SUPREME COURT OF INDIA

DIPAK MISRA, C.J.I, A.M.KHANWILKAR, J.
& DR. D.Y.CHANDRACHUD, J.

CIVIL APPEAL NO. 1549 OF 2011

THE STATE OF PUNJAB & ANR. …….Appellant(s)

.Vrs.

DHARAM PAL ……..Respondent(s)

SERVICE LAW – Promotion – If a person is put to officiate on a higher post with greater responsibilities, he is normally entitled to salary of that post – However, by an incorporation in the order or merely by giving an undertaking in all circumstances would not debar an employee to claim the benefits of the officiating position.

In this case, the respondent was appointed as a Clerk on 22.05.1970 and promoted to the post of Sr. Asst. on 22.09.1980 – He was given the officiating charge of the Superintendent Grade-II vide order Dt. 09.12.2004 and there after he was directed to function as Superintendent Grade I vide Government Order Dt. 26.05.2007 and superannuated from service on 31.03.2008 – He approached the High Court for grant of benefit of pay scale for the posts of Superintendent Grade II and Superintendent Grade I which was allowed – Hence the present appeal – If a person is promoted to the higher post or put to officiate on that post with an agreement that he would not claim higher salary or other attendant benefits, it would be contrary to law and also against public policy – Held, since the respondent was relieved from the substantive post and worked in the higher posts and Rules do not prohibit grant of pay scale, the view expressed by the High Court is absolute impeccable.

Case Laws Relied on :-

1. AIR 1983 SC 1060 : Smt. P.Grover –V- State of Haryana & Anr.
2. (1998)5 SCC 87 : Secretary-cum-Chief Engineer, Chandigarh -V- Hari Om Sharma & Ors.

Case Law Referred to :-

1. 2004 (4) RSJ 599 :Pritam Singh Dhaliwal v. State of Punjab and anr.[1]
2. (2003) 6 SCC 123 : State of Haryana and another v. Tilak Raj & ors.[2]
3. (2007) 8 SCC 279 : S.C. Chandra and others v. State of Jharkhand & other [3]
4. (2014) 13 SCC 283 : A. Francis v. Management of Metropolitan Transport Corporation Limited, Tamil Nadu [4]

5. AIR 1983 SC 1060 : Smt. P. Grover v. State of Haryana and another[5]
6. 1999 (2) SCT 286 : Selvaraj v. Lt. Governor of Island, Port Blair & ors [6]
7 (1998) 5 SCC 87 : Secretary-cum-Chief Engineer, Chandigarh v. Hari Om Sharma & ors.[7]

For Appellants : Ms. Uttara Babbar
For Respondents : Mr. Sudarshan Singh Rawat

Date of judgment : 05.09.2017

JUDGMENT

DIPAK MISRA, CJI

The present appeal, by special leave, calls in question the legal acceptability of the order dated 20.08.2008 passed by the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 18843 of 2007 whereby the Division Bench placing reliance on the decision in ***Pritam Singh Dhaliwal v. State of Punjab and another***[1] has acceded to the prayer made by the respondent for getting the benefit of the pay scale for the post he was holding on officiating basis.

2. To appreciate the gravamen of the controversy, exposition of facts in brief is necessitous. The respondent was appointed as a clerk on 22.05.1970 and promoted to the post of Senior Assistant on 22.09.1980. He was given the officiating charge of the Superintendent Grade II vide order dated 09.12.2004 and thereafter, he was directed to function as Superintendent Grade I vide Government Order dated 26.05.2007. As the factual narration would reveal, he stood superannuated from service on 31.03.2008.

3. Before the respondent attained the age of superannuation, he approached the High Court in a Writ Petition as he was not granted the benefit of the pay scale for the posts of Superintendent Grade II and Superintendent Grade I despite having performed the duties of officiating current duty basis regularly. He sought the relief for grant of pay, the arrears of pay and other consequential allowances and benefits with 18% interest. As stated earlier, the High Court placed reliance on the authority in ***Pritam Singh Dhaliwal*** (supra) and opined that the controversy is covered by the said decision and disposed of the writ petition in terms of the said judgment. Hence, the present appeal.

4. We have heard Ms. Uttara Babbar, learned counsel for the appellants and Mr. Sudarshan Singh Rawat, learned counsel for the respondent.

[1] 2004 (4) RSJ 599

5. Criticising the impugned order, it is submitted by Ms. Babbar that the High Court has committed gross illegality in granting the benefit to the respondent totally ignoring the restrictions incorporated in the orders dated 09.12.2004 and 26.05.2007 which clearly stipulated that the respondent official will work in his own pay scale and his officiating promotion would be subject to the recommendations of the Departmental Promotion Committee and on the approval of the Committee, he shall be given the financial benefits. She would further urge that the authority relied upon by the High Court does not hold good in view of what has been laid down by this Court in ***State of Haryana and another v. Tilak Raj and others***[2], ***S.C. Chandra and others v. State of Jharkhand and other*** [3] and ***A. Francis v. Management of Metropolitan Transport Corporation Limited, Tamil Nadu