SC 16, the Apex Court held as follows :

"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older."

Similar view has also been taken in ***Bhikhubhai Vithlabhai Patel and others v. State of Gujarat and another,*** (2008) 4 SCC 144 as well as in ***M/s. Shree Ganesh Construction*** (supra).

In the case of ***Bandeep Singh*** (supra) the apex Court held that the validity of administrative orders/ decisions/ executive instructions/ orders/ circulars must be judged by reasons stated in decision or order itself. Subsequent explanations or reasons cannot be accepted to sustain decision or order.

12. Reliance has been placed by opposite parties on ***Chandra Sekhar Swain*** (supra). In paragraph 21 of the said judgment it has been observed as follows:

> *"21. Annexure-7 dated 30.11.2016 is the order impugned, whereby the bid in respect of the work in question has been cancelled. The contention raised by learned Senior Counsel for the petitioner is that no reason has been assigned in support of such cancellation. To buttress his contention, he has placed reliance on* ***M/s. Shree Ganesh Construction*** *(supra). On perusal of the materials available on record, it appears that on 28.11.2016 the technical evaluation committee scrutinized the technical bids afresh on the basis of communication made on 17.11.2016. The proceedings of the technical evaluation committee held on 28.11.2016, which indicate the reasons for cancellation of the tender in question, were evidently made available on the website. On the basis of such reasons, as a consequential follow up action, the cancellation order was passed on 30.11.2016 in Annexure-7. In view of that, it cannot be said that the order of cancellation is a cryptic one, particularly when the same has been explained subsequently in the counter affidavit. If the reasons were available to the parties on the website on the date of cancellation, i.e., on 28.11.2016 itself, the communication vide Annexure-7, which was made on 30.11.2016, cannot be held to be unsustainable in the eye of law for not containing the reasons for cancellation of the bid in question. As such, the ratio decided in* ***M/s. Shree Ganesh Construction*** *(supra) is absolutely not applicable to the present case."*

In the said case, though the reasons had not been assigned, but it was specifically mentioned that the proceedings of the technical evaluation committee held on 28.11.2016 which indicates reasons for cancellation of the tender in question was evidently made available on the website. Therefore, if the reasons were made available on the website itself, the communication made without assigning any reasons cannot be said to be illegal or arbitrary

or unreasonable. Therefore, the case of ***Chandra Sekhar Swain*** (supra) is distinguishable from the present factual context and more so the law laid in ***M/s Shree Ganesh Construction*** (supra) is applicable to the present case.

13. The contention of learned Senior Counsel for the petitioner to the aforesaid effect is fortified by the office order no.15/3/05 dated 24.03.2005 issued by the Central Vigilance Commission, which reads as follows:-

> *"The Commission has observed that some of the Notice Inviting Tenders (NITs) have a clause that the tender applications could be rejected without assigning any reason. This clause is apparently incorporated in tender enquiries to safeguard the interest of the organisation in exceptional circumstance and to avoid any legal dispute, in such cases.*
>
> *2. The Commission has discussed the issue and it is emphasized that the above clause in the bid document does not mean that the tender accepting authority is free to take decision in an arbitrary manner. He is bound to record clear, logical reasons for any such action of rejection/recall of tenders on the file"*

14. In view of the aforesaid facts and circumstances, this Court is of the considered view that by way of subsequent explanation given in the counter affidavit the communications dated 17.03.2017 in Annexures-5 and 6 cancelling the tender in question without assigning any reason cannot sustain in the eye of law. More so, in view of the Central Vigilance Commission guidelines dated 24.03.2005, the tender accepting authority is not free to take any decision in an arbitrary manner and is bound to record clear and logical reasons for any such action of rejection/recall of tenders on the file. In view of such position, in absence of any reason communicated to the petitioner, the order so passed in Annexures-5 and 6 dated 17.03.2017 cannot sustain.

15. Coming to the decisions relied upon by learned Senior Counsel appearing for the opposite parties, in ***AL Faheem Meetex Private Ltd.*** (supra) the High Court, having quashed the decision of the bid evaluation committee dated 22.11.2010 cancelling its earlier decision dated 08.09.2010 in view of receipt of inadequate number of valid tenders, directed for inviting fresh tenders for construction of modern slaughterhouse. But the apex Court held that the bid, as accepted on 08.09.2010, is unsustainable. The reason assigned by the apex Court was that when a decision making process has not reached its finality and was still in embryo there was no acceptance of the bid

of respondent no.1 by the competent authority and, as such, no right much less enforceable right accrued to respondent no.1. Factually, the said case is not applicable to the present case.

16. In ***Maa Binda Express Carrier*** (supra), the apex Court held that submission of a bid/tender in response to a notice inviting tenders is only an offer which State or its agencies are under no obligation to accept. Bidders participating in the tender process cannot insist that their bids/tenders should be accepted simply because a bid is the highest or lowest. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in evaluation of their bids/tenders. Therefore, the decision to cancel the tender process was in no way discriminatory or mala fide nor violated any fundamental right of appellants so as to warrant any interference by Court. There is no dispute in the proposition laid down by the apex Court, but the said proposition has to be taken into consideration on the factual matrix of each case. So far as the facts of the present case are concerned, the petitioner having been found as L1 and request letter having been issued by the opposite parties seeking extension of the period of tender which the petitioner agreed and the same was extended by the opposite parties, for such conduct of the opposite parties it can be safely said that offer submitted by the petitioner was accepted and only formal letter of acceptance was to be issued in its favour. Therefore, the present case is quite distinguishable from that case.

17. In ***Ravinder Kumar*** (supra) the apex Court held that the Government being guardian of public finance it has right to refuse lowest or any other tender bid or bids submitted by bidders to it provided its decision is neither arbitrary nor unreasonable as it amounts to violation of Article 14 of Constitution of India. Similarly, in ***Susrita Holdings Priviate Limited*** (supra), the apex Court held the validity of tender process has to be considered in the light of fairness and reasonableness and of being in the public interest. In ***G.S. Investments*** (supra), similar view has also been taken by the apex Court. To the propositions, as advanced by the apex Court in the above mentioned judgments, there is no dispute save and except each case has been decided on its own facts and circumstances which is absolutely different from that of the present case.

18. In ***CWE-SOMA CONSORTIUM*** (supra), the apex Court categorically held that there is no obligation on the part of the person issuing tender notice to accept any tender or even lower tender. On perusing tenders

if it is found that there is no competition, person issuing tender may decide not to enter into contract and thereby cancel tender. But the said factual matrix is not available in the present case because in the instant case the participants had participated and as such a fair opportunity was given to the petitioner. But the tender has been cancelled without assigning any reason in the order of cancellation issued on 17.03.2017. In paragraph 23 of the said judgment, the apex Court categorically observed as follows:

> "*The right to refuse the lowest or nay other tender is always available to the Government. In the case in hand, the respondent has neither pleaded nor established mala fide exercise of power by the appellant. While so, the decision of the Tender Committee ought not to have been interfered with by the High Court. In our considered view, the High Court erred in sitting in appeal over the decision of the appellant to cancel the tender and float a fresh tender. Equally, the High Court was not right in going into the financial implication of a fresh tender.*"

19. The intervenor contended that pursuant to subsequent tender dated 20.03.2017 it had quoted lower price than that of the petitioner quoted pursuant to earlier tender dated 13.10.2016. But that itself cannot be said to be a ground to cancel the tender which has not seen the light of the day and in which this price bid of the petitioner was disclosed and known to all after the reverse bidding was over. As such, the cancellation of tender dated 17.03.2017 being without assigning any reason, subsequent issuance of fresh tender quoting a lower price than that of petitioner pursuant to earlier tender dated 13.10.2016 cannot be justified, more particularly this Court cannot go into the financial implication of a fresh tender in view of ratio decided by ***CWE-SOMA CONSORTIUM*** (supra).

20. In view of the factual and legal discussions made above, this Court is of the considered view that the orders of cancellation of tender dated 17.03.2017 passed in Annexures-5 and 6 cannot sustain in the eye of law and the same are hereby quashed. Consequentially, the re-tender notice dated 20.03.2017 issued by opposite party no.1 in Annexure-7 also cannot sustain in the eye of law and the same is accordingly quashed.

21. The writ petition is thus allowed. There shall be no order as to cost.

Writ petition allowed.

2017 (II) ILR - CUT-1047

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

W.P.(C) NO. 11214 OF 2003

MANAGEMENT, KALINGA HATCHERY PVT. LTD. ……..Petitioner

.Vrs.

PRESIDING OFFICER, LABOUR COURT & ANR. ……...Opp. Parties

INDUSTRIAL DISPUTES ACT, 1947 – S.25-F

Termination of workman – Tribunal directed re-instatement with 50% backwages – Management, though re-instated the workman but challenged the part of the award allowing/granting 50% backwages on the ground that he had not rendered any service during such period.

Admittedly, while terminating the workman from service, no notice, notice pay or retrenchment compensation had been paid to him – Violation of the three essential conditions of Section 25-F of the Act, which are mandatory before termination of the workmen – Held, termination of the workman being illegal he is also entitled to backwages to the tune of Rs. 50,000/- inclusive of interest.

(Paras 7,8,9)

Case Laws Referred to :-

1. AIR 2004 SC 4282 : Regional Manager, Rajasthan State Road Transport Corporation -V- Sohan Lal
2. (1960) I L.L.J. 504 (S.C) : Swadesamitran Ltd. -V- Their Workmen
3. (1977) I L.L.J. 1 (S.C.) : Hindustan Steel Ltd. -V- State of Orissa

For Petitioner : M/s. B.K.Nayak & D.K.Mohanty
For Opp. Parties : M/s. S.Mishra, B.Baral, T.Lenka, A.R.Majhi & N.Mallik

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Date of judgment: 02.11.2017

JUDGMENT

DR. B.R. SARANGI, J

The petitioner-management has filed this application challenging the award dated 28.04.2003 passed in Industrial Dispute Case No. 150 of 1991 whereby the Labour Court, while holding that termination of services of opposite party no.2 workman with effect from 09.09.1989 is illegal and unjustified, directed for reinstatement in service with 50 % back wages.

2. The factual matrix of the case is that opposite party no.2 workman was appointed as Farm Supervisor under the petitioner at Bhubaneswar on 18.04.1983 and his services were regularized w.e.f. 18.10.1983. While he was continuing as such, due to opening of the Sales Office at Mahatab Road, Cuttack in April, 1986, he was transferred to Cuttack as Sales Officer and assigned with the job of booking of orders, receiving cash from the poultry farmers along with rendering technical advice to them. On 05.05.1989, an FIR was lodged by opposite party no.2 workman before the Officer-in-charge, Madhupatna Police Station at about 8.30 p.m. stating therein that after finishing the cash transaction, while waiting to handover the sales proceeds to the officials of the Management at different junctures, three unknown persons forcibly entered into the office, tied his hands and legs at the point of knife, robbed a sum of Rs.23,924/-. After the incident, he reported the matter to the police and informed the same to the Managing Director of the Company. But subsequently, due to negligence in duty, after due investigation in the matter, he was placed under suspension from service on 10.05.1989. On the basis of the FIR lodged, the police caused investigation and submitted final report, which was communicated by the IIC of the Police Station to the petitioner management on 03.01.1990. On receipt of the said final report, opposite party no.2 workman was terminated from service w.e.f. 05.09.1989. Challenging such action of the petitioner management in terminating the services of opposite party no.2-workman, he approached the labour authorities for conciliation. The conciliation having ended with failure, the matter was referred to the Government. In exercise of powers conferred by Section 12 and Section 10 of the ID Act, 1947, the State Government in Labour and Employment Department referred the matter to the Labour Court framing the following terms of reference:

> "*Whether the termination of service of Shri Jatindra Kumar Mohanty by the Management of Kalinga Hatchery P. Ltd. Bhubaneswar with effect from 9.9.1989 is legal and/or justified ? if not, to what relief he is entitled?"*

On the basis of the aforementioned reference, the Labour Court called upon the petitioner management as we well as opposite party no.2 workman to participate in the proceeding and after due adjudication, the Labour Court, considering the materials placed before it, passed the final order, which reads as follows:

> *" Hence it is ordered:*

That the termination of services of the workman concerned by the management M/s. Kalinga Hachery (P) Ltd., Jail Road, Jharpada, Bhubaneswar with effect from 9.9.89 is illegal and unjustified. In such view of the matter the workman is entitled to be reinstated in service with 50% (fifty percent) back wages. The management is directed to implement the award within a period of 60 (sixty) days from the date of its publication in the Official Gazette.

The reference is thus awarded accordingly."

3. Mr. B.K. Nayak, learned counsel appearing for the petitioner management has stated that in view of the award passed by the Labour Court dated 28.04.2003, opposite party no.2 workman has already been reinstated in service, but the petitioner management is aggrieved by the direction given for payment of 50% of back wages to opposite party no.2 workman. Consequentially, it is contended that the part of the award has been complied with by reinstating opposite party no.2 workman in service, but so far as payment of back wages is concerned, since opposite party no.2 workman has not rendered any service, applying the principle of no work no pay, he is not entitled to get such benefit. Therefore, interference of this Court has been sought for in this writ application.

4. Learned counsel appearing for opposite party no.2 workman contended that since the Labour Court, pursuant to reference made by the State Government under Sections 10 and 12 of the Industrial Disputes Act, 1947 has come to a conclusion that termination of services of opposite party no.2 workman is illegal and unjustified, he is entitled to get back wages as directed and therefore, the said amount should be paid to him forthwith.

5. Having heard learned counsel for the parties and after perusing the records, since pleadings between the parties have been exchanged, with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The opposite party no.2 workman having already been reinstated in service, the only question remains to be decided in this writ petition is whether he is entitled to get 50% of the back wages, as directed by the Labour Court in its award dated 28.04.2003.

7. On the basis of the evidence available on record, it is evident that admittedly, before terminating opposite party no.2 workman from service, no notice, notice pay, or retrenchment compensation had been paid to him,

which amounts to violation of the provisions contained in Industrial Disputes Act, 1947. Section 25F of the Industrial Disputes Act, 1947 reads as follows:

> ***"25F. Conditions precedent to retrenchment of workmen***
>
> *No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-*
>
> *(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the*
>
> *(b) period of the notice;*
>
> *(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and*
>
> *(c) notice in the prescribed manner is served on the appropriate government or such authority as may be specified by the appropriate government by notification in the Official Gazette."*

In view of the provisions contained under Section 25-F(b) of Industrial Disputes Act (1947) as stated above, it is required to fulfill the following three conditions :

> (i) One month's notice in writing indicating the reasons for retrenchment or wages in lieu of such notice;
>
> (ii) Payment of compensation equivalent to fifteen days average pay for every completed year of continuous service or any part thereof in excess of six months; and
>
> (iii) Notice to the appropriate Government in the prescribed manner: The aforesaid conditions must be held to be mandatory before termination of a workman is given effect to. In the event of any contravention of the said mandatory requirement, the termination would be rendered void ab initio.

In ***Regional Manager, Rajasthan State Road Transport Corporation v. Sohan Lal,*** AIR 2004 SC 4282, the apex Court held that Section 25F of the

Industrial Disputes Act postulates fulfillment of three conditions. The said conditions must be held to be mandatory before termination of workmen is given effect to and in the event of any contravention of said mandatory requirement, the retrenchment would be rendered void ab initio.

The above mentioned provisions postulate that the mandatory conditions mentioned therein have to be complied with. Accordingly, the Labour Court, while answering the reference under Sections 10 and 12 of the Industrial Disputes Act, 1947, has come to a definite conclusion that the termination of opposite party no.2 workman is illegal and unjustified.

8. In ***Swadesamitran Ltd. v. Their Workmen,*** [1960] I L.L.J. 504 (S.C.), the apex Court held that the termination is found to be illegal and invalid for non-compliance of the mandatory requirements of Sec. 25-F, it is imperative for the Tribunal to award the relief of reinstatement with full back-wages and it has no discretion to award any other relief.

Similar view has also been taken in ***Hindustan Steel Ltd. v. State of Orissa,*** [1977] I L.L.J. 1 (S.C.).

Since the Labour Court has come to a finding, on examination of the evidence available on record, that termination of opposite party no.2 workman was illegal and unjustified, directed for his reinstatement in service and also payment of 50% back wages to him.

9. In course of hearing a query being made by this Court, Mr. Nayak, learned counsel appearing for the petitioner management stated that during continuance in service opposite party no.2 was getting a sum of Rs.500/- per month, and as such, no evidence has been adduced with regard to wages paid to the workman, consequently, no computation of exact amount of entitlement of opposite party no.2 workman has been made in the present case. Learned counsel for the opposite party no.2 workman could not answer with regard to wages received by opposite party no.2, while he was continuing in service. Therefore, accepting that opposite party no.2 workman was being paid a sum of Rs.500/- per month as wages and taking in account the same with effect from 09.09.1989 till the award was passed, the total amount would come to around Rs.90,000/-(rupees ninety thousand). Therefore, if 50% back wages would be taken into consideration, it may come to around Rs.45,000/- (rupees forty five thousand). Therefore, this Court thinks it proper to direct the petitioner management to pay a sum of Rs.50,000/- (rupees fifty thousand) inclusive of interest towards back wages

to opposite party no.2 workman, which shall be paid to him within a period of two months from the date of communication of this order.

10. With the above observation and direction, the writ petition stands disposed of.

Writ petition disposed of.

2017 (II) ILR - CUT-1052

INDRAJIT MAHANTY, J. & K.R. MOHAPATRA, J.

MATA NO. 7 OF 2017

PRIYADARSHANI MOHAPATRA .....Appellant

.Vrs.

LALMOHAN MOHAPATRA .....Respondent

(A) HINDU MARRIAGE ACT, 1955 – S.19

Place of suing – Territorial jurisdiction of the Court on the basis of residence of the parties – Residence, in its ordinary meaning is something, more or less, of a permanent character and it is something more than a temporary stay – So a place where the couple had casual or temporary visit, including the place where the couple had resided either for a health check up or business or for a change, cannot be treated to be a place of residence and it cannot be said that the couple had "last resided together" at that place within the meaning of section 19 of the Act, 1955.

Held, since the learned judge, Family Court lacks necessary territorial jurisdiction to entertain the proceeding, the impugned judgement being without jurisdiction is set aside.

(Paras 7, 9)

(B) CIVIL PROCEDURE CODE, 1908 – O-5, R-20 (1-A)

Substituted service – Before proceeding to issue a direction to publish notice under Order 5 Rule 20 C.P.C., the Court has to record a finding that he has reason to believe that the respondent/Opp.Party is keeping out of the way for the purpose of avoiding service of notice for which the summons could not be served in ordinary way.

In this case, notice was published in the Bhubaneswar edition of "The Samaj" which has no wide circulation in the locality where the appellant-wife voluntarily resides – Learned judge, Family Court

mechanically held the service of notice on the wife to be sufficient only basing upon the petition filed by the husband supported by affidavit, which is patently illegal and de hors the law – Held, the service of notice on the appellant-wife was not sufficient. (Paras 8,9)

Case Law Referred to :-

1. (1981) 4 SCC 517 : Jeewanti Pandey -V- Kishan Ch. Pandey

For Appellant : M/s. L.Samantaray, R.L.Pradhan, G.Das & J.Samantaray

For Respondent : M/s. K.K. Mishra & G.Agarwal

Date of Judgment: 21.09.2017

JUDGMENT

K.R. MOHAPATRA, J.

This is an Appeal under Section 19 of the Family Courts Act, 1984 (for short, 'Act 1984') filed by Smt. Priyadarshani Mohapatra (for short 'the wife') assailing *ex parte* judgment dated 17.11.2017 passed by learned Judge, Family Court, Bhubaneswar in C.P. No.726 of 2015 filed by Sri Lalmohan Mohapatra (for short, 'the husband') under Section 13 of the Hindu Marriage Act, 1955 (for short, 'the Act, 1955').

2. The husband filed a petition under Section 13 of the Act, 1955 (C.P. No.726 of 2015) before the learned Judge, Family Court, Bhubaneswar contending *inter alia* that the marriage between the parties to the said petition was solemnized on 06.07.2014 as per Hindu rites and custom. As there was age difference of 12 years between the couple, the wife did not cooperate with the husband to lead a conjugal life. To bring a change in the mind of the wife, the husband on 23.08.2014 took a house on rent at Manipallem in Visakhapatnam, where the husband was posted and took his wife with hope to lead a happy conjugal life. However, on 28.09.2014, when the husband returned from work at about 7.00 PM, he found that the door of his residence was locked. Subsequently, he ascertained from his house owner that his wife had left the house with her mother. On being contacted over phone, she expressed her unwillingness to join the company of her husband. However, an attempt was made by the relations of the husband to conciliate the matter and persuade the wife to lead a happy conjugal life with the husband. Accordingly, on the request of their relatives, the husband came to the house of one of his relations (cousin sister) at Bhubaneswar and the wife joined him on 03.05.2015. But on 05.05.2015, she quarreled with her husband and left

for her parental home. Subsequent discussions and persuasion of the family members to persuade the wife to lead happy conjugal life having failed, the husband filed proceeding as aforesaid for dissolving the marriage by a decree of divorce.

3. Registered notices were sent in the address of his wife returned back being undelivered. Hence, the husband filed a petition under Order 5 Rule 20 CPC to take out substituted notice by publication in newspaper. By order of the Family Court, substituted notice was published in Odia Daily "The Samaj" on 16.04.2016 and learned Judge, Family Court proceeded with the matter *ex parte and* the impugned judgment and order was passed dissolving the marriage between the parties by a decree of divorce. Assailing the same, the present appeal has been filed.

4. Heard learned counsel for the parties and perused the record. On consent of learned counsel for the parties, the matter was taken up for final disposal.

Learned counsel for the appellant (wife) submitted that the learned Judge, Family Court, Bhubaneswar had no territorial jurisdiction to entertain and adjudicate the proceeding under Section 13 of the Act, 1955 filed by the respondent (husband). The couple had last resided together at Manipallem, Visakhapatnam, where the respondent (husband) was posted. Even for the sake of argument, it is assumed that the wife had joined the husband at Bhubaneswar in latter's relation's house at Jagamara, Bhubaneswar, it cannot be said that they had last resided together at Bhubaneswar. He further contended that the husband has played fraud on learned Judge, Family Court by suppressing the service of notice. The substituted notice was published in Bhubaneswar edition of the Odia daily "The Samaj" on 16.04.2016, which has no circulation either at Visakhapatnam or at Parlakhemundi, where the wife has been residing. Hence, he prayed for setting aside the impugned ex parte judgment and decree holding it to be without jurisdiction.

5. Learned counsel for the respondent (husband), on the other hand, refuting the submissions of learned counsel for the appellant (wife), submitted that both the parties had last resided together at Jagamara, Bhubaneswar. Thus, the Court at Bhubaneswar had territorial jurisdiction to entertain the proceeding under Section 13(1) of the Act, 1955 filed by the respondent (husband). He further submitted that registered notice sent in the address of the respondent having been returned undelivered, the husband had filed a petition under Order 5 Rule 20 CPC on 30.03.2016 to take out

substituted notice by publishing the same in the local newspaper having wide circulation. The notice was published in local Odia Daily 'The Samaj' on 16.04.2016. In support of sufficiency of service of notice, the husband had also filed a petition along with affidavit on 18.05.2016 to treat the service of notice on wife to be sufficient. Learned Judge, Family Court, taking into consideration the affidavit filed vide his order dated 18.05.2016, held the service of notice on wife to be sufficient, set the wife *ex parte* and proceeded with the matter. The wife having sufficient knowledge of the proceeding, preferred not to contest the same and no application was filed before the learned Judge, Family Court to set aside the *ex parte* decree. As such, the appeal under Section 19 is not maintainable and the same is liable to be dismissed.

6. Section 19 of the Hindu Marriage Act, 1955 provides the Court to which the petition under the Act should be presented. It reads as follows:-

> "19. **Court to which petition shall be presented**.— Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction—
>
> (i) the marriage was solemnised, or
> (ii) the respondent, at the time of the presentation of the petition, resides, or
> (iii) the parties to the marriage last resided together, or
> (iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition, or
> (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive."
>
> (*emphasis supplied*)

7. The husband in para-29 of his petition under Section 13(1) of the Act, 1955, pleaded that the couple had last resided together at Bhubaneswar and thus, the Family Court at Bhubaneswar had territorial jurisdiction to entertain the proceeding. Paragraph-29 of the petition reads as follows:-

> "29. That, on 3.5.2015 both the parties being invited by Julismita Pattnaik cousin sister of the petitioner they came & stayed at their

> house at B-86, Krishna garden, phase-ii, Jagamara, Khandagiri, Bhubaneswar & on 5.5.2015 the respondent left the house without consent of the petitioner. Hence both the parties last resided in the house of their relation which comes under the Jurisdiction of the Hon'ble Court."
>
> (*emphasis supplied*)

The phrase 'last resided together' should not be liberally construed. It has to be read in a manner to give it a meaningful interpretation. It has to be read in the contest of the facts and circumstances of each case. It can by no stretch of imagination be treated to be a temporary place of stay. The term 'residence' should be given a purposeful interpretation to mean something more than a 'temporary stay'. It cannot certainly be a place of outing, a pleasure trip, visit for health check up or business or temporary stay for a change.

Hon'ble Supreme Court in the case of ***Jeewanti Pandey Vs. Kishan Chandra Pandey***, reported in (1981) 4 SCC 517 has interpreted the word 'residence' as provided under Section 19 of the Act, 1955. Paragraphs-12 and 13 of the said judgment is relevant for our consideration, which is quoted hereunder:

> "12. In order to give jurisdiction on the ground of 'residence', something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the court in which the respondent is sued, is his natural forum. The word 'reside' is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense 'residence' is more or less of a permanent character. The expression 'resides' means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. In Webster's Dictionary, 'to reside' has been defined as meaning 'to dwell permanently or for any length at time', and words like 'dwelling place' or 'abode' are held to be synonymous. Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary

> visit, e.g. for health or business or for a change. If a person lives with his life and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses or others, his actual and physical habitation is the place where he actually or personally resides.
>
> 13. It is plain in the context of cl. (ii) of s.19 of the Act, that the word 'resides' must mean the actual place of residence and not a legal or constructive residence; it certainly does not connote the place of origin. The word 'resides' is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. It follows that it was the actual residence of the appellant, at the commencement of the proceedings, that had to be considered for determining whether the District Judge, Almora, had jurisdiction or not. That being so, the High Court was clearly in error in uphold in the finding of the learned District Judge that he had jurisdiction to entertain and try the petition for annulment of marriage filed by the respondent under s.12 of the Act."

On perusal of the above case law, it can be safely said that the 'residence' in its ordinary meaning is something, more or less, of a permanent character and it is something more than a temporary stay. Thus, a place where the couple had casual or temporary visit, including the place where the couple had resided either for a health check up or business or for a change, cannot be treated to be a place of residence and it cannot be said that the couple had 'last resided together' at that place within the meaning of Section 19 of the Act, 1955. Thus, the Court having territorial jurisdiction over such places cannot be treated to be a competent Court of law for the purpose of a proceeding under the provisions of the Act, 1955.

8. So far as second contention of the appellant with regard to sufficiency of the notice, it appears from the order sheet of the learned Judge, Family Court that pursuant to order dated 24.11.2015, notices were directed to be issued on the wife and the case was posted to 27.01.2016 for appearance of the wife. On 27.01.2016, both the parties were absent. The case was then posted to 30.03.2016 for appearance of the wife (respondent in the Court below). Surprisingly on 30.03.2016 without recording any finding with regard to sufficiency of notice on the wife, learned Judge, Family Court entertained an application under Order 5 Rule 20 CPC filed by the husband

and allowed the same. Before proceeding to issue a direction to publish the notice under Order 5 Rule 20 C.P.C., the Court has to record a finding that he has reason to believe that the respondent (before the Court below) is keeping out of the way for the purpose of avoiding service of notice or that for any other reason, the summons cannot be served in ordinary way. In absence of such a finding, the Court could not have resorted to the provisions of Order 5 Rule 20 C.P.C. However, substituted notice was published in the Odia daily 'The Samaj' on 16.04.2016. A copy of the said newspaper along with the money receipt has been enclosed to the case record of the learned Family Court. It reveals that, Rs.5,120/- was paid by the husband at the Cuttack Office of 'The Samaj'. Further, copy of the paper publication reveals that the notice was published in the Bhubaneswar edition of the said newspaper. There is no evidence on record to come to a conclusion that the Bhubaneswar edition of 'The Samaj' had any circulation in the locality where the appellant (the wife) voluntarily resides. The purpose of publication of substituted notice is to bring to the notice of the respondent about the pendency of the proceeding against her. Thus, it should have been published in a newspaper having wide circulation in the locality, where the appellant-wife (respondent in the Court below) voluntarily resides, as per the requirement of Order 5 Rule 20 (1-A) C.P.C. Learned Judge, Family Court, without considering the same, most mechanically held the service of notice on the wife to be sufficient, only basing upon the petition supported by affidavit filed by the husband, which is patently illegal and *de hors* the law.

9. Taking into consideration the discussions made above, we have no hesitation to hold that the learned Judge, Family Court, Bhubaneswar lacks the necessary territorial jurisdiction to entertain the proceeding in CP No.726 of 2015 and that service of notice on the appellant-wife was not sufficient. Accordingly, the impugned judgment and order being without jurisdiction is hereby set aside. Parties are at liberty to take recourse of law for redressal of their grievances.

10. The Matrimonial Appeal is allowed, but in the circumstances there shall be no order as to costs.

Appeal allowed.

2017 (II) ILR - CUT-1059

S. PANDA, J. & S. PUJAHARI, J.

W.P.(C) NO. 14365 OF 2015

SANATANA SAHOO ……..Petitioner

.Vrs.

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

SERVICE LAW – Regularisation – Petitioner was engaged as Data Entry Operator since September 1995 and continuing till date without intervention of Courts – Though Finance Department granted concurrence for creation of two posts of Junior DEOs, said posts have been filled up on outsourcing basis by service providers without considering the case of the petitioner – The petitioner approached the Tribunal for regularisation which has been rejected – Hence the Writ Petition.

Odisha group 'C' and group 'D' posts (Contractual Appointment) Rules 2003 came into force in the year 2008 – Thus the engagement of the petitioner at best can be termed as irregular engagement but not illegal engagement – Moreover sanctioned posts are available since 2009 and the petitioner has completed more than ten years and the learned Tribunal has lost sight of all such facts while passing the impugned order – Held, the impugned order is quashed and the matter is remitted back to the authority to regularize the service of the petitioner by applying the ratio discussed and to extend consequential service benefits to the petitioner. (Paras 10,11)

Case Laws Referred to :-

1. (2006) 4 SCC 1 : Secretary, State of Karnataka & Ors. -V- Umadevi
2. (2010) 9 SCC 247 : State of Karnataka & Ors. -V- M.L.Keshari

For Petitioner : Mr. Asok Mohanty & B.K.Nayak

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

Date of Judgment: 01.11. 2017

JUDGMENT

S. PANDA, J.

The order dated 14.05.2015 passed by Orissa Administrative Tribunal in O.A. No.3421 of 2014 is assailed in this writ petition, wherein the prayer of the petitioner for regularization/ absorption in the post of Junior Data Entry Operator/ Computer Operator with all consequential benefits, as has been extended to other similarly situated persons, has been rejected.

2. The brief fact leading to the writ application is as follows:

The petitioner having Post Graduate Diploma in Computer Application engaged as Computer Operator in P.H. Sub-Division, Baripada under Executive Engineer, RWSS, Balasore on 01.09.1995. Thereafter, his service was handed over to P.H. Division, Baripada. The Chief Engineer, PH (Urban) vide office order dated 06.11.2002 intimated to the F.A.-cum-Joint Secretary to Government, Housing and Urban Development Department, Bhubaneswar that the petitioner has been directed to work as Computer Operator in Housing and Urban Development Department. Pursuant to such order, the petitioner continued to work as Computer Operator in Housing & Urban Development Department on a consolidated salary of Rs.7000/-. While working as such, the applicant requested the authorities of P.H. Division as well as the authorities of Housing & Urban Development Department for regularization of his service.

Thereafter on the basis of the instruction given by the Chief Engineer, PH (Urban), the Executive Engineer, PH, Baripada furnished a list of employees wherein the name of the petitioner was reflected. In the office of the Housing & Urban Development Department also proposals have been mooted by the authorities to create posts of Data Entry Operator and to regularize the petitioner as no such post of Data Entry Operator was available earlier and the same were required after computerization of official work. The opposite party no.2 also in his note dated 16.08.2004 requested the Finance Department to consider the case of the petitioner. The Finance Department granted concurrence for creation of two posts of Junior DEOs in Housing & Urban Development Department. The said two posts have been filled up on out sourcing basis by service providers. However, the case of the petitioner was not considered in the said vacancy. On the other hand several similarly situated persons were regularized. Therefore, the petitioner approached the Orissa Administrative Tribunal, Bhubaneswar in O.A. No. 3421 of 2013 with a prayer to direct the opposite parties to regularize/ absorb the petitioner in the post of Junior Data Entry Operator/ Computer Operator with all service and financial benefits as has been extended to other similarly situated persons.

3. The stand of the petitioner before the Tribunal was that he has been working since 1995 and the persons who are similarly situated like him have already been extended with the benefit of regularization one in the year 2004 and another in the year 2013. While he was continuing in Housing and Urban

Development Department, though two posts were sanctioned by the Finance Department, the same were filled up on outsourcing basis. Therefore, non consideration of the case of the petitioner is illegal and discriminatory.

4. The said Original Application was disposed of vide order dated 14.05.2015 wherein the Tribunal held that the claim of the applicant for parity in service conditions with regular employees cannot be accepted and accordingly the Tribunal rejected prayer of the petitioner.

The Tribunal in the impugned order has also recorded its finding to the effect that the applicant has been working in the office of respondent No.2-Additional Chief Secretary to Government, Housing & Urban Development Department, since November, 2002 and his services has been appreciated by respondent No.2 himself which is seen in Note Sheet No. 641/H&UD dated 16.08.2004. Perusal of the said office note it is clear that the petitioner has contributed his service to the fullest satisfactory of the authorities. Due to his efficient working vitals files could have been completed in time. He has a long standing service at his credit since 1995 and hence the authorities recommended his case for regularization. However, the Tribunal rejected the case of the petitioner for regularization on the ground that as he is not covered under the rules.

5. Learned counsel for the petitioner submitted that though the petitioner has been performing his duty since 1995 and appreciating his performance he has been directed to work under H & UD Department, Secretariat Bhubaneswar since 2002 and juniors to him who were sponsored by the service providers have been regularized, non consideration of his case by the Tribunal for regularization/ absorption in the post of Data Entry Operator needs to be interfered with.

6. Learned Additional Government Advocate fairly admitted the service rendered by the petitioner under Housing & Urban Development Department and the fact of regularization of the service of the two Data Entry Operators, who were engaged by service provider on outsourcing basis. It is however submitted by learned Additional Government Advocate that the service of the petitioner could not be regularized in view of the introduction of Odisha Group 'C' and Group 'D' posts (contractual appointment) Rules, 2003.

7. On perusal of the record, it reveals that the petitioner having the requisite qualification was engaged as Data Entry Operator on 01.09.1995. Since he was computer literate by then and computers were introduced in

various departments of the State Government, being satisfied with the performance of the petitioner, on the discussion made between the Chief Engineer, P.H. Orissa with Secretary Housing & Urban Development Departments, vide order dated 06.11.2002, the petitioner was directed to work under Housing & Urban Development Department, at Bhubaneswar. Since then the petitioner has been performing his duty to the best of the satisfaction of all concerned. The Chief Engineer, PH (Urban) vide order dated 17.06.2009 directed all the Executive Engineers of PH divisions to furnish the information about DLR/NMR/HR workers engaged after 12.04.1993 for their regularization. Prior to deployment of the petitioner in Housing & Urban Development Department, there was a meeting on 30.10.2002 wherein it was decided to create the post of Computer Assistants in lieu of abolition of equal numbers of Junior Assistants. After the posting of the petitioner also Housing & Urban Development Department vide letter No. 641/HUD dated 16.08.2004 recommended the case of the petitioner for regularization with concurrence of Finance Department. Thereafter in the meeting of all Principal Secretary, it was decided to absorb Data Entry Operators. While the petitioner was so continuing two posts of Jr. Data Entry Operator in the Administrative Department of Housing & Urban Development Department was approved and accordingly the Housing & Urban Development Department recommended the case of the petitioner and others since their services are badly required. Thus, it is apparent that appreciating his performance, time and again steps are being taken for regularization of his service both by PH Department and U & UD Department. While he was so continuing, even though two posts of Jr. Data Entry Operators were created under H & UD Department, the same were filled up on out sourcing basis from the service provider without due process of selection. Their services have also been regularized. Thus non consideration of the case of an employee, whose services have been utilized for last 22 years, is nothing but exploitation of such employee by his employer. The persons who were sponsored through outsourcing agency by the Service Provider and not through the due process of selection, have already been regularized, whereas the petitioner, has been discriminated on the plea that he has not been appointed by following the Rules meant for Data Entry Operators.

8. Law is well settled in the case of ***Secretary State of Karnataka and others v. Umadevi reported in (2006) 4 SCC 1***, wherein at paragraph 53 it has been held as thus:-

> *"53. 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*.

However in the case of ***State of Karnataka & others v. M.L. Keshari & others reported in (2010) 9 SCC 247***, the principle decided by the Apex Court in the case of Umadevi (supra) has been further clarified and followed.

9. This Court in the case of **Prakash Kumar Mohanty v. State of Odisha and others (W.P.(C) No.22159 of 2012 decided on 28.02.2017)** referring to the decisions in the case of ***Umadevi*** (supra) and ***M.L. Kesari*** (supra) directed the competent authority to take a decision on the grievance of the petitioner in the light of the observations made in paragraph-53 of the Umadevi case within eight weeks from the date of receipt of copy of the order.

10. Admittedly in the present case, the petitioner having the requisite qualification was engaged as Data Entry Operator since September, 1995 and he has been continuing as such till date without the intervention of the Courts. He approached the Tribunal in the year 2013 for his regularization

before the notification issued by the State Government regarding Odisha Group 'C' and Group 'D' posts (contractual appointment) Rules, 2003. The recruitment rule came into force only in the year 2008 and the rule regarding contractual engagement as contended by the State Government was followed latter on. Thus the engagement of the petitioner at best can be termed as irregular engagement and not illegal engagement. That apart, it is also admitted that sanctioned posts are available since 2009 and the petitioner had also completed more than 10 years by then.

11. In view of the discussions made hereinabove paragraphs and in the peculiar facts and circumstances of this case, this Court is of the opinion that the Tribunal has lost sight of all such facts while passing the impugned order and it has not appreciated the entire facts in right perspective in the light of the aforesaid decisions of the Apex Court. Thus, this Court sets aside the impugned order dated 14.05.2015 passed in O.A. No. 3421 of 2013 and remits the matter back to the authorities to regularize the service of the petitioner by applying the aforementioned ratio and to extend consequential service benefits to the petitioner accordingly, within a period of eight weeks. The writ petition is disposed of accordingly.

Writ petition disposed of.

2017 (II) ILR - CUT- 1064

B.K.NAYAK, J. & DR.D.P.CHOUDHURY, J.

OJC NO. 5594 OF 1995
WITH BATCH

LINGARAJ MAHAPRABHU .....Petitioner

.Vrs.

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

(A) ODISHA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 – S.19 R/w Section 107, T.P. Act, 1882

Property of Lord Lingaraj Mahaprabhu leased out in favour of two sebaks, who subsequently sold it to different purchasers – Neither any proposal for such lease was moved by the Trust Board of the deity under Rule 4 of the OHRE Rules, 1959 nor the lease was registered in

pursuance of the permission of the Endowment Commissioner – Member, Board of Revenue held that the purchasers acquired tenancy right by virtue of their purchase – Hence the writ petitions.

Permission granted by the Endowment Commissioner for lease of the land is fabricated as the same is not in accordance with the Rules – Moreover in the absence of registered lease deed, no lease hold right is said to have been created in favour of the sebaks – So the purchasers can not be said to be deemed tenants under the State Govt. after vesting, in terms of section 8(1) of the OEA Act – Even if there was a valid permission by the Commissioner of Endowments that by itself would not create a lease unless the same is registered as required U/s. 107 of the T.P.Act and mere acceptance of premium and rent by the temple administration coupled with delivery of possession, if any, would not be sufficient for creation of a permanent lease for the purpose of construction of residential house.

Held, there being no lease hold right or tenancy right created in favour of the vendors in respect of the disputed property merely by acceptance of salami and rent and issuance of ownership certified by the Executive Officer of Lord Lingaraj Mahaprabhu the purchasers of the disputed property cannot be said to have acquired lease hold or tenancy right over the same by virtue of their purchase – The impugned orders Dt. 21.08.1993 and 06.03.1998 passed by the Member, Board of Revenue in OEA Revision Case No. 3 of 1981 are illegal, hence quashed. (Paras 7 to 12)

(B) ODISHA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 – S.19

Alienation by way of exchange, sale or mortgage or lease for more than five years of any immovable property belonging to any religious institution including the deity require sanction of the Commissioner of Endowments after considering the necessity/benefit there by accruing to such institution or deity – So heavy duty is cast on the Administrative Department, Commissioner of Endowments and other authorities working under him to make scrutiny of the requirements and benefits of the deity before putting stamp of approval to go ahead with the alienation – On the other hand, the State Govt., the Commissioner of Endowments or the Officers subordinate to him and the trustee of the deity must be vigilant with the fact that they are not merely custodian of the deity but also a good promoter for the welfare of the deity so as to enhance the avowed object of the Act.

In this case the order of permission U/s. 19 of the Act is fabricated and the creation of lease hold right over the case land of the deity in favour of the vendors is shrouded in fraud which is not for the benefit of the deity and neither the purchasers, nor their vendors have acquired any kind of right in the case land belonging to Lord Lingaraj Mahaprabhu. (Paras 14,15,18,19)

Case Law Relied on :-

1. 2014 (SUPP.-II) OLR-706 : Lord Lingaraj Mahaprabhu Bije, Bhubaneswar -V- Bipra Charan Senapati (since dead) after him Prasanna Ku. Senapati & Ors.

Case Laws Referred to :-

1. 81 (1996) CLT 571 (Full Bench) : Basanti Kumar Sahoo -V- State of Orissa.
2. 2014 (I) OLR 602 : Chittaranjan Sahoo -V- Collector, Khurda & Ors.

For Petitioner : M/s. Ajodhya Ranjan Dash
R.K.Nayak, C.R.Swain & B.Mohanty

For Opp. Parties : Mr. S. Mantry , Mr. Biswajit Nayak
Mr. Amit Kumar Nath
Miss Sabitri Ratho, (A.G.A.)

Date of hearing :23.06.2017
Date of judgment :17.10.2017

JUDGMENT

B. K. NAYAK, J.

All these writ petitions involve common questions of fact and law and therefore, they were heard analogously and are being disposed of by this common judgment.

OJC Nos.5594 of 1995 and 8148, 8149, 8150, 8151 of 1998 are filed by the Deity, Lord Lingaraj Mahaprabhu, Bije-Bhubaneswar. The other four writ petitions have been filed by some private individuals.

2. The facts of the case are as follows:-

2.1. The disputed property measuring Ac.0.445 appertains to 1962 Settlement Plot No.247, under Khata No.1878 of Mouza-Bhubaneswar with classification 'Bagayat'. The disputed property along with other properties belong to the Deity, Lord Lingaraj Mahaprabhu of Bhubaneswar, who had intermediary interest in respect thereof. It was part of the Trust Estate of the Deity and admittedly it vested with the State Government on 18.03.1974

under the provisions of the Orissa Estates Abolition Act, 1951 (in short "the OEA Act"). Under a scheme prepared in terms of Section 42 of the Orissa Hindu Religious Endowments Act, 1951 (in short "OHRE Act") the management of the Deity's endowment vested in a Trust Board under the control of the Commissioner of Endowments. The day-to-day management of the Deity's Endowment is being looked after by an Executive Officer.

2.2. After vesting of the property the Commissioner of Endowments made a proposal for settlement of some properties including the disputed property in favour of the Deity, Lord Lingaraj Mahaprabhu under the provisions of section-7-A of the OEA Act. Accordingly the Member, Board of Revenue, Odisha in OEA Revision Case No.03 of 1981 by his order dated 29.04.1983 (Annexure-2 in OJC No.5594 of 1995) settled the disputed property along with some other properties in favour of the Deity.

2.3. The said settlement order was challenged by one Gopal Chandra Das before this Court in OJC No.1297 of 1989 on the ground that the disputed property had been leased out by Lord Lingaraj Mahaprabhu in the year 1970 in favour of two Sebaks, namely, Somanath Mohapatra and Nrusingha Mohapatra after obtaining permission of the Endowment Commissioner under section 19 of the OHRE Act and the two lessees got certificate of ownership and delivery of possession from the Deity's Executive Officer after paying salami and rent. The suit plot was sub-divided and numbered as Plot Nos.247/1 and 247/2. Plot No.247/1 was allotted to Somanath Mohapatra who got the same mutated in his name in the Estate Office of Lord Lingaraj Mahaprabhu. Plot No.241/2 was allotted to Nrusingha Mohapatra. By a Registered Sale Deed dated 06.12.1972 Somanath Mohapatra sold his half share in the suit property in favour of Gopal Chandra Das, the petitioner in OJC No.1297 of 1989, who took possession and constructed a house over the same and used to pay rent to the State Government on behalf of his transferor. Therefore, Somanath Mohapatra and after him the purchaser, Gopal Chandra Das became deemed tenants under the State Government in terms of section-8(1) of the OEA Act and hence, the Deity, Lord Lingaraj Mohaprabhu was not entitled to be settled with the disputed property.

By order dated 02.09.1992 OJC No.1297 of 1989 was disposed of quashing the order of settlement of the disputed property passed by the Member, Board of Revenue and the matter was remanded to the Member with direction to inquire into the claim of the petitioner, Gopal Chandra Das about the lease granted by the Deity's management in favour of his vendor.

2.4. After such remand, the matter was heard by the Member, Board of Revenue. Admittedly no lease deed was executed and registered in pursuance of the so called permission granted by the Endowment Commissioner in favour of Somanath Mohapatra and Nrusingha Mohapatra. On behalf of the Deity, it was contended before the Member, Board of Revenue that the order of sanction granted by the Endowment Commissioner under section-19 of the OHRE Act for lease was void inasmuch as no proposal for such lease was moved by the Trust Board of the Deity as required under Rule-4 of the OHRE Rules, 1959 and that no lease deed was executed and registered in pursuance of the permission of the Endowment Commissioner. The mutation of the disputed plot in the Estate Office of the Deity and the payment of salami and rent and issuance of ownership certificate in favour of the so-called lessees, it was urged, were fabricated. Therefore, the claim of lease of the disputed land in favour of Somanath Mohapatra and Nursinigha Mohapatra could not be accepted and consequently, the purchaser, Gopal Chandra Das could not be said to be a tenant so as to become a deemed tenant under the State Government in terms of section 8(1) of the OEA Act after vesting.

However, the permission order of the Endowment Commissioner under section 19 of the OHRE Act and the receipts with regard to payment of salami and rent to the temple management and issuance of ownership certificate in favour of Somanath Mohapatra and Nursingha Mohapatra were accepted by the Member, Board of Revenue as sufficient to create tenancy in favour of the original lessee, Somanath Mohapatra. It was held that tenancy has been created by acceptance of rent by the Deity-landlord. Accordingly the Member, Board of Revenue passed order on 21.08.1993 holding that Gopal Chandra Das was entitled to part of disputed land purchased by him and the same was directed to be excluded from the settlement order passed in favour of the Deity on 29.04.1983.

The aforesaid order dated 21.08.1993 passed by the Member, Board of Revenue after remand, has been assailed by the Deity, Lord Lingaraj Mahaprabhu in OJC No.5594 of 1995.

2.5 The so-called other lessee, namely, Nrusingha Mohapatra sold portions of his half share to four persons under four separate Sale Deeds as per descriptions given below:-

Sl. No.	Name of the purchaser	Date of Sale Deed	Area Sold
1.	Nityananda Mohapatra	05.01.1973	Ac.0.055
2.	Gouranga Charan Das	05.01.1973	Ac.0.055
3.	Premananda Palai	05.11.1975	Ac.0.056 ½
4.	Rajkishore Singh	05.11.1975	Ac.0.056 ½

After order dated 21.08.1993 was passed by the Member, Board of Revenue in favour of Gopal Chandra Das on remand in OJC No.1297 of 1989, the aforesaid four purchasers from Nrusingha Mohapatra filed four separate writ petitions before this Court bearing OJC Nos.1759 of 1992, 2129 of 1993, 2130 of 1993 and 2147 of 1993 challenging the settlement of the disputed land in favour of the Deity as per the order dated 29.04.1983, raising similar claims of tenancy of their vendor, as had been raised by Gopal Chandra Das in OJC No.1297 of 1989. The four writ petitions were disposed of by this Court by common order dated 29.07.1997 in terms of the order passed in OJC No.1297 of 1989, directing as follows:-

> " 2. In view of the order dated 02.09.1992 passed by this Court in OJC No.1297 of 1989, we feel that a fresh look by the, Member, Board of Revenue, Orissa in the matter would be appropriate, particularly when Deity's property is involved. To avoid unnecessary delay, the petitioner in each is directed to appear before the Member, Board of Revenue, Orissa on 03.09.1997 so that the matter can be gone into in detail. We make it clear that we have not expressed any opinion on merit……."

2.6 After the aforesaid common order dated 29.07.1997 passed in the four writ petitions, the Member, Board of Revenue took up further hearing and passed final order on 06.03.1998 holding that since the order passed by his predecessor in office on 21.08.1993 has not been quashed, there was no ground to review the said order. The Member, Board of Revenue accordingly held as follows:-

> "…… …… …… but the plaint copies of the present petitioner's reveal that they have purchased fractions of Plot No.247, Ac.0.445 which has already been decided in favour of Gopal Chandra Das by my predecessor on 21.08.93 in OEA Case No.3 of 1981. Neither

> Gopal Chandra Das was made party in OJC Nos. 8148, 8149,8150,8151 of 1998 nor was the order of my predecessor dated 21.08.1993 challenged by either of the parties in OJC No.1297 of 1989 or in the present OJCs, which ultimately means that the said order is final. Hon'ble High Court has not also quashed order dated 21.08.1993 of my predecessor.
>
> In the premises, I do not find any ground to review order of my predecessor dated 21.08.1993"

The Member, Board of Revenue however, did not give any specific finding as to whether Nrusingha Mohapatra had acquired leasehold/tenancy right in respect of half of the disputed property and whether the said four writ petitioners (purchasers) acquired such tenancy right by virtue of their purchases from Nrusingha Mohapatra.

2.7 The aforesaid order dated 06.03.1998 passed by the Member, Board of Revenue at the instance of the four purchasers has been challenged by the Deity, Lord Lingaraj Mahaprabhu in OJC Nos.8148, 8151, 8149 and 8150 of 1998. The said purchasers, namely, Nityananda Mishra, Premananda Palei, Gouranga Chandra Das and Rajkishore Singh have also challenged the very same order by filing OJC Nos.9703, 13458, 13460 and 13459 of 1998 respectively.

3. In the writ petitions filed by the Deity the Grounds of challenge to both the impugned orders of the Member, Board of Revenue are same. Identical contentions are raised by the purchasers from Somanath Mohapatra and Nrusingha Mohapatra with regard to their claims.

The purchasers from Nrusingha Mohapatra, viz. the petitioners in OJC No.9073, 13548, 13460, 13459 of 1998 and the purchaser from Somanath Mohapatra, i.e., Opposite Party No.4 in OJC No.5594 of 1995 contend that the disputed property was the trust estate of Lord Lingaraj Mahaprabhu, and that Somanath Mohapatra and Nrusingha Mohapatra made application to the Commissioner of Endowments for grant of permission for permanent lease of the disputed land for residential purpose in their favour under section 19 of the OHRE Act. Their applications were registered as O.P. Case No.74 and 76 of 1966 and by order dated 12.07.1970, the Endowment Commissioner passed order granting permission for permanent lease, whereafter the Temple Office of the Deity received salami from Somanath Mohapatra and Nrusingha Mohapatra and issued receipt in respect thereof

and mutated the plot in question as plot Nos.247/1 and 247/2 in the names of Somanath Mohapatra and Nrusingha Mohapatra. The Executive Officer of the Deity issued ownership certificate to Somanath Mohapatra and Nrusingha Mohapatra in respect of those plots. They also paid land revenue in the office of the Lord Lingaraj Mahaprabhu and obtained receipts. It is contended that even though no lease deed was executed and registered, the lease was created by acceptance of salami and rent and issuance of ownership certificate and delivery of possession to Somanath Mohapatra and Nrusingha Mohapatra. It is stated that by a Registered Sale Deed dated 06.12.1972, Somanath Mohapatra sold his part of the disputed land in favour of Gopal Chandra Das, who entered into possession, obtained permission from the Special Planning Authority and constructed a house and has been paying holding tax. It is stated that during settlement operation parcha in respect of the property purchased by Gopal Chandra Das was issued in his favour. It is also stated that, Gopal Chandra Das also filed OEA Lease Case No.292 of 1984 before the Additional Tahasildar, Bhubaneswar which was rejected on the ground that the land had already been settled with the Deity, Lord Lingaraj Mahaprabhu in OEA Revision Case No.3 of 1981. It is stated by learned Counsel for Gopal Chandra Das (Opposite Party No.2) in OJC No.5594 of 1995, that the order dated 21.03.1993 passed by the Member, Board of Revenue in OEA Revision Case No.3 of 1981 directing to exclude the disputed property from the settlement made in favour of the Deity is quite justified.

4. The purchasers from Nrusingha Mohapatra also contended similarly that as per order of the Commissioner of Endowments, the Deity's Office accepted salami and rent from Somanath Mohapatra and Nrusingha Mohapatra and bifurcated the Plot as Plot Nos.247/1 and 247/2 and allotted the same respectively to Somanath Mohapatra and Nrusingha Mohapatra. It is also stated that for his legal necessity, Nrusingha Mohapatra sold portions of his share of Ac.0.222 ½ to Nityananda Mishra, Gouranga Charan Das, Premananda Palei and Rajkishore Singh respectively by Registered Sale Deeds dated 05.01.1973, 05.01.1973, 05.11.1975 and 05.11.1975 and the purchasers took possession. It is also contended that after vesting the purchasers paid rent to the State. During the settlement operation, at the initial stage parcha was issued in favour of the purchasers, but in the final ROR the property was recorded in favour of the Deity, Lord Lingaraj Mahaprabhu. It is contended therefore that since lease had already been granted in favour of Somanath Mohapatra and Nrusingha Mohapatra, they

became tenants under the Deity-landlord and the purchasers acquired leasehold right by purchase and after vesting of the estate, they automatically became tenants under the State Government in accordance with the provisions of Section-8(1) of the OEA Act, and therefore, the disputed property was not liable to be settled in favour of the Deity under Section-7-A of the OEA Act.

Learned counsel for the purchasers from Nrusingha Mohapatra submitted that the order dated 06.03.1998 passed by the Member, Board of Revenue in the aforesaid OEA Revision Case No.3 of 1981 did not specifically hold that Nrusingha Mohapatra had acquired leasehold right over the disputed land and accordingly the purchasers from him also stepped into his shoes and became deemed tenants under the State after vesting, though he ought to have specifically accepted the tenancy right of the purchasers as had been done by his predecessor in case of Gopal Chandra Das.

5. Mr. A. R. Dash, learned counsel appearing for the Deity, Lord Lingaraj Mahaprabhu in all the writ petitions contended that in terms of Rule-4 of the OHRE Rules the Trust Board of the Deity's Endowment is required to file application under Section 19 for transfer of Deity's property, and that in the instant case instead of the Trust Board or the Executive Officer of the Deity's Endowment, the two proposed lessees made application before the Endowment Commissioner for grant of permission for lease of the land and assuming that any permission order has been granted, the same is void since the application was not in accordance with the Rules. It is also submitted that the permission is a fabricated one since the permission case number registered as Original Proceeding No.76 of 1966 before the Endowment Commissioner relates to applicant, Kedar Mahasuar and not to Somanath Mohapatra and Nrusingha Mohapatra. His further contention is that assuming that permission was granted by the Endowment Commissioner for lease of the disputed property, the purported lease being for residential house purpose and of permanent character, a registered lease deed should have been executed and in absence of such registered document there is no valid lease. He further submitted that the receipts showing payment of salami and rent and issuance of ownership certificate to Somanath Mohapatra and Nrusingha Mohapatra are fabricated documents and the Temple Authorities did not admit the correctness and genuineness of the same. He also contended that assuming that salami and rent was accepted, in absence of a Registered Lease Deed no leasehold right can be said to have been created in favour of Somanath Mohapatra and Nrusingha Mohapatra and their purchasers. He

therefore urged that the impugned order dated 21.08.1993 of the Member, Board of Revenue holding that tenancy right has been created in favour of Gopal Chandra Das and his purchased land should be excluded from the settlement made in favour of the Deity, and the subsequent impugned order of the Member dated 06.03.1998 holding that the order dated 21.08.1993 has not been set aside and therefore there is no ground to review the same, cannot be sustained.

6. The claim of the purchasers from Somanath Mohapatra and Nrusingha Mohapatra is that their vendors having obtained lease of the disputed property from the Deity, Lord Lingaraj Mahaprabhu with the permission of the Endowment Commissioner and their lease-hold right being purchased by them they became deemed tenants under the State Government after vesting, in terms of Section-8(1) of the OEA Act. It is therefore necessary to see whether Somanath Mohapatra and Nrusingha Mohapatra got lease of the disputed property from Lord Lingaraj Mahaprabhu and whether the lease said to have been granted in their favour is legal and valid and whether their purchasers can be said to have acquired such leasehold right by virtue of their purchase and as such entitled to claim the benefit of the provision of section-8(1) of the OEA Act.

7. It was contended on behalf of the Deity, Lord Lingaraj Mahaprabhu that the so called permission granted by the Endowment Commissioner under section 19 of the OHRE Act in O.P. Nos.74 and 76 of 1966 is a fabricated document. We had therefore, called for the records of O.P. No.74/66 and 76/66 from the office of the Commissioner of Endowments, Odisha. The records of the Endowment Commissioner revealed that the application filed jointly by Somanath Mohapatra and Nrusingha Mohapatra and addressed to the Commissioner of Endowments is dated 10.04.1970. It has not been registered as an Original Proceeding. On the contrary the application only makes a reference to O.P. Nos.74/66 and 76/66. It is, therefore, clear that the application dated 10.04.1970 could not have been registered as Original Proceeding of 74 and 76 of the year 1966. The reverse of the first page of the application contains two orders dated 09.06.1970 and 12.06.1970. Both the dates written in ink have been interpolated. By the second order, permission has been granted by the Commissioner of Endowments for leasing out the disputed property in favour of the applicants for their house purpose. The order also specifically directed for grant of permanent lease and for execution and registration of lease deed at the cost of the applicants within a month from the date of passing of the order. A reference has been made in the

application under section 19 of the OEA Act that earlier Somanath Mohapatra and Nrusingha Mohapatra had made application for lease which were numbered as O.P. Nos.74 of 1966 and 76 of 1966. No application of 1966 of the said applicants is available. It is not known whether in the year, 1966 Somanath Mohapatra and Nrusingha Mohapatra made application jointly or separately. Page four and page eleven of the Commissioner's record reveal that order was passed on 10.05.1969 whereby the applications were rejected. It does not stand to reason as to how order sanctioning lease was passed in the very same original proceedings on the subsequent joint application of Somanath Mohapatra and Nrusingha Mohapatra dated 10.04.1970. The Deity-petitioner in OJC No.5594 of 1995 has filed certified copy of the application of O.A. No.76 of 1966 of the Office of the Commissioner of Endowments, Orissa (Annedure-6), which relates to the property of Lord Lingaraj Mahaprabhu, but the applicant was one Kedar Mahasuar. Neither Somanath Mohapatra nor Nrusingha Mohapatra was an applicant in that Original Proceeding. In the aforesaid circumstances, this Court is of the view that the order of the Commissioner of Endowments granting permission for leasing out the disputed property in favour of Somanath Mohapatra and Nrusingha Mohapatra is of doubtful authenticity. The Endowment Commissioner's record appears to have been fabricated.

8. Assuming that there was a valid permission by the Commissioner of Endowments for leasing out the disputed property in favour of Somanath Mohapatra and Nrusingha Mohapatra, that by itself would not create a lease. No lease deed having been executed and registered as required under Section-107 of the Transfer of Property Act, mere acceptance of premium and rent by the Temple Administration coupled with delivery of possession, if any, would not be sufficient for creation of a permanent lease for the purpose of construction of residential house.

9. An exactly identical question arose before this Court in the case of ***Lord Lingaraj Mahaprabhu Bije, Bhubaneswar v. Bipra Charan Senapati (since dead) after him Prasanna Kumar Senapati and others reported in 2014 (SUPP.-II) OLR-706,*** wherein it has been held as follows:-.

> **"10**. ……. Moreover, the Member, Board of Revenue, without considering the nature and purpose of proposed lease that was sanctioned by the Endowment Commissioner in favour of opposite party no.1 has observed that tenancy right has been created in favour of opposite party no.1 as the petitioner accepted salami and

> rent from him, which is not justified in the absence of a registered deed of lease. During the course of hearing learned counsel for opposite party no.1 submitted that the proposed lease in favour of opposite party no.1 was for construction of residential house and that after getting ownership certificate on payment of salami and rent opposite party no.1 entered into possession of the land and constructed a residential house thereon. This indicates that the proposed lease in favour of opposite party no.1 was for the purpose of construction of residential house and as such the proposed lease was of permanent character which can be created only by a registered deed as per provision of Section 107 of the Transfer of the Property Act, 1882, which *inter alia* provides that a lease of immovable property from year to year or for any term exceeding one year, or reserving of yearly rent can be made only by a registered instrument. It is also evident from the lease sanction order (Annexure-a-1) that the Commissioner of Endowments directed for execution and registration of lease deed at the cost of the applicant, i.e., present opposite party no.1. It is a debatable question whether a person getting a lease from the intermediary for the purpose of construction of a house would be a deemed tenant under the State after vesting of intermediary interest, within the purview of Section 8(1) of the O.E.A. Act. However, the fact remains that though opposite party no.1 paid the salami no instrument of lease has been executed and registered and, therefore, opposite party no.1 had not acquired lease hold right over the property."

10. The ratio of the aforesaid decision applies with full force to the facts of the present cases. Therefore, it must be held no leasehold right or tenancy right in respect of the disputed property was created in favour of Somanath Mohapatra and Nrusingha Mohapatra merely by acceptance of salami and rent and issuance of ownership certified by the Executive Officer of Lord Lingaraj Mahaprabhu. Therefore, Gopal Chandra Das, the purchaser from Somanath Mohapatra (Opposite Party No.2 in OJC No.5594 of 1995) and the purchasers from Nursingha Mohapatra, viz., the petitioners in OJC Nos.9703 of 1998, 13458 of 1998, 13460 of 1998 and 13459 of 1998 cannot be said to have acquired leasehold/tenancy right over the property by virtue of their purchase.

11. The subsequent order dated 06.03.1998 of the Member, Board of Revenue, Odisha, except confirming the earlier order of his predecessor in office dated 21.08.1993 did not give any specific finding in favour of the purchasers from Nursingha Mohapatra. In any event, the said order must be interpreted to be one affirming the earlier order dated 21.08.1993 of his predecessor. The Deity, Lord Lingaraj Mahaprabhu has rightly challenged the said order dated 06.03.1998 in OJC Nos.8148, 8149, 8150 and 8151 of 1998.

12. In the light of the discussions and analysis made in the preceding paragraphs, we are of the view that the orders dated 21.08.1993 and 06.03.1998 passed by the Member, Board of Revenue, Odisha, Cuttack in OEA Revision Case No.03 of 1981 are illegal, contrary to law and as such unsustainable. We accordingly quash the said orders. In the result, OJC No.5594 of 1995 and OJC Nos.8148, 8149, 8150 and 8151 of 1998 are allowed, and OJC Nos.9703, 13458, 13459 and 13460 of 1998 are dismissed. However, there shall be no order as to costs.

Records received from the Commissioner, Hindu Religious Endowments and the Member, Board of revenue, Odisha be returned forthwith.

DR. D.P. CHOUDHURY, J.

With due respect, I have gone through the judgment authored by my learned brother Hon'ble Sri Justice B.K. Nayak and I fully agree with the view taken by His Lordship. I though it proper to supplement the judgment with following paragraphs.

13. Section 19 (1) of the Hindu Religious Endowments Act, 1951 (hereinafter called "the Act, 1951) is re-produced below for better appreciation:

> **"19. Alienation of immovable trust property-**(1) Notwithstanding anything contained in any law for the time being in force no transfer by exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to, or given or endowed for the purpose of, any religious institution, shall be made unless it is sanctioned by the Commissioner as being necessary or beneficial to the institution and no such transfer shall be valid or operative unless it is so sanctioned.

[**Explanation**-A lease for a term not exceeding five years but with a condition of renewal permitting continuance of the lease beyond five years shall, for the purposes of this sub-section, be deemed to be a lease for a term exceeding five years.

(1-a) The fact of execution of a lease deed with a condition for renewal or renewal of such a deed shall be communicated to the Commissioner by the Trustee not later than fifteen days from the date of execution.

(1-b) After expiry of the term of the lease the lessee shall deliver possession of the leasehold land to the lessor, failing which, the Commissioner may take action in accordance with the provision of Section 68 :

Provided that all structures, permanent or temporary, if any, constructed plants and machineries and other things installed and kept on the leasehold land, which is a subject-matter of a lease executed after commencement of the Orissa Hindu Religious Endowments (Amendment) Act 22 of 1989 by the lessee, his servants or agents, shall become the property of the religious institution unless removed from the land within such period, as may be prescribed, after expiry of the term of lease, in respect of which the Commissioner shall take action under the provision of Section 68.

(1-c) Notwithstanding anything contained in the proviso to Sub-section (1-b), no property belonging to a person other than the lessee shall be subjected to confiscation under the said proviso, unless such person fails to remove his property within a period of thirty days from the date of publication of a notice which shall be issued by the Trustee within such period as may be prescribed after the expiry of the term of lease :

Provided that any person whose property is affected under Sub-section (1-c), may file an application to the Commissioner claiming the property whose decision shall, subject to the decision of the Civil Court, be final.]"

Sub-Section (1) of Section 19 was incorporated in 1954 by O.H.R.E. (Amendment) Act. The explanation with subsequent Sub-Sections were inserted vide Orissa Act No.29 of 1978. Since alienation of immovable

property by way of so called lease purportedly related back to 1966 or 1969 and 1970, sub-Section (1) of Section 19 of the Act is relevant.

14. The provision of Section 19 (1) of the Act clearly enshrines that any alienation by way of exchange, sale or mortgage or the lease for more than five years of any immovable property belonging to any religious institution including deity require sanction by the Commissioner of Endowment. Secondly such sanction can be only made after considering the necessity or benefit thereby accruing to the religious institution or deity. On the other hand, there should be two conditions to be satisfied before any alienation being proved as valid.

15. The facts already depicted in the aforesaid para need no further revisit but it is clear that the order of sanction was shrouded with fraud being fabricated and there is no registered deed of lease executed in accordance with law. There is no material produced by the so called lessees that lease was granted for the benefit of the Lord Lingaraj or otherwise it was necessary for the religious institution to create leasehold right over the property in question. Thus, in the eye of law, there is no alienation of immovable property of the case lands to Somanath Mohapatra and Nrusingha Mohapatra by way of lease and consequently the transfer of same to subsequent transferees is equally bad and illegal.

16. It is reported in ***Basanti Kumar Sahoo v. State of Orissa; 81 (1996) CLT 571 (Full Bench)*** that the provisions in Section 19 of the Act are mandatory in nature and contravening such provisions make the transaction void. On the other hand, it transfers no right, title and interest with the transferee or lessee.

17. It is reported in ***2014 (I) OLR 602; Chittaranjan Sahoo v. Collector, Khurda and others***, where Their Lordships observed at para-22 in following manner:

> "22. There can also be no dispute to the settled legal proposition that the deity is a juristic perpetual minor/and disabled person, and the property belonging to a minor and/or a person incapable to cultivate the holding by reason of physical disability or infirmity requires protection. A deity is covered under both the classes. The manager/trustee/pujari and ultimately the State authorities are under obligation to protect the interest of such a minor or physically disabled person. The deity cannot be divested of any title or rights of immovable property in violation of the statutory provisions.

> The object is laudable and based on public policy. In order to protect its interest even a worshiper having no interest in the property may approach the authority or Court."

18. With due regard to the aforesaid decision, since the deity is perpetual minor, Section 19 is created to safeguard or protect the interest of the deity. It is, therefore, heavy duty is cast on the Administrative department, Commissioner of Endowment and other authorities working under him to make scrutiny of the requirements of the deity and the benefits for the larger interest of the deity before putting stamp of approval to go ahead with the alienation. On the other hand, the State Government, the Commissioner of Endowment or the Officers subordinate to him and the trustee of the deity must be vigilant with the fact that they are not merely custodian of the deity but also a good promoter for the welfare of the deity so as to enhance the avowed object of the Act.

19. Now adverting to the present case, when we have held in the aforesaid paras that order of permission under Section 19 of the OHRE Act is fabricated, the creation of leasehold right over the case land of deity Lord Lingaraj in favour of Somanath Mohapatra and Nrusingha Mohapatra is shrouded in fraud. It is observed above that alienation is not for the benefit of the deity or necessary for the deity, the lessees Somanath Mohapatra and Nrusingha Mohapatra acquire no kind of right in the case land and structure thereon which undoubtedly belong to Lord Lingaraj.

20. Before parting this judgment, it must be remembered by the stakeholders looking after the religious endowment institutions to take care of the deity in all respect for the best interest of the deity. There is no bar for the alienation but procedure must be strictly to be followed under law according to actual requirement of the deity and for absolute benefit of the deity. Any sort of fraud or the backdoor method to acquire the land of the deity is against the public policy and same should be guarded well by the regulatory authorities as available under the concerned statutes.

21. In terms of the above discussion, it is reiterated that OJC No.5594 of 1995 and OJC Nos.8148, 8149, 8150 and 8151 of 1998 are allowed and OJC Nos.9703, 13458, 13459 and 13460 of 1998 are dismissed.

Writ petitions disposd of.

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W.P.(C) NO. 3315 OF 2013

ANANDRUP JAIDEEP DEV SHARMA ……..Petitioner

.Vrs.

COMMISSIONER-CUM-SECRETARY, HOME DEPTT., BHUBANESWAR & ORS. ……Opp. Parties

ODISHA JUDICIAL SERVICE (SPECIAL SCHEME) RULES, 2001 – RULES 3,4

Selection and appointment of the petitioner as Adhoc Additional District Judge in the Fast Track Courts – Whether the Petitioner is entitled to be regularized to continue as regular Addl. District Judge ? Held, No.

In this case the Central Govt. floated and funded for establishment of Fast Track Courts, for which the State Govt. framed 2001 Rules, so such recruitment and appointment was purely schematic and temporary i.e. till the Central Govt. decides to continue the Scheme – On 31.03.2011 the scheme came to an end and the High Court issued notification in 2012 to hold regular examination for the Fast Track Court Judges and the petitioner having participated in the above examination and became unsuccessful can not challenge the same selection process – Moreover the direction given in Brij Mohan Lal (1) with regard to regularisation of directly recruited Fast Track Court Judges being an interim order, was superseded by its final judgment in Brij Mohan (2).

Held, the question of absorption and regularisation of the petitioner as regular Addl. District Judge is non est – Further the prayer of the petitioner to declare the 2012 examination as illegal and invalid sans merit. (Paras 24,25,33,34,38)

Case Laws Referred to :-

1. (2002) 5 SCC : Brij Mohan Lal v. Union of India & Ors.
2. (2012) 6 SCC 502 : Brij Mohan Lal v. Union of India & Ors.
3. (2008) 6 SCC 731 : Madhumita Das v. State of Orissa
4. (2010) 6 SCC 331 : B.P. Singhal v. Union of India
5. (1985) 3 SCC 398 : Union of India & Anr. v. Tulsiram Patel
6. (1972) 2 SCC 788 : Bennett Coleman & Co. v. Union of India
7. (2008) 3 SCC 512 : K. Manjusree v. State of A.P.
8. (2008) 7 SCC 11 : Hemani Malhotra v. High Court of Delhi

9. (2010) 3 SCC 104 : Ramesh Kumar v. High Court of Delhi & Anr.
10. (2014) 5 SCC 774 : Bishnu Biswas & Ors. v. Union of India & Ors.
11. (2016) 10 SCC 484 : Salam Samarjeet Singh v. High Court of Manipur at Imphal

For Petitioner : M/s. K.P.Bhoumik & S.Parida

For Opp. Parties : Mr. B.P.Tripathy, A.G.A.
M/s. P.K.Parhi, D.Gochhayat & Miss M.Sahoo
M/s. S.Patra, P.K.Mohapatra, A.Panda,S.J.Mohanty & D.D.Sahu
M/s. A.K.Nayak & S.Sahoo
Mr. Ashis Kumar Mishra
M/s. S.Ghosh & A.R.Panigrahi
M/s. A.K.Mohanty (A), R.K.Behera, R.C.Pradhan, P.N.Mohanty & P.K.Mohanty
M/s. R.Achary, T.Barik, S.Hidayatullah & A.Mahanta
M/s. B.K.Das, U.R.Jena, S.K.Das & N.K.Mohanty

Date of Judgment: 28.11.2017

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge has been made to the examination for regularization of the Fast Track Courts Additional District Judges with further prayer not to terminate the services of the petitioner.

FACTS

2. The adumbrated facts leading to the writ petition is that the opposite party No.3 made Advertisement No.1/2003 for recruitment of ad hoc Additional District Judges under the Orissa Judicial Service (Special Scheme) Rules, 2001 (hereinafter called "the Rules, 2001") as per the direction of the Hon'ble Supreme Court in T.C. (Civil) No.22 of 2001 [***Brij Mohan Lal v. Union of India and others; (2002) 5 SCC***] (hereinafter called ***"Brij Mohan Lal-I").*** After qualifying in written examination, as per the Advertisement, the petitioner along with some of the opposite parties were called to viva voce test. During viva voce the present petitioner along with four other candidates were not found selected. So, the petitioner along with other candidates filed writ application bearing W.P.(C) No.2780 of 2004 before this Court. This Court delivered judgment on 9.9.2005 directing the Registry to consider the petitioner and other similarly situated candidates for appointment as Ad hoc Additional District Judges. At the same time, the

appointment of opposite party Nos.6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 were quashed. So, the Orissa High Court filed S.L.P. (C) 19938 of 2005, State filed S.L.P. (C) 20046 of 2005 and those opposite parties whose appointments were quashed also filed S.L.P. (C) 20421 of 2005 in the Supreme Court. The Hon'ble Apex Court upheld the judgment of this Court passed in W.P. (C) No.2780 of 2004. Accordingly the petitioner was issued with the appointment order on 27.12.2005 vide Annexure-3 as Ad hoc Additional District Judge of the Fast Track Court created under 11th Finance Commission.

3. Be it stated that after ***Brij Mohan Lal-(1)*** final Judgment was passed by the Hon'ble Supreme Court in T.C. (Civil) No.22 of 2001, ***Brij Mohan Lal v. Union of India and others; (2012) 6 SCC 502*** (hereinafter called ***"Brij Mohan Lal-(2)*** on 19.4.2012. By virtue of the said judgment direction was issued to regularize the services of Ad hoc Additional District Judges by holding an examination in the manner prescribed by the Hon'ble Apex Court. It is specifically mentioned in that judgment that while High Court would consider to give appointment to these applicants, must keep in mind that these applicants have put in number of years as Fast Track Court Judges and served the country by administering justice in accordance with law. In accordance with the direction of the Hon'ble Supreme Court, the Orissa High Court issued notification directing the serving Ad hoc Additional District Judges (ADJ) including petitioner as Ad hoc ADJs who have been terminated by virtue of the judgment of this Court passed in W.P.(C) No.2780 of 2004 and some of the Judicial Officers of the Fast Track Court who have served for short while and tendered resignation.

4. Be it further stated that the Judicial Officers who were not found suitable by virtue of the order of this Court in W.P.(C) No.2780 of 2004 were also found eligible to appear in the examination for appointment as direct District Judges under the order of the Supreme Court and is also challenged in this writ petition. However, in the writ petition it is specifically submitted that the petitioner along with some Additional District Judges in the Fast Track Courts serving for more than seven years could not succeed in the written examination whereas opposite party Nos.13, 14 and 15 who were thrown out of service as per the order of this Court in W.P.(C) No.2780 of 2004 were found qualified in the written test.

5. In the ***Brij Mohan Lal-(2),*** the modalities for examination have been well prescribed at Para 207.9 (c) that there shall be 150 marks for the written examination and 100 marks for the interview and the qualifying marks shall

be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates. But the opposite party No.3 issued notification on 6.12.2012 inviting ad hoc Additional District Judges of the Fast Track Court prescribing the qualifying marks as 40% in aggregate for general candidates and 35% for SC/ST/OBC candidates in each paper in utter disregard to the direction issued in ***Brij Mohan Lal-(2)*** case. It is not out of place to mention that vide Advertisement No.1/2000, the minimum qualifying marks in two written papers with 50% each paper and those who qualified in the written test were called for viva voce. In that test only two candidates were selected and rest of the candidates securing below such cut off marks were recruited as ad hoc Additional District Judges in Fast Track Courts.

6. During that appointment some unsuccessful candidates filed writ petition vide W.P.(C) No.10635 of 2003 whereunder this Court disapproved the Full Court proceeding about lowering down the standard of merit and objected to selection of seven candidates as Fast Track Court Additional District Judges. Against that judgment S.L.P. (C) No.16335 of 2008 was filed where a stay was granted temporarily to the operation of the judgment of this Court. So, those candidates whose appointment as Fast Track Additional District Judges were quashed were also called to the written examination in question and after their success, they were called to viva voce test purportedly held on 8.2.2013 to regularize their service as Additional District Judges which is illegal.

7. Be it stated that while the petitioner and other similarly situated candidates were allowed by the order of the Hon'ble Supreme Court at different occasion to continue as Fast Track Court Additional District Judges with further direction to consider their absorption as direct District Judges, the direction to ask the petitioner and other similarly situated persons to qualify in the written examination again under the order of the ***Brij Mohan Lal-(2)*** is not acceptable. So, the writ petition is filed to declare the impugned examination for regularization of the Additional District Judges of the Fast Track Court as illegal and void. It is further prayed not to allow opposite party No.3 to hold viva voce examination during pendency of the writ petition and to allow the petitioner to continue as Additional District Judge until further order.

SUBMISSIONS:

8. Learned counsel for the petitioner precisely argued that the petitioner has been duly qualified to be the Additional District Judge of the Fast Track Court after undergoing the regular examination held for appointment of the

District Judges directly from Bar in 2003 and petitioner has rendered nine years of service by the time the impugned examination for regularization of the District Judges are held in 2012. He further submitted that when the petitioner has been appointed as Ad hoc Additional District Judge and posted at several places in view of order in case of ***Brij Mohan Lal-(1)*** and the case filed by Madhumita Das, the service of the petitioner was not affected and there is clear direction in those cases by the Hon'ble Apex Court for regularization of service of petitioner and similarly situated persons. Thus, the advertisement made by the Hon'ble High Court in 2012 is grossly erroneous.

9. Learned counsel for the petitioner further submitted that the advertisement made by opposite party No.3 in pursuance of the direction of the Hon'ble Supreme Court in ***Brij Mohan Lal-(2)*** invited not only the petitioner and other serving Fast Track Court Additional District Judges but also the Additional District Judges who were removed by virtue of the order of the Hon'ble Supreme Court in earlier occasion and the Fast Track Additional District Judges who left the job, thus create confusion to fulfill the real spirit of the judgment in ***Brij Mohan Lal-(2).*** It is the sole object of the judgment of ***Brij Mohan Lal-(2)*** that the Judges of Fast Track Court who were continuing should be only called to formal test as they have put in good number of years as Additional District Judges of Fast Track Court and rendered justice to the people.

10. Learned counsel for the petitioner further submitted that the Hon'ble Supreme Court has clearly held in ***Brij Mohan Lal-(2)*** that while regularizing the service of ad hoc Additional District Judges of the Fast Track Court, the High Court must keep in mind that they have rendered justice to the public for some years and for that aggregate mark for the written and viva should be 40% for general candidates and 35% for SC/ST/OBC but never directed for 40% or 35% marks for respective category of persons as the case may be in each paper separately and 40% marks for the viva voce which were advertised by the opposite party No.3 for selection of the petitioner and other similarly situated persons vide impugned notification dated 6.12.2012 under Annexure-H series.

11. Learned counsel for the petitioner submitted that while the petitioner was discharging his duties as Ad hoc Additional District Judge of the Court, same has been well appreciated by the superior Courts including the Hon'ble Apex Court, the discontinuance of the job of the petitioner who have rendered service successfully as Ad hoc Additional District Judge would not

only smack the spirit of the judicial service but also against the justice delivery system. So, he prayed to declare the examination held in pursuance of the notification dated 6.12.2012 by the opposite party Nos.1 to 3 as illegal and void and the petitioner should be allowed to continue in service.

12. Learned Additional Government Advocate supporting the counter submitted that the impugned examination has been conducted in pursuance of the direction of the Hon'ble Supreme Court passed in ***Brij Mohan Lal-(2)*** on 19.4.2012. He further submitted that the service rendered by the petitioner as Ad hoc Additional District Judge of the Fast Track Court is nothing but a temporary service and at no point of time his service has been regularized and it has been only extended from time to time by notification of the State Government on the recommendation of the Hon'ble High Court.

13. Learned Additional Government Advocate further submitted that in the judgment dated 19.4.2012 in ***Brij Mohan Lal-(2)*** it has been clearly directed to allow all sitting or former Fast Track Court Judges who were directly appointed from the Bar to sit at the recruitment examination and accordingly the opposite party Nos.1 to 3 have obeyed the order. Since the direction of the Hon'ble Supreme Court passed in ***Brij Mohan Lal-(2)*** is the culmination of all the interim orders either passed in ***Brij Mohan Lal-(I)*** or in case of Madhumita Das, such final judgment on Fast Track Court Scheme is binding on the parties. Since it is direct competition within all the Judges recruited under Fast Track Court Scheme and Fast Track Court Scheme was scrapped by the Central Government, there is no illegality committed by the opposite party Nos.1 to 3 to allow the petitioner along with other opposite patties to take part in the Examination.

14. Learned Additional Government Advocate further submitted that the advertisement made for regularization of the service of the ad hoc Additional District Judges of Fast Track Court is thoroughly in accordance with the modalities directed by the Hon'ble Supreme Court in ***Brij Mohan Lal-(2)*** because the Hon'ble Supreme Court has directed to keep 150 marks for written examination and 100 marks for viva voce and same has been also advertised vide Annexure-H series. Moreover, for the written examination aggregate mark of 40% for general candidates and 35% for SC/ST/OBC candidates in each paper out of 150 marks and 40% for the viva voce as per the Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 have been kept in accordance with the directive of the Hon'ble Supreme Court. So, he submitted that there is no illegality in the advertisement for

recruitment/absorption of the Ad hoc Additional District Judges to the post of regular Additional District Judges. Hence, he prayed to dismiss the writ petition.

15. MAIN POINT FOR CONSIDERATION:

(I) Whether the petitioner is entitled to continue as regular Additional District Judge since he has already been selected and continued as Ad hoc Additional District Judge in the Fast Track Courts ?

(II) Whether the examination held for absorption or regualrisation of the Ad hoc Additional District Judges under Fast Track Court Scheme as regular Additional District Judges is legal and proper ?

DISCUSSION:
POINT NO.(I)

16. It is not in dispute that in ***Brij Mohan Lal v. Union of India-(I)*** case the Hon'ble Apex Court directed for appointment of three categories of Ad hoc Additional District Judges for ensuring quick dispension of justice through Fast Track Court under 11th Finance Commission. It is admitted fact that one of the category of appointment of Ad hoc Additional District Judges was direct from Bar besides Judicial Officers having been given ad hoc promotion from eligible Judicial Officers subject to their suitability and retired Judicial Officers having good service record maintained. It is also clear from the pleadings of both the parties that the members appointed from Bar directly should be preferably in the age group of 35 to 45 years so that they can continue against the regular post if the Fast Track Courts ceased to function. In order to carry out the order of the Hon'ble Supreme Court, the State of Orissa on 22.2.2003 made Orissa Judicial Service (Special Scheme) Rules, 2001. It is also admitted fact that there was Advertisement No.1/2003 for recruitment of ad hoc Additional District Judges for Fast Track Courts under said Rules 2001 on 14.11.2003. On 7.1.2004 petitioner along with seven candidates cleared the written examination.

17. It is revealed from the pleadings of both the parties that on 8.1.2004 the Full Court proceedings of this Court lowered down the minimum cut off mark in written examination and called 31 more candidates for interview. In that Examination there was cutoff marks for viva voce as 40%. As such on 26.7.2004 the Home Department issued appointment letter in favour of 15 candidates as ad hoc Additional District Judges vide Annexure-2. So, one Madhumita Das along with Kashinath Rout who qualified in the written test

but failed in the viva voce, challenged the said appointment of 15 candidates on various grounds including the decision of the Full Court for lowering down the minimum percentage of qualifying marks in written examination from 50% to 35% in each paper and 40% in aggregate and fixing minimum qualifying marks in the viva voce test.

18. As stated above, it is admitted fact that the Court allowed the said writ petition filed by Madhumita and Kasinath directing to quash the appointment and to consider afresh the candidates who have secured more than 50% of marks in each paper in the written examination. It is further revealed from both the pleadings that against the judgment of this Court, the High Court filed S.L.P.(C) 19938 of 2005, State filed S.L.P.(C) 20046 of 2005 and those candidates who lost the job as Ad hoc Additional District Judges filed S.L.P. (C) No.20421 of 2005 in the Hon'ble Supreme Court. All the three petitions were considered and the judgment of this Court passed in W.P.(C) No.2780 of 2004 was upheld. Hence, a fresh appointment for five candidates including the petitioner were issued vide Annexure-3. The appointment of the present petitioner is reproduced below:

> "No.58121/HS., In pursuance of the judgment dated 9.9.2005 in W.P.(C) No.2780 of 2004 of the Hon'ble Orissa High Court and the Order dated 7.10.2005 passed in S.L.P. (C) No.19938 of 2005 of the Hon'ble Supreme Court, Shri Anandrup Jaideep Devsharma, Advocate, Cuttack is hereby appointed temporarily as Adhoc Additional District Judge in the scale of pay of Rs.16750-400-19150-450-20,500/- by way of direct recruitment from the Bar in the Additional District Judge Court (Fast Track Court) established out of 11th Finance Commission/ward for a period ending 31.3.06 with effect from the date he joins as such.
>
> 2. His service conditions will be governed by Orissa Judicial Service (Special Scheme) Rules, 2001 and as amended from time to time."

The aforesaid notification clearly shows that he has been appointed under the Special Scheme and his service was absolutely temporary for a period ending 31.3.2006. This notification was issued on 27.2.2005. However, it is stated in the writ petition that the petitioner continued for seven years as such and same fact is not denied in the counter. However, there is no material to show that the petitioner was ever absorbed against the regular vacancy of Additional District Judges.

19. It will not be out of place to mention that the petitioner was appointed under a Special Scheme for the purpose of Fast Track Courts but not under the then Orissa Judicial Service Rules 1997 or OSJS Rule 1963 because OSJS and OJS Rule 2007 came into force in 2007.

20. It is observed at para 30 of ***Brij Mohan Lal-(2)*** that the Rules of 2001 enacted are related to temporary appointments. Rule 3 of the Orissa Rules 2001 provides that notwithstanding anything contained in the Orissa Superior Judicial Service Rules, 1963 and Orissa Judicial Service Rules, 1994, the appointment of Additional District Judges was on ad hoc and purely temporary basis for implementation of the FTC Scheme. Rule 4 of said Rules contemplates that the appointment made under these Rules shall be purely on ad hoc basis and is liable to be terminated at any time without any prior notice. In 2003 such Scheme was amended permitting the selection of members from the Bar by way of direct recruitment while the Hon'ble Supreme Court directed in ***Brij Mohan Lal-(1).*** In clear way in ***Brij Mohan Lal-(2) (supra)*** it has been observed by Their Lordships in the following manner:-

> "31. xxx These Rules clearly indicate that the appointment to the post of FTC Judges under the FTC Scheme was purely ad hoc and temporary, without giving any right to the persons so appointed."

21. With due regard to the aforesaid para of the judgment, it is clear that the appointment to the post of FTC Judges under FTC Scheme does not give any right to the FTC Judges for being appointed on regular basis as they have to face the recruitment again under the Rules meant for appointment to the post of Additional District Judges under erstwhile Orissa Superior Judicial Service Rules, 1963. However, it is pleaded by the learned counsel for the petitioner that there is order of the Hon'ble Apex Court for absorbing the Ad hoc Additional District Judges against regular vacancy without facing any examination as directed in case of ***Brij Mohan Lal-(1)*** and the case filed by Madhumita Das and others v. State of Orissa. It may be more appropriate to quote paragraphs-21, 22, 23 and 24 of the judgment in ***Brij Mohan Lal-(2)*** to meet the argument of the learned counsel for the petitioner:

> "21. Now, we may notice another group of cases where the prayer made is diametrically opposite to that made in the case of ***Brij Mohan Lal*** (supra). The petitioners in Writ Petition (C) No.261 of 2008 titled *Sovan Kumar Dash v. State of Orissa* have approached

this Court directly under Article 32 of the Constitution with a prayer that they should be absorbed against vacant posts in the regular cadre as per the directions contained in ***Brij Mohan Lal case;*** (2002) 5 SCC 1. They further made a prayer that the Notification dated 11-4-2008 issued by the State of Orissa calling for applications from eligible candidates for direct recruitment from the Bar to the cadre of the District Judge be quashed. These petitioners have taken the plea that they have already crossed the eligibility condition of age.

22. Similarly, another set of petitioners have also filed Writ Petition (C) No.250 of 2008 titled ***Madhumita Das v. State of Orissa***. The petitioners therein were working as FTC Judges. While invoking the writ jurisdiction of this Court under Article 32 of the Constitution, they prayed that they be absorbed against the regular vacancies of the State cadre of District Judges. They further prayed that the abovementioned advertisement dated 11-4-2008, inviting applications for all the posts of District Judges including the posts against which the petitioners were working, be quashed. It is the contention of the petitioners in this petition that they have already attained an age more than the higher age limit prescribed while working as ad hoc Judges of the FTCs. Also, while judging the performance of the FTC Judges, the condition of completion of eight sessions trials per month cannot be imposed as it has not so been imposed against the judges who are forming the regular cadre of the State services.

23. In this petition, no final order has been passed by this Court. However, at the interim stage, when the Writ Petition came up for hearing on 11-6-2008, this Court passed the following order: (*Madhumita Das case* ***(2008) 6 SCC 731***, SCC pp.731-32, paras 1-4)

"1. Issue notice.

2. Challenge in these writ petitions is to Advertisement 1 of 2008 issued by the Orissa High Court. The petitioners have been selected to function as ad hoc Additional District Judges in terms of the judgment of this Court in ***Brij Mohan Lal vs. Union of India and Ors. [(2002) 5 SCC 1].*** It is their grievance that 16 posts advertised also include the 9 posts presently held by the petitioners in the two writ petitions. It is pointed out that the eligibility criterion fixed in the advertisement rules out the present petitioners. Firstly, some of them

are above the maximum age of 45 years and secondly, being Judicial Officers, they cannot apply for posts advertised for members of the Bar. It is also pointed out that in terms of what has been stated by this Court in ***Brij Mohan's case*** (supra), at para 10, Direction 4, they are to be continued (in the ad hoc posts) belonging to the Fast Track Courts, and, thereafter, in respect of regular posts available, after the Fast Track Courts cease to function. Their cases are to be considered subject to their performance being found satisfactory. Their stand is that they have been continued from time to time. Obviously, their performance was found to be satisfactory. Presently, we are not concerned with that question which may have relevance only at the time of considering their absorption in respect of the regular vacancies.

3. It is submitted by Mr. Uday U. Lalit, learned senior counsel that while assessing the performance, there cannot be different yardsticks, i.e. same parameters have to be adopted while judging the performance of the petitioners viz-a-viz those which are recruited from another source, i.e. from amongst the Judicial Officers. We find substance in this plea also. Therefore, we direct that the process of selection pursuant to Advertisement 1 of 2008 may continue but that shall only be in respect of 7 posts, and not in respect of 9 posts presently held by the petitioners.

4. It is pointed out that the High Court, after the advertisement [has] been issued has issued certain letters regarding the non-disposal of adequate number of cases. The petitioners have given reasons as to why there could not be adequate disposal of the cases. Needless to say, the High Court shall consider the stand taken in the responses while judging their suitability for appointment on regular basis. The petitioners shall continue to hold the posts until further orders, for which necessary orders shall be passed by the High Court. It is made clear that as and when regular vacancies arise, cases of the petitioners shall be duly considered. There shall not be any need for them to appear in any examination meant for recruitment to the cadre of District Judge."

24. As is evident from the above order in ***Madhumita Das*** case, (2008) 6 SCC 731, the cases of the petitioners were directed to be considered as and when the regular vacancies arose and they did not

need to appear in any examination meant for recruitment to that post. This order of the Court has been relied upon by all the petitioners in different matters before this Court who are or were working as FTC Judges and are praying for their regularization in the service. This was an interim order subject to the final order that the Court would pass while disposing of the writ petition finally."

22. From the aforesaid observations of the Hon'ble Supreme Court in ***Brij Mohan Lal-(2),*** it is clear that the observations of the Hon'ble Supreme Court as contended by the learned counsel for the petitioner were interim order and same are subject to final order passed in ***Brij Mohan Lal-(2***).

23. In ***Brij Mohan Lal-(2),*** it is clearly maintained at paragraphs-91, 92, 93, 94, 95, 96 and 97 in the following manner:

"91. It is believed that, where Rule of Law prevails, there can be nothing like unfettered discretion or unaccountable action. The degree of reasoning required in support of the decision may vary. The degree of scrutiny during judicial review may vary. But the need for reasoning exists. As a result, when the Constitution of India provides that some offices will be held during the pleasure of the President, without any express limitations or restrictions, this power should, however, necessarily be read as being subject to the fundamentals of constitutionalism. (Refer ***B.P. Singhal v. Union of India*** (2010) 6 SCC 331).

92. We must also notice another settled position of law, stated by this Court in the case of ***Union of India & Anr. v. Tulsiram Patel*** [(1985) 3 SCC 398], that the origin of Government services is contractual. There is an offer and acceptance in every case. But once appointed to his post or office, the Government servant acquires a status and his rights and obligations are no longer determined by the consent of both the parties, but by the statute or statutory rules as framed and unilaterally altered by the Government. In other words, the legal position of a Government servant is more one of status than that of contract.

93. Therefore, the appointees do not have an absolute right to the post, but we would have to consider the effect of the judgments of this Court in ***Madhumita Das (supra)*** and ***Brij Mohan Lal (supra)*** to examine if the petitioners in these cases are entitled to any relief or not.

94. Before we enter into discussion upon that aspect of the case, it will be necessary for us to deliberate on the question whether a writ of mandamus can at all be issued in this case and, if so, its scope. Needless to say, the origin of the FTC Scheme was in a policy decision by the Central Government. The Central Government had taken a decision to implement the FTC Scheme, particularly to deal with the arrears of criminal cases in the country and it had taken unto itself the burden of financing the entire scheme. It was to incur all infrastructural and recurring expenditures for implementation of the FTC Scheme. Examined from any point of view, it was a policy decision of the Union of India, which was accepted by the various State Governments, which in turn implemented this policy by appointing ad hoc Judges to preside over FTCs. These appointments were made by three different methods: from amongst the retired Judges, by promotion from Civil Judges (Senior Division), and by direct recruitment from the Bar.

95. The Central Government then has taken a decision not to finance the FTC Scheme beyond 31-3-2011. However, some of the State Governments have still taken a decision at their own level to continue with the FTC Scheme, for the time being. None of the States appearing before us have stated that, as a matter of policy or otherwise, they have decided to continue the FTC Scheme at their own expense as a permanent feature of Justice Administration System.

96. It is a settled principle of law that matters relating to framing and implementation of policy primarily fall in the domain of the Government. It is an established requirement of good governance that the Government should frame policies which are fair and beneficial to the public at large. The Government enjoys freedom in relation to framing of policies. It is for the Government to adopt any particular policy as it may deem fit and proper and the law gives it liberty and freedom in framing the same. Normally, the Courts would decline to exercise the power of judicial review in relation to such matters. But this general rule is not free from exceptions. The Courts have repeatedly taken the view that they would not refuse to adjudicate upon policy matters if the policy decisions are arbitrary, capricious or mala fide.

97. In bringing out the distinction between policy matters amenable to judicial review and those where the Courts would decline to exercise their jurisdiction, this Court, in ***Bennett Coleman & Co. v. Union of India*** [(1972) 2 SCC 788], held as under: (SCC p.834, para 125)

"125. … The argument of the petitioners that Government should have accorded greater priority to the import of newsprint to supply the need of all newspaper proprietors to the maximum extent is a matter relating to the policy of import and this Court cannot be propelled into the unchartered ocean of governmental policy."

24. With due regard to the said observation of the Hon'ble Supreme Court, it is clear that the Fast Track Court Scheme was only floated by the Central Government for temporary purpose and the Judges were appointed till the Scheme was continued. When the Scheme came to an end by the Central Government on 31.3.2011, such Judges appointed under FTC Scheme have no right to continue in service except as propounded by the Hon'ble Supreme Court in their final judgment in ***Brij Mohan Lal-(2).*** In ***Brij Mohan Lal-(2),*** at paragraphs-205, 206 and 207 Their Lordships observed as follows:

"205. Thus, these two orders must be seen in the light of the fact that the Union of India, as well as the State Governments of their own, extended the FTC Scheme for another five years i.e. till 2010 and thereafter, by another year. The Central Government ultimately took the decision not to finance the FTC Scheme with effect from 30-3-2011. Even thereafter, a number of States have taken the decision to continue the FTC Scheme while retaining the appointees thereto till 2012, 2013 and even till 2016. The State of Haryana has even thought of making it as a permanent feature of dispensation of justice in the State. The cumulative effect of all these factors is that the petitioners had a legitimate expectation that either their services would be continued as the FTC Scheme would be made a permanent feature of the justice administration in the State concerned or they would be absorbed in the regular cadre. But mere expectation or even legitimate expectation of absorption cannot be a cause of action for claiming the relief of regularization, particularly when the same is contrary to the Rules and letters of appointment.

206. In ***Madhumita Das, (2008) 6 SCC 731***, the protection was granted in an interim order and we also feel that such directions cannot be issued, if they are contrary to the enacted statute. When all these facts, circumstances and the judgments of this Court are harmoniously construed with an intention to do complete justice as well as to protect the fundamental rights and protections available to the public at large, it would appear necessary that this Court passes certain directions.

207. Without any intent to interfere with the policy decision taken by the Governments but, unmistakably, to protect the guarantees of Article 21 of the Constitution, to improve the Justice Delivery System and fortify the independence of judiciary, while ensuring attainment of constitutional goals as well as to do complete justice to the lis before us, in terms of Article 142 of the Constitution, we pass the following orders and directions:

207.1. Being a policy decision which has already taken effect, we decline to strike down the policy decision of the Union of India vide letter dated 14-9-2010 not to finance the FTC Scheme beyond 31-3-2011.

207.2. All the States which have taken a policy decision to continue the FTC Scheme beyond 31-3-2011 shall adhere to the respective dates as announced, for example in the cases of States of Orissa (March 2013), Haryana (March 2016), Andhra Pradesh (March 2012) and Rajasthan (February 2013).

207.3. The States which are in the process of taking a policy decision on whether or not to continue the FTC Scheme as a permanent feature of administration of justice in the respective States are free to take such a decision.

207.4. It is directed that all the States, henceforth, shall not take a decision to continue the FTC Scheme on ad hoc and temporary basis. The States are at liberty to decide but only with regard either to bring the FTC Scheme to an end or to continue the same as a permanent feature in the State.

207.5. The Union of India and the State Governments shall re-allocate and utilize the funds apportioned by the Thirteenth Finance

Commission and/or make provisions for such additional funds to ensure regularization of the FTC judges in the manner indicated and/or for creation of additional courts as directed in this judgment.

207.6. All the decisions taken and recommendations made at the Chief Justices and Chief Ministers' Conference shall be placed before the Cabinet of the Centre or the State, as the case may be, which alone shall have the authority to finally accept, modify or decline, implementation of such decisions and, that too, upon objective consideration and for valid reasons. Let the Minutes of the Conference of 2009, at least now, be placed before the Cabinet within three months from the date of pronouncement of this judgment for its information and appropriate action.

207.7. No decision, recommendation or proposal made by the Chief Justices and Chief Ministers Conference shall be rejected or declined or varied at any bureaucratic level, in the hierarchy of the Governments, whether in the State or the Centre.

207.8. We hereby direct that it shall be for the Central Government to provide funds for carrying out the directions contained in this judgment and, if necessary, by re-allocation of funds already allocated under the 13th Finance Commission for Judiciary. We further direct that for creation of additional 10% posts of the existing cadre, the burden shall be equally shared by the Centre and the State Governments and funds be provided without any undue delay so that the courts can be established as per the schedule directed in this judgment.

207.9. All the persons who have been appointed by way of direct recruitment from the Bar as Judges to preside over the FTCs under the FTC Scheme shall be entitled to be appointed to the regular cadre of the Higher Judicial Services of the respective States only in the following manner :

(a) The direct recruits to the FTCs who opt for regularization shall take a written examination to be conducted by the High Courts of the respective States for determining their suitability for absorption in the regular cadre of Additional District Judges.

(b) Thereafter, they shall be subjected to an interview by a Selection Committee consisting of the Chief Justice and four seniormost Judges of that High Court.

(c) There shall be 150 marks for the written examination and 100 marks for the interview. The qualifying marks shall be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates. The examination and interview shall be held in accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services.

(d) Each of the appointees shall be entitled to one mark per year of service in the FTCs, which shall form part of the interview marks.

(e) Needless to point out that this examination and interview should be conducted by the respective High Courts keeping in mind that all these applicants have put in a number of years as FTC Judges and have served the country by administering Justice in accordance with law. The written examination and interview module, should, thus, be framed keeping in mind the peculiar facts and circumstances of these cases.

(f) The candidates who qualify the written examination and obtain consolidated percentage as afore-indicated shall be appointed to the post of Additional District Judge in the regular cadre of the State.

(g) If, for any reason, vacancies are not available in the regular cadre, we hereby direct the State Governments to create such additional vacancies as may be necessary keeping in view the number of candidates selected.

(h) All sitting and/or former FTC Judges who were directly appointed from the Bar and are desirous of taking the examination and interview for regular appointment shall be given age relaxation. No application shall be rejected on the ground of age of the applicant being in excess of the prescribed age.

207.10. The members of the Bar who have directly been appointed but whose services were either dispensed with or terminated on the ground of doubtful integrity, unsatisfactory work or against whom, on any other ground, disciplinary action had been taken, shall not be eligible to the benefits stated in para 207.9 of the judgment.

207.11. Keeping in view the need of the hour and the Constitutional mandate to provide fair and expeditious trial to all litigants and the citizens of the country, we direct the respective States and the Central Government to create 10% of the total regular cadre of the State as

additional posts within three months from today and take up the process for filling such additional vacancies as per the Higher Judicial Service and Judicial Services Rules of that State, immediately thereafter.

207.12. These directions, of course, are in addition to and not in derogation of the recommendations that may be made by the Law Commission of India and any other order which may be passed by the Courts of competent jurisdiction, in other such matters.

207.13. The candidates from any State, who were promoted as FTC Judges from the post of Civil Judge, Senior Division having requisite experience in service, shall be entitled to be absorbed and remain promoted to the Higher Judicial Services of that State subject to :

(a) Such promotion, when effected against the 25% quota for out-of-turn promotion on merit, in accordance with the judgment of this Court in the case of *All India Judges' Assn.* (3), (2002) 4 SCC 247, by taking and being selected through the requisite examination, as contemplated for out-of-turn promotion.

(b) If the appointee has the requisite seniority and is entitled to promotion against 25% quota for promotion by seniority-cum-merit, he shall be promoted on his own turn to the Higher Judicial Services without any written examination.

(c) While considering candidates either under category (a) or (b) above, due weightage shall be given to the fact that they have already put in a number of years in service in the Higher Judicial Services and, of course, with reference to their performance.

(d) All other appointees in this category, in the event of discontinuation of the FTC Scheme, would revert to their respective posts in the appropriate cadre."

25. In view of above direction and particularly in view of the contention of the learned Additional Government Advocate that the High Court has already issued notification in 2012 to hold regular examination for the Fast Track Court Judges for their absorption and regularization, the question of continuity of the job of petitioner as a regular Additional District Judge is non est. So, the plea of the petitioner that he continued as regular District Judge is indefensible. Point No.(I) is answered accordingly.

POINT NO.(II)

26. In the writ petition, it has been also submitted that the opposite party No.3 has not held the written examination of the Ad hoc Additional District Judges posted in Fast Track Courts as per the direction given by the Hon'ble Supreme Court in ***Brij Mohan Lal (II)*** but at the same time it is admitted that petitioner has appeared in pursuance of the advertisement made by the Court in the said Examination but he was not qualified according to the pleadings of both the parties.

27. Learned counsel for the petitioner alleged inter alia that the Hon'ble Apex Court has directed in ***Brij Mohan Lal (II)*** vide para 207.9 that since the petitioner along with other candidates have already exercised the power by rendering justice to the people of the nation, instead of facing rigorous test, the concerned High Court would only hold the written test and viva voce consisting of 250 marks and in that test each candidate should secure 40% marks in case of general category and 35% marks in case of candidates belong to SC/ST/OBC category. But the opposite party No.3 issued notification to hold the written examination with pass mark of 40%/35% as per the category of the candidates in each paper and also advertised for holding interview where cutoff mark was kept as 40% which are completely against the directive of the Hon'ble Supreme Court in ***Brij Mohan Lal-(2)'s*** case. So, he submitted that the examination being held contrary to the directive of the Hon'ble Supreme Court, must be declared as illegal and improper.

28. Learned Additional Government Advocate submitted that there is no irregularity or illegality in conducting the written Examination or viva voce in accordance with the advertisement as the advertisement has been made in accordance with the directive of the Hon'ble Supreme Court in ***Brij Mohan Lal-(2)*** case. He submitted that the Hon'ble Supreme Court have also directed that while the viva voce will be held, same should be held in accordance with the Recruitment Rules of the respective States. According to him, in our State there is Recruitment Rules, namely, the Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 (hereinafter called "OSJS & OJS Rules, 2007") and it is clearly mentioned therein that viva voce for the direct District Judges has got cutoff marks of 40% to pass in the interview.

29. Considering the aforesaid submissions of respective parties, we may refer the case of ***Madhumita Das and Bijaya Kumar Jena v. State of Orissa***

& others (W.P.(C) No.2870 of 2013 & W.P.(C) No.3025 of 2013, disposed of on 19.4.2017) where at paragraphs-27, 28 and 29 I have taken the view in the following manner:

> **"27.** The directive of the Hon'ble Supreme Court passed in paragraph 207.9 of the judgment in ***Brij Mohan Lal (supra)*** has to be followed both in letter and spirit. However, conjoint reading of all the clauses in paragraph 207.9 of the judgment of the Hon'ble Supreme Court in Brij Mohan Lal's case, it can be only deduced in the following manner:
>
> (1) In the matter of written test and viva voce relevant Recruitment Rule has to be followed for direct recruitment to the District Judges cadre to the extent of relaxation given in the judgment of the Hon'ble Apex Court. Hon'ble Apex Court have made it clear in clause (f) that the candidates who qualify the written examination and obtain consolidated percentage as aforeindicated in Clause (c) of para 207.9 would be called to interview. It is, therefore, Hon'ble Apex Court taking the services of the Fast Track Judges into consideration have directed that the qualifying marks shall be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates out of 150 marks in written examination. So, as observed by the Hon'ble Apex Court the aggregate consolidated percentage of mark is not to include the interview mark.
>
> (2) When the qualifying marks in the written test has been prescribed by the Hon'ble Apex Court, the High Court only would issue the notification for recruitment by following the directive but not keeping the minimum qualifying mark on each paper in the written test.
>
> (3) In view of the specific directive of the Hon'ble Supreme Court in Clause (d) that each of the appointees shall be entitled to one mark per year of service in the FTCs, which would form part of the interview marks and Their Lordship having directed in Clause © of the same para that there should be 100 marks for the interview, the interview mark has to be awarded to the candidates who qualify in the written test by keeping the minimum aggregate marks in the written test out of 150 marks. Hon'ble Apex Court have not directed to take the aggregate mark of 40% and 35% as the case may be for respective category as a mark secured in the written test and in the interview.

(4) With regard to Clause (c) of same para Their Lordships have also directed to follow the written examination and interview in accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services. When the Hon'ble Supreme Court have not prescribed the minimum pass mark for interview and had directed for following the relevant Recruitment Rules, it must be the Recruitment Rules with regard to the interview have to be followed to comply the directive of the Hon'ble Supreme Court.

The relevant provisions in the Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 (hereinafter called "OSJS & OJS Rule") for recruitment to the cadre of District Judges directly from the Bar is placed below for better appreciation:

"Appendix-B
(See Rule 10)

(Direct recruitment to the post of District Judges)

A. Written Examination

The written examination shall be on the following two papers each carrying 100 marks with a duration of 2 hours for each papers as follows:-

Paper-1

(1) Code of Civil Procedure,	. . 30 Marks
(2) Personal Law	. . 30 marks
(3) Transfer of Property Act, Specific Relief Act, Limitation Act, Law of Contract, Orissa Consolidation of Holdings and Prevention Fragmentation of Land Act, Orissa Estate Abolition Act, Orissa Land Reforms Act, Law of Motor Accident Claim.	. . 40 marks
Total	. . 100 marks

Paper-2

(1) Code of Criminal Procedure,	. . 30 marks
(2) Indian Penal Code,	. . 30 marks
(3) Indian Evidence Act	. . 30 marks

(4) Narcotic Drugs and Psychotropic Substance Act,
Prevention of Food Adulteration Act,
Prevention of Corruption Act,
Essential Commodities Act,
Environment Protection Act,
Water (Prevention and Control of Pollution) Act & . .10 marks
(Scheduled Castes and Scheduled Tribes
(Prevention of Atrocities) Act, 1989.

Total . .100 marks

B. Interview

Interview shall carry 30 marks.

Candidates shall be called for interview in the proportion of 1.10 provided that such candidates have obtained at least 50% of marks in each of the written papers.

C. The final merit list shall be prepared on the basis of the marks obtained in the written tests and interview.

Provided that a candidate shall not be included in the merit list unless he secures at least 50% of marks in each of the written papers and a minimum of 40% of marks in interview."

(Underlined for emphasis)

28. From the aforesaid OSJS & OJS Rule, it is clear that there are 200 marks in written examination and 30 marks in interview. The candidate who has secured 50% of marks in each of the written paper shall be called for the interview and a minimum 40% of marks shall be secured in the interview to be included in the merit list. As per the directive of the Hon'ble Supreme Court 200 marks for the written examination have been reduced to 150 marks and the interview marks have been raised to 100 marks. Moreover, there is no any aggregate marks to be secured in the written examination under the Rules whereas the aggregate marks of 40% for General candidates and 35% for SC/ST/OBC candidates have been prescribed by the directive of the Hon'ble Supreme Court. Without prescribing any mark for the interview specifically their Lordships directed to follow the OSJS & OJS Rule so far as the interview and the written examination are concerned for direct recruitment to the post of District Judges. Where the minimum mark for interview is not specifically mentioned but directive is made to follow the OSJS & OJS Rule, obviously their Lordships have directed to follow the Recruitment Rules by keeping

the minimum marks in the interview for the candidates who qualify in the written examination by keeping such consolidated aggregate marks in both the papers. The directive in this regard is clearly inferred from the directive of the Hon'ble Supreme Court in Clauses (a) (b) (c) (d) and (e) of para 207.9.

29. Judging from the case of the present petitioners, there is no doubt that both the petitioners in the respective cases have secured 40% out of total 150 marks in the written test, for which both the petitioners have qualified in the written examination as per the directive of the Hon'ble Supreme Court at para 207.9 and are consequently entitled to appear in the interview. The advertisement at Clause (ii) dated 6.12.2012 being in conflict with the directive of the Hon'ble Supreme Court by requiring minimum marks in each paper as 40% for general candidates and 35% for SC/ST/OBC candidates is liable to be quashed to the said extent. I agree with my learned brother B.K. Nayak, J. to this extent but respectfully I do not agree that the total aggregate marks both in the written test and interview have to be taken together to comply the directive of the Hon'ble Supreme Court."

30. In the aforesaid case the decisions reported in ***(2008) 3 SCC 512, K. Manjusree v. State of A.P.; (2008) 7 SCC 11, Hemani Malhotra v. High Court of Delhi; (2010) 3 SCC 104, Ramesh Kumar v. High Court of Delhi & another; (2014) 5 SCC 774, Bishnu Biswas & others v. Union of India & others*** have also been referred to.

31. I have taken the view at paragraphs-34 and 35 of the aforesaid judgment in the following manner:

> **"34.** From the aforesaid decisions of the Hon'ble Apex Court, it is clear that where statutory rules prescribe a particular mode of selection, it has to be given strict adherence. Moreover, it is emanated from the aforesaid decision that if the statutory rules give a particular benchmark for interview it has to be followed because at the interview many essential aspects of the candidature of a candidate are necessary to be evaluated. Thus, recently the Hon'ble Supreme Court in the case of ***Salam Samarjeet Singh v. High Court of Manipur at Imphal***, reported in ***(2016) 10 SCC 484*** have also been pleased to consider a similar issue. Although the two members Bench have

given independent views by referring the judgment to the Larger Bench to decide the issue in that case but their Lordships have consistently taken the view that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly.

(Underlined for emphasis)

35. Adverting to the present case, it appears that the directive of the Hon'ble Supreme Court in ***Brij Mohan case (supra)*** have directed to follow the concerned Recruitment Rules while conducting the written test and the interview and Their Lordships have categorically directed that while giving the interview mark, one mark per year of service in the Fast Track Court also should be taken into consideration. The OSJS & OJS Rules also prescribe that there should be 40 % marks in the interview. This process has also been adopted by this Court in its Full Court proceeding dated 26.11.2012. Thus, the OSJS & OJS Rule in conjoint reading with the Full Court proceeding of this Court in compliance to the directive of the Hon'ble Supreme Court have rightly issued notice vide Annexure-7 that there should be minimum interview mark as 40% while there will be 100 marks in the interview. So, with due respect to my learned Esteemed brother B.K. Nayak, J., the minimum mark for the interview stipulated by the OSJS & OJS Rule must be adhered to and consequently Clause (iii) in Annexure-7 is legal and proper requiring no interference."

32. The aforesaid view has been dissented by my learned brother Hon'ble Sri Justice B.K. Nayak as observed in the respective paragraphs for which on this point the matter has been referred to the 3rd Hon'ble Judge and the opinion of the 3rd Hon'ble Judge has not been received.

However, in pursuance of the aforesaid view, in the present case the petitioner has secured aggregate of 55% marks which is less than 40% in the written examination for which he is not eligible otherwise to appear in the viva voce. It will not be out of place to mention that the advertisement made by the opposite party No.3 at Clause (ii) is not in accordance with the Hon'ble Apex Court but keeping 40% cutoff marks in the viva voce out of 100 is legal and proper.

33. Apart from this, the question arises whether the petitioner can challenge the examination after he participated in the same examination and became unsuccessful to qualify in the examination. It is trite in law that a

candidate having participated in selection process and after became unsuccessful cannot challenge same selection process. So, in the present case petitioner has no locus standi to challenge the examination in question. Point No.(II) is answered accordingly.

CONCLUSION:

34. In terms of above discussion as mentioned hereinabove, the prayer of the petitioner that the examination be declared illegal and invalid and he be continued as regular Additional District Judge sans merit. Consequently prayer for not to hold viva voce and not to terminate the services of petitioner are also rejected. The writ petition being devoid of merit stands dismissed.

B.K. NAYAK,J.

35. I had the advantage of going through the judgment of my learned Brother and, I agree with the ultimate conclusion reached by my learned brother that the petitioner is not entitled to the reliefs sought for by him. However, I prefer to shortly add the following reasons for the conclusion. Facts pleaded by the parties need no repetition.

36. This writ petition was filed initially by two persons. Petitioner No.2, Kasinath Rout has withdrawn from the writ petition with liberty to file a fresh writ petition as per order dated 18.01.2017. Hence, this writ petition is confined to only petitioner No.1, who is hereinafter referred to as 'the petitioner'.

37. Petitioner's two fold prayer are that he being selected and appointed as Fast Track Additional District judge by following the procedure for direct recruitment of District Judge and in view of the order passed by the Hon'ble supreme Court in ***Brij Mohan Lal v. Union of India and others; (2002) 5 Supreme Court Cases 1*** hereinafter referred to as **'*Brij Mohan Lal*-(1)'**), the petitioner should not be terminated from service and be allowed to continue in the cadre of District Judge on regular basis. His second prayer is that the recruitment test as per the advertisement pursuant to final judgment of the Hon'ble Supreme Court in the same case of ***Brij Mohan Lal***, reported in ***(2012) 6 SCC 502*** (hereinafter referred to as "***Brij Mohan Lal*-(2)"**) should be quashed and the tests should not be allowed to be held.

38. On introduction of the scheme for establishment of Fast Track Courts by the Central Government, the State Government framed rules called "The

Orissa Judicial Service (Special Scheme) Rules, 2001". The Scheme was being funded by the Central Government under the Five Year Plans and accordingly the recruitment and appointment under the aforesaid 2001 Rules was purely schematic and not of permanent character, which otherwise means that the persons appointed under the Scheme will continue in office as Fast Track Ad hoc Additional District Judges till the Central Government decides to continue with the Scheme. Of course as per order of the Hon'ble Apex Court in ***Brij Mohan Lal*-(1)** (supra) the persons who were recruited under the scheme to the Fast Track Courts by following the procedure as per rules governing direct recruitment of District Judges from the Bar may aspire for continuing in the regular cadre of District Judge. After the Central Government decided to abolish the Scheme of Fast Track Courts, writ petitions were filed in several High Courts and also even before the Hon'ble Supreme Court praying to direct the Central Government not to abolish the Scheme of Fast Track Courts. All those petitions were heard by the Hon'ble Supreme Court in that very case of ***Brij Mohan Lal*** and the final judgment was passed as per judgment in ***Brij Mohan Lal*-(2)** (supra), wherein the Hon'ble Supreme Court directed for regularizing the services of the Fast Track Court Judges, whose services had not been terminated on ground of dishonesty or doubtful integrity, by subjecting them to limited recruitment examination consisting of both written and viva-voce tests. The guidelines and directions in this respect have been given in paragraph ten (10) of the judgment in **Brij Mohan Lal(2)**.

Therefore, whatever direction or observation was given in ***Brij Mohan Lal*-(1)** with regard to regularization of directly recruited Fast Track Court Judges which was an interim order, was superseded by the final judgment in ***Brij Mohan Lal*-(2)**. After passing of the final judgment, the directions/ observations made in ***Brij Mohan Lal*-(1)** lost their force, and it is only the directions given in ***Brij Mohan Lal*-(*2*)** which are necessary to be complied with. In the case of ***Brij Mohan Lal*-(*2*)** the Hon'ble Supreme Court having given their thumb of approval to the decision of the Union Government to discontinue the Fast Track Courts Scheme, and the State Government having not resolved to fund the Fast Track Courts established under the Scheme, the petitioner and all other Fast Track Court Ad hoc Additional District Judges were liable to be terminated. Keeping in view the fact that the Fast Track Court Judges had rendered a number of years of service as Additional District Judges and crossed the age limit for entering into any other service, the Hon'ble Supreme Court in ***Brij Mohan Lal*-(2)** laid down guidelines to be followed for the absorption of such terminated

Fast Track Court Judges in the regular cadre of District Judge, and that in pursuance thereto the High Court of Orissa issued advertisement for conducting tests for the Ad hoc Additional District Judges for their absorption in the regular cadre. Therefore, the petitioner cannot take objection to **Brij Mohan Lal-(2)** and the consequential tests for the recruitment.

39. In the aforesaid circumstances the petitioner is not entitled to the reliefs sought for by him and the writ petition accordingly stands dismissed.

Writ petition dismissed.

2017 (II) ILR - CUT-1106

S. K. MISHRA, J.

W.P.(C) NO. 4696 OF 2016

PROF. DIBAKAR NAIK ……..Petitioner

.Vrs.

HON'BLE CHANCELLOR OF ODISHA & ORS. ……..Opp. Parties

ODISHA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY ACT, 1965 – S.9 (2), (3)

Whether the word "shall" appearing in section 9(3) of the Act is mandatory or directory - ? – Held, mandatory.

In this case, the word "shall" appearing in section 9(3) of the OUAT Act is mandatory and the provision that the term of the office of the Vice Chancellor shall be three years from the date of appointment does not render section 9(2) of the OUAT Act nugatory, which provides that a person shall not be appointed or continued after attaining the age of 65 years. (Para 7)

Case Laws Referred to :-

1. (1975) 2 SCC 482 : Govindlal Chhganlal Patel -V- The Agricultural Produce Market Committee, Godhra & Ors.
2. (1967) 1 SCR 120 : Khub Chand -V- State of Rajasthan
3. (1973) 3 SCC 889 : Haridwar Singh -V- Bagun Sumbrui
4. (1974) 2 SCC 33 & 49 : In re Presidential Poll
5. (2007) 2 SCC 265 : Guru Jambheswar University through Registrar – V- Dharam Pal

For Petitioner : M/s. G.A.R.Dora, Senior Advocate,
G.R.Dora, Dr. J.K.Lenka

For Opp. Parties : M/s. Jayant Das, Senior Advocate,
Aditya N.Das, E.A.Das, N.Sarkar
Mr. S.P.Mishra, Senior Advocate

Mr. Asok Mohanty, Senior Advocate
M/s. Gouri Mohan, S.S.Padhy, S.Satpathy,
S.Dwibedi (for intervener)

Date of Judgment : 09.10.2016

JUDGMENT

S.K.MISHRA, J.

The petitioner-Prof. Dibakar Naik is a highly educated academician having done M. Sc. in Agriculture Economics, Ph.D. in Economics and was awarded post-Doctorate in Aqua Cultural Economics with specialization in Aqua Culture Economics from the International Centre, Auburn University. He has completed 20 years as Professor; 18 Scholars acquired Ph.D. degree under his direct guidance.

2. When the appointment of Vice-Chancellor to the Orissa University of Agriculture and Technology, hereinafter referred to as the "OUAT" for brevity, was considered, he applied to the Principal Secretary to the Governor of Odisha on 18.02.2016. It is further seen that the Secretary and Director General of ICAR by virtue of letter dated 07.12.2015 in Annexure-3 recommended the petitioner's candidature for the post of Vice-Chancellor. The petitioner sent a copy of the Bio-data to the Principal Secretary for consideration. It is also found that among 12 candidates forwarded to the Chancellor by the State Government, the petitioner was shown at the top of the list. He claims that he is not only eligible but also fittest candidate keeping in view his qualification, experience and publication etc. The search committee was formed by His Excellency the Governor of Odisha and Chancellor, OUAT. The search committee called the applicants and after scrutiny forwarded the names of the short listed candidates to the Chancellor but petitioner was not called.

3. The petitioner asserts that by adopting a misinterpretation of Sub-section (3) of Section 9 of the Orissa University of Agriculture and Technology Act, 1965, hereinafter referred to as the "OUAT Act" for brevity, his name is not considered for the appointment of Vice-Chancellor. It is

asserted that as per Sub-section (2) of Section 9 of the OUAT Act, a person, who has not attained the age of 65 years, is eligible. It is therefore contended by the petitioner that a person below 65 years is eligible for the post of Vice-Chancellor. The term of three years has nothing to do with the eligibility of the candidate. Therefore, he prayed by further elaborating on this issue that the appointment made in pursuance of the recommendation made by the search committee, thereby appointing Surendranath Pasupalak should be quashed and the opposite parties should be directed to hold fresh selection and consider the selection of Vice-Chancellor on merits. In this case, the opposite parties have appeared but the most important counter filed by the opposite party no.1, who happens to be Special Secretary to Governor of Odisha and Chancellor of OUAT. The main contention relied upon by the Special Secretary is that a conjoint reading of Sub-sections (2) and (3) of Section 9 of the OUAT Act, 1965 it is apparent that a person, who has attained 65 years, cannot be appointed nor shall hold the post of Vice-Chancellor and the term of the office of the Vice-Chancellor shall be three years from the date of his appointment. Thus, keeping in view the statutory mandate, there is no discretion in the hands of the Chancellor to give appointment for a period shorter than three years in view of the use of the expression "shall" in Section 9(3) of the OUAT Act, 1965. Thus, from the pleadings and arguments advanced by the learned counsels for the parties, basic question that arises is regarding the interpretation of Section 9, especially Sub-sections (2) and (3) of the aforesaid OUAT Act. It is apposite to take note of the exact words appearing in the statute.

> " 9 (1) Omitted.
>
> (2) No person, who has attained the age of sixty-five years, shall be appointed or shall continue to hold the office of the Vice-Chancellor,
>
> (3) The term of office of the Vice-Chancellor shall be three years from the date of his appointment.
>
> Provided that the Chancellor may, from time to time, extend the aforesaid term of office for a total period not exceeding six months.
>
> (4) xxxx xxxx"

4. Several cases have been relied upon by the contesting parties regarding the interpretation of statute. In ***GOVINDLAL CHHAGANLAL PATEL VS. THE AGRICULTURAL PRODUCE MARKET COMMITTEE, GODHRA AND OTHERS*** (1975) 2 SC C 482, a bench of

three judges of the Hon'ble Supreme Court had examined Section 6(5) of the Gujarat Agricultural Produce Markets Rules, 1965 to consider how the word "shall" and "may" has to be interpreted. The most important discussion regarding this appears at paragraphs 9, 10 and 13. At paragraph-9 of the aforesaid case, the Hon'ble Supreme Court took note of the Section 6 of the aforesaid Gujarat Agricultural Produce Markets Act and held that it is the normal rule of construction of statute, a rule not certainly absolute and unqualified, but the condition which brings to play exception to that rule do not exist. The Hon'ble Supreme Court further held that far from it, the scheme of the Act and the purpose of particular provision in Section 6(1) underline to give provision to its plain and natural meaning. It is not reasonable in the Legislature to assume ignorance of distinction between "section" of the statute and "sub-section" of that Section. At paragraph-11, the Hon'ble Supreme Court quotes, Maxwell, Crawford and Craies abound in illustration where the words "shall" and "may" are treated as interchangeable. "Shall be liable to pay interest" does not mean "must be liable to pay interest", and "may not drive on the wrong side of the road" must mean "shall not drive on the wrong side of the road". But the problem which the use of language poses is: Does the legislature intend that its command shall be performed ? Or it is enough to comply with the command in substance ? In other words, the question is "is the provision mandatory or directory".

The Hon'ble Supreme Court at paragrarph-12 in the aforesaid case further observed that plainly, "shall" must normally be construed to mean "shall" and not "may" for the distinction between the two is fundamental. Granting the application of mind, there is little or no chance that one, who intends to leave a leeway will use the language of command in the performance of an act. The Apex Court further observed that since even lesser directions are occasionally clothed in words of authority, it becomes necessary to determine and ascertain the true meaning lying behind mere words.

At paragraph-13, in the case of Govindlal Chhaganlal Patel Vs. The Agriculture Produce Market Committee, Godhra & others (supra), the Hon'ble Supreme Court took note of a very American case approvingly the plain question whether statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by construing its nature, design, and consequence which would follow from

constructing in the way or the other. After quoting the same, the Hon'ble Supreme Court in the aforesaid case held that the governing factor is the intent of legislature, which should be gathered not from the words used by the legislature but from the variety of other circumstance and consideration. In other words, the use of word 'shall' or 'may' is not conclusive whether a particular requirement of law is mandatory or directory. But the circumstance that legislature has used a language of compulsive force is always great relevance in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to construed as peremptory. The Hon'ble Supreme Court further observed that if the words of a statute are themselves precise and unambiguous, no more is necessary than to expound those words in ordinary sense, the words themselves in such case best declaring the intention of the legislature. Thereafter, the Hon'ble Supreme Court has examined the ratio decided in ***Khub Chand v. State of Rajasthan***, (1967) 1 SCR 120, ***Haridwar Singh v. Bagun Sumbrui,*** (1973) 3 SCC 889 and ***In re Presidential Poll,*** (1974) 2 SCC 33 & 49 and come to the conclusion at paragraph-18 that the word appearing in the statute cannot be treated as "may" and the notification must be issued in the Gujarati newspaper having circulation in a particular area. This judgment is a locus-classicus and perhaps it is not necessary to go into the other judgments relied upon by the parties.

5. This Court finds it profitable to take note of the case of ***GURU JAMBHESWAR UNIVERSITY THROUGH REGISTRAR v. DHARAM PAL,*** (2007) 2 SCC 265. The Hon'ble Supreme Court has the occasion to examine the Section 25-F (b) and 2(aaa) of the Industrial Disputes Act, 1947. After taking into consideration a number of earlier cases decided by the Hon'ble Supreme Court, it at paragraph-10 of the aforesaid case, in a very clear and uncertain term observed that the language used in Section 2 (aaa) is absolutely plain and clear and, therefore, there is no slightest ambiguity in the same. The Hon'ble Supreme Court further held that it is well settled principle of law that words of a statute are first understood in ordinary or popular sense and phases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or there is something in the context or in the object of the statute to suggest to the contrary. The true way is to take the words of the legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or the context of the words in question, controlled or altered. As is often said the golden rule is

that the words of a statute must prima facie be given their ordinary meaning and ordinary meaning of the words should not be departed from unless it can be shown that the legal context in which the words are used requires a different meaning.

6. Coming to the question at hand by applying the aforesaid principles, this Court takes note of the fact that Sub-section (2) of Section 9 of the OUAT Act, 1965 provides that no person, who has attained 65 years shall be appointed or shall hold the office of Vice-Chancellor. Sub-section (3) of Section 9 of the OUAT Act provides that the term of the office of the Chancellor shall be three years from the date of his appointment. The learned Senior Advocate Mr. Dora submitted that if the Sub-section (3) of Section 9 of the OUAT Act is given effect, it will make Sub-Section (2) nugatory in the sense that a person, if he is attained at the age of 62 years, may continue up to 65 years but a person, who has already completed 62 that may have lesser time as tenure in the office and shall also be appointed as Vice-Chancellor and the words "shall" appearing in Sub-section (3) should be interpreted as "may". On this issue, the learned counsels appearing for the opposite parties, especially Mr. Asok Mohanty, Senior Advocate contends that the two provisions has to be read together and in a harmonious way. There is no ambiguity in Sub-section (3) of Section 9 of the OUAT Act. So, there is no need to control the same by the objectives and reasons of the enactment or the preamble of the OUAT Act, 1965. It is argued that if Sub-section (3) of Section 9 of the OUAT Act is taken to be lying down a mandatory even that the term of the VC shall be three years from the date of his appointment, a person, who has already crossed 62 cannot appointed as the Vice-Chancellor.

7. In applying the principles in the aforesaid discussed cases of the Hon'ble Supreme Court and giving harmonious interpretation to both the provisions, this Court is of the opinion that the word "shall" appearing in Sub-section (3) is mandatory. This interpretation of the clause is also in the public interest as the statute itself provides that a person should at least work as Vice-Chancellor of the OUAT for three years, thereby he can make a better plan of his academic career of the students in a better way and still have a effective implementation of the said plan and objectives. This provision of having at least three years of service from the date of appointment of the Vice-Chancellor is also taking out short tenures appointment, thereby protecting University from frequent change of administration and fluctuating administrative decisions and policies. So, this Court is of the opinion that the word "shall" appearing in Sub-Section (3) of

Section 9 of the OUAT Act is mandatory and the provision that the term of the office of the Vice-Chancellor shall be three years from the date of his appointment does not render Sub-Section (2) of Section 9 of the OUAT Act nugatory, which provides that a person shall not be appointed or continue after he attained the age of 65. Hence, there is no merit in the writ petition. The writ petition is, therefore, dismissed. However, there shall be no orders as to the costs.

Writ petition dismissed.

2017 (II) ILR - CUT-1112

DR. A.K. RATH, J.

CMP NO. 1083 OF 2014

LABANGALATA NAYAK ……..Petitioner

.Vrs.

RAMESH CH. PATTNAIK & ORS. ……...Opp. Parties

LEGAL SERVICES AUTHORITIES ACT, 1987 – S.21

Award of the Permanent and Continuous Lok Adalat – Whether such award can be challenged in spite of the bar contained U/s. 21(2) of the Legal Services Authorities Act, 1987 or Order 23 Rule 3A C.P.C. ? Held, the above award can be challenged by filing a petition under Articles 226, 227 of the Constitution of India.

(Para 12)

Case Laws Referred to :-

1. 2015 (II) ILR-Cut. 504 : Kedar Nath Nayak@ Ors. -V- Sisira Dei (dead) by L.Rs. & Ors.
2. 2016(I) CLR 398 : Smt. Gourimani@Umamani Devi & Ors. -V- Narayan Tripathy @ Ors.
3. 2016 (Supp.-II) OLR 750 : Ramakrushna Muda -V- Raghunath Mudra & Ors.

For Petitioner : Mr. D.P.Mohanty

For Opp. Parties : Mr. S.P.Mishra, Sr. Adv.,
Mr. K.M.Dhal & A.Mohanty

Date of hearing :14.09.2017
Date of judgment:18.09.2017

JUDGMENT

DR. A.K.RATH, J.

This petition challenges the orders dated 31.1.2014 and 6.2.2014 passed by the Judge, Permanent and Continuous Lok Adalat, Cuttack in Title Suit No.221 of 1979.

2. The brief facts necessary to appreciate the controversy are that one Puspendra Kumari, wife of Sailendra Narayan Singh, was the owner of the land measuring an area of Ac.1.203 dec. appertaining to Khata No.18, Plot No.1032 of Mouza-Tulasipur, Cuttack town with a house standing thereon. She instituted Title Suit No.287 of 1978 against Ramesh Chandra Pattanaik for declaration of right, title and interest, recovery of possession and permanent injunction in respect of Ac.0.82 dec. 5 kadies of land. Ramesh instituted Title Suit No.221 of 1979 for specific performance of contract against Puspendra Kumari in respect of Ac.0.116 dec. of land. Rajanirani Samantasinghar, mother of Ramesh, instituted Title Suit No.256 of 1979 against Sailendra, husband of Puspendra Kumari & others for specific performance of contract. Sukanti Pattnaik, wife of Ramesh, instituted C.S.(I) No.38 of 2006 for a declaration that the sale deed No.3552 dated 21.6.2005 executed by the learned Civil Judge (Senior Division), 1st Court, Cuttack as void, illegal and inoperative and to declare the judgment and decree dated 19.4.2003 and 2.5.2003 respectively passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack in Tile Suit No.443 of 2000 as void and not binding. All the suits had been instituted in the court of the learned Civil Judge (Senior Division), 1st Court, Cuttack The schedule of properties, mentioned in all the suits, are as follows;

SUITS	SCHEDULE
T.S. No.287 of 1978	Khata No.18, Plot No.1032 Ac.0.82 dec. 5 kadies
T.S. No.221 of 1979	Sabak Khata No.18, Plot No.1032 corresponding to Hal Khata No.7320, Hal Plot No.558/1545, area Ac.0.116 dec.
T.S. No.256 of 1979	Sabak Khata No.18, Plot No.1032 corresponding to Hal Khata No.730, Hal Plot No.557,

	area Ac.0.80 dec.
C.S. No.38 of 2006	Khata No.18, Plot No.1032, Area Ac.0.80 dec. All are of Mouza-Tulsipur Cuttack town

3. The petitioner as plaintiff instituted Title Suit No.443 of 2000 for specific performance of contract against Puspendra Kumari. The suit was decreed. Since the defendant did not come forward to execute the sale deed, the decree was executed and the sale deed was registered in his favour through process of court on 21.6.2005 in respect of the land appertaining to Hal Khata No.730, Hal Plot No.557, Ac.0.105 dec.

4. Sukanti was not a party in T.S No.256 of 1979. She filed an application for impleadment. The same was allowed. Thereafter, Sukanti instituted C.S. No.38 of 2006 seeking reliefs mentioned supra. Pursuant to the order of this Court, four suits continued simultaneously. All suits were posted for judgment on 30.1.2014. On the same day, opposite party no.1 and opposite party nos.2 to 8 filed a petition for compromise in Title Suit No.221 of 1979 and dismissal of connected suit, i.e., Title Suit No.287 of 1978. On the very day aforesaid opposite parties filed another petition for compromise of T.S. No.256 of 1979 and C.S (I). No.38 of 2006. The petitions were rejected. Title Suit No.256 of 1979 and C.S. No.38 of 2006 were dismissed on contest. The compromise petition filed in Title Suit No.221 of 1979 was sent to the Permanent and Continuous Lok Adalat, Cuttack. The petitioner made objection to the compromise on the ground that a portion of her land had been included in the compromise petition and the same was not the subject-matter of dispute in the suit. The compromise petition does not contain any specific schedule. The same only relates to Schedule-B of the plaint in T.S. No.221 of 1979, i.e., Plot No.558/1545. The compromisepetition was not supported by affidavit. Though the area of Plot No.558/1545 was Ac.0.70 dec., but then the area Ac.0.116 dec. was included in the compromise petition without any specification. The Judge, Permanent and Continuous Lok Adalat, Cuttack overruled the objection of the petitioner. On the basis of the memo filed by opposite party no.2 indicating the area proposed to be transferred, the compromise was recorded and the suit was disposed of in terms of the compromise.

5. Heard Mr.D.P. Mohanty, learned counsel for the petitioner and Mr. S.P. Mishra, learned Senior Advocate along with Mr. K.M. Dhal and Mr.A. Mohanty, learned counsel for opposite party no.1.

6. Mr. Mohanty, learned counsel for the petitioner submitted that the petition under Article 227 of the Constitution is maintainable against the award passed by the Permanent and Continuous Lok Adalat. Aggrieved party can challenge the same under Article 226 and/or Article 227 of the Constitution. Since the petitioner was not a party to the compromise, but was substantially affected by the decree, the petition is maintainable. He further contended that the petitioner as plaintiff instituted T.S. No.443 of 2000 for specific performance of contract against Puspendra Kumari. The suit was decreed. As the defendant did not come forward to execute the sale deed, the sale deed was executed through process of court on 21.6.2005. A part of an area has been illegally included in the compromise petition filed by the parties. The petitioner was not a party to the said suit. Her objection was overruled without any rhyme or reason. The effect of compromise will take away the judgment and decree passed by the competent court of law. To buttress his submission, he relied on the decision of the apex Court in the case of State of Punjab v. Jalour Singh, AIR 2008 SC 1209.

7. Per contra Mr. Mishra, learned Senior Advocate for the opposite party no.1 contended that the petitioner has no locus standi to challenge the legality and validity of the compromise decree/award passed by the Permanent and Continuous Lok Adalat. Title Suit No.287 of 1978 and Title Suit No.221 of 1979 were heard analogously and at the fag end of the trial of the suits, the parties entered into compromise, whereupon the defendant agreed to execute the registered sale deed in favour of the plaintiff-opposite party no.1 in respect of the suit property in T.S. No.221 of 1979 after receiving consideration of Rs.21,46,000/-. The compromise petition was referred to the Permanent and Continuous Lok Adalat whereafter the award was passed. The petitioner was not party in both the suits. The consent decree was merely the record of contract between the parties. Since no sale deed has been executed and registered as yet by defendants-opposite parties 2 to 8 in favour of plaintiff-opposite party no.1, the award is still in the domain of an executory contract. He further contended that the claim of opposite party no.1 in the suit was for Ac.0.116 dec. out of Sabik Plot No.1032 with boundaries given in Schedule-B of the plaint. It is preposterous on the part of the petitioner to say that the Permanent and Continuous Lok Adalat took objection raised by the petitioner into consideration but in a most improper manner asked opposite party no.2 to file a separate memo as to from which plot, balance area was proposed to be transferred under the compromise. Since the area of Hal Plot No.558/1545 is Ac.0.070 dec., opposite party no.2 on the direction of the Permanent and Continuous Lok Adalat rightly filed a

separate memo indicating therein that he was proposing to transfer the balance area of Ac.0.046 dec. out of H.S Plot No.557 which stood recorded in the name of his mother. It is only after the sale deed is executed and registered, then only it can be ascertained as to whether the right, title and interest of the petitioner over Hal Plot No.557 is affected, since during Hal settlement operation Sabik Plot No.1032 has been sub-divided into several Hal plots including Hal Plot No.557. He further contended that the mother of opposite parties 2 to 8 filed T.S No.287 of 1978 for eviction of opposite party no.1 and recovery of possession of Ac.0.082 dec. 5 kadies of land out of Sabik Plot No.1032 since opposite party no.1 was in possession of that portion of Sabik Plot No.1032. In the event T.S No.287 of 1978 is decreed, opposite party no.1 is liable to be evicted from Ac.0.082 dec. 5 kadies of land. Thus the petitioner has no valid and genuine grievance against the compromise decree/award. He further contended that it is open to the petitioner to file appeal under Sec. 96 CPC, as she was not a party to the suit or institute a separate suit. He relied on the decisions of this Court in the case of Kedar Nath Nayak @ others v. Sisira Dei (dead) substituted by L.Rs & others, 2015 (II) ILR – Cut. 504, Smt. Gourimani @ Umamani Devi & others v. Narayan Tripathy @ others, 2016 (I) CLR 398 and Ramakrushna Muda v. Raghunath Mudra & others, 2016 (Supp.-II) OLR 750.

8. The seminal point that inter alia hinges for consideration is as to whether the petition under Article 227 of the Constitution of India is maintainable against the award passed by the Lok Adalat ?

9. In Jalour Singh (supra), the question arose before the apex Court as to what is the remedy available to the aggrieved person of the award passed by the Lok Adalat under Sec. 20 of the Legal Services Authorities Act. In that case, the award was passed by the Lok Adalat resulting in disposal of the appeal pending before the High Court pertaining to a claim case arising out of Motor Vehicle Act. Assailing the award, one party to the appeal filed a writ petition under Article 226/227 of the Constitution of India. The High Court dismissed the writ petition holding, inter alia, that the same is not maintainable. The aggrieved party filed an appeal by way of special leave before the apex Court. The apex Court, after examining the scheme of the Act allowed the appeal and set aside the order of the High Court. The apex Court held –

> "12. It is true that where an award is made by the Lok Adalat in terms of a settlement arrived at between the parties (which is duly signed by

parties and annexed to the award of the Lok Adalat), it becomes final and binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any court. If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondent to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat. The question of challenging such an order in a petition under Article 227 does not arise. As already noticed, in such a situation, the High Court ought to have heard and disposed of the appeal on merits."

10. Taking a cue from Jalour Singh (supra), the apex Court in Bharvagi Constructions & another v. Kothakapu Muthyam Reddy & others (Civil Appeal No.11345 of 2017 arising out of SLP(C) No.23605 of 2015) disposed of on 07.09.2017) held thus;

"27. In our considered view, the aforesaid law laid down by this Court is binding on all the Courts in the country by virtue of mandate of Article 141 of the Constitution. This Court, in no uncertain terms, has laid down that challenge to the award of Lok Adalat can be done only by filing a writ petition under Article 226 and/or Article 227 of the Constitution of India in the High Court and that too on very limited grounds.

28) In the light of clear pronouncement of the law by this Court, we are of the opinion that the only remedy available to the aggrieved person (respondents herein/plaintiffs) was to file a writ petition under Article 226 and/or 227 of the Constitution of India in the High Court for challenging the award dated 22.08.2007 passed by the Lok Adalat. It was then for the writ Court to decide as to whether any ground was made out by the writ petitioners for quashing the award and, if so, whether those grounds are sufficient for its quashing.

29) The High Court was, therefore, not right in by passing the law laid down by this Court on the ground that the suit can be filed to challenge the award, if the challenge is founded on the allegations of fraud. In our opinion, it was not correct approach of the High Court to deal with the issue in question to which we do not concur."

11. The law laid down by the apex Court in the case of Jalour Singh & Bharvagi (supra) proprio vigore apply to the facts of the case.

12. Thus inescapable conclusion is that notwithstanding the bar contained in Legal Services Authorities Act or Order 23 Rule 1-A (ii) CPC, the only remedy available to the aggrieved person is to challenge the award of the Permanent and Continuous Lok Adalat by filing a petition under Article 226 and/or Article 227 of the Constitution.

13. In Ramakrushna Mudra (supra), this Court relied on the decision of the apex Court in the case of Municipal Corporation of Delhi v. Sh. Jai Singh and others, 2010 AIR SCW 5968 wherein the scope of Article 227 of the Constitution had been dealt with. In Municipal Corporation of Delhi (supra), the apex Court held :

> "xxx xxx xxx
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> Before we consider the factual and legal issues involved herein, we may notice certain well recognized principles governing the exercise of jurisdiction by the High Court under Article 227 of the Constitution of India. Undoubtedly the High Court, under this Article, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with well established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this Article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well recognized constraints. It cannot be exercised like a 'bull in a china shop', to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice. The High Court cannot lightly or liberally act as an appellate court and reappreciate the evidence. Generally, it cannot substitute its own conclusions for the conclusions reached by the

courts below or the statutory/quasi-judicial tribunals. The power to re-appreciate evidence would only be justified in rare and exceptional situations where grave injustice would be done unless the High Court interferes. The exercise of such discretionary power would depend on the peculiar facts of each case, with the sole objective of ensuring that there is no miscarriage of justice.

xxx xxx xxx"

14. On the anvil of the decisions cited supra, the instant case may be examined. The assertion of the petitioner is that the suit filed by her against Puspendra Kumari for specific performance of contract had been decreed. The sale deed was executed through process of court on 21.6.2005. She was not a party to Title Suit No.221 of 1979 and Title Suit No.287 of 1978. A portion of land which was alienated in her favour, had been included in the compromise petition. In the event the compromise decree is given effect to, then earlier decree passed in her favour and consequential execution of the sale deed will be non est. The same cannot be. Since the case requires adjudication of the aforesaid aspect, a detailed scrutiny of the record is to be made.

15. In view of the same, the impugned orders dated 31.1.2014 and 6.2.2014 passed by the passed by the Judge, Permanent and Continuous Lok Adalat, Cuttack in Title Suit No.221 of 1979 are set aside. The matter is remitted back to the learned trial court. Liberty is granted to the petitioner to file a petition in support of her case. It is open to the opposite parties to file objection to the same. Learned trial court shall ascertain as to whether the suit schedule land alienated in favour of the petitioner through process of court by means of registered sale deed dated 21.6.2005 has been included in the compromise petition. In the event learned trial court comes to the conclusion that the petitioner's land has been included in the compromise petition, it shall exclude the same. Thereafter, the learned trial court shall dispose of the suits in terms of the compromise petition filed by the parties.

16. On a bare reading of the decisions in the case of Gourimani and Kedar Nath Nayak (supra), it is evident that the same are distinguishable on facts.

17. The petition is allowed to the extent indicated above. No costs.

Petition is allowed.

2017 (II) ILR - CUT-1120

DR. A.K. RATH, J.

R.S.A. NO. 490 OF 2005

PRAVAKAR SAHOO & ANR. ……..Appellants

.Vrs.

STATE OF ORISSA & ANR. ……Respondents

ODISHA PREVENTION OF LAND ENCROACHMENT ACT, 1972 – S.16

Whether the civil Court has jurisdiction to adjudicate the complicated question of title inspite of the bar contained in section 16 of the O.P.L.E. Act, 1972 ? Held, yes. (Para 10)

Case Laws Referred to :-

1. AIR 1982 ORISSA 207 : Abhimanyu Jee -V- Dr. Gayaprasad & Ors.
2. AIR 1991 SC 884 : L.I.C. of India -V- M/s. India Automobiles & Co. & Ors.
3. AIR 1996 ORISSA 199 : State of Orissa -V- Bhanu Mali (dead) Nurpa Bewa & Ors.
4. AIR 1982 SC 1081 : Govt. of Andhra Pradesh –V- Thummala Krishna Rao & Anr.
5. ILR 1980 (1) Cutt.582 : Ghasi Khamari & Ors. -V- State of Orissa & Ors.
6. AIR 1979 Orissa 8 : Satyabadi Naik -V- The State of Orissa
7. AIR 2001 SC 965 : Santosh Hazari -V- Purushottam Tiwari

For Appellants : Mr. B.K.Nayak

For Respondents: Mr. R.P.Mohapatra, A.G.A.

Date of Hearing :07.09.2017

Date of Judgment:13.09.2017

JUDGME3NT

DR. A.K. RATH, J.

Plaintiffs are the appellants against an affirming judgment.

02. The case of the plaintiffs is that the suit schedule land originally belonged to Ratha Prusty and Bharat Prusty. In an amicable partition, the property fell to the share of Bharat Prusty. He alienated an area of Ac.0.13 dec. appertaining to sabik plot nos.870 and 871 in favour of the plaintiffs by means of a sale deed. Delivery of possession was made to the plaintiffs. Thereafter they had constructed their house over the same and residing with their family members since 1980. The suit land was wrongly recorded in the name of the State in the hal settlement. While the matter stood thus, Encroachment Case No.11 of 1986-87 was initiated against their father. The

Tahasildar, Patna, defendant no.2, initiated Encroachment Case No.2/2000-2001 against the plaintiff no.1 in respect of the suit land. Order of eviction was passed on 8.12.2000. Plaintiff no.1 preferred Encroachment Appeal No.1 of 2001 before the Sub-Collector, Keonjhar, which was dismissed on 30.3.2001. He challenged the same in Encroachment Revision No.6 of 2001 before the Additional District Magistrate, Keonjhar. The revisional authority set aside the order and remanded the case for fresh disposal in accordance with law. It is further pleaded that the suit schedule land is a raiyati land of Bharat Prusty and others. The same was wrongly recorded in the name of State. For the self-same land, Encroachment Case No.11 of 1986-87 was initiated against their father. Initiation of encroachment case is bad in law. With this factual scenario, they instituted the suit for declaration that the order dated 19.8.2002 passed by the defendant no.2 in Encroachment Case No.2 of 2000-2001 is illegal and permanent injunction.

03. The defendant no.1 filed written statement denying the assertions made in the plaint. The case of the defendant no.1 is that the suit land has been recorded in the name of the State. The father of the plaintiffs could not establish that the suit land is a raiyati land in the Encroachment Case No.11 of 1986-87. The defendant no.2 filed written statement taking the similar stand to that of defendant no.1.

04. On the interse pleadings of the parties, learned trial court struck seven issues. Both parties led evidence, oral and documentary, to substantiate their cases. Learned trial court came to hold that plaintiffs had not perfected title over the suit land. The order of eviction passed by the Tahasildar, Patna, defendant no.2, is legal and justified. Held so, it dismissed the suit. The unsuccessful plaintiffs filed appeal before the learned District Judge, Keonjhar, which was subsequently transferred to the court of the learned Adhoc Additional District Judge (F.T.-I), Keonjhar and renumbered as R.F.A. No.63/41 of 2003/04. Learned lower appellate court came to hold that after the case was remanded by the revisional authority, the Tahasildar, Patna passed the order of eviction on 19.8.2002. The plaintiffs filed appeal. Thus, the civil court has no jurisdiction to entertain the grievance of the plaintiffs. Held so, it dismissed the appeal.

05. The second appeal was admitted on the following substantial questions of law. The same are:

> "(i) Whether the lower appellate court has committed any error in holding that the suit is not maintainable ?

(ii) Whether the findings of the court below that the suit plot does not relate to hal plot no.1472/01 is not based on any material available on record ?"

06. Heard Mr. B.K. Nayak, learned counsel for the appellants and Mr. R.P. Mohapatra, learned Additional Government Advocate for the respondents.

07. Mr. Nayak, learned counsel for the appellants argued with vehemence that the civil court has jurisdiction to entertain the suit. Learned lower appellate court is not justified in holding that civil court has lacks jurisdiction to entertain the suit. He further contended that once an appeal is filed, the learned lower appellate court is duty bound to decide all the issues. But in the instant case, the learned lower appellate court had not decided any issue. Thus the judgment of the learned lower appellate court is perverse.

08. Per contra, Mr. Mohapatra, learned Additional Government Advocate for the respondents submitted that plaintiffs had encroached upon the Government land. In a proceeding under the Orissa Prevention of Land Encroachment Act (hereinafter referred to as "OPLE Act"), order of eviction was passed. The same was not challenged by the plaintiffs. Learned trial court has rightly held that the suit land is a Government land.

09. In *Abhimanyu Jee vs. Dr. Gayaprasad and others,* AIR 1982 ORISSA 207, this Court held that the finding in the House Rent Control proceeding that there was no relationship of landlord and tenant between the plaintiff and defendants operated as res judicata and the finding was not available to be re-adjudicated in the civil court. But then, in the case of *Life Insurance Corporation of India vs. M/s.India Automobiles and Co. and others,* AIR 1991 SC 884, the apex Court observed that the decision rendered by court of limited jurisdiction, that is to say, the rent control court will not operate as res judicata in the subsequent suit relating to title notwithstanding the terms of Sec.11 of the C.P.C. including Expl.VIII thereto. Taking a cue from *Life Insurance Corporation of India* (supra), this Court in the case of *State of Orissa vs. Bhanu Mali (Dead) Nurpa Bewa and others,* AIR 1996 ORISSA 199 held that the decision in the case of *Abhimanyu Jee* (supra) must be taken to have impliedly overruled. In the said report, this Court further held that the decision of the apex Court in the case of *Govt. of Andhra Pradesh vs. Thummala Krishna Rao and another,* AIR 1982 SC 1081 was not followed in *Narayan Chandra Yotish* (supra). Taking a cue from *Narayan Chandra Yotish* (supra) and the decisions of this Court in the case of *Ghasi Khamari*

and others vs. State of Orissa and others, ILR 1980 (1) Cutt.582, *Satyabadi Naik vs. The State of Orissa,* AIR 1979 Orissa 8, this Court held that the Civil Court had jurisdiction to decide the question raised before it. It was further held that the decision of the learned Single Judge in the case of *Narayan Chandra Yotish* (supra) did not take note of the two Bench decisions of this Court arising under the very same Act as well as the decision of the apex Court rendered under an Act containing *pari materia* provisions must be taken to have been wrongly decided.

10. Notwithstanding the bar contained in Sec.16 of the OPLE Act, the civil court has jurisdiction to adjudicate the complicated question of title.

11. In *Santosh Hazari vs. Purushottam Tiwari*, AIR 2001 SC 965, the apex court held thus:

> "15. xxx xxx xxx
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> The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. The task of an appellate Court affirming the findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi v. Bijendra Narain Choudnary, AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage, adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on

facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of the fact (See Madhusudam Das v. Smt. Narayani Bai, AIR 1983 SC 114). The rule is-and it is nothing more than a rule of practice-that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the creditability of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to whether the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact (See Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh, AIR 1951 SC 120). Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

12. The lower appellate court had not dealt with the issues and dismissed the appeal on the ground that the civil court has no jurisdiction to entertain the suit. As held above, the suit is maintainable. The inescapable conclusion is that the judgment and decree of the learned lower appellate court is not sustainable in the eye of law. The substantial questions of law are answered accordingly.

13. Resultantly, the judgment and decree of the learned lower appellate court is set aside. The matter is remitted back to the leaned lower appellate court for de novo hearing.The appeal is allowed. No costs.

Appeal allowed.

2017 (II) ILR - CUT-1125

DR. A.K. RATH, J.

S.A. NO. 200 OF 1996

BULI JENA & ORS. ……..Appellants

.Vrs.

BISHNU CHARAN SUTAR ……..Respondent

ADMINISTRATIVE LAW – Void order – Not challenged in higher forum – A void order or decision rendered between the parties can not be said to be non-existent in all cases and all situations – Ordinarily, such an order will be effective inter parties until it is successfully avoided or challenged in higher forum. (Para 12)

Case Laws Referred to :-

1. 57 (1984) CLT-1 (F.B.) : Radhamani Dibya & Ors. -V- Braja Mohan Biswal & Ors.
2. Vol.33(1991) OJD 539(Civil) (F.B.) : Smt Basanti Kumar Sahu -V- State of Orissa & Ors.
3. AIR 1996 SC 906 : State of Kerala -V- M.K.Kunhikannan Nambiar

For Appellants : Mr. A.K. Mohanty

For Respondent : Mrs. Dipti Mishra

Date of Hearing :09.10.2017
Date of Judgment:23.10.2017

JUDGMENT

DR. A.K. RATH, J.

This appeal is by the defendants against a reversing judgment. The suit was for declaration of right, title and interest, confirmation of possession and in alternative recovery of possession, declaration that the entry in the M.S.R.O.R. as well as the order passed in R.F. Case No.750 of 1977 are wrong and permanent injunction.

02. The case of the plaintiff-respondent is that the suit land originally belonged to Krushna Chandra Mishra. The settlement record of right was published in the year 1930 in his name. After his death, his widow, Smt. Dibya was in possession of the land. She used to pay rent. She died in the year 1965 leaving behind her daughter's son, Pranakrushna Nanda, as her sole heir. The suit land was 'Brahmator Bahal'. Pranakrushna filed R.F. Case No.1126 of 1976. The same was allowed in his favour in the year 1978. He was in possession of the land. To press his legal necessity, he alienated the suit land to the plaintiff by means of a registered sale deed dated 6.1.1982 for a valid consideration and thereafter delivered possession. The defendants had no semblance of right, title and interest over the suit land. They obtained an order in R.F. Case No.750 of 1977. No notice was issued to him. The order is infraction of principle of natural justice.

03. The defendants filed written statement denying the assertions made in the plaint. The case of the defendants is that the suit land originally belonged to Krushna Chandra Mishra. The suit land was let out on bhag basis in favour of their father, who possessed the suit land as bhag tenant continuously for more than 45 years. Krushna Chandra Mishra died leaving his widow as the only heir, who did not want any rajbhag from their father. After death of their father, they are in possession of the same. Neither the plaintiff nor his vendor was in possession of the suit land. Their names were recorded in the major settlement R.O.R. The order passed in R.F. Case No.1126 of 1976 is illegal. The O.E.A. Collector vide order dated 22.6.1976 in R.F. Case No.750 of 1977 acknowledged the defendants to be tenants and allowed them to continue as temporary lessees. Further plea of the defendants is that Pranakrushna is not the legal heir of Krushna Chandra Mishra. The plaintiff fraudulently obtained a registered sale deed from Pranakrushna. The plaintiff had no right, title and interest over the suit land.

04. On the interse pleadings of the parties, learned trial court struck six issues. Both parties led evidence, oral and documentary, to substantiate their cases. Learned trial court came to hold that the plaintiff had failed to establish that he is in possession of the suit land. The intermediary Krushna Chandra Mishra had not filed any application under the O.E.A. Act before the competent authority to record his name. The defendants were recognized as tenant under Sec.8(1) of the O.E.A. Act by the Tahasildar in R.F. Case No.750 of 1977. It further held that the recording of the defendants' status as settled raiyat in respect of the suit land in M.S.R.O.R. is wrong. The order passed by the Tahasildar is in accordance with law. He is not entitled to get

relief of permanent injunction. Held so, it decreed the suit in part and declared the status of the defendants recorded in the M.S. R.O.R. is wrong. Assailing the judgment and decree of the learned trial court, the plaintiff filed T.A. No.5 of 1985 in the court of the learned Additional District Judge, Bhadrak, which was allowed.

05. The second appeal was admitted on the substantial questions of law enumerated in ground nos.1 to 5 of the memorandum of appeal. The same are:

> "1. Whether in view of the admitted fact that the appellants are in possession of the suit land for the last 45 years as bhag tenants and are paying water rate and on vesting of the estate on 27.6.63 the appellants were accepted as tenants by the State under Section 8(1) of the Orissa Estate Abolition Act as per Ext.C dated 22.6.78 is the learned lower appellate court is justified in observing that the relationship of land lord and tenant is to be decided under the provisions of the Orissa Land Reforms Act.
>
> 2. Whether the learned lower appellate court has erred in law in observing that the O.E.A. Collector has no jurisdiction to give a finding on the question in as much as the O.E.A. Collector has been vested with power under Section 8(1) of the said Act and under Section 8(1) of the O.E.A. Act any person who immediately before the date of vesting of an estate in the State Government was in possession of any holding as a tenant under an intermediary skill, on and date of vesting be deemed to be a tenant of the State Government and such person skill hold the land in the same rights and subject to the same restrictions and liabilities as he was entitled or subject to immediately before the date of vesting.
>
> 3. Whether in view of the concurrent findings of the courts below to the effect that the defendants are in possession of the suit land for more than 12 years as raiyats have the defendants acquired the status of occupancy raiyats and as such they are evictable from the suit land.
>
> 4. Whether the learned lower appellate court has acted illegally and with material irregularity in considering the effect of payment of water rate by the defendants which had been considered by the learned trial court which has great bearing for just decision of the case and if non-consideration of the same has materially affected the result of the case.

5. Whether in view of the admitted position as accepted by the learned lower appellate court that O.E.A. Case No.1126 of 1976 was disposed on lease principles and not under the provisions of Section 6 and 7 of O.E.A. Act does not take away the effect of the order under Section 8(1) of the said Act, if the learned lower appellate court has erred in law in not considering the effect of the order as per Ext.C in its proper perspective and if such a situation has led to a wrong conclusion."

06. Mr. Mohanty, learned counsel for the appellants submitted that the estate vested in the State on 27.04.1963. Pranakrushna was not in possession of the land at the time of vesting. R.F. Case No.1126 of 1976 filed by Pranakrushna was not for settlement under Sec.6 & 7 of the O.E.A. Act, but under the lease principles. In the said case, no affidavit was filed by the applicant Pranakrushna. The R.I. had submitted report on 22.10.1978 (Ext.D) after disposal of case. No proclamation was made as required under law. In view of the same, the order dated 20.10.1978 passed in R.F. Case No.1126 of 1976, Ext.7, by the Tahasildar is bad in law. The plaintiff has not acquired any title by virtue of the said order. The order of the Tahasildar, Ext.7, does not take away the effect of the order under Sec.8(1) of the said Act, Ext.C. The father of the defendants was a bhag chasi under the ex-intermediary till the date of vesting and thereafter under the State till his death. He being in continuous possession of the suit land for more than 12 years became automatically an occupancy tenant under the Orissa Tenancy Act. He further submitted that the findings of the learned appellate court that the relationship of landlord and tenant is to be decided under the provisions of O.L.R. Act is not tenable in the eye of law.

07. Mrs. Mishra, learned counsel for the respondent submitted that the lease was granted in favour of the plaintiff in R.F. Case No.1126 of 1976. The order had not been challenged by the defendants. The Tahasildar had jurisdiction to entertain R.F. Case No.750 of 1977 filed by the defendants. The order is without jurisdiction and a nullity.

08. Learned appellate court came to hold that the suit land vested in the State on 27.6.1963 free from all encumbrances. The suit land originally belonged to Krushna Chandra Mishra. After his death, his widow, Smt. Dibya, was in possession of the land. Pranakrushna is the son of Suryamani Debi, who was the only daughter of Krushna Chandra Mishra and Smt. Dibya. He is the only heir. The land was leased out in favour of Pranakrushna in R.F. Case No.1126 of 1976. The defendants had not challenged the order

before the competent forum. The Tahasildar had jurisdiction to pass the order. The order is valid and binding. Pranakrushna had acquired title by virtue of the said order. It further held that the very relationship of bhag chasi had not been established by the defendants. The defendants had not been able to show that their father or they were bhag tenants under Krushna Chandra Mishra or his wife by clear and cogent evidence. The plea of adverse possession putforth by the defendants was negatived.

09. On a bare perusal of the order dated 21.10.1978 passed by the O.E.A. Collector in R.F. Case No.1126 of 1976 vide Ext.7, it is evident that the land was leased out in favour of Pranakrushna. The said order has not been challenged by the defendants and attained finality. In R.F. Case No.750 of 1977, Ext.C, the O.E.A. Collector came to hold that the defendant is not the recorded baheldar, but a tenant. The settlement cannot be made in his favour under the provisions of the O.E.A. Act. Curiously it abruptly came to a conclusion that the defendant is to continue as a temporary lessee under the Government under Sec.8(1) of the O.E.A. Act as the recorded baheldars have failed to file claim petition for settlement in their favour within the stipulated time. The O.E.A. Collector dehors its jurisdiction to pass order observing that the defendants shall continue as temporary lessees. The order is nonest in the eye of law.

10. The Full Bench of this Court in the case of *Radhamani Dibya and others vs. Braja Mohan Biswal and others,* 57 (1984) C.L.T.-1 (F.B.) held:

> "Section 8(1) of the Orissa Estates Abolition Act makes no provision for an application. No enquiry is contemplated under this section. The section is merely declaratory of the continuity of the tenure of tenants as it was immediately before the date of vesting……"

11. Taking a cue from *Radhamani Dibya and others* (supra) another Full Bench of this Court in the case of *Smt. Basanti Kumari Sahu vs. State of Orissa and others,* Vol.33(1991) O.J.D. 539 (Civil) (F.B.) held:

> "8. Having regard to the provisions contained in Section 8(1) and the meaning and interpretation given to the provision by this Court, it is clear that no proceeding is contemplated under section 8(1). Therefore, no power of adjudication of tenancy right is vested in any revenue authority. It does not envisage settlement of land belonging to the Government with tenancy right."

12. In *State of Kerala vs. M.K. Kunhikannan Nambiar*, AIR 1996 S.C. 906, the apex Court held that even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact be effective inter parties until it is successfully avoided or challenged in higher forum. Mere use of the word "void" is not determinative of its legal impact. The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise.

13. The order passed by the competent authority in R.F. Case No.1126 of 1976 has attained finality. In view of the same, Pranakrushna has acquired right, title and interest over the suit schedule property. To press his legal necessity, he alienated the suit land in favour of the plaintiff by means of a registered sale deed dated 6.1.1982 for a valid consideration and thereafter delivered possession. Thus the plaintiff became the absolute owner of the suit property.

14. The word 'raiyat' has been defined in Sec.5(2) of Orissa Tenancy Act. It means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors-in-interest or persons who have acquired such a right. Sec.23(1) of the Act provides that every person who, for a period of twelve years whether wholly or partly before or after the commencement of this Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village. Sec.24(1) postulates that every person who is a settled raiyat of a village within the meaning of Sec.23 of the Act shall have a right of occupancy in all land for the time being held by him as a raiyat in that village. There is neither any pleading nor evidence on record that the defendants were settled raiyat of the village. Thus, they failed to prove that they are occupancy raiyat. The substantial questions of law are answered accordingly.

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

Appeal dismissed.

2017 (II) ILR - CUT-1131

DR. B.R. SARANGI, J.

RVWPET NO. 268 OF 2016
WITH
MISC.CASE NO. 282 OF 2016

CENTRAL RESERVE POLICE FORCE & ORS. ……..Petitioners

.Vrs.

UPENDRA PANDA ……Opp. Party

(A) LIMITATION ACT, 1963 – S.5

Delay in filing review petition – Delay due to bureaucratic movement of the file – Sufficient cause to be shown to explain each day's delay, so that the court can exercise its discretion to condone such delay.

In this case, delay of 199 days has been caused only for bureaucratic movement of the file but each day's delay has not been explained as required under law – Held, this Court is not inclined to condone the delay. (Para 5)

(B) CIVIL PROCEDURE CODE, 1908 – O-47, R-1

Review of order passed in writ petition – It can only be made if it satisfies the scope and ambit of order 47, Rule 1 C.P.C., though not in words but on principle – However, it cannot be sought as a matter of course by raising a new plea. (Paras 7, 8)

Case Laws Referred to :-

1. AIR 2011 SC 1237 : Union of India -V- Nripen Sarma
2. 2013 (4) SCC 52 : Amalendu Kumar Bera -V- State of West Bengal
3. 2012 AIR SCW 1812 : Officer of the Chief Post Master General -V- Living Media India Ltd.
4. 2014 (II) ILR-CUT-847 : State of Orissa -V- Bishnupriya Routray

For Petitioner : Mr. Bimbisar Das, Central Govt. Counsel

For Opp. Party : M/s. N.R.Routray, Smt. J.Pradhan, T.K.Choudhury, S.K.Mohanty & P.R.J.Dash

Date of judgment : 10.11.2017

JUDGMENT

DR. B.R. SARANGI, J.

The opposite party-writ petitioner, who was working as Assistant Sub-Inspector in 12th Battalion, CRPF, Sambalpur, was subjected to

disciplinary proceeding. He requested the inquiry officer to allow him to engage Sri Ganeswar Padhi, a retired Head Post Master to act as a Defence Assistant. Such request was rejected by order dated 23.12.2015 on the ground that the Defence Assistant, sought to be engaged, was not from the Unit/Force as required under Circular Order No. 05/2011. The opposite party then filed W.P.(C) No. 1566 of 2016 seeking to quash the order dated 23.12.2015 refusing to engage Defence Assistant and participate in the inquiry, the order dated 26.12.2015 directing to proceed with the proceedings on the basis of the available documents and calling for the witnesses to depose their statements to complete departmental enquiry procedure, and the order dated 20.01.2016 directing the opposite party-writ petitioner to appear before the departmental inquiry and proceed with the hearing by deposing the statement of the witnesses concerned to enable for completion of the departmental enquiry proceedings.

2. This Court by order dated 04.03.2016, relying upon the judgment dated 03.03.2009 rendered in W.P.(C) No. 2772 of 2009 (***Sohar Ranjan Pattnaik v. Union of India and others)***, as agreed to by the learned Central Government Counsel that the claim made by the writ petitioner was squarely covered by the said judgment, disposed of the writ application by quashing the orders issued by the authority on 23.12.2015, 26.12.2015 and 20.01.2016 in Annexures - 4, 5 and 8 respectively allowing the writ petitioner to engage Defence Assistant to conduct his case and further to continue the departmental proceedings afresh from the stage of preliminary enquiry. Such order dated 04.03.2016 passed in W.P.(C) No. 1566 of 2016 has been sought to be reviewed by means of this application, which has been filed after lapse of 199 days excluding the limitation period of 30 days. Consequentially, Misc. Case No. 282 of 2016 has been filed for condonation of delay in filing the review petition under Section 5 of the Limitation Act. The reasons for delay in approaching this Court have been mentioned in paragraph-4 of the said misc. case which read thus:

> *"That after disposal of the writ petition, the copy of the order was forwarded to the DIG (Law) Directorate vide letter dated 06.04.2016. Thereafter, the legal opinion and certain clarifications as required by the Ministry and Law & Justice vide Signal No.J.II-226/16-LWP dated 08.06.2016 were submitted Signal dated 11.07.2016 and 19.07.2016 for further instruction from the Law Directorate. The Law Directorate vide Signal No. J.II.226/2016-LWP-9 dated*

19.08.2016 intimated the DIG of Police, CRPF, Odisha Sector that the Ministry of Home Affairs & Ministry of Law and Justice have advised to file a Review Application with delay condonation petition, if required. After receipt of the said information, the DIG of Police, CRPF, Odisha Sector intimated the learned Assistant Solicitor General of India about the opinion of the Ministry to file a Review Petition vide their letter dated 23.08.2016. After receipt of the aforesaid letter, the Asst. Solicitor General wrote to the DIG of Police, CRPF asking him to contact the present Central Govt. Counsel for filing of the necessary Review Petition and the Dy. Commandant (Law) on behalf of the IGP, Odisha Sector, CRPF vide dated 26.09.2016 requested the present Central Govt. Counsel to prepare the Review Application. As such the review petition is filed with a delay of 182 days."

3. On perusal of the application for condonation of delay, it reveals that the reasons have been assigned as bureaucratic movement of the file and as such each day's delay has not been explained as required under law. While construing Section 5 of the Limitation Act, it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for filing of review gives rise to a right in favour of the petitioners which is binding between the parties. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown, discretion is given to the Court to condone delay and proceed with the matter. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice.

4. The apex Court has considered the application for condonation of delay and laid down the law in ***Union of India v. Nripen Sarma***, AIR 2011 SC 1237; ***Amalendu Kumar Bera v. State of West Bengal***, 2013 (4) SCC 52; and ***Officer of the Chief Post Master General v. Living Media India Ltd.***, 2012 AIR SCW 1812. Relying upon such judgments, a Division Bench of this High Court (of which this Court is a member) in Writ Appeal No. 171 of 2017 (***Union of India v. Kahnei Charan Biswal***) refused to condone delay of 637 days in filing the appeal.

5. In ***State of Orissa v. Bishnupriya Routray***, 2014 (II) ILR-CUT-847, this Court also refused to condone the delay of 706 days in preferring the appeal. Against the said judgment though SLP was filed, the same was dismissed by the apex Court because of non-furnishing the cause to condone

the delay. In the case in hand, delay of 199 days has been caused only for bureaucratic movement of the file and as such each day's delay has not been explained as required under law. Therefore, this Court is not inclined to condone the delay.

6. Apart from the condonation of delay, on perusal of the order dated 04.03.2016 passed in W.P.(C) No. 1566 of 2016, it is seen that the said order has been passed after hearing the Central Government Counsel and he had categorically agreed that the case of the opposite party-writ petitioner was squarely covered by the judgment of this Court rendered in W.P.(C) No. 2772 of 2009 (***Sohar Ranjan Pattnaik v. Union of India***) disposed of on 03.03.2009. Since the review petitioners, as opposite parties in the writ petition, were represented by learned Central Government Counsel and on his concession the matter was disposed of by the impugned order, in the considered view of this Court, they cannot turn around and seek review of the same.

7. It is well settled principle of law laid down by the apex Court that review cannot be sought as a matter of course. It can be made if it satisfies the scope and ambit of Order 47 Rule 1 of CPC, though the same is not strictly applicable to the writ proceedings but its principle applies. Such question had come up for consideration in RVWPET No. 275 of 2011 (***Suresh Kumar Agarwal v. Bimala Bhue and others)*** disposed of on 08.11.2017, wherein a Division Bench of this High Court (of which this Court is a member) has elaborately discussed the scope of review, which is very limited in nature. As the instant review application filed by the petitioners also does not come within the ambit and scope of the Order 47 Rule 1 CPC, this Court is also not inclined to review the order so passed on 04.03.2016.

8. In addition to what have been stated above, it is needless to say that, for the first time, a new plea has been taken in the application for review that in view of the Circular Order no. 05/2011 the benefit is not admissible to the opposite party. That was never brought to the notice of the Court by the learned Central Government Counsel, who was appearing for the opposite parties in the writ petition (who are petitioners in review petition). Therefore, such a new ground, as taken in the review application, cannot be the basis for review of the order dated 04.03.2016, which was passed with the agreement of the parties in view of the ratio decided by this Court in ***Sohar Ranajn Pattnaik*** (supra).

9. For all the above reasons, this Court does not find any merits, either in the application for condonation of delay, or in the application for review. Accordingly, the same are hereby dismissed. However, there shall be no order as to cost.

Petitions dismissed.

2017 (II) ILR - CUT-1135

BISWAJIT MOHANTY, J.

W.P.(C) NO. 13615 OF 2017

DEBENDRA KUMAR DALEI ……..Petitioner

.Vrs.

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

SERVICE LAW – Transfer of Petitioner as Gana Sikshyak – Action challenged – Petitioner was transferred from Jagannathpur Upper Primary School to Bajedhanua Primary School by virtue of an order of the Government Dt. 17.06.2017 on the subject of "Rationalization" of Elementary Teachers in Government Primary and Upper Primary Schools – Government resolution Dt. 25.07.2017 shows that a Gana Sikshyak on completion of 8 years of continuous and satisfactory engagement shall be regularized as "Elementary Level-V Teacher" – Since the petitioner has not yet been regularized as Elementary Level-V Teacher, order of the Government Dt. 17.06.2017 has no application to him – Held, the impugned order of transfer being a product of an arbitrary exercise of power is liable to be quashed and the petitioner shall be allowed to continue in Jagannathpur Upper Primary School with all consequential benefits as due and admissible in accordance with law. (Paras 5, 6)

Case Law Referred to :-

1. 2016 (Sup.I) OLR 1051 : Hemanta Ku. Ghadei -V- State of Odisha & Ors.

For Petitioner : Mr. Jayanta Ku. Rath, (Senior Advocate),
M/s. Durgesh Narayan Rath, P.K.Rout,
A.K.Saa & D.K.Mohapatra

For Opp. Parties : M/s. S.R.Mohapatra & T.K.Mohapatra
Standing Counsel (S. & M.E. Dept.)

Date of Judgment: 14.11.2017

JUDGMENT

BISWAJIT MOHANTY, J.

The present writ application has been filed by the petitioner with a prayer to quash his order of transfer dated 6.7.2017 under Annexure-5 passed by opp. party No.4.

2. The case of the petitioner is that he was engaged as Gana Sikshyak by the order of opp. party No.2 issued on 31.5.2008 vide Annexure-1. While so continuing, the petitioner acquired C.T. qualification on 20.1.2014. Vide Annexure-4, the Government of Odisha in School and Mass Education Department issued a resolution on 25.7.2016 wherein it was made clear that a Gana Sikshyak with +2/Degree qualification with either C.T./B.Ed and who has completed 8 years of continuous and satisfactory engagement shall be regularized as "Elementary Level-V Teacher" and on regularization, the Elementary Level-V Teacher would be allowed pay scale of Rs.5,200-20,200 with Grade Pay of Rs.2200/- with D.A. and other allowances. The petitioner has not yet been regularized as Elementary Level-V Teacher and he continues to work as Gana Sikshyak. On 17.6.2017, the Government of Odisha in Department of School and Mass Education vide Annexure-3 issued an order on the subject of "Rationalization of Elementary Teachers in Government Primary and Upper Primary Schools during Academic Session 2017-18". The said order makes it clear that rationalization in Elementary Teachers posted in Elementary Institution through out the State is to be taken up in the following manner: (a) A second teacher is to be posted in schools having single teacher and (b) At least one Graduate Science Teacher and one Graduate Arts Teacher in each Upper Primary School having Class-VIII are to be posted. In case of non-availability of adequate number of Graduate Science Teachers in the district, +2 Science teachers are to be posted in Upper Primary Schools to ensure that no Upper Primary School is left without a Science teacher. The above noted posting is to be done by the District Level Transfer Committee. It is the case of the petitioner that this resolution under Annexure-3 has no application to him as he is not an Elementary Teacher. He is only a Gana Sikshyak. Notwithstanding such position making use of the Government order under Annexure-3, the petitioner has been transferred on 6.7.2017 vide Annexure-5 to Bajedhanua Primary School. Challenging such transfer, the petitioner has filed the present writ application.

3. Mr. Rath, learned Senior Counsel appearing for the petitioner submitted that as indicated earlier, Annexure-3 only applies to Elementary Teachers and not to Gana Sikshyak. Thus, the petitioner, a Gana Sikshyak could not have been transferred while implementing the rationalization policy of the Government under Annexure-3. The petitioner can only be transferred after he is regularized as Elementary Level-V teacher/Elementary Teacher. The authorities cannot make use the order of the Government under Annexure-3 to transfer him on the ground of rationalization of posting of Elementary Teachers. Therefore, according to Mr. Rath, transferring the petitioner from Jagannathpur Upper Primary School to Bajedhanua Primary School making use of the Government letter dated 17.6.2017 under Annexure-3 is legally impermissible. Therefore, the order of transfer passed by opp. party No.4 under Annexure-5 is wholly without jurisdiction and is liable to be quashed. Further, Mr. Rath, learned Senior Counsel relied on a decision of this Court in the case of ***Hemanta Kumar Ghadei v. State of Odisha and others reported in 2016 (Supp.-I) OLR-1051,*** wherein it has been emphasized that rationalization policy does not cover transfer/ deployment order of Gana Sikshyaks.

4. Mr. Samal, learned Standing Counsel for School and Mass Education Department submitted that invoking the power under Annexure-3, a Gana Sikshyak can be transferred as a Gana Teacher is an Elementary Teacher and is covered under rationalization programme. Thus, the impugned order of transfer has been correctly issued relying on the Government order under Annexure-3.

5. From the contentions made by the respective parties, it is required to be seen as to whether a Gana Sikshyak can be transferred using Annexure-3 and whether a Gana Sikshyak be described as an Elementary Teacher so as to be covered by the Government order under Annexure-3 which speaks of rationalization of posting of Elementary Teachers.

Admittedly, the petitioner is presently working as a Gana Sikshyak. The resolution of the Government in School and Mass Education Department dated 25.7.2016 under Annexure-4 makes it clear that a Gana Sikshyak with the required qualification and on completion of 8 years of continuous and satisfactory engagement will be regularized as an Elementary Level-V teacher/Elementary Teacher. Secondly, it is not disputed that the Orissa Elementary Education Service Level-V consists of posts of Assistant Teachers of Government Primary School and Government Upper Primary

Schools and not Gana Sikshyaks as provided under the Orissa Elementary Education (Method of Recruitment and Conditions of Services of Teachers and Officers) Rules, 1997, for short, "1997 Rules". It has also been admitted by opp. party No.4 in its counter at Paragraph-6 that Elementary Level-V teacher post is only meant for Assistant Teachers. Admittedly, the petitioner is not an Assistant Teacher as his engagement has not yet been regularized as Elementary Level Teacher. Thus, he continues to be a Gana Sikshyak and cannot be described as an Elementary Teacher. In such background, this Court is of the opinion that the Circular under Annexure-A/3 has no application to a Gana Sikshyak like the petitioner. It only applies to Elementary Teachers and as indicated earlier, the petitioner is yet to become an Elementary Teacher even in the lowest grade, i.e., Elementary Level-V teacher, who is usually described as Assistant Teacher. In such background, this Court has no hesitation to come to a conclusion that the impugned order of transfer under Annexure-5 which has been issued invoking the Circular under Annexure-3 is clearly a product of arbitrary exercise of power. The opp. party No.4 could not have invoked the rationalization order of the Government under Annexure-3, which is applicable only to Elementary Teachers. Apart from this, this Court in its judgment rendered in ***Hemanta Kumar Ghadei (supra)*** has noted the circular issued by the Government of Orissa in its School and Mass Education Department on 18.5.2013 to all Collectors-cum-C.E.Os, Zilla Parishads with regard to rationalization of posting of Elementary Teachers/Zila Parishad Teachers/Sikhya Sahayakas and Gana Sikshyaks working in Government Primary and Upper Primary Schools wherein it has been made clear that though in few districts Gana Sikshyaks/Sikhya Sahayakas have been transferred, however, transfer of these category of teachers is highly objectionable.

6. For the above noted reasons, the impugned order of transfer dated 6.7.2017 under Annexure-5 transferring the petitioner from Jagannathpur Upper Primary School to Bajedhanua Primary School being a product of an arbitrary exercise of power is hereby quashed and it is directed that the petitioner shall be allowed to continue in Jagannathpur Upper Primary School with all consequential benefits as due and admissible in accordance with law. The writ application is accordingly allowed and disposed of as such.

Writ application allowed.

2017 (II) ILR - CUT-1139

BISWANATH RATH, J.

W.P.(C) NO. 29092 OF 2013

SANKARSAN PRADHAN .....Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ARTS. 15(4), 16(4)

Whether the petitioner, who born in a forward/un-reserved class and given in adoption in a backward/reserved class or any other voluntary act, can be automatically entitled to claim benefit of reservation as S.C./S.T. under Articles 15(4) or 16(4) of the Constitution of India ? Held, No. (Paras 6,7)

Case Laws Referred to :-

1. (1996) 3 SCC 545 : Valsamma Paul (MRS) -V- Cochin University & Ors.
2. (2016) 13 SCC 312 : Jayashri Bhaskar Gosavi -V- Vishwanath Krishnath Panke & Ors.
3. (1956) All E.R. 341, 345 : Lazarus Estates Ltd. -V- Beasley

For Petitioner : M/s. Samir Ku. Mishra, D.K.Pradhan, S.K.Rout, A.Behera & L.Pradhan

For Opp. Parties : Mr. Jyoti Prakash Patra, A.S.C.

Date of hearing :11.09.2017
Date of Judgment:9.10. 2017

JUDGMENT

BISWANATH RATH, J.

This writ petition involves a challenge to the decision of the State Level Scrutiny Committee dated 31.5.2013.

2. Short background involved in the case is that petitioner upon completion of his High School Certificate Examination in the year 1982 obtained a caste certificate from the competent authority i.e. the Tahasildar, Khandapara on 14.10.1982 by virtue of an outcome in the Misc. Case no.146 of 1982. His name being sponsored to the office of the opposite party No.3, the Board of Revenue, Orissa vide its order No.387 dated 11.1.1988 selected the petitioner for appointment as Junior Assistant. The petitioner joined service on 19.1.1988 and in course of his employment he has been promoted

to the post of Senior Assistant on 1.2.1991, then to the post of S.O. Level-1 on 22.2.2001. In the meanwhile, petitioner has been promoted to the post of Section Officer, Level-1 on 28.5.2004. It is alleged that while the petitioner was continuing as such, a co-employee namely Baidyanath Majhi along with some other persons filed a complaint before the opposite party No.3 raising objection to the caste certificate produced by the petitioner for the purpose of employment. Based on which, the petitioner was asked by the opposite party No.2 to submit his caste certificate in original on or before 25.11.2006. Accordingly, the petitioner submitted his caste certificate along with the residential certificate before the opposite party No.2. Being not satisfied with the certificates produced by the petitioner, the opposite party No.2 directed the petitioner to submit a recent caste certificate from the concerned authority returning back the old one to the petitioner. It also appears that though the petitioner had applied for fresh caste certificate but in the meantime, the petitioner got promotion to the post of Establishment Officer on Adhoc basis. Petitioner though submitted his joining report but the same was not accepted by the authority and his case was referred to the opposite party no.1 for further action. In the meantime, the petitioner received a letter dated 22.12.2006 calling upon him to explain within three days from the date of receipt of the letter as to why disciplinary actions shall not be taken against him for his meeting the Joint Secretary in the matter of acceptance of his joining report without having prior permission from the competent authority. The petitioner submitted his explanation. In the meantime, the petitioner was again reminded to produce the recent caste certificate, which compelled the petitioner to approach the opposite party No.1. Pursuant to which, the opposite party no.1 directed the opposite party no.2 to accept the joining report of the petitioner with a permission to the opposite party no.2 to conduct a confidential enquiry. Basing on the report to get into the appropriate disciplinary proceedings in the event the petitioner is found to have forged caste certificate, it is alleged that despite several directions the petitioner is not allowed to join in the promotional post. As such, the petitioner was constrained to approach the Orissa Administrative Tribunal by filing O.A. No.806 of 2007 for relief claimed therein. In the meantime, the opposite party No.2 referred the allegations involving the petitioner to the State Level Scrutiny Committee. The State Level Scrutiny Committee called for a report from the Tahasildar, Khandapara. At this stage, the Tahasildar, Khandapara reported that the petitioner has obtained the caste certificate under the claim that he was adopted by one Amin Pradhan, who is 'Kandha' by caste. The State Level Scrutiny Committee by its meeting dated 15.3.2007

cancelling the caste certificate of the petitioner directed for taking actions against the petitioner following the provisions contained in the Orissa Caste Certificate (S.C. & S.T.) Rules, 1980 and under the provisions of the I.P.C. Petitioner challenged the decision of the State Level Scrutiny Committee by filing W.P. (C) No.11668 of 2007 before this Court and this Court was pleased to remand the matter for fresh decision after setting aside the order passed by the State Level Scrutiny Committee. In the meantime, the State Level Scrutiny Committee again passed an order against the petitioner. Petitioner challenged the said order on the premises of being passed without affording opportunity to the petitioner vide writ petition vide W.P.(C) No.8621 of 2008 and this Court by its order dated 7.7.2009 while quashing the order of the State Level Scrutiny Committee remitted the matter again back to the State Level Scrutiny Committee for reconsideration of the matter. In the meantime, a criminal case was also initiated against the petitioner under Section 420, 468, 471 of I.P.C which matter ended with an order of acquittal vide judgment dated 31.1.2012. In the meantime, the petitioner was terminated from his service on the premises of getting employment on production of fake certificate. Petitioner filed an appeal seeking reinstatement before the Government of Orissa. Petitioner also challenged the order of termination by filing O.A. No.2299 of 2007. The Orissa Administrative Tribunal dismissed the original application by its order dated 22.11.2013 and the petitioner has filed a writ petition before this Court vide W.P.(C) No.8910 of 2013 which is claimed to be pending at this point of time. In the meantime, the proceeding before the State Level Scrutiny Committee was concluded against the petitioner holding that while reaffirming its previous order of cancellation of the caste certificate, directed the Tahasildar to correct the relevant records accordingly and while observing that the decision terminating the petitioner as appropriate, directed the D.W.O., Nayagarh to investigate and assess the kind and quantum of financial benefit enjoyed by the petitioner and his family members, further also to file necessary F.I.R to decide the criminal liability involving the petitioner, the S.P., Nayagarh was also directed therein to initiate the criminal proceeding under appropriate provisions of law, giving rise the petitioner to file the present writ petition.

3. Assailing the impugned order, Sri S. Mishra, learned counsel for the petitioner submitted that there is sufficient materials available to establish the case of the petitioner that from the date of birth, the petitioner has been recognized as the son of Amin Pradhan and there has been absolutely no material to indicate that the petitioner is the son of Panu Sahu. It is alleged

that for production of various public documents, the petitioner has been able to satisfy that he is the son of Amin Pradhan and therefore, claims that the report of the Tahasildar as well as the impugned order are all based on no material. For the grant of caste certificate on the basis of materials available on record by the competent authority, it cannot be stated that the petitioner has obtained the caste certificate on fraudulent basis and since the caste certificate is not based on fraud, cancellation of such a certificate cannot result in dismissal of a person from his service with recovery of financial benefits accrued in the meantime. There is not a single document available establishing that the petitioner is the adopted son of Amin Pradhan. Sri Mishra also claimed that there has been improper consideration of statement of Udayanath Sahu and Magi Sahoo. It is also claimed that the evidence of Udayanath Sahu and Magi Sahoo has no relevancy for the reason that both of them are in enemical term with the petitioner and there are some criminal cases pending between the petitioner and the said Udayanath Sahu and Magi Sahoo. Sri Mishra, learned counsel appearing for the petitioner also contended that the observation involving the R.O.R vide Khata no.1, Mouza-Badazhar, Tahasildar-Khandapara stands in the name of Udayanath Pradhan, Gangadhar Pradhan, Nakul Pradhan, Kokila Pradhan, Manguli Pradhan and Hara Pradhan, who are the sons and daughters of Amin Pradhan. Mere nonappearance of name of Sankarsan Pradhan in the R.O.R cannot be a ground to decide the case against the petitioner. Further, the observation of the State Level Scrutiny Committee on the basis of village address of Sankarsan Pradhan as well as the Amin Pradhan also claim to be erroneous. It is also contended that the observation and findings taking out the caste certificate of the petitioner on the basis of the petitioner's performing Durga Puja, Grama Devi Puja, Thanapati Puja and Kali Puja along with the other co-villagers remaining in the same village, has no basis. The observation of the State Level Scrutiny Committee that the petitioner doesn't have any knowledge of "Kandha Language" has also no foundation. Sri Mishra, learned counsel for the petitioner referring to several other documents annexed to the writ petition also made a claim that there is no material to disapprove the claim of the petitioner to be the son of Amin Pradhan and therefore, prayed this Court for interfering in the impugned order and setting aside the same.

4. Sri Patra, learned State Counsel on the other hand, opposing the case of the petitioner, drawing the attention of this Court to the counter affidavit filed by the opposite party nos.1 & 2 submitted that the petitioner has failed in producing any concrete material to establish that he is not the son of Panu

Sahu and that he is the son of Amin Pradhan. It is also contended that there has been enquiries at different point of time involving the allegations against the petitioner and in all occasions the report pointed out one and only indication that the petitioner is the natural born son of Panu Sahu. Petitioner not only failed in bringing any oral evidence to support his case but also failed in demolishing the statement of his kith and kin as well as co-villagers, who have in one tone stated that the petitioner is the son of Panu Sahu who belongs to 'Teli' by caste. There is sufficient material available to establish that the petitioner is the natural born son of Panu Sahu. There is no single document available to show that the petitioner is the natural born son of Amin Pradhan.

5. Taking this Court to the detail discussions of the State Level Scrutiny Committee, learned State Counsel submitted that for the detail discussions by the State Level Scrutiny Committee, there is also otherwise no infirmity in the impugned order. Further, taking this Court to several decisions of the Hon'ble Apex Court learned State Counsel submitted that the case of the opposite parties has the support of the said decisions.

Under the circumstance, learned State Counsel submitted that for the observations and reasons assigned in the impugned order, there is no scope for this Court to interfere in such matters.

6. Considering the rival contentions of the parties, this Court finds, during enquiry by the State Level Scrutiny Committee involving the doubts raised on the S.T. status of the petitioner, the Director, O.G.P vide his letter no.356 dated 28.12.2006 referred the matter to the Tahasildar, Khandapara for verification of the genuineness of the caste of Sri Sankarsan Pradhan and for submitting a confidential report thereon. In response to which, the Tahasildar by his letter dated 11.1.2007 reported that on local enquiry it has been found that Sri Sankarsan Pradhan is the natural born son of Sri Panu Sahu belonging to 'Teli' by caste and has been adopted by Amin Pradhan belonging to 'Kandha' by caste. It also appears from the report submitted by the Tahasildar, Khandapara involving the enquiry by State Level Scrutiny Committee, where the Tahasildar made it clear that the caste certificate granted in favour of the petitioner was based on the claim of the petitioner regarding his adoption by Amin Pradhan who belongs to "Kandha Tribe". Petitioner completely failed in destabilizing such report of the Tahasildar and accordingly, failed in establishing that the caste certificate issued in his favour was not on the basis of development through adoption. In the enquiry, even though the petitioner was provided opportunity to satisfy his case by

providing documentary and or oral evidence but it appears, the petitioner produced a Xerox copy of admission report in Lingaraj Nodal U.P. (M.E.) School, Khalisai for the year 1969-70 and he failed in producing either any other documentary evidence or any oral evidence to establish his claim. This certificate again established that petitioner is a resident of 'Khalisai' whereas his so called father belongs to 'Badajhada', P.S.-Khandapara. It also appears in the proceeding that the State Level Scrutiny Committee taking into consideration a copy of the R.O.R vide Khata no.1, Mouza-Badajhada, P.S./Tahasil-Khandapara found that the R.O.R stands in the name of Udyanath Pradhan, Gangadhar Pradhan, Nakula Pradhan, Manguli Pradhan, Kokila Pradhan and Hara Pradhan as the sons and daughter of Amin Pradhan with indication of the caste as "Malua Kandha". There was no mentioning of the name of the petitioner in the said R.O.R. In spite of such a document being taken into consideration and in spite of the clear information with the petitioner that his name is not found place in the R.O.R relied upon, the petitioner did not examine any of the person named therein to at least establish that he is also a son of Amin Pradhan. Even though the R.O.R was not found available showing the petitioner as the son of Amin Pradhan but the State Level Scrutiny Committee again found from another R.O.R. that place of property indicated therein belongs to Khalisai which appears to be the village of his own father namely Panu Sahu whereas the Amin Pradhan belongs Badajhada. There has been examination of some witnesses from the side of State such as Sri Udayanath Sahu and Magi Sahoo, both are of village Khalisai. Udayanath Sahu being the natural cousin brother of the petitioner and Sri Magi Sahoo being also a co-villager, both of them have deposed that the petitioner is the natural born son of Panu Sahu who belongs to 'Teli' by caste. This Court finds surprise that the petitioner even though claims that he has enmity with these witnesses and statement of such persons should not be relied but he had not taken any step to bring either of any of his relation or co-villagers to support his claim. It is also found that the petitioner is never a residence of a village belonging to Amin Pradhan. There is also a statement of another witness namely Ratnakar Sahu of Khalisai appearing to be the natural cousin brother of the petitioner, who has also claimed that the petitioner has purchased Ac.0.37 decimals of land from his natural father Panu Sahu in the village Khalisai. From the statements recorded, it also appears that the petitioner firstly married with a lady belonging to the 'Teli' by caste at Puri and on the death of his 1st wife, he married twice thereafter and both the second and third wife also belong to 'Teli' by caste. At the time of recording his statement, the petitioner has also admitted that he not only

worships the goddesses Durga, Grama Devati, Thanapati and Kali Puja but also celebrates like Jantal and Sala Puja etc. He has also admitted to be belonging to 'Nagasya' Gotra, which is a Gotra belonging to Hindu Caste and he never appears to be a person belonging to the 'Kandha' by caste. There has also been examination of several documents. The documents nowhere establish that petitioner belongs to scheduled tribe community. Petitioner was also tested to get his strength on the language used by the Scheduled Tribe persons in the locality and other aspects involving the scheduled tribe are concerned, it appears, the petitioner has also failed to pass this acid test to prima facie establish his claim to be belonging to scheduled tribe community. All the above goes to show that the findings by the State Level Scrutiny Committee establishing that the petitioner does not belong to scheduled tribe community are based on number of sources indicated hereinabove. It is on the other hand, appears that the petitioner though born through Panu Sahu but may be has been adopted by Amin Pradhan. Law is fairly well settled that mere adoption of a person belonging to a non-tribe to a scheduled tribe, does not automatically become the scheduled tribe.

7. In the case of ***Valsamma Paul (MRS)*** *versus* ***Cochin University and others*** as reported in **(1996) 3 SCC 545** the Hon'ble Apex Court in paragraph no.33 held as follows:

> "33. However, the question is : Whether a lady marrying a Scheduled Caste, Scheduled Tribe or OBC citizen, or one transplanted by adoption or any other voluntary act, ipso facto, becomes entitled to claim reservation under Article 15(4) or 16(4), as the case may be? It is seen that Dalists and Tribes suffered social and economic disabilities recognized by Articles 17 and 15(2). Consequently, they became socially, culturally and educationally backward; the OBCs also suffered social and educational backwardness. The object of reservation is to remove these handicaps, disadyantages, sufferings and restrictions to which the members of the Dalits or Tribes or OBCs were subjected and was sought to bring them in the mainstream of the nation's life by providing them opportunities and facilities."

Ultimately the observation of the Hon'ble Apex Court is that a candidate born in forward class, transplant in backward class by adoption or any other voluntary act, cannot be entitled to benefit of reservation for the S.C. or S.T.

In another case of ***Jayashri Bhaskar Gosavi*** *v.****Vishwanath Krishnath Panke and others*** as reported in **(2016) 13 SCC 312** the Hon'ble Apex Court in paragraph-2 therein has a clear opinion that the tribal status should be based on one's independent root and a wife cannot claim tribal status of her husband dependant on her merit.

In the case of ***Lazarus Estates, Ltd****. v.* ***Beasley*** (1956) All E.R. 341, 345 Lord Denning, J. observed that *"No Court will allow a person to keep an advantage which he has obtained by fraud."*

8. The proceeding before the State Level Scrutiny Committee is not a mere summary procedure where a party has fullest scope for documentary as well as oral evidence to establish his case. Even though the petitioner was given several opportunities to establish his case including two remand orders by this Court yet, the petitioner was unable to bring any satisfactory documentary evidence as well as oral evidence.

Since the petitioner's case before the State Level Scrutiny Committee was dependant on the validity of caste certificate already granted in his favour, it was incumbent upon the petitioner to satisfy at least the caste certificate already granted in his favour is not a fraudulent one.

9. From the entire pleadings and arguments of the petitioner, this Court nowhere finds, the petitioner had any endeavour to establish that the caste certificate granted in his favour is on the basis of information available on record so as to avoid the rigor of a document being obtain by fraud.

10. For the detail discussions in the impugned order by the State Level Scrutiny Committee, for the observations of this Court made hereinabove and for the settled position of law taken note of hereinabove, this Court finds, there is no infirmity in the impugned order. Accordingly, the writ petition stands dismissed, but however, in the circumstance, there is no order as to cost.

Writ petition dismissed.

2017 (II) ILR - CUT-1147

BISWANATH RATH, J.

C.M.P. NO. 461 OF 2017

BINODINI SADUAL ……..Petitioner

.Vrs.

RANJIT KU. MOHANTY & ORS. ……..Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-6, R-17

Amendment of plaint – Suit instituted in the year 1998 for eviction only – Defendant No.2 filed written statement during 1999 questioning the title of the plaintiff – Plaintiff sought amendment in 2016 claiming right, title and interest in respect of the suit property – Defendants raised objection – However, learned trial court allowed the amendment with costs which was affirmed by the learned Addl. District Judge in Civil Revision – Hence this petition.

In this case if amendment will be allowed after a long delay of 18 years, it will not only change the nature and character of the suit but also prejudice the defendants – The amendment being grossly time barred needs to be rejected – Held, the impugned order is set aside and the application for amendment is rejected. (Paras 9,10,11)

Editorial Note

The judgement Dt. 16.08.2017 passed by this Court in C.M.P. No. 461 of 2017 was assailed before the Hon'ble Supreme Court of India in petition for Special Leave to Appeal (C) No. 28117/2017 where in the Hon'ble Apex Court while hearing the matter on 30.10.2017 did not find any ground to interfere with the impugned order and as such dismissed the Special Leave Petition, confirming the judgement passed by the High Court.

Case Laws Referred to :-

1. AIR 2007 SC 1478 : Shiv Gopal Sah @Shiv Gopal Sahu -V- Sita Ram Sarangi & Ors.
2. AIR 1999 SC 3033 : P.A.Ahammed Ibrahim -V- Food Corporation of India.
3. AIR 2004 SC 1094 : Ramnik Vallabhdas Madhvani & Ors. -V- Taraben Pravinlal Madhvani
4. (91) 2001 CLT 144 : Dr. Laxminarayan Mohapatra -V- Sihini Bahar Sur & Ors.

5. 2014 (Suppl.-II) OLR-658 : Bhramara Nayak -V- Satya Badi & Ors.
6. (2012) 11 SCC 341 : Abdul Rehman & Anr. -V- Mohd. Ruldu & Ors.
7. (2016) 1 SCC 530 : Basant Balu Patil & Ors. -V- Mohan Hirachand Shah & Ors.
8. (2006) 4 SCC 385 : Rajesh Ku. Aggarwal & Ors. -V- K.K.Modi & Ors.
9. 2007 (1) OLR (SC) 406 : State Bank of Hyderabad -V- Town Municipal Council
10. (2002) 7 SCC 559 : L Sampath Kumar -V- Ayyakannu & Anr.
11. 2009 (II) OLR (SC) 880 : Surendra Kumar Sharma -V- Makhan Singh

For Petitioner : Dr. A.K.Mohapatra, A.K.Mohapatra, B.Panda, S.Nath, S.P.Mangaraj, T.Dash, A.Mohapatra & B.Subudhi

For Opp. Parties : M/s. P.K.Rath, R.N.Parija, A.K.Rout, S.K.Pattanaik, A.Behera & B.K.Dash

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Date of hearing : 20.07.2017
Date of Judgment :16.08.2017

JUDGMENT

BISWANATH RATH, J.

This Civil Miscellaneous Petition involves the order dated 26.7.2016 passed by the Civil Judge (Sr.Divn.), Baripada appearing at Annexure-3 and the order dated 11.4.2017 passed in Civil Revision No.5/2016 by the 1st Additional District Judge, Baripda, vide Annexure-4. This Court finds, the order dated 26.7.2016, vide Annexure-3 involves an application for amendment of the pleadings at the instance of the plaintiff thereby allowing the amendment of plaint with award of cost of Rs.1000/- whereas the order dated 11.4.2017 passed in Civil Revision No.5/2016 appearing at Anexure-4 dismissing the Civil Revision against the order involving Annexure-3 on the ground of maintainability.

2. Short background involved in the case is that O.P.1-plaintiff filed T.S. No.65/98 for a judgment and decree of eviction against defendant nos.1 to 3 from 'B' & 'C' Schedule land and demolition of the construction in the Schedule 'D' land subsequently registered as C.S. No.65/98. It appears, pending suit for final adjudication, there has been number of amendments and ultimately an amendment involved herein was brought by way of an application dated 20.4.2016 after long eighteen years of the institution of the suit by O.P.1 bringing the following proposed amendments :-

"Proposed Amendment

That in para-12 in the prayer portion after para-a (ai) be added a(i). That the plaintiffs right title and interest over Schedule-A land be declared.

That in para-10 after the word valued at Rs.60,000/- the rest be deleted and in its place the following be added.

"But as it is a suit for declaration of title and eviction ACF worth of Rs.2984.25 has been paid".

That in Schedule-A in the second line after the word name of before the word in Mouza-Balarampur, the name wrongly typed as Durga Prasad Tiwary be deleted and in its place "Ranjit Kumar Mohanty" is to be included.

The sketch map inadvertently not given is given for better appreciation of this case.

That in Schedule-B the description part is to be deleted and in its place the following be added.

"House standing over plot No.667 which is in illegal occupation of defendant No.1."

In filing the application under Order 6 Rule 17 of C.P.C., O.P.1-plaintiff in paragraph-2 of the application contended that the defendants while filing the written statement have categorically taken a stand that the vendor of the plaintiff had no sailable right on the date of sale and accordingly has challenged the title of the plaintiff and his vendor and further contended that the requirement of amendment is based on the above stand of the defendants, particularly, challenging the title of the plaintiff in the written statement filed by them. To their objection, the defendant nos.1 & 2 objected the move for amendment on the premises that the amendment being filed after eighteen years of filing of the suit is not maintainable both in law and fact, there being no occasion for the plaintiff to file amendment at this point of time, the attempt for present amendment is only to linger the disposal of the suit. It is also contended by the defendant nos.1 & 2 that since the amendment with regard to declaration of right, title and interest involving Schedule A land, the amendment application is claimed to be not maintainable, the amendment leads to change the nature and character of the suit, the materials and the drawing being available from the threshold, it is

contended that the plaintiff is not permitted to bring the facts and the sketch map through the amendment application after long gap of eighteen years. It is ultimately contended that in the event the amendment is allowed, it will lead to change the nature and character of the suit and further, there cannot be any effective adjudication of the prayer involved therein in absence of the co-sharers. It is also contended that the amendment is also opposed for no materials supporting in favour of the plaintiff accompanying the amendment application.

3. Learned trial court considering the rival contentions of the parties and following catena of decisions referred to at the time of hearing of the application for amendment allowed the amendment but however subject to grant of cost to mitigate the sufferings of the defendants.

4. Assailing the impugned order, Dr.A.K.Mohapatra, learned senior counsel for the petitioner reiterating the stand already taken in the court below submitted that the Civil Judge (Sr.Divn.), Baripada allowing the amendment without affording opportunity to the defendants and filing additional written statement is erroneous. Dr. Mohapatra further submitted that the plaintiff has already undertaken several amendments and the plaintiff was also otherwise precluded from bringing the pleadings and prayer made therein for his not bringing the same in the earlier occasions. Dr. Mohapatra alleged that the amendment being filed after lapse of eighteen years of filing of the suit without explaining the delay for bringing such amendment that too without explaining his bona fide for not bringing the same earlier could not be properly assessed by the trial court. Referring to the decisions involving the case in ***Shiv Gopal Sah alias Shiv Gopal Sahu vrs. Sita Ram Saraugi & others***, AIR 2007 SC 1478, ***P.A.Ahammed Ibrahim vrs. Food Corporation of India***, AIR 1999 SC 3033, ***Ramnik Vallabhdas Madhvani & others vrs. Taraben Pravinlal Madhvani***, AIR 2004 SC 1084, ***Dr. Laxminarayan Mohapatra vrs. Sihini Bahar Sur & others,*** (91) 2001 CLT 144, ***Bhramara Nayak vrs. Satya Badi & others***, 2014 (Suppl.-II) OLR-658, Dr.Mohapatra, learned senior counsel for the petitioner ultimately prayed for interference in the impugned orders and setting aside the same.

5. To his opposition, Sri P.K.Rath, learned counsel for the O.P., plaintiff in the court below answering on the question of delay in filing the amendment application contended that for the filing of the additional written statement by defendant no.2 on 22.9.2015 brought to the notice of the petitioner for the first time about the challenge to the mutation record and

disputing the title of the plaintiff gave rise to the O.P.1 to bring the amendment application. On the merit of the amendment application, Sri Rath contended that the amendment sought for since is in consistence with the averments in the existing plaint at paragraph-8, there being no other property involved or introduction of new property, the amendment sought for is within the permissible limit. It is further contended by Sri Rath that since the trial has not commenced, no prejudice is to be caused to the defendants in the event the amendment is allowed. It is lastly contended by Sri Rath that since the plaintiff is entitled to bring the independent suit claiming right, title and interest over the disputed property, rejection of the amendment application and forcing the plaintiff to go for independent suit will not only lead to multiplicity of litigations but will also linger the adjudication of the suit at hand. Referring to decisions involving the case in ***Abdul Rehman & another vrs. Mohd. Ruldu & others,*** (2012) 11 SCC 341, ***Basant Balu Patil & others vrs. Mohan Hirachand Shah & others*** (2016) 1 SCC 530, ***Rajesh Kumar Aggarwal &others vrs. K.K.Modi & others*** (2006) 4 SCC 385, ***State Bank of Hyderabad vrs. Town Municipal Council***, 2007 (1) OLR (SC) 406, ***Sampath Kumar vrs. Ayyakannu & another*** (2002) 7 SCC 559, ***Surendra Kumar Sharma vrs. Makhan Singh*** 2009 (II) OLR (SC) 880, Sri Rath contended that the decisions referred to herein above have great bearing to the case of the petitioner and therefore, prayed for rejection of the Civil Miscellaneous Petition.

6. Considering the rival contentions of the parties and going through the pleadings available on record, this Court finds, there is no dispute that the suit was originally filed in the year 1998 involving a suit for eviction alone being registered as T.S. No.65/98, which was subsequently re-numbered as C.S. No.65/98 on the file of Civil Judge (Sr.Divn.), Baripada. The plaint in original stage was simply a suit for eviction specifically with the following prayer :-

> "Therefore, the plaintiff prays :-
>
> (a) That, the defendant no.1 to 3 be evicted from the suit house described in schedule 'B' &'C' of the plaint and so also defendant no.4 be directed to demolish the boundary wall constructed over schedule 'D' land and to give vacant possession to the plaintiff.
>
> Any other relief or reliefs as per law and equity be passed."

Looking to the plaint averments in its original form from paragraphs-2, 3, 4, 6, 7, 8 & 8(a), this Court finds, the plaintiff had a clear case of his

right and title over the disputed property. Similarly from the reading of the averments in the written statement filed by the defendant no.1 in the year 1999, this Court finds, there is clear denial to the transfer of the property in favour of the plaintiff. There has been specific response denying the possession of the vendor of the plaintiff as appearing in paragraph-7 of the written statement filed in 1999. There appears, there is also a denial of the induction of defendant no.3 as tenant by Durga Prasad Tiwari. It is also claimed, there has been correct recording of the possession in favour of the defendants by the Settlement Authority. There is also serious objection with regard to execution of sale deed in faovur of the plaintiff appearing at paragraph-10 of the written statement filed in the year 1999. From whole reading of the written statement averments indicated herein above, this Court finds, there involves a strong challenge to the right and title of the plaintiff over the disputed property since 1999. The pleading and counter statement may be in the preliminary stage and the actual fact can be ascertained only after the trial involving the suit is concerned.

7. Considering the prima facie case and looking to the pleading in the plaint and the averments in the written statement, this Court is satisfied with the plea of Dr.Mohapatra, learned counsel for the petitioner that the amendment involving the right, title and interest of the property at the instance of the plaintiff has been brought after long gap of eighteen years and disbelieve the plea of the plaintiff that the plaintiff has for the first time came to know the challenge to the right, title and interest of the plaintiff from the additional written statement filed by defendant no.2 in the year 2015, as such statement in the additional written statement is only a reiteration of the facts already there in the written statement. It appears, the defendant no.2 since filing of the written statement in the year 1999 has a strong challenge to the right and title of the plaintiff.

8. Considering the submission of Sri Rath, learned counsel for the O.Ps. that the amended provision of Order 6 Rule 17 of C.P.C. requiring satisfaction of due diligence in filing an amendment application with inordinate delay has no application to the case as the suit is prior to the amendment of Order 6 Rule 17 of C.P.C., this Court finds, though the amended provision is not applicable to the case at hand for being instituted in the year 1998 prior to the amendment, yet for the availability of the challenge to the plaintiff's right, title and interest over the disputed property having been brought by way of response in the written statement in the year 1999, this Court finds, the proposed amendment not only suffers on account of

delay but also involves no bona fide action on the part of the plaintiff. On perusal of the discussions made in the impugned order, this Court finds, even though the trial court has taken into account the plea and objection of the respective parties but has failed to appreciate the delay in bringing the proposed amendment.

9. In spite of a clear pleading justifying right over property by the plaintiff and in spite of a clear denial of the plaintiff's claim of right and title over disputed property by the defendant no.2 since 1999, it cannot be construed that plaintiff was unaware of challenge to his right and came to know this aspect only in 2014 when additional written statement was filed. Besides plaintiff-O.P.1 since has amended the plaint on different occasions, nothing prevented the plaintiff to bring such amendment earlier. Thus the present amendment is grossly barred by time and meant to frustrate the trial of the suit. This Court further observes that such amendment if allowed at this stage will not only change the nature and character of the suit but will put the defendants into prejudice.

10. Considering the submission of Dr.Mohapatra that the relief brought by way of amendment is grossly hit by limitation, this Court relying on a decision of Hon'ble apex Court reported in (2016) 1 SCC 530 observes that there is no manner of doubt that the amendment of plaint to incorporate the declaration of title is necessarily to relate back to the date of filing of the suit. Considering that the suit was filed in 1998 and the claim of right, title and interest being brought by way of amendment in April, 2016, the relief brought by way of amendment is grossly barred by time. Even though the amended provision at Order 6 Rule 17 of C.P.C. has no application to the case at hand but there being no appearance of bona fide step in bringing the amendment at the instance of the plaintiff here, amendment of this nature after nearly two decades is not permissible in the eye of law. For the view of the Hon'ble apex Court in (2016) 1 SCC 530 being a later judgment view expressed in (2002) 7 SCC 559 has no prevailing value. This Court observes that the attempt of amendment after two decades of the cause of action cannot be taken as a mere delay and latches on the other hand looking to the counter statement in the written statement filed in 1999, it appears, there is clear indication challenging the right, title and interest of the plaintiff from the threshold and this is a case of serious lapse on the part of the plaintiff thus it is a case where plaintiff shall be debarred from bringing a suit for declaration of right, title and interest at this stage even. For the pleadings in the plaint and the counter statement in the written statement filed in 1998 and 1999

respectively bring the dispute on the claim for right, title and interest involving the suit property, this case cannot be a case of cause of action taking place on filing of additional written statement.

11. For the observations herein above and taking into consideration the decision of the Hon'ble apex Court, vide (2016) 1 SCC 530, this Court has no hesitation in interfering in the impugned order, vide Annexure-3 and thus the order, vide Annexure-3 is set aside. Amendment application stands rejected. So far the order, vide Annexure-4, for the observation herein above and since the proceeding involved therein was not maintainable, the order, vide Annexure-4 needs no interference.

12. Under the circumstance, the Civil Miscellaneous Petition stands allowed. No cost.

Petition allowed.

2017 (II) ILR - CUT-1154

BISWANATH RATH, J.

C.M.P. NO. 883 OF 2017

RAJANIKANTA MOHANTY & ORS. .....Petitioners

.Vrs.

SMRUTI BISOI & ORS. .....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – S.151.
R/W O-18, R-17 CPC.

Re-opening of evidence/recalling of witnesses – Application filed U/s. 151 C.P.C. readwith Order 18, Rule 17 C.P.C. to recall D.W.6 for further examination – Application rejected by the learned trial court, though there is specific pleading showing requirement of his further examination – Hence this petition.

After deletion of Rule 17-A of Order 18 from C.P.C., there is no specific provision in the code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination – In the otherhand Order 18, Rule-17 C.P.C. is not a provision intended to enable the parties to recall any witness for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when evidence was being recorded – Further, Order 18, Rule 17 C.P.C. is primarily a provision enabling the Court to clarify any issue or doubt by recalling

any witness either suo motu, or at the request of any party, so that the court itself can put questions and elicit answers – However, section 151 of the code provides that nothing in the code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court – So in the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, the inherent power U/s. 151, subject to its limitations, can be invoked in appropriate cases.

Held, power U/s 151 C.P.C. can be exercised to deal with any particular procedural aspect which is not provided expressly or impliedly in C.P.C. and the Court in appropriate cases can exercise its discretion to permit re-opening of evidence or recalling of witnesses for further examination/cross-examination, after evidence led by the parties – The impugned order is set aside and direction issued to the learned trial court to fix a date for appearance of D.W.6 for further examination with liberty to the contesting parties to cross-examine him. (Paras 12,13,14)

Case Law Relied on :-

1. (2011) II SCC 275 : K.K.Velusamy -V- N.Palanisamy

Case Laws Referred to :-

1. 2016 (Supp.I) OLR (SC) 938 : Ram Rati -V- Manage Ram (D) through L.R.s
2. 2005 (VI) SCC 344 : Salem Advocate Bar Association, T.N. -V- Union of India
3. (2011) II SCC 275 : K.K.Velusamy -V- N.Palanisamy
4. AIR 1994 Orissa 131 : U.K.Ghosh -V- M/s. Voltas Ltd. & Anr.

For Petitioners : M/s. Banshidhar Baug, M.R.Baug, R.R.Jethi, P.C.P.Das & G.R.Sahoo

For Opp. Parties : M/s. Priyadarshi Routray
M/s. Suman Routray, G.C.Pattanaik, M.K.Sahoo & Sarthak Kumar
M/s. Jatindra Mohanty & R.Dash

Date of hearing : 8.09. 2017
Date of Judgment : 8.09. 2017

JUDGMENT

BISWANATH RATH, J.

This Civil Miscellaneous Petition involves a challenge to the impugned order at Annexure-6 rejecting an application at the instance of the defendant Nos. 2 to 5 under Order 18 Rule 17 of C.P.C read with 151 of C.P.C.

2. Short background involved in the case is that after examination of D.W. 6 finding inadvertent omission in the affidavit in evidence submitted on behalf of the D.W. 6, an application under Order 18 Rule 17 of C.P.C. read with Section 151 of C.P.C was filed with a prayer to recall the D.W. 6 for his further examination in chief on the points indicated therein. On their appearance the defendant Nos.8 & 9 filed objection challenging the maintainability of the application and further, resisting the attempt of the petitioners on the premises that in the event of allowing such an application the defendant No.5 will be allowed to fill up the lacunas, which is not permissible in the eye of law. There was no objection by the other defendants except plaintiffs and defendant nos.8 & 9.

Considering the rival contentions of the parties, learned trial Court further taking into consideration a decision of the Hon'ble Apex Court in the case in between ***Ram Rati v. Manage Ram (D) Through Lrs.*** as reported in **2016 (Supp.-I) OLR (SC) 938** rejected the application giving rise the present Civil Miscellaneous Petition.

3. Assailing the impugned order, referring to the response in paragraph No.8 of the written statement so also referring to the application under Order 18 Rule 17 read with Section 151 of C.P.C learned counsel for the petitioners submitted that though the examination of D.W. 6 is over but there has been bona fide omission of certain questions. Sri Baug, learned counsel for the petitioners further submitted that though the application considered in the impugned order was nomenclated as an application under Order 18 Rule 17 read with Section 151 of the C.P.C but looking to the prayer made therein, it appears, the application was to be treated as an application under Section 151 of the C.P.C. The trial Court on the premises that application at the instance of the petitioners being filed under Order 18 Rule 17 referring to a decision of the Hon'ble Apex Court dealing a matter strictly involving provision at Order 18 Rule 17 of C.P.C rejected the application without considering the fact that the petitioners have moved an application following Section 151 of C.P.C.

Referring to a decision in the case in between ***Salem Advocate Bar Association, T.N. v. Union of India*** as reported in **2005(VI)SCC344** particularly referring to the paragraph No.13 of the said decision, learned counsel for the petitioners submitted that the test of the moment was to find out whether the party satisfied that even after exercise of due diligence that part of the evidence was not within his knowledge or could not be produced when the party was leading evidence, the Court may permit for leading of such evidence at a later stage on such terms appears to be just.

4. Further, referring to a decision of the Hon'ble Apex Court in the case in between ***K.K. Velusamy v. N. Palanisamy*** as reported in **(2011) II SCC 275** particularly referring to paragraph Nos.3, 10 & 11 of the said decision, Sri Baug, learned counsel submitted that for the observation of the Hon'ble Apex Court that for the request in such contingency, the matter should have been considered in exercise of power under Section 151 of C.P.C rather than confining the consideration under the provisions of Order 18 Rule 17 of C.P.C.

5. Referring to another decision of this Court in the case in between ***U.K. Ghosh v. M/s. Voltas Ltd., and another*** as reported in **AIR 1994 Orissa 131** particularly referring to the paragraph No.4 of the judgment learned counsel for the petitioners submitted that this Court had only observation that this nature of application cannot be entertained for the reason there is an attempt to fill up the lacunas.

6. Challenging the order, referring the judgment of the Hon'ble Apex Court by the trial Court, Sri Baug, learned counsel for the petitioners further referring to the facts available therein, the averments and findings of the Hon'ble Apex Court submitted that the decision of the Hon'ble Apex Court involved only consideration of the effect of Order 18 Rule 17 of C.P.C and claimed that the decision is clearly distinguishable. It is under the above premises, learned counsel for the petitioners prayed for interference of this Court in the impugned order and rejecting the same.

7. Sri J. Mohanty, learned counsel for the defendant Nos.8 & 9 in the Court below referring to the objection filed by the defendant Nos.8 & 9 and further referring to the provision contained in Order 8 Rule 1 of C.P.C as well as the decision of the Hon'ble Apex Court as reported in **2016(Sup.-I) OLR SC 938** contended that under no circumstance, attempt to fill up the lacunas in the affidavit evidence already submitted, can be permitted. It is, thus, contended that the trial court having relied on this decision has not

committed any error in passing the impugned order leaving any scope to interfere with the same.

8. Sri R. Routray, learned counsel for the opposite party Nos.1 to 3 supported the stand taken by Sri J. Mohanty, learned counsel and submitted that for having no infirmity, the impugned order leaves no scope for this Court to interfere with the same.

9. Considering the rival contentions of the parties, this Court finds, there is no dispute that the petitioners have specific pleading involving the requirement of further examination of D.W. 6 as clearly borne from paragraph No.8 of the Additional written statement. Looking to the application filed by the petitioners this Court finds, though the petitioners have nomenclated the application to be an application under Order 18 Rule 17 of C.P.C read with 151 of C.P.C., but looking to the prayer made therein this Court finds, the petitioners have also specific prayer to recall D.W. 6 for his further examination in chief on the points stated therein. Reading of the application and the response in the additional written statement this Court finds, the petitioners' attempt remaining with the pleadings already available on record, it is at this stage this Court takes into consideration the submission of the learned counsel for the opposite party nos.6 & 7 that the petitioners since have scope for putting such questions to the other defendants available for chief no further examination of the D.W. 6, will not prejudice the case of the petitioners, this Court observes, since evidence left out can be brought through other defendants, it is, on the other hand, there will be no prejudice if such evidence is brought through further chief of the D.W. 6.

10. Now coming to examine the decisions cited at Bar, this Court dealing with the decisions taken reliance by the trial court as reported in **2016(Sup.-I) OLR SC938** finds from paragraph no.1 of the said decision as follows :

> "Whether a witness can be recalled under Order 18 Rule 17 of C.P.C for further elaboration of aspects left out in evidence already closed is the issue for consideration in this case."

11. Looking to the discussions and findings of the Hon'ble Apex Court in the case referred to hereinabove, this Court finds, the case was considered in the spirit of the provision available under Order 18 Rule 17 of C.P.C exclusively. Further, for the clear pleading as well as prayer of the petitioners in the application taken up for consideration in the trial Court for further examination in the chief in D.W. 6, the decision referred to hereinabove has no application to the present case.

12. Considering the decision cited by the learned counsel for the petitioners in the case in between ***K.K. Velusamy v. N. Palanisamy*** as reported in **(2011) II SCC 275** and looking to the specific relief claimed therein, this Court finds, the Hon'ble Apex Court in paragraph Nos.7, 8, 9, 10, 11 & 16 has observed as follows:

> "**7.** The amended definition of "evidence" in Section 3 of the Evidence Act, 1872 read with the definition of "electronic record" in Section 2(1)(*t*) of the Information Technology Act 2000, includes a compact disc containing an electronic record of a conversation. Section 8 of the Evidence Act provides that the conduct of any party, or of any agent to any party, to any suit, in reference to such suit, or in reference to any fact in issue therein or relevant thereto, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
>
> **8.** In *R.M. Malkani v. State of Maharashtra* this Court made it clear that electronically recorded conversation is admissible in evidence, if the conversation is relevant to the matter in issue and the voice is identified and the accuracy of the recorded conversation is proved by eliminating the possibility of erasure, addition or manipulation. This Court further held that a contemporaneous electronic recording of a relevant conversation is a relevant fact comparable to a photograph of a relevant incident and is admissible as evidence under Section 8 of the Act. There is therefore no doubt that such electronic record can be received as evidence.
>
> **9.** Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. (Vide *Vadiraj Naggappa Vernekar* v. *Sharadchandra Prabhakar Gogate*[2]*.)*

10. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to *clarify any issue or doubt*, by recalling any witness either suo motu, or at the request of any party, so that the Court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

11. There is no specific provision in the Code enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under Section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the Court to put such question to elicit any clarifications.

16. Neither the trial court nor the High Court considered the question whether it was a fit case for exercise of discretion under Section 151 or Order 18 Rule 17 of the Code. They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. Both the courts have mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings."

For the decision of the Hon'ble Apex Court considering such nature of cases in the spirit of provision at Section 151 of C.P.C this Court finds, the decision referred to hereinabove has a clear support to the petitioners' case.

13. For the observation of this Court that the petitioners had moved the application also for consideration of the Court applying the provision of Section 151 of C.P.C and further, for the attempt of the petitioners is not going beyond the pleadings available in the additional written statement and for the petitioners having a scope to bring this evidence by examining the other defendants available for the purpose of chief and further for the scope of defendants to have the scope of cross examination and for the decision of the Hon'ble Apex Court in the case in between ***K.K. Velusamy v. N. Palanisamy*** as reported in **(2011) II SCC 275** this Court finds, the observation as well as the findings of the trial Court are improper and the impugned order having been passed without consideration of all the above aspects cannot be sustainable in the eye of law.

14. Under the circumstances, while interfering with the impugned order this Court sets aside the order vide Annexure-6 and allows the application at the instance of the petitioners vide Annexure-4 and directs the trial Court to fix a date for appearance of the D.W. 6 for further examination with liberty to the contesting parties to cross examine the D.W. 6 to be produced for further examination. Further considering that there is delay in disposal of the suit of the year 2005 and keeping the request of Sri Mohanty, learned counsel for the opposite party Nos.6 & 7, this Court directs the learned Civil Judge (Sr. Divn.), Bhubaneswar to conclude the trial within two months from the date of receipt of a certified copy of this judgment. This Court also records the undertaking of all the counsels appearing that respective parties will not resort to unnecessary adjournment.

15. The writ petition succeeds and in the circumstances, there is no order as to cost.

Writ petition allowed.

2017 (II) ILR - CUT-1162

S. K. SAHOO, J.

CRLMC NO. 1426 OF 2005

CHITTARANJAN MISHRA & ANR. ……..Petitioners

.Vrs.

STATE OF ORISSA ……..Opp. Party

(A) CRIMINAL PROCEDURE CODE, 1973 – Ss. 397(3), 401 & 482

Whether the application U/s. 482 Cr.P.C. before the High Court which is in the garb of second revision is maintainable, when the impugned order was challenged before the learned Sessions Judge in revision and was confirmed in view of the bar U/s. 397 (3) Cr.P.C. ? Held, Yes.

When the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of the process of the Courts or the required statutory procedure has not been complied with and the order passed requires correction, it is the duty of the High Court to have it corrected in exercise of its inherent power U/s. 482 Cr.P.C. and in an appropriate case even in exercise of revisional power U/s. 397(1) Cr.P.C. read with section 401 Cr.P.C.

(Paras 4,7)

(B) CRIMINAL PROCEDURE CODE, 1973 – S. 319

Power U/s 319 Cr.P.C. being an extraordinary one should be used sparingly if the Court is satisfied that any person other than the accused who is facing trial has committed the offence for which he should also be tried alongwith the accused facing trial, only when there is sufficient evidence available against such person.

In this case the petitioner No.1 is dead and the evidence of the eye witnesses and injured persons against petitioner No. 2 is not consistent and discrepant in nature so as to implead him as an accuse in the case and the learned Courts below exercised their power in a routine and mechanical manner, which is required to be corrected by invoking power U/s. 482 Cr.P.C. – Held, the impugned orders passed by the learned Courts below being not sustainable in the eye of law are quashed. (Para 7)

Case Law Relied on :-

1. (1997) 13 Orissa Criminal Reports (SC) 41 : Krishnan -V- Krishnaveni

For Petitioner : Mr. Udit Ranjan Jena

For Opp. Party : Mr. Prem Kumar Patnaik, A.G.A.

Date of Hearing :13.11.2017
Date of Judgment:13.11.2017

JUDGMENT

S. K. SAHOO, J.

This is an application under section 482 of Cr.P.C. filed by the petitioners Chittaranjan Mishra and Satyapriya Mishra challenging the impugned order dated 19.04.2005 passed by the learned Addl. Sessions Judge, Sonepur in Criminal Revision No.35 of 2004 in dismissing the revision and thereby confirming the orders dated 29.07.2004 and 12.10.2004 passed by the learned J.M.F.C., Rampur in G.R. Case No. 95 of 1995.

The learned Trial Court in exercise of its power under section 319 of Cr.P.C. vide order dated 29.07.2004 arrayed the petitioners as accused and issued process against them holding that they have committed offences under sections 341/323/324/34 of the Indian Penal Code and section 25 of the Arms Act. The petitioners filed a petition before the learned trial Court to recall such order which was rejected as per order dated 12.10.2004. The petitioners challenged both the orders before the learned Revisional Court which was rejected as per order dated 19.04.2005.

2. On the basis of the first information report lodged by one Debasis Biswal (P.W.14) before the officer in charge of Dungarpali Police Station on 25.09.1995, Dungarpali P.S. Case No.68 of 1995 was registered under sections 341/323/324/34 of the Indian Penal Code against the petitioners and other accused persons. After completion of investigation, the Investigating Officer submitted charge sheet on 10.08.1996 under sections 341/323/324/34 of the Indian Penal Code and section 25 of the Arms Act against accused persons namely Jabadu Nanda and Yale Nag. Though the petitioners were named in the first information report as accused but the Investigating Officer did not find any material against them for which they were not charge sheeted. Since the co-accused Yale Nag absconded, the case against him was splitted up and the co-accused Jabadu Nanda was charged under sections 323/324/34 of the Indian Penal Code and section 25 (1-B) of the Arms Act.

During course of trial of co-accused Jabadu Nanda, fourteen witnesses were examined on behalf of the prosecution.

On perusal of the evidence on record, the learned trial Court invoking its power under section 319 of Cr.P.C., came to hold that the petitioners appeared to have committed the offences under sections 323/324/34 of the Indian Penal Code and section 27 of the Arms Act and accordingly, issued summons against them. On 12.10.2004 the petitioner no.2 Satyapriya Mishra appeared through his advocate in the case and filed a petition under section 205 of Cr.P.C. for dispensing with his personal attendance and both the petitioners also filed another petition to recall the order of taking cognizance dated 29.07.2004. Both the petitions were dismissed by the learned trial Court on the very day. The petitioners filed a revision petition in the Court of Session which was taken up by the learned Addl. Sessions Judge, Sonepur in Criminal Revision No.35 of 2004 and vide order dated 19.04.2005, the learned Revisional Court dismissed the revision and therefore, confirmed the orders passed by the learned J.M.F.C., Rampur.

3. The petitioner no.1 died during pendency of this CRLMC application and as such so far as the petitioner no.1 is concerned, this CRLMC application has become infructuous.

Mr. Udit Ranjan Jena, learned counsel appearing for the petitioner no.2 contended that power under section 319 of Cr.P.C. is an extraordinary one which is conferred on the trial Court which should be used very sparingly and only when compelling reasons exist for taking cognizance against other persons against whom action has not been taken. He further contended that in the present case, there is no such clinching material against the petitioner no.2 Satyapriya Mishra so as to invoke such power and therefore, the impugned orders passed by the learned trial Court as well as by the Revisional Court are not sustainable in the eye of law and therefore, the same should be set aside.

Mr. Prem Kumar Patnaik, learned Addl. Government Advocate on the other hand contended that this application under section 482 of Cr.P.C. is in the garb of second revision inasmuch as the petitioners have already approached the Revisional Court against the impugned orders passed by the learned trial Court which was dismissed and therefore, this CRLMC application should not be entertained.

4. In case of **Krishnan -Vrs.- Krishnaveni reported in (1997) 13 Orissa Criminal Reports (SC) 41**, it is held that ordinarily, when revision has been barred by section 397(3) of the Code, a person accused/complainant cannot be allowed to take recourse to the revision to the High Court under

section 397(1) or under inherent powers of the High Court under section 482 of the Code since it may amount to circumvention of the provisions of section 397(3) or section 397(2) of the Code. It is further held that when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of the process of the Courts or the required statutory procedure has not been complied with or there is failure of justice or the order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensure. It is therefore, to meet ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under Section 397(1) read with section 401 of the Code.

Therefore, merely because the petitioners earlier already approached the Revisional Court and were unsuccessful, they are not debarred from approaching this Court under section 482 of Cr.P.C. but such power under section 482 of Cr.P.C. has to be exercised as held by the Hon'ble Supreme Court in a case where there is glaring miscarriage of justice or abuse of the process of the Courts or there is failure of the justice. Now, it is to be seen whether the orders passed by the Courts below falls within such category or not.

5. It is the settled position of law that power under section 319 of Cr.P.C. is an extraordinary one and to be used sparingly and only if the compelling reasons exists for taking cognizance and such power can be exercised by the Court suo motu or on the application of someone including the accused already before the Court. If the Court is satisfied that any person other than the accused who is facing trial has committed the offence for which he should also be tried along with the accused facing trial, there is no dearth of power with the learned trial Court under section 319 of Cr.P.C. to exercise it suo motu which is obviously to be invoked when there is sufficient evidence available against such person.

6. In this case, there are three injured persons namely, Manoj Biswal (P.W.1), Saroj Biswal (P.W.2) and Debasis Biswal (P.W.14).

Assault on injured P.W.1 Manoj Biswal

So far as the assault on injured P.W.1 Manoj Biswal is concerned, though P.W.8 has stated that the petitioner no.2 dealt a bhujali blow to P.W.1

as a result of which he sustained bleeding injury on his right palm but P.W.1 himself has not implicated the petitioner no.2 in his assault.

Assault on injured P.W.2 Saroj Biswal

So far as the assault on injured P.W.2 Saroj Biswal is concerned, P.W.1 Manoj Kumar Biswal and P.W.3 Bikal Biswal have stated that the petitioner no.2 Satya Mishra dealt a bhujali blow on the head of P.W.2 causing bleeding injury whereas P.W.2 himself has stated that it is co-accused Chitta Mishra who dealt a bhujali blow on his head causing injury and he has not implicated the petitioner no.2 in his assault.

P.W.7 Geeta Biswal is an eye witness to the occurrence and she has not implicated the petitioner in any manner in the assault of P.W.2.

Assault on P.W.14 Debasis Biswal

So far as the assault on P.W.14 Debasis Biswal is concerned, P.W.1 Manoj Biswal has stated that the petitioner no.2 caught hold of P.W.14 near the temple and co-accused Chitta Mishra (petitioner no.1 to this CRLMC application who is already dead) dealt a bhujali blow on the left side shoulder on its back causing bleeding injury.

P.W.14 himself on the other hand stated that the petitioner no.2 Satyapriya Mishra assaulted him by means of bhujali as a result of which he sustained injury.

P.W.3 Bikal Biswal is another eye witness to the occurrence and he has not implicated the petitioner no.2 in any manner in the assault of P.W.14. He has implicated only co-accused Chitta Mishra to have assaulted P.W.14 with a bhujali.

P.W.7 Geeta Biswal is an eye witness to the occurrence but she has not stated anything against the petitioner no.2 relating to the assault on P.W.14.

Therefore, it appears that two witnesses who have attributed specific overt act against the petitioner no.2 relating to the assault on P.W.14 are P.W.1 and P.W.14 himself but their evidence are completely contradictory to each other.

7. Thus a combined reading of the evidence of the eye witnesses as well as the injured persons, it appears that the evidence against the petitioner no.2 Satyapriya Mishra is not consistent and it is discrepant in nature. On the basis of such material, it is difficult to hold that the evidence against petitioner

no.2, if goes unrebutted, would lead to conviction on the accusation of assault on the three injured persons. On going through the evidence, I am of the view that there was no sufficient evidence against the petitioner no.2 for impleading him in the case as an accused and the learned Magistrate has exercised its extraordinary power under section 319 of Cr.P.C. in a routine and mechanical manner. I am of the further view that by passing such orders by the Courts below, there has been grave miscarriage of justice and abuse of process of the Courts which is required to be corrected invoking power under section 482 of Cr.P.C. in the ends of justice.

Therefore, the impugned orders dated 29.07.2004 and 12.10.2004 passed by the learned J.M.F.C., Rampur in G.R. Case No. 95 of 1995 so also the order dated 19.04.2005 passed by the learned Addl. Sessions Judge, Sonepur in Criminal Revision No. 35 of 2004 are not sustainable in the eye of law and the same are hereby quashed.

8. Accordingly, the CRLMC application so far as the petitioner no.2 Satyapriya Mishra is concerned, is allowed.

Application of petitioner No.2 allowed.

2017 (II) ILR - CUT-1167

S. K. SAHOO, J.

JCRLA NO. 13 OF 2002

GULI BEHERA .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

CRIMINAL APPEAL No. 119 Of 2002

GARIBA @ GIRISHA NAIK & ANR. .....Appellants

.Vrs.

STATE OF ORISSA .....Respondent

EVIDENCE ACT, 1872 – S.9

Identification of the accused for the first time in Court without prior T.I. parade – No satisfactory explanation by the prosecution for non-holding of such parade – Since purpose of prior test identification

is to test and strengthen the trustworthiness of the version of the identifying witness regarding identification of the accused, the Court has to take a very cautious, judicious and pragmatic approach while accepting such evidence.

In this case T.I. parade was not conducted – No explanation by the prosecution – No evidence that the witness who identified the accused in Court had sufficient opportunity to observe the features of the accused at the time of the commission of the crime – No evidence on record that after arrest the accused persons were taken to the village of the informant and in the absence of any material to show that they were kept under covers after their arrest, this court is unable to place any reliance on the evidence of identification by the prosecution witnesses for the first time in Court – Held, the impugned judgment and order of conviction against the appellant is set aside.

(Paras 8,9)

Case Laws Referred to :-

1. A.I.R. 2002 SC 3325 : Dana Yadav @ Dahu -Vrs.- State of Bihar
2. 1995 Criminal Law Journal 2255 : Ramanath Naik -Vrs.- State

For Appellant : Mr. Manoranjan Padhi
For Respondent : Mr. Prem Kumar Patnaik, A.G.A.

Date of Hearing :16.09.2017
Date of Judgment :16.09.2017

JUDGMENT

S. K. SAHOO, J.

The appellant in Jail Criminal Appeal No.13 of 2002 Guli Behera and the appellants in Criminal Appeal No.119 of 2002 Gariba @ Girisha Naik and Bana Palai @ Banabasi Polai faced trial in the Court of learned Asst. Sessions Judge, Bhanjanagar in S.C. No.4 of 1997 (S.C. 25/97 GDC) for offences punishable under sections 364/34, 307/34, 323/34, 506-II/34, 387/34 of the Indian Penal Code read with section 25(1-A) of the Arms Act.

The learned Trial Court vide impugned judgment and order dated 05.03.2002 acquitted the appellants of the charges under sections 307/34 of the Indian Penal Code and section 25(1-A) of the Arms Act but found them guilty under sections 364/323/387/506-II/34 of the Indian Penal Code and sentenced each of them to undergo R.I. for seven years and to pay a fine of Rs.5000/- (rupees five thousand) each, in default of payment of fine, to undergo further R.I. for one year under sections 364/34 of the Indian Penal

Code; sentenced to undergo S.I. for six months for the offence under sections 323/34 of the Indian Penal Code; sentenced to undergo R.I. for three years for the offence under sections 506-II/34 of the Indian Penal Code and sentenced to undergo R.I. for five years and to pay a fine of Rs.2000/- (rupees two thousands) each, in default of payment of fine, to undergo further R.I. for one year for the offence under sections 387/34 of the Indian Penal Code and the sentences were directed to run consecutively.

Since the jail criminal appeal and criminal appeal arise out of a common judgment, with the consent of the parties, the appeals are heard analogously and disposed of by this common judgment.

2. The prosecution case, in short, is that on 21.01.1996 some school students along with their parents and school teachers of Arabinda Sikhyaniketen of Gobara had gone to Daha Irrigation Project for a picnic. During such picnic, the students and some parents and some teachers were staying in the irrigation I.B. and taking tiffin. Some other parents including the informant Dr. Panu Naik (P.W.14) had been to a nearby village to arrange chicken for the dinner. In their absence, while the children were loitering in front of the said I.B., some persons suddenly came there in motor cycles and forcibly took away Laxmikanta Naik (P.W.19), son of the informant after assaulting him. While those persons were taking away P.W.19 in a motor cycle, the informant and other parents found them on the way while they were returning from a nearby village after purchase of chicken. When the informant protested the action of those culprits, they assaulted the informant by fist blows and pointed a revolver on his head and directed him to pay a sum of Rs.1,00,000/- (rupees one lakh only) by the next day at 10.30 a.m. in order to get back his son. Thereafter, finding no other way, the informant and other parents came back to the picnic site and P.W.19 was taken away by the culprits towards Indragada. Out of those culprits, the informant could able to identify one as Kadar Naik of village Basudevpur. When the picnic party returned back to Gobara, on the way the informant lodged a written report in writing at Bhanjanagar police station regarding the occurrence.

3. Basing upon such first informant report, Bhanjanagar P.S. Case No.17 of 1996 was registered on 21.01.1996 under sections 364/307/323/506/387/34 of the Indian Penal Code read with section 25(a) of the Arms Act. P.W.20 Sachidananda Mohapatra, Inspector in charge of Bhanjanagar police station took up investigation of the case. During course of investigation, the I.O. examined the informant, visited the spot, examined some witnesses and came

to know that the informant had already paid Rs.65,000/- (rupees sixty five thousand only) to the culprits and accordingly, his son Laxmikanta (P.W.19) was released. During further investigation, the I.O. could able to seize some of the loot amount which the culprits had paid to different persons of village Baibeli in order to purchase rations. The I.O. recovered a motor cycle from Banabasi Polai which was subsequently detected to be a stolen motor cycle with reference to Baliguda P.S. Case No.3 of 1996 under section 379 of the Indian Penal Code. The appellant Gariba Naik and co-accused Kalu Naik were arrested on 31.01.1996 and the I.O. also arrested appellant Banabasi Palei and from appellant Gariba Naik, he recovered one gun and some cash. The gun was sent for ballistic expert examination and after obtaining the report and sanction order of the District Magistrate, Ganjam, charge sheet was submitted against the appellants and co-accused Kalu Naik, Rabindra Naik, Md. Sarif, Raju Sahu, Dillip Naik, Kedar Naik and Tuku Polai.

Out of the aforesaid accused persons, the learned S.D.J.M., Bhanjanagar committed the appellants and co-accused Md. Sahib to the Court of Session to face trial. The co-accused Md. Sahib escaped from the local Spl. Sub-Jail, Bhanjanagar for which the sessions case was split up against him.

4. In order to prove its case, the prosecution has examined as many as twenty witnesses and has proved eleven documents.

P.Ws. 1, 2, 3, 4, 6, 12 and 15 are the eye witnesses to the occurrence. P.W.14 is the informant, P.W.19 is the victim boy, P.W.18 is a police officer who stated to have taken zima of the motor cycle seized in connection with another case and P.W.20 is the Investigating Officer of this case. The remaining witnesses are all seizure witnesses.

Exts.1, 2/1, 3/1, 5/1 and Ext.8 are the seizure lists, Ext.6 is the zimanama, Ext.7 is the F.I.R., Ext.9 is the forwarding letter of the S.D.J.M., Bhanjanagar for sending of seized revolver to the S.F.S.L., Bhubaneswar, Ext.10 is the report of the S.F.S.L., Bhubaneswar and Ext.11 of the office coy of the sanction order of the District Magistrate, Ganjam.

5. During trial, P.Ws.1, 2, 4, 5, 8, 9, 10, 13, 16 and 17 did not support the prosecution case for which they were declared hostile. The conviction of the appellants is based on the evidence of six witnesses i.e. P.W.3 Bhikari Charan Gouda, P.W.6 Kishore Chandra Panda, P.W.11 Smt. Damayanti Nayak, P.W.12 Rajendra Rout, P.W.14 Dr. Panu Nayak and P.W.19 Laxmikanta Nayak.

6. P.W.3 Bhikari Charan Gouda has stated that the accused persons who were standing in the dock were among the six persons, who kidnapped Laxmidhara Nayak (P.W.19). In the cross-examination however he has stated that first he saw the goondas at a distance of 200 cubits away from him and the motor cycle of the goondas were moving in a high speed and for the first time he was seeing the accused persons in the dock on the date of his deposition and prior to his identification in the dock, he had also seen them on the verandah of the Court. He further stated that P.W.14 Dr. Panu Nayak who had come to the Court on that day, identified the accused persons standing in the Court on the verandah of the Court to be the culprits just prior to his examination.

P.W.6 Kishore Chandra Panda has stated that the four accused persons standing in the dock were among the six persons who were taking the boy in two motor cycles and in the cross-examination, he has stated that for the first time, he saw the accused persons standing in the dock on the date of occurrence and for the second time, he was seeing them on the date of his deposition.

P.W.11 Smt. Damayanti Nayak who is the mother of the victim has stated that the four accused persons standing in the dock were among the culprits along with Kedar Naik and in the cross-examination she has stated that she saw the four co-accused persons standing in the dock for the first time at Daha on the date of occurrence and for the second time in the Court on the date of her deposition.

P.W.14 Dr. Panu Nayak who is the father of the victim has stated that the four accused persons standing the dock were among the culprits who had kidnapped his son and in the cross-examination, he has stated that two days after the occurrence, the culprits were apprehended by police and they were taken to village Gobara which is his village.

P.W.19 Laxmikanta Nayak, the victim has stated that he could not remember if the accused persons in the dock were there at the spot or not.

P.W.20 Sachidananda Mohapatra is the investigating officer who has stated that during course of investigation, after arrest of appellant Garib and Kalu, he had not requested the Court for T.I. parade by the informant and by his son or by other witnesses who had occasioned to see the occurrence of kidnapping of the son of the informant. P.W.20 tried to explain that the informant, his son and other witnesses did not agree to co-operate the police

for any T.I. parade of the suspects but he admitted that in the case diary, he has not mentioned about such aspects.

7. Mr. Manoranjan Padhi who was appointed as the counsel for all the three appellants in the two criminal appeals was supplied with the paper book. He placed the impugned judgment, evidence of the witnesses and contended that the identification of the appellants by the witnesses for the first time in Court without being tested by prior T.I. parade should not be accepted and all the appellants should be given benefit of doubt.

Mr. Prem Kumar Patnaik, learned Addl. Government Advocate on the other hand supported the impugned judgment and submitted that since number of witnesses have identified the appellants in Court to have participated in the occurrence, therefore, the identity cannot be doubted and thus the learned trial Court has not committed any illegality in accepting their evidence.

8. Admittedly in this case, the test identification parade has not been conducted. The reason which has been offered by the investigating officer regarding non-corporation of the informant, his son and other witnesses to participate in the T.I. parade has not been mentioned in the case diary. No such suggestion has been given by the prosecution to any of the witnesses who identified the appellants in Court for the first time that in spite of request of the investigating officer, they did not co-operate for holding T.I. parade in respect of the suspects. Nothing in writing has been obtained from the witnesses regarding their non-inclination to participate in the T.I. Parade. There is no evidence that the accused persons refused to take part in the test identification parade. It appears that the occurrence in question took place on 21.01.1996. The first information report (Ext.7) was lodged by P.W.14 on the very day. The appellants Guli Behera and Bana Palei @ Banabasi Palei were arrested on 24.01.1996 and they were forwarded to Court on 25.01.1996. Similarly the appellant Gariba @ Girisha Naik was arrested on 31.01.1996 and he was forwarded to Court on 01.02.1996. The charge sheet was submitted on 23.04.1996. Therefore, there is absolutely no satisfactory explanation offered by the prosecution for non-holding of the T.I. parade and I am not inclined to accept the explanation offered by the investigating officer that prayer for T.I. parade was not made after the arrest of the appellants as the informant, his son and other witnesses did not agree to co-operate the police for any T.I. parade of the suspects.

On perusal of the evidence of the witnesses who identified the appellants in Court, it appears from the evidence of Dr. Panu Naik (P.W.14) who is the informant in the case that two days after the occurrence, the culprits were apprehended by the police and the culprits were taken to village Gobara which is his own village. There is no material on record that after the arrest of the accused persons, they were kept under covers so that nobody can see their faces and in that manner they were taken to village Gobara. Therefore, the possibility of the accused persons being shown to the witnesses cannot be ruled out.

P.W.3 though identified the appellants in Court but he has stated that it is informant who identified them in the verandah of the Court to be the culprits just prior to his examination. He further stated that he was seeing the accused persons for the first time in the dock on the date of his examination. When P.W.3 has stated that the accused persons were at a distance of 200 cubits from him while moving in the motor cycle in a high speed, it would be too difficult on the part of P.W.3 to remember their faces and stature about one year after the occurrence when he deposed in Court. Therefore, the identification of the appellants by P.W.3 in Court for the first time without being tested by any prior T.I. parade cannot be accepted.

So far as P.W.6 is concerned, he has also stated that after the date of occurrence, he is seeing them for the second time in Court on the date of his evidence. Similar is the evidence of P.W.11 and P.W.12.

In the case of **Dana Yadav @ Dahu -Vrs.- State of Bihar reported in A.I.R. 2002 Supreme Court 3325**, it is held as follows:-

> "38. (e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in Court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in Court of an accused by a witness and the same is a rule of prudence and not law. In exceptional circumstances only, evidence of identification for the first time in Court, without the same being corroborated by previous identification in the test

identification parade or any other evidence, can form the basis of conviction."

In the case of **Ramanath Naik -Vrs.- State reported in 1995 Criminal Law Journal 2255**, a Division Bench of this Court has held that identification for the first time during trial is inherently of a very weak character which looses much of its value without prior test identification parade.

It is well settled that the substantive evidence is the evidence of identification in Court and the test identification parade provides corroboration to the identification of the accused by the witness in Court. The purpose of prior test identification is to test and strengthen the trustworthiness of the version of the identifying witness regarding identification of the culprits. It is always considered a safe rule of prudence to seek for corroboration to the sworn testimony of witness in Court as to the identity of the accused who are strangers to the witness, in the form of earlier identification. If T.I. Parade is not conducted when the accused is stranger to the witness, while giving evidence in Court, the witness may very well think to himself that the police must have caught hold of the right person and therefore, he would be tempted to identify the accused in the dock as culprit. This is human psychology and therefore, the Court has to take a very cautious, judicious and pragmatic approach to accept the evidence of identification of the accused for the first time in Court without being tested by prior test identification parade.

In the case in hand, there is no evidence that the witnesses who identified the appellants in Court had sufficient and fair opportunity to observe the features of the appellants at the time of commission of the crime and there were some special features in the appellants to recognize them in Court for the first time after a year of the occurrence. Except giving the approximate age and height of the culprits and their dresses, no special features of any of the culprits have been indicated by the informant in the F.I.R. Therefore, when no test identification parade has been conducted and no satisfactory explanation has been offered by the prosecution for non-holding of the test identification parade and when there are evidence on record that after the arrest of the accused persons, they were taken to the village of the informant and absence of any material to show that they were kept under covers after their arrest, I am unable to place any reliance on the evidence of identification adduced by P.W.3, P.W.6, P.W.11, P.W.12 and P.W.14 for the first time in Court.

9. In view of the aforesaid discussions, the impugned judgment and order of conviction against the appellants and the sentence passed thereunder is not sustainable in the eye of law and accordingly, the same is hereby set aside. The appellants are acquitted of the charges under sections 364/323/387/506-II/34 of the Indian Penal Code.

It appears that the appellant Guli Behera was not granted bail during pendency of the appeal. He shall be released forthwith from custody, if his detention is not otherwise required in any other case. The appellants Gariba @ Girisha Naik and Bana Palei @ Banabasi Polai have been granted bail by this Court on 24.07.2003. They are discharged from the liability of their bail bonds. Their personal bonds as well as surety bonds stand cancelled. If the appellants are in custody in connection with this case without filing bail bonds, they should to set at liberty forthwith, if their detention is not required in any other case.Accordingly, the jail criminal appeal and the criminal appeal are allowed.The hearing fee for both the criminal cases is assessed to be Rs.5000/- which would be paid to the learned counsel for the appellants immediately.

Appeals allowed.

2017 (II) ILR - CUT-1175

S. K. SAHOO, J.

CRLA NO. 282 OF 2008

SATYANANDA PANI .....Appellant

.Vrs.

STATE OF ORISSA (VIG.) .....Respondent

(A) PREVENTION OF CORRUPTION ACT, 1988 – Ss. 7, 13(1)(d)

"Proof of demand" of illegal gratification is the gravamen of the offence under sections 7 and 13(1)(d) of the P.C.Act, 1988 and in absence there of, the charge would fail – Mere acceptance of any amount allegedly by way of illegal gratification or recovery there of, de hors the proof of demand, ipso facto, would not be sufficient to bring home the charge under the above sections.

In this case there is not only absence of acceptable evidence regarding the occasion for the appellant to demand the bribe money but also absence of clinching material relating to demand and acceptance of the same – Moreover there is absence of recovery of tainted money from the possession of the appellant – So the guilt of the appellant has not been established beyond all reasonable doubt and the appellant is entitled to the benefit of doubt – Held, the impugned judgment and order of conviction and sentence is set aside. (Paras 9 to 15)

(B) PREVENTION OF CORRUPTION ACT, 1988 – Ss. 7, 13(1)(d) & 13(2)

Conviction for the charge under sections 7, 13(1)(d) read with section 13(2) P.C. Act, 1988 – Evidence of the complainant should be corroborated in material particulars – Since the complainant can not be placed on any better footing than that of an accomplice, corroboration in material particulars connecting the accused with the crime has to be insisted upon. (Para 8)

Case Laws Referred to :-

1. (2003) 26 Orissa Criminal Reports 274 : Niranjan Bharati -Vrs.- State of Orissa.
2. 1994 Criminal Law Journal 1383 : Babu Lal Bajpai -Vrs.- State of U.P.
3. A.I.R. 1979 S.C. 1408 : Suraj Mal -Vrs.- The State (Delhi Administration)
4. (2016) 63 OCR (SC) 150 : Khaleel Ahmed -Vrs.- State of Karnataka.
5. (2011) 50 Orissa Criminal Reports 189 : State of Orissa -Vrs.- Dr. Biswanath Hota.
6. A.I.R. 2003 S.C. 2169 : Subash Parbat Sovane -Vrs.- State of Gujrat
7. (2009) 43 Orissa Criminal Reports (SC) 48: C.M. Girish Babu -Vrs.- CBI, Cochin.
8. 2014(1) Acquittal 216 (Del.) : Raj Kishore -Vrs.- State.
9. (2014) 58 OCR 703 : Manoranjan Mohanty -Vrs.- State of Orissa.
11. 1980 SCC(Crl.) 121 : Panalal Damodar Rathi -Vrs.- State of Maharastra.
12. 2013 (II) OCR 308 : Antaryami Bihari -Vrs.- State of Orissa (Vigilance)
13. (2009) 44 OCR (SC) 425 : State of Maharashtra -Vrs.- Dnyaneshwar Laxman Rao Wankhede.
14. 1994 CLJ 1710 : Gurucharan Singh -Vrs.- State of Haryana.
15. 2007 (4) Crimes 22 (SC) : State of Karnatak -Vrs.- Ameer Jan.
16. (2007) 37 OCR (SC) 872 : Ajay Singh -Vrs.- State of Maharastra.
17. 1971 SCC (Crl.) 684 : Yudhishtir -Vrs.- State of Madhya Pradesh.

For Appellant : Mr. Smruti Ranjan Mohapatra
For Respondent : Mr. Sanjay Ku. Das, Standing Counsel (Vig.)

Date of Argument: 10.08.2017
Date of Judgment : 09.10.2017

JUDGMENT

S. K. SAHOO, J.

The appellant Satyananda Pani faced trial in the Court of learned Special Judge, Vigilance, Bhubaneswar in T.R. Case No. 45 of 1995 for offences punishable under section 7 and section 13(1)(d) punishable under section 13(2) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') on the accusation that on 19.01.1994 at about 4.00 p.m., he being a public servant functioning as Excise Inspector, Striking Force, Berhampur, in his office situated at Gosaninuagaon, Berhampur by corrupt and illegal means and abusing otherwise his official position, obtained pecuniary advantage to the extent of Rs.300/- from the complainant (P.W.6) and directly accepted such amount from him as gratification other than legal remuneration as a motive for showing favour to P.W.6 for not filing an excise case against him.

The learned Trial Court vide impugned judgment and order dated 24.06.2008 found the appellant guilty of the offences charged and sentenced him to undergo R.I. for six months and to pay a fine of Rs.1000/-, in default, to undergo R.I. for one month under section 7 of the 1988 Act and to undergo R.I. for one year and to pay a fine of Rs.2000/-, in default, to undergo R.I. for three months under section 13(1)(d) read with section 13(2) of the 1988 Act and both the sentences of imprisonment were directed to run concurrently.

2. The factual matrix of the prosecution case as per the written report presented by P.W.6 Prakash Chandra Sahoo before the Superintendent of Police, Vigilance, Berhampur on 19.01.1994 is that on 31.12.1993 the appellant who was the local Excise Inspector called him and his father to his office located at Gosaninuagaon and asked them to sign on a paper on the ground of seizure of liquor from a field situated nearer to their homestead land. When P.W.6 expressed his unwillingness for such action of the appellant as he was not present in the village, the appellant assured P.W.6 and his father that nothing would happen to them as the liquor was seized from the field. Accordingly, P.W.6 and his father put their signatures on the paper produced by the appellant. It is further stated in the F.I.R. that when they put their signatures, the appellant threatened them to initiate a case against them as the liquor was seized from the back side of their homestead land and to send them to Court after arrest. The appellant further told them that if they would pay Rs.300/-, no case would be initiated against them. Thereafter,

P.W.6 and his father returned to their village. Within three to four days, two peons of Excise Office came to the house of P.W.6 and told him to come to the Excise Office as the appellant had called him but P.W.6 did not go to the Excise Office. On 18.01.1994 at about 7.00 p.m. the appellant with his staff searched the residential premises of P.W.6 but did not get any contraband articles. At that time, P.W.6 was not present in his house. The appellant threatened the father of P.W.6 to search his house again and to send them to Court in custody as earlier demand of Rs.300/- was not fulfilled. When P.W.6 came to know about the development from his father, finding no other way, he collected Rs.300/- to give the same as bribe to the appellant against his desire.

On the basis of such first information report, Berhampur Vigilance P.S. Case No. 05 of 1994 was registered on 19.01.1994 under sections 13(2) read with 13(1)(d) and section 7 of the 1988 Act.

3. P.W.11 J. Rama Chandra Rao, Inspector of Vigilance, Reserve Squad, Berhampur was directed by the Superintendent of Police, Vigilance, Berhampur to detect the case by laying a trap and to investigate the case.

On the requisition of P.W.11, the official witnesses along with Vigilance Officers assembled in the Vigilance Office, Berhampur on 19.01.1994 at about 2.30 p.m. P.W.6 appeared before them as per previous instruction and he narrated before the officials regarding demand of bribe by the appellant as monthly contribution as he was regularly selling liquor without licence. P.W.6 further told that the appellant had threatened him to arrest if the amount was not paid regularly. P.W.6 produced three numbers of 100 rupees G.C. notes. Official witnesses Md. Arif (P.W.8) and Kedar Ch. Behera (P.W.3) put their initials with dates on those currency notes and noted down the numbers in two separate sheet papers. Demonstration was made to show the use and effect of phenolphthalein powder in the solution of sodium carbonate. The currency notes were smeared with phenolphthalein powder and after handling sample was preserved. The tainted notes were given to P.W.6 with instruction to make payment to the appellant only on demand. Debendra Kumar Satpathy (P.W.4), Junior Clerk was asked to accompany P.W.6 with instruction to overhear conversation between the appellant and P.W.6 and to give signals after transaction. A preparation report (Ext.6) was prepared.

After preparation of the trap, the trap party members along with P.W.6, P.W.4 and other official witnesses proceeded to the spot at about 3.30

p.m. After reaching nearer to the spot, P.W.6 and P.W.4 walked towards the office of the appellant and other members of the trap party took their position at the nearby places waiting for the signal from P.W.4.

It is the further prosecution case that at the relevant point of time, the office -cum- residence of the appellant was closed from inside. P.W.6 knocked at the door and the appellant opened the same. The appellant asked P.W.6 as to why he had come there to which P.W.6 replied that he had brought money. When the appellant asked P.W.6 to give money, P.W.6 gave the tainted currency notes of Rs.300/- to the appellant which was received by the appellant and he kept the same in his left side chest shirt pocket. At about 4.05 p.m. on getting signal, P.W.11 rushed to the office of the appellant and found the appellant sitting on his chair and one Kanhei Sahoo was present in the office. When the appellant saw the vigilance staff, he kept the money on the table and directed Kanhei Sahoo to conceal the money and accordingly, Kanhei Sahoo took the money from the table and kept it inside his shirt pocket and again Kanhei Sahoo kept the money on the table when he saw the vigilance staff. P.W.11 disclosed the identities of the trap party members and challenged the appellant to have received bribe from P.W.6 to which the appellant denied. The tainted G.C. notes were found on the table of the appellant. The hand wash of the appellant was taken separately and tested in the solution and there was slight change of colour to pink/rose. Samples were preserved for chemical examination. When the matter was confronted to P.W.6 and P.W.4, they stated that the appellant received the currency notes in his hand and kept the same on his table, then in his shirt pocket and thereafter threw it but Kanhei Sahu collected the money at the instance of the appellant and kept in his pocket but seeing the approach of the Vigilance staff, Kanhei Sahu kept the notes on the table. P.W.11 took the pocket wash of the appellant, hand wash and pocket wash of Kanhei Sahu were also taken and tested resulting change of colour to pink/rose. Samples were preserved for chemical test. The numbers of the currency notes were verified with the earlier noting, which tallied. P.W.11 seized the tainted G.C. notes, shirt of the appellant, his identity card, terrycot full check shirt of Kanhei Sahu and paper chit. P.W.11 prepared the detection report (Ext.7) and a copy of the detection report was given to the appellant. Tainted money was seized under seizure list Ext.8. P.W.11 seized the original P.R. 21/93-94 from the office of Superintendent of Excise, Chatrapur which revealed that P.W.6 was named as an accused in that P.R. and the appellant had sent the P.R. to the office of the Superintendent of Excise, Chatrapur on 22.01.1994 vide letter no.45. P.W.11

also seized Court Dak book on 30.04.1994. P.W.11 also seized the tour diary of the appellant for the period from 31.12.1993 to 22.01.1994 and he sent the exhibits for chemical examination to R.F.S.L., Berhampur and obtained the chemical examination report (Ext.13). P.W.11 placed all the documents before the Sanctioning Authority and had discussion with him and obtained sanction order (Ext.19).

On completion of investigation, P.W.11 submitted charge sheet on 31.01.1995 against the appellant under sections 7, 13(1)(d) read with 13(2) of the 1988 Act.

4. The defence plea of the appellant who examined himself as D.W.1 was that on 31.12.1993 he was the Excise Inspector, Striking Force, Berhampur and on that day at about 5.00 p.m. while he was patrolling at Khajuria Road near the house of P.W.6, on receipt of the information, he detained P.W.6 and searched his person in presence of the witnesses and recovered five liters of I.D. liquor from his possession and accordingly, he arrested P.W.6 at the spot and released him on bail and on 01.01.1994 he sent the preliminary report (Ext.2) to the Superintendent of Excise, Chatrapur wherein he had mentioned that it was a fit case for submission of charge sheet and on 18.01.1994 he sent the final prosecution report to the Court of learned S.D.J.M., Berhampur. It is the further defence plea that on 19.01.1994 at about 3.30 to 4.00 p.m. while the appellant was in the office of the Inspector of Excise, Gosaninuagaon, Berhampur, P.W.6 and Jogendra Satpathy came there. When the appellant enquired about their coming, P.W.6 told him to drop the criminal proceeding initiated against him. The appellant intimated P.W.6 about submission of prosecution report against him. P.W.6 all on a sudden wanted to insert some currency notes in the shirt pocket of the appellant but the appellant gave some slaps to P.W.6 and also fist blow on his wrist for which the currency notes fell down on the ground. One Kanhei Sahu, a relation of P.W.6 was present there at that time and P.W.6 asked Kanhei to collect the currency notes and to keep it in his pocket. At that time, the Vigilance staff rushed to the room of the appellant and challenged him to have received money from P.W.6 but the appellant denied about such charge and told that P.W.6 was forcibly putting some currency notes in his pocket. When Vigilance staff asked P.W.6 about the currency notes, he told about the presence of the currency notes in the pocket of Kanhei. The currency notes were brought from the pocket of Kanhei and placed on the table. It is the further defence plea that since the appellant had filed one excise case against

P.W.6, false allegation regarding demand and acceptance of bribe was leveled against him by P.W.6.

5. In order to prove its case, the prosecution examined eleven witnesses.

P.W.1 P. Chiti Babu was the Head Clerk in the office of Superintendent of Excise, Chatrapur who is a witness to the seizure.

P.W.2 Narahari Mahakudu did not support the prosecution case for which he was declared hostile by the prosecution.

P.W.3 Kedar Chandra Behera and P.W.4 Debendra Kumar Satpathy were the Junior Clerks in the Settlement Office, Berhampur who were the members of trap party. Both of them were declared hostile by the prosecution for not supporting the prosecution case fully.

P.W.5 Prasanta Kumar Acharya was the Senior Scientific officer, Regional F.S.L., Bhubaneswar who proved the chemical analysis report.

P.W.6 Prakash Chandra Sahoo was the informant in the case.

P.W.7 Basudev Patra did not support the prosecution case for which he was declared hostile by the prosecution.

P.W.8 Md. Arif was the Asst. Settlement Officer, Berhampur and he was a member of the trap party.

P.W.9 Rabindranath Mohanty was the Commissioner of Excise and Inspector General of Registration, Cuttack who accorded sanction for the prosecution of the appellant. He proved the sanction order Ext.19.

P.W.10 A.V. Rama Rao was the A.S.I. of Excise, Striking Force, Berhampur who is a witness to the seizure.

P.W.11 J. Rama Chandra Rao is the investigating officer.

The prosecution exhibited twenty two documents. Exts.1, 8, 9, 10, 11, 12 and 20 are the seizure lists, Ext.2 is the preliminary report of the appellant, Ext.3 is the carbon copy of the P.R., Ext.4 is the tour diary, Ext.5 is the chit of paper, Ext.6 is the preparation report, Ext.7 is the detection report, Ext.13 is the chemical examination report, Ext.14 is the F.I.R, Exts.15, 16 and 17 are the signatures of P.W.8 on the tainted notes, Ext.18 is a sheet of paper containing numbers of G.C. notes, Ext.19 is the sanction order and Ext.22 is the prosecution report.

The prosecution proved ten material objects. M.O.I is the packet containing G.C. notes, M.O.II and M.O.III are the shirts and M.O.IV to M.O.X are the glass bottles.

The appellant examined himself as D.W.1 and exhibited two documents. Ext.A is the entry no.17 in the dispatch register and Ext.B is the endorsement in the Dak book.

6. The learned Trial Court after assessing the evidence on record came to hold that the appellant has not disputed the search of the house of P.W.6 and seizure of liquor from his house premises. The appellant has also not disputed the recovery of tainted G.C. notes from his office. It is further held that the informant has corroborated the allegation made in the F.I.R. and the evidence of P.W.8 and P.W.11 give credence to the statement of P.W.6 that the appellant had demanded bribe from him. It is further held that P.W.4 stated about the disclosure made by P.W.6 relating to demand of Rs.300/- by the appellant and thus there is sufficient evidence on record to hold that the appellant had demanded bribe from the informant towards monthly mamulu and not to file any case against him. It is further held that the chemical examination report (Ext.13) clearly established that the appellant after handling the tainted G.C. notes had kept it inside his pocket and the prosecution case that the appellant thereafter handed over the tainted G.C. notes to Kahnei Sahu finds corroboration from the C.E. report as pocket wash of Kahnei Sahu had contained phenolphthalein. It is further held that besides the oral evidence of the witnesses, the scientific test establishes the facts beyond reasonable doubt that the appellant after handling the tainted G.C. notes had kept it in his pocket and thereafter handed it over to Kanhei Sahu who had kept it in his pocket and seeing the approach of the vigilance staff, Kanhei Sahu kept it on the table of the appellant. It is further held that in view of the oral evidence of the witnesses coupled with scientific test report, the irresistible conclusion was that the appellant had voluntarily and consciously accepted the bribe of Rs.300/- from the informant. It is further held that the appellant has failed to discharge the onus and the prosecution has successfully established the fact that the appellant received the amount of Rs.300/- towards illegal gratification.

7. Mr. Smruti Ranjan Mohapatra, learned counsel appearing for the appellant contended that no work of the informant (P.W.6) was pending with the appellant and as such there was no occasion for the appellant to demand bribe money from the informant. It is further contended that the charge

against the appellant that he demanded Rs.300/- from the informant for not filing an excise case against him has not been proved by the prosecution inasmuch as on the date of occurrence, prosecution report had already been submitted against P.W.6 in the excise case by the appellant. It is further contended that the tainted money was not recovered from the possession of the appellant but it was lying on the table when the Vigilance party arrived at the spot and therefore, the acceptance part is also falsified. It is further contended that the story narrated by the informant as well as the overhearing witness relating to acceptance of the tainted money by the appellant is discrepant in nature and therefore, the prosecution case is doubtful. It is further contended that the overhearing witness has not given any signal as per previous instruction to him, which shows that it was an unsuccessful trap. It is further contended that the evidence on record indicates the presence of one Kanhei Sahu at the time of occurrence but he has not been examined by the prosecution during trial for which adverse inference should be drawn against the prosecution. It is further contended that defence plea has been established by preponderance of probabilities and the learned Trial Court has rejected the defence plea in a mechanical manner without proper analysis of evidence and therefore, benefit of doubt should be extended in favour of the appellant. The learned counsel for the appellant placed reliance in the cases of **Niranjan Bharati -Vrs.- State of Orissa reported in (2003) 26 Orissa Criminal Reports 274**, **Babu Lal Bajpai -Vrs.- State of U.P. reported in 1994 Criminal Law Journal 1383**, **Suraj Mal -Vrs.- The State (Delhi Administration) reported in A.I.R. 1979 S.C. 1408**, **Khaleel Ahmed -Vrs.- State of Karnataka reported in (2016) 63 Orissa Criminal Reports (SC) 150**, **State of Orissa -Vrs.- Dr. Biswanath Hota reported in (2011) 50 Orissa Criminal Reports 189**, **Subash Parbat Sovane -Vrs.- State of Gujrat reported in A.I.R. 2003 S.C. 2169**, **C.M. Girish Babu -Vrs.- CBI, Cochin reported in (2009) 43 Orissa Criminal Reports (SC) 48**, **Raj Kishore -Vrs.- State reported in 2014(1) Acquittal 216 (Del.)**, **Manoranjan Mohanty -Vrs.- State of Orissa reported in (2014) 58 Orissa Criminal Reports 703**, **Panalal Damodar Rathi -Vrs.- State of Maharastra reported in 1980 Supreme Court Cases (Crl.) 121**, **Antaryami Bihari -Vrs.- State of Orissa (Vigilance) reported in 2013 (II) Orissa Law Reviews 308**, **State of Maharashtra -Vrs.- Dnyaneshwar Laxman Rao Wankhede reported in (2009) 44 Orissa Criminal Reports (SC) 425**, **Gurucharan Singh -Vrs.- State of Haryana reported in 1994 Criminal Law Journal 1710**, **State of Karnatak -Vrs.- Ameer Jan reported in 2007 (4) Crimes 22 (SC)**, **Ajay Singh -Vrs.- State of**

Maharastra reported in (2007) 37 Orissa Criminal Reports (SC) 872 and **Yudhishtir -Vrs.- State of Madhya Pradesh reported in 1971 Supreme Court Cases (Crl.) 684**.

Mr. Sanjay Kumar Das, learned Standing Counsel appearing for the Vigilance Department on the other hand contended that demand of illegal gratification of Rs.300/- from the informant (P.W.6) by the appellant has been proved through the evidence of P.W.6, P.W.8 and P.W.11 which is also partly supported by P.W.3 and P.W.4. It is further contended that the informant was not aware about the submission of final prosecution report against him before the Court and therefore, he being an illiterate person believed the appellant in good faith that no prosecution would be instituted against him if fulfills the demand of the appellant. It is further contended that Kanhei Sahu could not be examined in the Trial Court as he was dead when the summons were issued to him. It is further contended that the hand wash, shirt pocket wash and identity card wash which belonged to the appellant which were collected in the bottles were found to have contained phenolphthalein on chemical analysis as per the report (Ext.13) which was proved by P.W.5, a Senior Scientific Officer. It is further contended that even though the prosecution witnesses like P.W.3 and P.W.4 have been declared hostile for not supporting the prosecution case in its entirety but the testimony of such witnesses cannot be washed off completely and the part of the evidence in which they have supported the prosecution case and which is found to be credit-worthy can be acted upon. It is further contended that there is no infirmity or illegality in the impugned judgment of the learned Trial Court and therefore, the appeal should be dismissed. The learned counsel for the Vigilance Department relied upon the decisions of the Hon'ble Supreme Court in the cases of **State of Bihar -Vrs.- Basawan Singh reported in A.I.R. 1958 S.C. 500**, **Dalpat Singh -Vrs.- State of Rajasthan reported in A.I.R. 1969 S.C. 17**, **Hazarilal -Vrs.- the State of Delhi Administration reported in A.I.R. 1980 S.C. 873**, **Kishan Chand Mangal -Vrs.- State of Rajasthan reported in A.I.R. 1982 S.C. 1511**, **State of U.P. -Vrs.- Dr. G.K. Ghosh reported in A.I.R. 1984 S.C. 1453**, **T. Shankar Prasad -Vrs.- State of A.P. reported in (2004) 27 Orissa Criminal Reports (SC) 599**, **Varada Rama Mohana Rao -Vrs.- State of Andhra Pradesh reported in A.I.R. 2004 S.C. 3221**, **State of West Bengal -Vrs.- Kailash Chandra Pandey reported in A.I.R. 2005 S.C. 119**, **Raj Rajendra Singh Seth -Vrs.- The State of Jharkhand reported in (2008) 41 Orissa Criminal Reports (SC) 159** and **State of A.P. -Vrs.- P.**

Satyanarayan Murthy reported in (2008) 41 Orissa Criminal Reports (SC) 790.

8. The principle of law that emerges from the views expressed by different Courts including the Hon'ble Supreme Court in the above decisions placed by both the parties is that mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. In order to constitute an offence under section 7 of 1988 Act, proof of demand is a sine qua non. The burden rests on the accused to displace the statutory presumption raised under section 20 of the 1988 Act by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in section 7 of the 1988 Act. In a case where the accused offers an explanation for receipt of the alleged amount, the question that arises for consideration is whether that explanation can be said to have been established. While invoking the provisions of section 20 of 1988 Act, the Court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt inasmuch as the accused is not required to establish his defence by proving beyond reasonable doubt as the prosecution, but can establish the same by preponderance of probability. For arriving at the conclusion as to whether all the ingredients of the offence i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in their entirety. The standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. The initial burden of proving that the accused accepted or obtained the amount other than legal remuneration is upon the prosecution. It is only when this initial burden regarding demand and acceptance of illegal gratification is successfully discharged by the prosecution, then burden of proving the defence shifts upon the accused and a presumption would arise under section 20 of the 1988 Act. The proof of demand of illegal gratification is the gravamen of the offence under sections 7 and 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the

demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under sections 7 or 13 of the Act would not entail his conviction thereunder. The evidence of the complainant should be corroborated in material particulars and the complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon. Even if the trap witnesses turn hostile or are found not to be independent, if the evidence of the complainant and the other circumstantial evidence on record is found to be consistent with the guilt of the accused and not consistent with his innocence, there should be no difficulty for the Court in upholding the prosecution case. The Trial Court which has the occasion to see the demeanour of the witnesses is no doubt in a better position to appreciate it and the Appellate Court should not lightly brush aside the appreciation done by the Trial Court except for cogent reasons.

9. Let me first deal with the first contention raised by the learned counsel for the appellant that there was no occasion for the appellant to demand bribe money from P.W.6 as no work of P.W.6 was pending with the appellant as on the date of trap.

The charge was framed against the appellant on the accusation of demand of Rs.300/- made by him to P.W.6 for not filing the excise case against P.W.6. The documentary evidence i.e. P.R. No. 21/93-94 which was seized by the Investigating Officer (P.W.11) goes to show that it was submitted against P.W.6 on 18.01.1994 in the Court of learned S.D.J.M., Berhampur which was prior to the date of occurrence and the prosecution report relates to seizure of I.D. liquor from the possession of P.W.6 by the appellant on 31.12.1993. The informant has stated about filing of the case against him by the appellant after obtaining signatures on the documents. P.W.3 and P.W.4 have also stated about the submission of the prosecution report against P.W.6 on 18.01.1994. The tour diary (Ext.4) which was submitted by the appellant to the Excise Superintendent indicates regarding detection of the case. As per the evidence of P.W.1, the appellant intimated to the Superintendent of Excise on 01.01.1994 that it was a fit case for submission of charge sheet and the same was verified by the Superintendent.

Therefore, it is clear that immediately after the detection of the excise case against the informant, the appellant had intimated the same to his superior officer indicating his opinion which shows the bonafideness on the

part of the appellant. Had there been any intention of demanding bribe money by the appellant from P.W.6 for not filing the excise case, he would not have reported the matter to his superior officer. After reporting the detection of the case and giving his opinion to the superior officer that it was a fit case for submission of prosecution report and that the prosecution report would be submitted soon, it is difficult to accept that the appellant would demand bribe money from P.W.6 not to file the excise case. Since prosecution report had already been submitted in the Court prior to the date of trap which was also intimated by the appellant to P.W.6 on the date of trap when P.W.6 approached the appellant in his office -cum- residence as stated by the overhearing witness (P.W.4), there is sufficient force in the contention of the learned counsel for the appellant that there was no occasion as on the date of trap for the appellant to raise a demand of bribe money as prosecution report had already been submitted by then. The contention of the learned counsel for the Vigilance Department that P.W.6 was not aware about the submission of the prosecution report against him and therefore, he believed the appellant in good faith is too difficult to be accepted inasmuch as P.W.6 has stated that after obtaining their signatures on the documents, the appellant filed a case against them. The bonafideness in the conduct of the appellant right from the date of detection of the excise case against P.W.6 in reporting to the superior officer, giving his opinion against P.W.6 in his preliminary report and submission of final prosecution report prior to the date of trap, goes against the prosecution case that there was any occasion for the appellant as on the date of trap to demand bribe money from P.W.6.

10. Coming to the next contention raised by the learned counsel for the appellant that the charge against the appellant that he demanded Rs.300/- from the informant for not filing an excise case against him has not been proved by the prosecution, as already discussed not only the bonafideness in the conduct of the appellant right from the beginning of detection of the excise case against P.W.6 creates doubt about such demand but also the materials on record are highly discrepant in that respect. The overhearing witness (P.W.4) has stated that the appellant while unlocking the door of the room used as office replied to P.W.6 that he had already submitted charge sheet against P.W.6 on 18.01.1994 in the case which was started on 31.12.1993 and there was no need for P.W.6 coming to meet him. He has further stated that P.W.6 told the appellant that he had come to give Rs.300/- to him and tried to push the currency notes into the pocket of the appellant but the appellant resisted and gave a blow while warding off the pushing of

money into his pocket for which the currency notes were strewn on the floor. P.W.4 has specifically stated in his cross-examination that he has not heard or seen the appellant demanding Rs.300/- from P.W.6. Even though P.W.6 has stated that the appellant demanded Rs.300/- per month and threatened to book him and his father in excise cases if they failed to give the money but in the first information report, such aspect has not been reflected rather it is mentioned that after obtaining the signatures of P.W.6 and his father in papers, the appellant told them to give Rs.300/- not to file the case against them. P.W.6 has stated that he did not remember specifically the date and the name of the day on which the appellant demanded Rs.300/- from him as monthly payment. P.W.6 has further stated that he did not complain against the appellant before any authority after he demanded money from them before he went to the vigilance office. The father of P.W.6 who is supposed to be aware about such demand has not been examined by the prosecution to corroborate the evidence of P.W.6. In view of the discrepancies in the evidence of P.W.6 relating to demand of bribe money, the contradictory evidence of P.W.4, non-examination of the father of P.W.6 to prove such demand aspects as well as the other surrounding circumstances like submission of final prosecution report prior to the date of trap creates doubt that the appellant demanded Rs.300/- from the informant for not filing an excise case against him.

11. It is not disputed that the tainted money was not recovered from the appellant but it was lying on the table when the vigilance party led by P.W.11 arrived at the spot. P.W.3 has stated that when they entered inside the excise office, he found the appellant was standing inside the office and one person had held some currency notes of one hundred rupees denomination in his right hand and the moment he saw them, he put those notes on the table of the Excise Inspector and that person gave his name as Kanhei Sahu when asked by vigilance officers. P.W.4 has stated that P.W.6 told the appellant that he had come to give him Rs.300/- and tried to push the currency notes into the pocket of the appellant but the appellant resisted and gave a blow while warding off the pushing of the money into his pocket and the currency notes were strewn on the floor and at that time another man collected the currency notes from the ground and put them in his shirt pocket and that man was Kanhei Sahu who though initially denied to have collected the money from the floor and kept it in his pocket but subsequently on being challenged, he brought the currency notes from the pocket and kept them on the table in the office of the appellant as was directed by the vigilance staff. The defence plea

of the appellant who was examined as D.W.1 gets corroboration from the evidence of P.W.3 and P.W.4. Though P.W.6 has stated that the appellant accepted the money in his hands, kept it in his shirt pocket and seeing the vigilance staff coming towards the office, he kept the notes on the table and asked Kanhei Sahu to conceal the notes but it has been confronted to P.W.6 and proved through the Investigating Officer (P.W.11) that he has not stated about the same in his statement recorded under section 161 of Cr.P.C. Therefore, P.W.6 for the first time has stated about the acceptance of tainted currency notes by the appellant and the instruction given by the appellant to Kanhei Sahu. The role of Kanhei Sahu at the spot is highly suspicious and he was not arrayed as an accused rather shown as a witness for the prosecution but could not be examined on account of his death. The manner in which the tainted money was found on the table as per the evidence of the witnesses falsifies the prosecution case that the appellant accepted such money from P.W.6 towards bribe.

12. It appears that the overhearing witness (P.W.4) had not given any signal to the trap party members as was earlier instructed to him to give such signal soon after the transaction of payment of tainted bribe amount is over. P.W.4 has stated that while he was coming out to give signal, the Vigilance staff entered. P.W.3 has stated that though they were told by the Inspector Rama Rao (P.W.11) that after they saw P.W.4 rubbing his head with his right hand, they should proceed to the Excise Office but they did not receive any signal though they waited for about half an hour. P.W.6 has also not stated about any signal being given by P.W.4 to the Vigilance Police. P.W.8 has stated in a different manner that within half an hour, a Vigilance Constable came running towards the vehicle and reported that bribe giving and taking transaction was over. In view of the aforesaid evidence, the statement made by the Investigating Officer (P.W.11) that at about 4.05 p.m. on getting signal, they rushed to the office of the appellant cannot be accepted. Since as per the detection report (Ext.6), P.W.4 was supposed to relay the signal by combing his head by means of his left hand frequently coming to the verandah outside soon after the transaction of payment of tainted bribe amount was over and as per the evidence of P.W.4, no such signal was given by him, it disproves the prosecution case of transaction of payment of tainted bribe amount to the appellant.

13. Even though the report of chemical analyst marked as Ext.13 indicates about the presence of phenolphthalein in the hand washes of both the hands of the appellant, his pocket wash and his identity card wash which was there in

his shirt pocket collected in the bottles but in view of the defence plea which gets corroboration from the evidence of the prosecution witness (P.W.4) that there was an attempt made by P.W.6 to thrust the currency notes into the pocket of the appellant and resistance was offered by the appellant to such attempt, the possibility of currency notes smeared with phenolphthalein coming in contact with the shirt pocket, identity card and hands of the appellant cannot be ruled out and therefore, findings of the chemical analyst cannot be a clinching circumstance against the appellant in the facts and circumstances of the case.

14. The defence has taken a specific plea. Not only the appellant who is competent witness in view of section 315 of Cr.P.C. has examined himself as D.W.1 in support of his plea but some of the documentary evidence adduced in the case and the ocular evidence of some of the prosecution witnesses probablises the defence plea and creates doubt about the truthfulness of the prosecution version. The learned Trial Court has not properly assessed the defence plea in its proper perspective and seems to have ignored the lacunas in the prosecution case. The finding of the learned Trial Court in the concluding paragraph that the appellant had demanded Rs.300/- not to raid the house of P.W.6 frequently and for non-submission of P.R. in excise cases against him is contrary to the charge framed against the appellant.

15. In view of the above discussions, it is apparent that the prosecution case suffers from serious infirmities. In the absence of any acceptable evidence regarding the occasion for the appellant to demand the bribe money, absence of clinching materials relating to the demand and acceptance of the bribe money by the appellant, absence of recovery of tainted currency notes from the possession of the appellant and the fact that the defence plea has been established by preponderance of probabilities, I am of the view that though there is some suspicion against the appellant but suspicion howsoever strong cannot take the place of proof. In the circumstances, since the guilt of the appellant has not been established beyond reasonable doubt and the impugned judgment suffers from perversity, I am constrained to give benefit of doubt to the appellant.

In the result, the appeal is allowed. The impugned judgment and order of conviction and the sentence passed thereunder is set aside and the appellant is acquitted of all the charges. The appellant is on bail by virtue of the order of this Court. He is discharged from liability of his bail bond. The personal bond and the surety bond stand cancelled.

Appeal allowed.

2017 (II) ILR - CUT-1191

SUJIT NARAYAN PRASAD, J.

W.P.(C) NO. 5595 OF 2004

DEBI PRASAD MOHANTY .....Petitioner

.Vrs.

CHIEF EXECUTIVE OFFICER, CESCO & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART. 311(2)

Disciplinary proceeding – Compulsory retirement – Allegation is misbehaviour and unauthorized absence from duty – Non-supply of relevant documents to the delinquent-employee and not allowing him to cross-examine the complainant – A delinquent-employee should not be punished without providing adequate opportunity to him/her.

In this case, the petitioner-employee was not provided with the copy of the complaint petition as required under Rule 15(2) of the OCS (CCA) Rules, 1962 – Provision is mandatory in nature – Maintainability of the writ petition questioned on the ground of availability of alternative remedy of appeal – However, this Court, considering the punishment is of the year 2004 and the matter is pending for the last 13 years and relegating the matter at this stage will further lead to miscarriage of justice, felt it to be a fit case to exercise its extraordinary jurisdiction – Held, the impugned order Dt. 21.05.2004, not being sustainable in law is quashed. (Paras 17 to 20)

Case Laws Referred to :-

1. (1988) 8 SCC 1 : Whirlpool Corporation -V- Registrar of Trade Marks, Mumbai & Ors.
2. (1999) 8 SCC 582 : Hardwari Lal -V- State of U.P. & Ors.
3. AIR 1978 SC 851 : Mohinder Singh Gill & Anr. -V- The Chief Election Commissioner, New Delhi & Ors.
4. AIR 1991 SCC 471 : Union of India & Ors. -V- Mohd. Ramzan Khan
5. (1993) 4 SCC 277 : M.D. Eastern Coal India Ltd, Hyderabad -V- B.Karunakar
6. (2007) 1 SCC 338 : Govt. of Andhra Pradesh & Ors. -V- A.Venkata Raidu
7. (2010) 2 SCC 772 : State of Uttar Pradesh & Ors. -V- Saroj Ku. Sinha
8. (2006) 6 SCC 794 : Union of India & Anr. -V- K.G.Soni
9. (1995) 6 SCC 749 : B.C.Chaturvedi -V- Union of India & Ors.

For Petitioner : M/s. Kali P.Mishra, J.K.Khandayatray, S.Das, S.Mohapatra, C.Mallick.

For Opp. Parties : Mr. Banoj Ku.Patnaik, Prasanjit Sinha, P.K.Sahoo, R.K.Nayak.

Date of hearing : 24.08.2017
Date of judgment : 24.08.2017

JUDGMENT

S. N. PRASAD, J.

This writ petition has been filed for quashing the order dated 21.05.2004 issued under signature of Superintending Engineer, Electrical Circle No.1, Bhubaneswar whereby and where under the order of punishment of compulsory retirement w.e.f. date of Suspension i.e. w.e.f. 28.01.2003 has been passed on confirmation of departmental proceeding No.4231/2001 dated 3.11.2001 and 14/2008 dated 18.12.2003.

2. Case of the petitioner is that while he was working as Clerk-B (U/S) under the opposite parties, a departmental proceeding was initiated in Proceeding No.4231 dated 3.11.2001 making allegation of charge of mis-behaviour to the superior officer by using unparliamentary and derogatory language, insubordination, refusal to accept office order, unauthorized absence from duty and misconduct. Another proceeding was initiated in Proceeding No.4231 dated 3.11.2001 alleging the same nature of allegation. The petitioner has approached this Court at the initial stage of the departmental proceeding, since relevant documents from the authority basis upon which the charges has been framed, has not been supplied to him, which is the mandatory requirement as per the provision 15(2) of O.C.S. (C.C.A.) Rules, 1962.

This Court vide order dated 21.05.2004 has passed an interim order to the effect that departmental proceeding may continue but no final decision will be taken without leave of this Court till the next date.

3. Grievance of the petitioner is that the document relevant for putting proper defence of the charges has not been supplied to her. The authorities have proceeded with the departmental proceeding but without supplying the relevant documents specially the complaint of misbehaving with the consumer of the area and the report submitted in this regard by the then S.D.O. of the area and as such it is the contention of the petitioner that he has seriously been prejudiced in the departmental proceeding since he has not been allowed to defend himself properly.

4. Learned counsel for the petitioner has submitted that the settled proposition of law is that the copy of complaint of the complainant if not allowed to be examined by the delinquent employee, it amounts to violation of principle of natural justice. She argues that the report basis upon which the departmental proceeding has been initiated, copy of the same has not been exhibited by the S.D.O. concerned since in spite of repeated notice issued to him, he has not appeared before the enquiry officer and the enquiry officer after noting it down in the enquiry report has given the finding by proving the charge.

She further submits that the authorities during pendency of the writ petition has passed the final order on 21.05.2004, the petitioner came to know about the final order only in course of pendency of the writ petition, when the authorities have brought the order of punishment dated 21.05.2004 by way of counter affidavit, thereafter the application for making amendment in the prayer portion has been filed challenging the order of punishment dated 21.5.2004 which has been allowed by this Court vide order dated 6.5.2016 passed in misc. case No.14529 of 2015. She relies upon the provision of Rule 15 of the O.C.S. (Control and Appeal) Rule and the judgment rendered by Hon'ble Apex Court to substantiate her argument that in case of non-supply of memorandum of charge the entire proceeding will be vitiated. She further relies upon the judgment that even if the complainant would not be allowed to examine in the departmental proceeding, the departmental proceeding will vitiate.

She further submits that even the order of compulsory retirement is not sustainable in the eye of law, since it has been passed with retrospective effect i.e. w.e.f. 28.01.2003 i.e. from the date of suspension and she submits that it is settled that there cannot be any order of punishment making it operative with retrospective effect which further suggests that the authorities have acted with malice and ulterior motive.

5. Learned counsel for the opposite party has vehemently objected the submission made by the petitioner by submitting that there is no infirmity in the decision taken by the authority since the petitioner was allowed adequate opportunity to defend himself. He has been supplied all relevant documents as relevant for the purpose of providing adequate opportunity to him.

He has further submitted on the strength of averments made in the counter affidavit that all adequate opportunity has been provided as such the

petitioner cannot claim that he has not been provided with adequate opportunity to defend himself.

He has objected regarding maintainability of the writ petition by submitting that under the statute there is provision of appeal and as such during course of the availability of alternative remedy, this Court sitting under Article 226 of the Constitution of India may not interfere with the order of punishment.

6. Learned counsel for the petitioner in response to the maintainability of the writ petition on the ground of availability of alternative remedy of appeal, has submitted that there is no dispute that in case of availability of alternative remedy, the writ court should not interfere with the finding of the disciplinary authority but simultaneously it is settled that if there is violation of principle of natural justice or the decision taken by the authority is without jurisdiction or it is contrary to the statutory provision, availability of alternative remedy will not be a bar to adjudicate the writ petition by the High Court sitting under Article 226 of the Constitution of India.

She further submits that even otherwise the jurisdiction conferred to the High Court sitting under Article 226 of the Constitution of India does not bar to entertain it rather it is the self-imposed restriction upon the High Court not to entertain the writ petition in case of availability of statutory remedy of appeal but when there is miscarriage of justice it is up to the High Court to entertain or not to entertain.

Heard learned counsel for the parties and perused the documents available on record.

7. This Court has thought it proper to decide the issue on maintainability before entering into merit of the rival submission of the parties.

8. Learned counsel for the opposite party has raised preliminary objection regarding maintainability of the writ petition by submitting that there is provision of statutory appeal, as such this writ petition may not be maintainable. It is not in dispute that in case of availability of statutory remedy of appeal, the High Court sitting under Article 226 of the Constitution of India should refrain itself in interfering with the decision of the disciplinary authority but simultaneously there is exception that if in case of violation of principle of natural justice or miscarriage of justice or the order is contrary to the statutory provision or the order is with malice and

malafide, if proved the High Court sitting under Article 226 can interfere instead of relegating the matter before the appellate authority. Reference in this regard may be made to the judgment rendered by the Hon'ble Supreme Court in the case of **Whirlpool Corporation vrs. Registrar of Trade Marks, Mumbai and others** reported in (1998) 8 SCC 1.

In view of settled proposition, when the case of the facts in hand has been assessed, it is the considered view of this Court that it is a case where the principle of natural justice has grossly been violated by not allowing the petitioner to go through the complaint, by not allowing him to examine the complainant and the report has not been proved by the persons who have reported against the petitioner.

9. In that view of the matter and accepting the principle to entertain the writ petition in case of exception instead of relegating the matter before the appellate authority, it would be proper to interfere with the order of punishment.

The other reason is that the order of punishment is of the year 2004 and the matter is pending since then and 13 years has already gone and as such at a belated stage, relegating the matter before the appellate authority will further led to miscarriage of justice, hence this Court finds that it is a fit case where the extraordinary jurisdiction conferred to it, can be exercised.

10. The fact which is not in dispute that the petitioner who was working as Clerk under the opposite party was assigned with the duty to make assessment of the meter in respect of consumers in the area. The consumers have made complaint against him regarding misbehavior in course of discharging official duty, on receipt of the complaint made by the consumer, the S.D.O. of the area has been asked to submit a report in this regard and accordingly the enquiry has been conducted by him, a report was submitted, basis upon which the authorities have decided to initiate a departmental proceeding No.4231 dated 3.11.2001 alleging therein following charges;

*"**Charge No.1:- (Mis-behaviour to consumers)***

The AMC, Temple Sub-Division in his letter to the Superintending Engineer, Grievance Cell, CESCO has intimated that, Mr. Mohanty's behavior in office affects the consumer delaing. The allegation of Sri Dayanidhi Satpathy, Under Secretary (Retd.), Finance Department, Govt. of Orissa has been received by SE Grievance Cell. CESCO on the basis of

which Sri Mohanty was put under suspensioin (Copy enclosed). The statement of Sri Satpathy was read and its truthfulness was verified. Besides, on enquiry it was established beyond doubt that consumers were harassed by the delinquent employee and even were exploited.

Charge No.2 (Dis-obedience of Instruction of Superior Officers)

SDO (Elect.), Temple Sub-Division vide his letter No.1517/Dtd. 07.06.2002 addressed to Sri Mohanty has mentioned that, Mr. Mohanty is reluctant to obey the orders of Superior Officers. Also Sri Mohanty had repeatedly questioned the authority of the S.D.O. in allocation of seats to different staff. This acts of Sri Mohanty shows dis-obedience of orders of superior officers and gross in-disciplince. In another confidential letter No.1/dtd. 24.01.2003 to SE, Grievance Cell, the SDO (El.), Temple Sub-Division has also mentioned about his mis-behaviour to Sri M.S. Subudhi, Ex-SDO No.-III, Bhubaneswar and has disobedience in accepting the transfer order to NED, Nayagarh which was intentionally avoided by him as he remained absent unauthorisedly for which he had been called for explanation by SEEC No.-I, Bhubaneswar vide his letter No.4271/Dtd. 02.11.2002. On the basis of the above, it can be undoubtedly concluded that, professional mis-conduct has been committed by the delignequent employee as habitually he was stubborn and dis-obedient to the instruction of Superior Officers.

Charge no.-3 : Use of derogatory language towards Superior Officers and Consumers.

The above charge is also convincingly established as the delinquent employee was habitually using derogatory language towards Superior Officers and consumers.

Charge No.-4 Dereliction in duty and indiscipline attitude

From the contents of the correspondence and interrogation of the controlling officers of the Sub-Division, it is proved beyond doubt that, the delinquent employee has indiscipline attitude leading to constant repeated dereliction in duty.

Charge No.-5 Misconduct

Letter No.1517/dated 07.06.2002 and Conf. No.1/Dtd. 24.01.2008 of SDO (El.), Temple Sub-Division mentioned the act of misconduct by Sri

Mohanty. All the correspondence and enquiry on spot revealed that, the charge of Mis-conduct is undoubtedly proved and hence established."

The petitioner has been proceeded under the provision of O.C.S. (C.C.A.) Rules, 1962 which is applicable so far as the disciplinary rule of the establishment where the petitioner was working.

11. The grievance of the petitioner at the time of initiation of proceeding No.4231 dated 3.11.2001, is that the relevant documents basis upon which the charge has been framed, has not been supplied to him. This Court has perused the memorandum of charge under Annexure-2 of the writ petition that there is no enclosure in the list of documents basis upon which the charge has been framed against him. The petitioner immediately approached this Court by filing writ petition for supply of relevant documents, accordingly, this Court has passed the order dated 21.05.2004 while issuing notice to the opposite parties, passed an interim order directing the authorities to proceed with the departmental proceeding but not to take final decision without leave of this Court till next date.

The enquiry proceeding has proceeded but the relevant documents has not been supplied. In the meanwhile, another departmental proceeding has also been initiated on 18.02.2003 vide Proceeding No.14 under Annexure-3, from its perusal it is evident that disciplinary proceeding contains the same charge which was the subject matter of earlier charge dated 3.11.2001 but again without supported by relevant documents, basis upon which the memorandum of charge has been supplied to the petitioner.

The petitioner has raised mainly on three grounds;

(i) The copy of the complaint has not been brought on record

(ii) The complainant has not been brought for his cross-examination by the petitioner.

(iii) The S.D.O has not turned up to prove the charge basis upon which the departmental proceeding has been initiated against the petitioner.

12. It is evident from the record that the petitioner has made due requisition for supply of the copy of the complaint and the other relevant documents but the disciplinary authority has denied the same by saying that the copy of the complaint cannot be provided since the complaint has been obtained by the complainant on the condition to keep it confidential and further the documents has been denied by giving a reason that since the

Department is of Commercial Sector, as such they have preferred not to disclose the documents and witnesses for the alleged unethical action as mentioned in Clause-f of letter dated 23.12.2003.

13. It is evident from the said communication dated 10.03.2004 under Annexure-10 that the disciplinary authority has not disputed the fact that the relevant document for the purpose to provide opportunity to defend the petitioner has not been provided on the pretext that the documents having said to be confidential and the documents being under the Commercial Sector has been decided not to provide to the petitioner.

14. In the case of the petitioner, the provision of O.C.S. (C.C.A.) Rules, 1962 is applicable wherein major and minor punishment has been reflected under the provision of Rule-13 and while Rule 15 provides procedure for imposing penalty, one of the procedures is under sub-rule 3 of Rule 15 i.e., the enquiry is to be commenced without prejudice to the provisions of the Public Servants (Inquiries) Act, 1950 no order imposing on a Government servant any of the penalties specified in Clauses (vi) to (ix) of Rule 13 shall be passed except after an inquiry held as far as may be in the manner hereinafter provided. Sub-rule (3) of the said provision provides that the Government servant shall, for the purpose of preparing his defence, be supplied with all the records on which the allegations are based. He shall also be permitted to inspect and take extracts from such other official records as he may specify, provided that such records are not relevant for the purpose or it is against of the public to allow him access thereto.

15. It is evident from this provision that the documents, basis upon which the charge is to be framed, has mandatorily to be supplied to the delinquent employee, however in case of non-supply a specific reason is to be given.

In the facts of this case the reason has been given i.e. to maintain confidentiality and since the establishment is a Commercial Sector but according to the considered view of this Court, these two reasons cannot be said to be justified for non-supply of relevant documents to the petitioner. It is cardinal principle of law that, if a man is to be punished, he has right to defend himself properly. It is also cardinal principle that if any complaint has been made, the concerned employee has right to cross-examine that complainant, otherwise it will be is said to be the violation of principle of natural justice. Reference may be made to the judgment rendered by the Hon'ble Supreme Court in the case of **Hardwari Lal vrs. State of U.P. and**

others reported *in (1999) 8 SCC 582* at para-3, 4 and 5, which are being reproduced herein below:-

> "**3.** Before us the sole ground urged is as to the non-observance of the principles of natural justice in not examining the complainant, Shri Virender Singh, and the witness, Jagdish Ram. The Tribunal as well as the High Court have brushed aside the grievance made by the appellant that the non-examination of those two persons has prejudiced his case. Examination of these two witnesses would have revealed as to whether the complaint made by Virender Singh was correct or not and to establish that he was the best person to speak to its veracity. So also, Jagdish Ram, who had accompanied the appellant to the hospital for medical examination, would have been an important witness to prove the state or the condition of the appellant. We do not think the Tribunal and the High Court were justified in thinking that non-examination of these two persons could not be material. In these circumstances, we are of the view that the High Court and the Tribunal erred in not attaching importance to this contention of the appellant.
>
> **4.** However, Shri Goel, the learned Additional Advocate General, State of Uttar Pradesh has submitted that there was other material which was sufficient to come to the conclusion one way or the other and he has taken us through the same. But while appreciating the evidence on record the impact of the testimony of the complainant cannot be visualized. Similarly, the evidence of Jagdish Ram would also bear upon the state of inebriation, if any, of the appellant.
>
> **5.** In the circumstances, we are satisfied that there was no proper enquiry held by the authorities and on this short ground we quash the order of dismissal passed against the appellant be setting aside the order made by the High Court affirming the order of the Tribunal and direct that the appellant be reinstated in service. Considering the fact of a long lapse of time before the date of dismissal and reinstatement, and no blame can be put only on the door of the respondents, we think it appropriate to award 50 per cent of the back wages being payable to the appellant. We thus allow the appeal filed by the appellant. However, there shall be no order as to costs."

It is also cardinal principle that if the principle of natural justice has not been followed, the proceeding will be said to be bad in the eye of law from its inception. This Court has gathered from the memorandum of charge that the memorandum of charge is without any list of documents while the provision (3) of Rule 15 says that the documents is to be supplied along with the memorandum of charge, further enquiry is to be commenced for imposing major punishment in the light of the provision of Public Servants (Inquiries) Act, 1950. This provision provides that a man cannot be punished without providing adequate opportunity to defend himself.

16. Learned counsel for the opposite party has submitted that the petitioner has been provided with all due opportunity but he has not rebuted the finding of the enquiry officer, wherein the complainant has not been allowed to be cross-examined by the petitioner, copy of the complainant has not been brought on record as also the S.D.O. who has prepared the report, basising upon which the departmental proceeding has been initiated has not come forward to prove the said report, in view of such admitted position as would be evident from the finding of the Enquiry Officer, the statement made by the authority in the counter affidavit has got no relevance for the reason that the finding of the Enquiry Officer which has been written in black and white cannot be improved by way of additional affidavit, reference in this regard may be made to the judgment rendered by the Hon'ble Supreme Court in the case of **Mohinder Singh Gill & another vrs. The Chief Election Commissioner, New Delhi and others** reported in AIR 1978 SC 851 at para-8 which is being reproduced herein below:-

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, be the time it comes to court on account of a challenge, get validated by additional grounds later brought out.
>
> Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and

must be construed objectively with reference to the language used in the order itself."

17. This Court has discussed the submission of the learned counsel for the petitioner that the relevant documents has not been supplied to him, the earlier view of the Hon'ble Supreme Court with respect to the effect of non-supply of the documents and as per the judgment rendered by the Hon'ble Supreme Court in the case of **Union of India and others vrs. Mohd. Ramzan Khan** reported in *AIR 1991 SCC 471* that due to non-supply of the relevant documents the departmental proceeding is to be vitiated but the view has been challenged by the Hon'ble Supreme Court in its judgment rendered in the case of **M.D. Eastern Coal India Ltd., Hyderabad vrs. B. Karunakar** reported in (1993) 4 SCC 277, wherein the proposition has been laid down that in case of non-supply of the relevant documents, the departmental proceeding will not vitiate, rather the delinquent employee is so prejudice caused due to non-supply of the relevant documents.

In the light of the view of the Hon'ble Supreme Court rendered in the case of **M.D., ECIL (supra),** this Court has examined the effect of non-supply of the relevant documents and found that the petitioner has not been supplied the relevant documents, i.e. the documents basis upon which the memorandum of charge has been framed on the ground of maintaining confidentiality, when no documents has been supplied, there is no issue of prejudice rather it will be said that the petitioner has been denied with the due opportunity to defend himself.

In the judgment rendered in the case of **Government of Andhra Pradesh and others vrs. A. Venkata Raidu** reported in (2007) 1 SCC 338, wherein their lordships has been pleased to hold at para-9, which is being quoted herein below:-

"**9.** xxx xxx It is a settled principle of natural justice that if any material is sought to be used in an enquiry, then copies of that material should be supplied to the party against whom such enquiry is held, In Charge 1, what is mentioned is that the respondent violated the orders issued by the Government. However, no details of these orders have been mentioned in Charge 1. It is well settled that a charge-sheet should not be vague but should be specific. The authority should have mentioned the date of the GO which is said to have been violated by the respondent, the number of that GO, etc. but that was not done. Copies of the said GOs or directions of the

> Government wee not even placed before the enquiry officer. Hence, Charge 1 was not specific and hence no finding of guilt can be fixed on the basis of that charge. Moreover, as the High Court has found, the respondent only renewed the deposit already made by his predecessors, Hence, we are of the opinion that the respondent cannot be found guilty for the offence charged."

In the case of **State of Uttar Pradesh and others vrs. Saroj Kumar Sinha** reported in (2010) 2 SCC 772, wherein it has been laid down at para-29 and 30 that "it is a basic requirement of the rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceedings which may culminate in punishment being imposed on the employee. 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."

18. It is evident from the settled proposition as laid down by the Hon'ble Supreme Court as referred hereinabove and also the provision of Rule 15 of the O.C.S. (C.C.A.) Rules, 1962 that the documents basis upon which the memorandum of charge is being permitted is mandatory to be supplied to the delinquent employee but in the instant case, it has not been supplied on the excuse that it pertains to confidentiality.

19. This Court is conscious of the settled proposition that jurisdiction of the High Court in interfering with the order of the disciplinary authority in exercise of power of judicial review is very limited but it can well be exercised if the finding is perverse or the proceeding has been initiated without providing due opportunity of being heard to the delinquent employee. For ready reference the proposition laid down by the Hon'ble Supreme Court in the case of **Union of India and another vrs. K.G. Soni** reported in *(2006) 6 SCC 794*, it has been held at para-14, which is being quoted herein below:-

> "**14.** The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the case of *Associated Provincial Picture Houses Ltd. Vrs. Wednesbury Corporation* reported in (1948) 1 KB 223, the Court

> would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in the decision-making process and not the decision.

In another judgment in the case of **B.C. Chaturvedi vrs. Union of India and others** reported in *(1995) 6 SCC 749*, it has been held at para-12, which is being quoted herein below:-

> **"12.** Xxx xxx The Court/Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

20. This Court after taking into consideration the reason given hereinabove and for the reason stated, is of the considered view that the office order dated 21.05.2004 is not sustainable in the eye of law. Accordingly, the same is quashed. In the result the petitioner is entitled to get all consequential benefit. Accordingly, the writ petition is allowed.

Writ petition allowed.

2017 (II) ILR - CUT-1204

J. P. DAS, J.

JCRLA NO. 58 OF 2014

GOBARDHAN NAIK .....Appellant

.Vrs.

STATE OF ODISHA .....Respondent

PENAL CODE, 1860 – Ss.304-I, 304-II

Deceased died at the spot due to gun shot injury – Conviction U/s. 304-Part I, I.P.C. – Conviction challenged – Occurrence took place due to preceding hot exchange of words between the accused and the family of the informant – Accused though killed the victim, he had not come to the spot with an intention to kill him – Held, the conviction of the appellant U/s. 304-I, I.P.C. is modified to be U/s. 304-II, I.P.C. and the sentence of R.I. for ten years and to pay a fine of Rs. 5000/-, in default, R.I. for six months U/s. 304-I of I.P.C. is modified to be R.I. for seven years. (Paras 8, 10)

For Appellant : M/s. A.Tripathy, H.Sahoo & B.C.Patra

For Respondent : Addl. Govt. Adv.

Date of hearing : 28.10.2017
Date of judgment: 07.11.2017

JUDGMENT

J.P.DAS, J.

The appellant stood convicted under Sections 304-I/294/506 of the Indian Penal Code along with Sections 25 and 27 of the Arms Act and sentenced to undergo R.I. for ten years and to pay a fine of Rs.5000/- in default to undergo R.I. for six months for the offence under Section 304, Part-I of the I.P.C; R.I. for one month without any fine for the offence under Section 294 of the I.P.C; R.I. for one year and to pay a fine of Rs.1000/-, in default, to undergo R.I. for one month for the offence under Section 506 of the I.P.C. and R.I. for one year and to pay a fine of Rs.1,000/-, in default, to undergo R.I. for one month on each count for the offences under Sections 25(1-B) and 27(1) of the Arms Act with a direction for concurrent running of all substantive sentences by the learned Sessions Judge in S.T. Case No.80 of 2011.

2. The case of the prosecution is that the informant and the accused are neighbours and on 16.06.2010 at about 9 A.M. the accused passed some filthy comments on the grand daughter of the informant to which the daughter of the informant objected. Thereafter, the accused abused the daughter of the informant using obscene words and when she protested, the accused gave out threats to eliminate her by gun and bombs. The informant and his daughter being scared of such threat immediately proceeded to the Police Station for help. The wife of the informant was alone at home and at about 1.30 P.M. the accused had a quarrel with the wife of the informant and fired at her from a gun which resulted in death of the victim at the spot. The villagers present at the spot, tried to give water to victim but she was dead. The informant getting the news from one Grama Rakhi, came back to the village and found the dead body of his wife lying on his house verandah. A report was lodged at the police station and the investigation was taken up. In course of investigation, inquest and post-mortem were conducted over the dead body, witnesses were examined, one pellet along with some blood stained earth was seized from the spot of occurrence and were sent to S.F.S.L. for chemical examination. After completion of all examinations and obtainment of reports, the charge sheet was submitted against the accused under Sections 302/294/506 of the Indian Penal Code along with Sections 25 and 27 of the Arms Act. Charges were framed as per allegations made in the charge sheet to which the accused pleaded not guilty and faced the trial. In course of trial, prosecution has examined twelve witnesses including the eye witnesses to the occurrence, the doctor who conducted post-mortem examination besides the Police officers who took part in the investigation. No evidence was adduced on behalf of the accused in defence.

3. Analysing the evidence placed on record, the learned Sessions Judge held the accused guilty and convicted him under Section 304, Part-I of the I.P.C. so also for the other offences as charged and passed the impugned judgment of conviction and sentences as aforesaid.

4. In course of hearing of the appeal, which was registered on a petition of the convict-appellant from jail, learned counsel engaged on behalf of the High Court Legal Services Committee mainly contended that the medical evidence placed on behalf of the prosecution was not sufficient to establish that the victim died out of gun shot injury and further the alleged weapon of offence was also not recovered or seized in course of investigation apart from the fact that the pellet which was allegedly seized from the spot of

occurrence, did not contain any stain of blood. It was also submitted that the conviction under Sections 25 and 27 of the Arms Act is not sustainable since there was no sanction order obtained from the District Magistrate on behalf of the prosecution prior to submission of charge sheet.

5. In order to prove its case, the prosecution has mainly relied on the evidence of two independent eye witnesses namely, P.Ws. 4 and 7 who have categorically stated that during the morning hours there was a disturbance between the accused and the informant and his daughter whereafter the informant and his daughter went to the police station. Thereafter, the accused had an altercation with the wife of the informant and the accused fired from a gun at the victim who died at the spot sustaining bleeding injuries. Both the witnesses have stated that the pellet hit on the right hand and right chest of the victim who fell down sustaining bleeding injuries. Some persons administered water to her and brought her to her verandah but she died. It was submitted by the learned counsel for the appellant that out of said two witnesses, the P.W.7 was again recalled for further examination and in course of his such examination, he has stated that he has not seen the accused firing at the spot. Learned trial court has discussed the material evidence in detail on record and has observed that both the eye witnesses have categorically stated about the alleged incident and firing by the accused at the victim and their such evidence could not be demolished in course of their cross-examination at the first instance, but after framing of further charge under Sections 25 and 27 of the Arms Act, which was left out inadvertently at the time of framing of charges at the first instance, the said eye witnesses were recalled for further cross-examination and the P.W.4 stood to his earlier statement whereas the P.W.7 stated that he was not a direct witness to the occurrence and had not seen the firing by the accused. Learned Sessions Judge has observed that P.W.7 might have been gained over during the period of two years between the first and second examination and I do not find any acceptable reason to discard the evidence of P.W.7 who had categorically stated about the occurrence at the first instance.

6. Now coming to the medical evidence, it was submitted by the learned counsel for the petitioner that although the allegation was gun shot injury still there was no exit wound on the body of the victim found out by the doctor and the pellet found and seized from the spot did not contain any blood stain as opined by the chemical examiner. It was further stated that the doctor P.W.8 in his evidence has stated that the injury as found was not possible if one fires from front to front and the injury may be possible if one falls

downward. Stressing on this statement of the doctor it was submitted by the learned counsel for the petitioner that the allegation of prosecution that the death of the deceased was due to the gun shot fired by the accused, has not been proved beyond all reasonable doubt. Learned trial court has also discussed this aspect in detail and has observed that the eye witnesses have categorically stated that the gun shot fired by the accused hit on the right hand and right chest of the victim and the doctor has stated to have found injuries to the right lung and liver and the cause of death was due to huge bleeding from abdominal cavity for the aforesaid injuries**.** Of course, no pellet was found inside the body of the victim and there was no exit wound but the materials placed by the prosecution and the circumstances under which the death of the deceased was caused immediately at the spot, I am not inclined to accept the contention raised on behalf of the appellant that the cause of death was not due to gun shot injuries.

7. It was submitted by the learned counsel for the appellant that the alleged weapon of offence has not been recovered in course of investigation. In this regard, it was submitted by the learned counsel for the State that non-recovery of the weapon of offence is not always fatal to the prosecution case and further the appellant while in police custody confessing his guilt had led the Police to a river where he had thrown the gun but it could not be recovered since it was a flowing river. I find sufficient force in the contentions made on behalf of the State.It was further submitted on behalf of the appellant that the learned Sessions Judge has discussed at length the ingredients of offences under Sections 302/304 of the I.P.C. and has reached a conclusion that the alleged incident was a culpable homicide not amounting to murder. It was further submitted that although the learned Sessions Judge has observed repeatedly considering the circumstances as found out, especially that there was quarrel and disturbance between the accused and the informant during the morning hours and the accused was not in a normal state of mind, being provoked, that the accused did not have an intention to cause death of the victim, still he has convicted the accused under Section 304-I of the I.P.C, which should have been under Section 304, Part-II of the I.P.C..

8. Going through the impugned judgment, it is seen that the learned Sessions Judge has discussed at length the circumstances under which the alleged occurrence took place and the preceding exchange of hot words between the informant with his daughter and the accused and has categorically observed that considering the evidence on record it can be

clearly deduced that the accused though killed the victim, he had not come to the spot with an intention to kill her. But after a lengthy discussion, he has again held that the accused was liable for the offence under Section 304-I of the I.P.C. Considering the materials evidence available on record, I am not in agreement with the findings of the learned Sessions Judge that the accused had the intention to cause death of the victim and hence, the conviction of the appellant under Section 304-I is modified to be under he Section 304-II of the I.P.C..

9. The conviction of the appellant under Sections 294/506, I.P.C. was fairly conceded to. But so far as the conviction under Sections 25 and 27 of the Arms Act is concerned, learned counsel for the appellant submitted that the learned Sessions Judge has categorically held in the Paragraph-14 of the impugned judgment that the accused at the relevant point of time was having a gun without license as required under Section 3 of the Arms Act and used the said gun for committing the offence as alleged. Thus, it was submitted that as per settled proposition of law prior sanction of the District Magistrate is necessary in respect of any offence under Section 3 of the Arms Act and that having not been procured in this case, the conviction of the appellant under Sections 25 and 27 of the Arms Act is liable to be set-aside. As found from the record, charge sheet was submitted for the offence under Section 25 and 27 of the Arms Act but no sanction order was filed in this case. The charge has also been specifically framed for violation of Section 3 of the Arms Act. In such circumstances, the conviction under Sections 25 and 27 of the Arms Act is not sustainable and is liable to be set-aside.

10. Lastly, it was submitted by the learned counsel for the appellant that the appellant is in custody since 15.04.2011 and has thus undergone sentence for more than six and half years.

11. Considering the submissions, the materials placed before the Court and the circumstances of the case, the appeal is allowed in part. The conviction and sentence passed under Section 25(1-B) and 27(1) of the Arms Act is set-aside. The conviction of the appellant under Section 304, Part-I of the Indian Penal Code is modified to be Section 304, Part-II of the Indian Penal Code. The sentence of R.I. for ten years and to pay a fine of Rs.5000/- ,in default, R.I. for six months under Section 304,Part-I of the I.P.C is modified to be R.I. for seven years. The conviction and sentences passed against the appellant for the offences under Sections 294/506, I.P.C. stand confirmed. The substantive sentences are to run concurrently.

12. The Jail Criminal Appeal is disposed of accordingly.

Appeal disposed of.

2017 (II) ILR - CUT-1209

DR. D.P. CHOUDHURY, J.

O.J.C. NO. 12958 OF 1996
WITH BATCH

M/S. MAA BHUASUNI ROLLER FLOUR MILLS ……..Petitioner

.Vrs.

STATE OF ORISSA
(CO-OPERATION DEPT.) & ANR. ……..Opp. Parties

ODISHA AGRICULTURAL PRODUCE MARKETS ACT, 1956 – S.2(1)(i)

Whether, Suji, Maida, Atta and Dals are agricultural produce as declared vide notification Dt. 21.11.1994 ? – Held,Yes.

As wheat and other cereals are the agricultural produce in its raw form and the products sated above are brought out after being processed without having any separate identity except the nature of use of the same by human being, they are also agricultural produce in common parlance.

Held, Suji, Atta, Maida and Dals are agricultural produce being at par with wheat. (Paras 26, 27, 28)

Case Laws Referred to :-

1. (1992) 1 SCC418: Saraswati Sugar Mills vs Haryana State Board & Ors.

For Petitioner : M/s. B.N.Tripathy, B.N.Joshi & B.Mishra

For Opp. Parties : Mr. Prasanjeet Mohapatra, A.S.C.
M/s. L.Pradhan, A.K.Mohanty, B.K.Sharma, G.K.Dash, S.Jee & P.K.Mohanty.
M/s. S.Mohanty, N.C.Sahoo, S.Mohanty & R.R.Swain

Date of hearing : 29.08.2017
Date of Judgment:15.09.2017

JUDGMENT

DR. D.P.CHOUDHURY, J.

These writ petitions have been filed challenging the inaction of the opposite parties in collecting the market fee on the finished goods and the notification dated 21.11.1994 issued by the Government of Orissa, Cooperation Department on the ground that it contravenes the provisions of the Orissa Agricultural Produce Markets Act, 1956 (hereinafter called as the "Act, 1956").

2. Since the above three writ petitions have got common question of law, they are being taken up together for disposal by this common judgment.

FACTS

3. The adumbrated facts of the petitioners are that the petitioner in OJC No.12958 of 1996 is an industrial unit carries on its business of manufacturing Atta, Maida, Suji etc. after purchasing wheat from different sources, i.e, from outside market, Food Corporation of India and from local market also. The petitioner in OJC No.13550 of 1998 is also an industrial unit carries on its business of manufacturing Chura (flattened rice) and Atta, Maida and Suji. The petitioner in W.P.(C) No.3873 of 2003 is an association of Millers and Traders and it carries on business of milling the agricultural market produces within the Jatni Regulated Market Committee area and challenges the notification dated 04.02.2003 issued by the Government of Orissa in Cooperation Department notifying Mung Dal, Biri Dal, Buta Dal and Harad Dal as agricultural produces.

4. Under the provisions of the Act, 1956 and the Rules made thereunder, there is fixed guidelines for declaring the market area and procedure to deal with the agricultural produces which would solely on the benefit of the agriculturists and also the procedure for collection of the market fee on the agricultural produces.

5. Be it stated that Section 11 of the Act, 1956 defines the procedure for levy of market fee on the agricultural produce and its rate. The petitioners' units, being industrial units, carrying on business in manufacturing of Atta, Maida and Suji and in course of its business, purchases Wheat from the local market as well as from the Food Corporation of India and outside market for use/processing of the same in the unit and is not for any other purpose of export or buying and selling as such in the market area.

6. It is further averred that the impugned notification from the opposite party no.2 with annexures has been received by the petitioners wherein Suji, Atta and Maida are included under the heading "Cereal" to the Schedule of the Act. The opposite party no.1 published the impugned notification in the Official Gazette and after expiry of the objection period, communicated the said notification to opposite party no.2, which was only communicated to the petitioners on 4.11.1996. Orissa Agricultural Produce Markets Rules, 1958 (hereinafter called as "the Rules, 1958") depicts that the fees shall be levied on agricultural produces brought from the outside market area into market for use by any industrial concern situated within the market area or for export subject to condition that a declaration in respect of the produce has been made and certified in Form-IV. But the petitioners claim that their units cannot be levied with market fee. The Schedule of the Act, 1956 and Rules made thereunder defines "Wheat" as the agricultural produce under the heading "Cereals" and Wheat products are not Cereal in the amendment of the Act for which Atta, Maida and Suji are not agricultural produce and cultivators are no way connected with the transaction of said items in a Market area. On the other hand, opposite party no.2 in connivance with opposite party no.1, contravening Section 3 and Section 4(7) of the Act, 1956 made the impugned notification dated 21.11.1994 vide Annexure-1. The claim that such notification is illegal and improper due to non-compliance of the mandatory provision to bring the same to the textbooks. So, the petitioners challenge such notification on the ground that Sujit, Ata and Maida, being not finished products of the Wheat, levying market fee on such products of the petitioners, is illegal and improper. Since the notification adding such product to the definition of agricultural produce and there is no proper legislative process followed, meeting such provision is not only ultra vires but also legal and proper. So, the writ petitions have been filed challenging such notification having not followed the mandatory provisions of the statute while incorporating Annexure-1.

7. Per contra, the opposite party no.1-State has filed a counter affidavit refuting the allegations made in the writ petition. It is the case of the opposite party no.1 that under Section 26 of the Act, 1956, the State Government has got power to amend or cancel any of the item of agricultural produce specified in the Schedule. So, the Government, being competent, included Suji, Maida and Ata as agricultural produce after following necessary procedure to include the same in the Schedule of agricultural produces. Accordingly, the impugned notification was made and the opposite party no.2 was informed in accordance with law. As per Rule 48(3) of the Rules, 1958,

the agricultural produce brought from the outside for the purpose of processing by the industrial concern situated within the market area or for export from such area, shall be subject to levy of market fee unless he furnishes a declaration in respect of such produce and the certificate in Form-IV to any officer or servant of the Market Committee. Since the petitioner has brought agricultural produces into the market area and processed it in the industrial unit and thereafter sold the same to purchaser like M/s.Prakash Enterprises as evident from Annexure-2 to the writ petition, said purchaser required to pay the market fee while levying market fee on the processed agricultural produce like Ata, Maida and Suji likewise Ata, Maida and Suji are process items of Wheat and in view of Section 26 read with Section 2 (1)(i) of the Act, 1956, the notification dated 25.11.1988 is not illegal and collection of market fee on these items as per Section 11 of the Act is also illegal and proper. Since under Section 4 of the Act, the Gazette Notification has been issued for general public and the petitioners, being traders within the public, has got every legal right to file objection failing which it can be said that issuance of notification dated 25.11.1988 was wrong and illegal. Hence, the collection of market fee on such items included in the Schedule of the Act, 1956 as agricultural produce at the instance of opposite party no.2 is correct and proper for which the writ petitions be dismissed.

8. The Regulated Market Committee, Jatni, opposite party no.2 has also filed a counter affidavit stating therein that under Section 4(1) of the Act, 1956, the State Government is empowered to enact and include agricultural produce or goods to be levied in a specific market area of a Regulated Market Committee notified from time to time after receiving objection under Section 4(2) of the Act. In the instant case, the State Government, with due notice to the general public and local bodies, included Wheat as an agricultural produce and subsequently, the State Government, vide notification dated 23.5.1994 included Suji, Maida and Atta, Maize and Flattened Rice (Choora), Lentil (Masur), Poultry, eggs, fish and dry fish for levy of market fee for Jatni RMC. The notification was issued after observing all the formalities of preparing legislation vide Gazette Notification and communicated to opposite party no.2. Since then, opposite party no.2 issued notice to the petitioners to show cause as to why the market fee on the arrival of goods on truck number mentioned in the schedule failing which criminal action would be taken. Thereafter, the petitioner filed show cause stating that the petitioners-unit is not liable to pay any market fee and opposite party no.2 sent a reminder to

produce the purchase and sale register of wheat and wheat products and its valuation so that the market fee would be assessed.

9. It is the case of the opposite party no.2 that it is a Statutory Body, being bound by the notification of the State Government, has levied market fee upon declared goods of the petitioners and the petitioners cannot raise any objection to the collection of such market fee.

10. Be it stated that the dictionary meaning of "Cereal" is any grain used for food as Wheat, Oats and as the Atta, Maida and Suji are products of Wheat, the same are coming under "Cereal" and, therefore, the opposite party no.2 is legally competent to collect the market fee on such products from the petitioners.

11. A rejoinder to the counter of opposite party no.2 filed in OJC No.12958 of 1996 has been filed reiterating the facts mentioned in the writ petition. It is stated in the said rejoinder that the Government Notification vide Annexure-B/2 series asking for payment of market fee on Suji, Atta, Maida is in contravention to the provisions of the Act, 1956 and the rules made thereunder because no opportunity was given to the petitioners to file objection when such products were included in the notification as agricultural produce.

12. Mr.Tripathy, learned counsel for the petitioners submitted that the petitioners are industrial units carrying on business manufacturing Atta, Maida and Suji from Wheat procured from outside sources. According to him, the petitioner purchased the Wheat from outside to process the same in the market area whereafter they used to sell the same. The State Government has not followed the correct legislative process to include Suji, Maida and Atta and different kinds of Dal under the purview of agricultural produce so as to collect the market fee when sold. He further submitted that the opposite parties have erred in law by issuing notification in 1994 with vague grounds.

13. Learned counsel for the petitioners further submitted that the opposite party no.1-State Government has not invited objections from general public including the petitioners to amend the Schedule attached to the Act, 1956 so as to include the Atta, Maida and Suji and other Dal products under the Schedule of the Act and the notification was never put up before the Legislatures to issue impugned notification for which such Legislation lacks bona fideness and falls short of to declare the same as agricultural produce.

14. Mr.Tripathy, learned counsel for the petitioners further submitted that Suji, Atta and Maida being finished products and not having kept the originality of the Wheat, which is admittedly the agricultural produce cannot be said to be agricultural produce including the Schedule for applying Section 11 of the Act, 1956 to collate the market fee. Similarly, he submitted that the notification to include the Dals as agricultural produce is also defective for want of proper legislature process followed as these Dals cannot be taken as Cereals so as to cover up by the Schedule of the Act, 1956.

15. Mr.Tripathy, learned counsel for the petitioners further submitted that since the legislative process has not been followed, the Gazette Notification of the State Government showing these items as part and parcel of the agricultural produce as defined in the Act, 1956 is bad in law and suffers from vires and accordingly the same should be set aside.

16. Mr.Mohapatra, learned Additional Standing Counsel for the State submitted that as per the formality given in Section 4 of the Act, 1956, the notice inviting objection was issued and due to non-receipt of any objection from the public, the State Government added Suji, Maida, Atta and Dals in the relevant schedule of the Act, 1956 as agricultural produce. Since they are included as agricultural produce, Section 11 of the Act, 1956 directs for collection of market fee by the opposite party no.2-RMC. Apart from this, the Government has also issued notification under Sub-section 7 of Section 4 of the Act, 1956 for sale of these products as agricultural produce. So, the opposite party no.2-RMC has justifiably levied market fee from the purchaser of these products while the petitioners have sold the same to the purchaser.

17. Learned counsel for the opposite party no.2, supporting the contention of the learned Additional Standing Counsel for the State-opposite party no.1, submitted that since the products have been included by the State Government in Cooperation Department allowing the petitioners to levy market fee, the contention of the learned counsel for the petitioners should be rejected and the amount already paid should not be allowed to return.

18. POINTS FOR CONSIDERATION

The main points for consideration are as to (I) whether Suji, Maida, Atta and Dals are agricultural produce; and (ii) whether the State Government has followed the procedure for issuing the notification for including Suji, Maida, Atta and Dals as agricultural produce in the Schedule of the Act, 1956.

19. DISCUSSIONS
POINT No.(I)

It is admitted fact that the petitioners have got industrial unit inside the market area of Jatni and they bring Wheat from outside to process the same and sell the same inside the market area and the RMC used to collect the market fee from the purchasers. It is not in dispute that Dals, Atta, Maida and Suji are being sold by the petitioners in the market area after the same being processed having been brought from outside.

20. Before going further on the facts, the law on the subject is required to be dichotomized. Section 11 of the Act, 1956 has been amended in the following manner:

> "**11. Levy of fees-**It shall be competent for a Market Committee to levy and collect such fees (hereinafter referred to as the market fees) not being less than one rupees from every purchaser for every hundred rupee worth of agricultural produce marketed in the market area in such manner as may be prescribed and at such rate as may be specified in the bye-laws:
>
> Provided that the rate of fees to be specified in the bye-laws shall not exceed three percent of the value of agricultural produce sold in the markets within the market area:
>
> Provided further that no such fees shall be levied and collected in the same market area in relation to any agricultural produce in respect of which fees under this section have already been levied and collected therein:
>
> Explanation-For the purpose of this section all notified agricultural produce leaving a market yard shall unless the contrary is proved, be presumed to have been brought within such yard by the person in possession of such produce."

21. Rule-48 of Orissa Agricultural Produce Markets Rules, 1958 is produced below for better reference.

> "48. (1) The Market Committee shall levy and collect market fees from:
>
> (a) a purchaser notified agricultural produces marketed in the market area;

(b) The person deemed to be a purchaser under the explanation to Section 11 of the Act in respect of the notified agricultural produce; and

(c) The persons bringing any notified agricultural produce into the market area for the purpose of processing or for export only, but not processing it therein or exporting it therefrom within the period of thirty days as provided in the provisos to Sub-section(6) of Section 4 of the Act, at such rates as may be specified in its bye-laws, subject to the minima and the maxima specified in Section 11 of the Act;

(2) The Market Committee shall levy and collect licence fees from traders, adatyas, brokers, weighmen, measures, surveyors and warehousemen operating in the market area at such rates as may be fixed in its bye-laws.

(3) A person brining any notified agricultural produce from outside the market area into the market area, for the purpose of processing by his industrial concern situated within the market area, if any, or for export from such area, shall be subject to levy of market fee unless he furnishes a declaration in respect of the produce and the certificate in Form-IV, to any Officer or servant of the Market Committee specifically authorized by the Committee in that behalf at the time of entry of the said produce into the market area

Provided that if the agricultural produce is not used by the industrial concern and is removed from the market or if it is not exported within twenty days of the purchase, the Market Committee shall levy and collect fees on such agricultural produce from the industrial concern or the persons furnishing the certificate at such rates as may be specified in its bye-laws.

(4) Retail sale of agricultural produce by the producer shall be exempted from any fees.

Explanation-"Retail Sale" in respect of any agricultural produce means the sale of such agricultural produce in any calendar day not exceeding the quantity or value specified in the bye-laws of the Market Committee.

(5) Purchase of any agricultural produce in any calendar day not exceeding the quantity or value specified in the bye-laws of the Market Committee,

by a buyer for his domestic or household consumption shall be exempted from the payment of any fee.

22. From the aforesaid provisions, it is clear that the market fee is to be levied under Section 11 of the Act, 1956 as per the manner prescribed in Rule-48 of the Rules, 1958. It is also clear that the agricultural produce has been defined in Section 2(i) of the Act, 1956, which is quoted hereunder in the following manner:

> **"(i) 'Agricultural Produce'** means such produce (whether processed or not) of agriculture, forest, animal husbandry, agricultural, horticulture and pisciculture as are specified in the Schedule**"**

23. From the aforesaid provision, it may not be out of place to mention that the agricultural produce has notified in the Schedule if brought inside the market area for sale and purchase or processed must be exigible to market fee.

24. Section 26 of the Act, 1956 says as under:

> **"26. Amendment of Schedule-** The State Government may, by notification, add to amend of cancel any of the items of agricultural, produce specified in the schedule.**"**

From the aforesaid provision, it is clear that the State Government from time to time can add the agricultural produce in the Schedule for their transaction or processed in the market area for larger interest of the agriculturists and farmers. It is true that if there is declaration made by the traders about storing of same for certain period as revealed from Section 4(4) of the Act, 1956, the same would not be exigible for payment of the market fee. In the instant cases, no such plea has been taken. Now, the contention of the learned counsel for the petitioners is that under no circumstances, Suji, Maida and Atta can be termed as agricultural produce as they are finished produce of Wheat which is undoubtedly an agricultural product as notified earlier. Similarly, Dals have also been added subsequently although Cereals are agricultural produce as per the definition of the Act, 1956.

25. The question now arises how to recognize a product as agricultural produce and whether the State Government can make entry of same in the list of agricultural produce arbitrarily or has got any nexus with the aims and objects of the Act, 1956.

26. At paragraphs-13, 14, 15 and 16 of the judgment in the case of ***Saraswati Sugar Mills vs Haryana State Board and Others; (1992) 1 SCC418,*** the Hon'ble Supreme Court have observed in the following manner:

> "13.The use of the word processing is also significant. Processing of vegetable products industry are normally understood in the sense they relate processing of vegetables which even after processing retain its character as vegetable.
>
> 14.Processing: Section 3(1), Marine Product Export Development Authority Act, 1972 defines processing in relation to marine products, as including the preservation of such products as canning, freezing, drying, salting, smoking, peeling or filleting or any other method of processing which the authority made by notification in the Gazette of India, specify in this behalf. Section 2(g) of the Agricultural and Processed Food Products Export Development Authority Act, 1985 defines processing in relation to scheduled products as including the process of preservation of such products such as canning, freezing, drying, salting, smoking, peeling or rilleting and any other methods of processing which the authority made by notification in the official Gazette specify in this behalf. Thus processing as generally understood in marine, agricultural and food products industries is an action, operation or method of treatment applying it to something. It is refining, development, preparation or converting of material especially that in a raw state into marketable form. It would be interesting to note that this Act contains a Schedule of "the agricultural or processed food products" which are to be governed by the Act which reads as follows:
>
> THE SCHEDULE (See Section 2(i)
> 1. Fruits, vegetables and their products.
> 2. Meat and meat products.
> 3. Poultry and poultry products.
> 4. Dairy products.
> 5. Confectionary, biscuits and bakery products.
> 6. Honey, jaggery and sugar products.
> 7. Cocoa and its products, chocolates of all kinds.
> 8. Alcoholic and non-alcoholic beverages.
> 9. Cereal products.
> 10. Cashewnuts, groundnuts, peanuts and walnuts.

11. Pickles, chutneys and papads.
12. Guar Gum.
13. Floriculture and floriculture products.
14. Herbal and medicinal plants.

15. **In CST v. Abdul Rehman Alladin, AIR 1964 Guj. 27** the expression "who processes any goods" in the Bombay Sales Tax was held to refer to the subjecting of any goods to a treatment or process. In **Addl. CIT v. Farrukhabad Cold Storage, (1977) 2 ITJ 202** held that processing of goods means that the goods must be adopted for a particular use. The variety of acts performed in respect of goods or their subjection to a process need not be such as may lead to the production of any new article. The act of subjecting goods to a particular temperature for a long period of time as in cold storage amounts to processing of goods. On the other hand manufacture is a transformation of an article which is commercially different from the one which is converted. The essence of manufacture is the change of one object to another for the purpose of making it marketable. **In Union of India v. Delhi Cloth and General Mills, AIR 1963 SC 79** this Court pointed out:

"The word 'manufacture' used as a verb is generally understood to mean as “bringing into existence a new substance” and does not mean 'merely' “to produce some change in a substance”, however minor in consequence, the change may be."

In the same decision, the following passage from the Permanent Edition of Words and Phrases from an American Judgment was quoted with approval:

"’Manufacture’ implies a change but every change is not manufacture, and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation, a new and different article must emerge having a distinctive name, character or use."

The essential point thus is that in manufacture something is brought into existence which is different from that originally existed in the sense that the thing produced is by itself a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article.

16.Processing essentially effectuates a change in form, contour, physical appearance or chemical combination or otherwise by artificial or natural means and in its more complicated form involves progressive action in performing, producing or making something. Vide **Corn Products Refining Co v Federal Trade Commission: CC A7, 144F 2d 211.**

With due regard to the aforesaid decision, Their Lordships have distinguished between "processing" and "manufacturing". Processing of any product is normally understood that since they relate to processing of that material which even after processing retains the character of vegetable. On the other hand, manufacturing is a transformation which is converted. In the instant case, Suji, Maida and Atta, being the products after processing of Wheat of common commercial parlance, the Suji, Maida and Atta can be said as processed food. It is trite in law that with regard to interpretation of statute, the welfare of the statute requires liberal construction whereas at the same time, statute requires strict construction. Since the Act, 1956 is more or less describes for levying the market fee, the same becomes the fiscal statute requiring strict construction. It will not be out of place to mention here that Section 11 of the Act,1956 is about levy of the market fee on processed or non-processed agricultural produce. So, Suji, Atta and Maida cannot be said to have got separate entity bereft of the Wheat product. So, the contention of the learned counsel for the petitioners that Suji, Maida and Atta cannot be on the same family of Wheat as congruous. So far as Dal is concerned, the Dals of all variety are nothing but containing the subject of Dal be it Harar, Masoor, Moong and Biri for which they are also under the same family, no character is lost at all by grinding the same or process the same except the requirement of same according to the need of the people. When the original character is not lost after being processed, the product cannot be taken to another family so as to make the concerned product out of agricultural product.

27. As Wheat and other Cereals are the agricultural produce in its raw form and the products stated above are brought out after being processed without having any separate identity except the nature of use of the same by human being, they are also same definition of agricultural produce in common parlance

28. In terms of the above discussion, the Court is of the view that Suji, Atta, Maida and Dals are agricultural produce being at par with Wheat. Point No.(I) is answered accordingly.

29. POINT No.(II)

It is the contention of the learned counsel for the petitioners that the notification issued in 1994 was not issued in consonance with the provisions of the Act, 1956 for which Atta, Maida, Suji and Dals cannot form part of the Schedule on which the entry fee would be leviable. On the other hand, learned counsel for the opposite parties 1 and 2 vehemently opposed the move by stating that the entire process for inclusion of such products in the Schedule as agricultural produce have been observed meticulously. Before going to answer the submissions and rival submissions, it is pertinent to point out the provisions of law. Section 2(1)(i) of the Act, 1956 states that agriculture produce means such produce (whether processed or not) of agriculture, forest, animal husbandry, agricultural, horticulture and pisciculture as are specified in the Schedule. Section 26 of the Act, 1956 says that the State Government may by notification, add to amend or cancel any of the items of agricultural produce specified in the Schedule.

30. From the aforesaid provision, it is clear that the Schedule of the Agricultural produce is always subject to addition and alteration according to the need of the market and the people using such agricultural produce. On the other hand, the Schedule must contain the agricultural produce duly notified by the State Government. On going through the Schedule, it appears that under the category "Cereals", wheat, paddy and rice are covered and similarly under the category of "Pulses", Biri Dal, Harad Dal, Masoor Dal, Buta Dal and other products are covered.

31. Section 3 of the Act, 1956 is reproduced below for better appreciation:

> "**3. Notification of intention of exercising control over purchase and sale of agricultural produce-**(1) The State Government may be notification declare its intention of regulating the purchase and sale of such agricultural produce and in such area, as may be specified in the notification. Such notification may also be published in the regional language of the area in a newspaper circulated in the said area or in such other manner as the State Government may deem fit.**"**

Sub-section (7) of Section 4 of the Act, 1956 is also reproduced below:

> "(7) Subject to the provisions of Section 3, the State Government may at any time by notification, exclude from a market area, any area

comprised therein or any agricultural produce in relation to such market area, or include in any market area, any area or any agricultural produce included in a notification issued under Section 3."

32. Now, a conjoint reading of aforesaid provisions of the Act, 1956 makes it clear that the State Government has got every right to declare any agricultural produce to be included in the Schedule of the Act, 1956 for the purpose of sale of such produce after necessary objections/suggestions invited from the public. Similarly, the State Government has also domain to include or exclude any agricultural produce in relation to such market area by following the same process, as required to declare any agricultural produce as part of the Schedule under Section 3 of the Act, 1956. When there is natural interpretation or natural meaning, the interpretation of statute does not require any assistance outside the language of Section 3 and Sub-section (7) of Section 4 of the Act, 1956 which are very clear.

33. Placing such ideal of interpretation, going through the concerned original file of the Government of Orissa in the Department of Cooperation, it reveals that there was a proposal by the RMC, Jatni to add Suji, Maida, Atta, Maize, Flattened Rice (Choora) etc. as agricultural produce in respect of the market area of RMC, Jatni and the proposal was made to invite objections/suggestions after draft preliminary notification is made. Such proposal has also been approved from the concerned Hon'ble Minister in the Cooperation Department on 19.05.1994. The Government Notification shows that on 23.05.1994 objections/suggestions, as per the provisions of the Act, 1956, were invited from the public for inclusion of such products as agricultural produce by allowing one month time and in both Oriya and English language, the said notification was issued. The note-sheet of the Government of Orissa in the concerned file further reveals that on 02.08.1994, the Joint Director of Cooperative Societies (Marketing) informed that no objection or suggestion has been received from any quarter by 02.08.1994 for which he has requested to issue final notification to include those products as agricultural produce. The note-sheet also shows that final notification was issued being duly approved by the concerned Hon'ble Minster of the State Government. So, necessary notification of the State Government was issued on 21.11.1994 by including Suji, Maida, Atta etc. as agricultural produce in accordance with Sub-section (7) of Section 4 of the Act, 1956 for purchase and sale in the market area of the RMC, Jatni. Thus, the entire process has been followed to declare Atta, Suji, Maida etc. as

agricultural produce by the State Government for their purchase and sale in the market area of RMC, Jatni. It has been already discussed in the aforesaid paragraphs that Suji, Maida, Atta etc. as a process product of Wheat which has already been taken place in the Schedule as agricultural produce under the provisions of the Act, 1956. So, the contention of Mr.Tripathy, learned counsel for the petitioners that no legislative process has been followed in accordance with the provisions of the Act, 1956 to declare such products as agricultural produce and at no stretch of imagination, they are agricultural produce, are all futile exercise and the same are untenable. The Point No.(II) is answered accordingly.

34. CONCLUSION

In the writ petitions, it has been prayed to quash Annexue-1 which declares Suji, Maida, Atta, Maize, Flattened Rice (Choora), Lentil (Masur), Fish and Dry Fish, Poultry and Eggs as agricultural produce for purchase and sale in the market area of RMC, Jatni. In the aforesaid writ petitions, there is no argument advanced to declare all such produce added in the Schedule as ultra vires to the provisions of the Act, 1956 except the produce of Atta, Maida, Suji and Masoor Dal. Further, it is prayed to issue direction not to collect market fee upon such agricultural produces. It has already been held that since Dals, Atta, Maida and Suji have already been included as per the request of the RMC, Jatni in the Schedule of the Act, 1956 as agricultural produce after following the necessary process of law as enshrined under the provisions of the Act, 1956, it cannot be said that proper procedure under the provisions of the Act, 1956 has not been followed. Moreover, it has been observed that they have been justifiably added as agricultural produce being tested on the touchstone of these products being process of agricultural produce which has already been notified in the Schedule of the Act, 1956. No other legal point was buttressed by Mr.Tripathy, learned counsel for the petitioners to take any other view than the views expressed above. Hence, the impugned notification dated 21.11.1994 vide Annexure-1 issuing for purchase and sale of Atta, Maida, Suji, Maize, Flattened Rice, Masur Dal etc in the market area of RMC, Jatni and collection of market fee on such produce in accordance with the provision of the Act, 1956 and Rules made thereunder are legal and proper.

35. In the result, the writ petitions sans merit for which they stand dismissed.

Writ petitions dismissed.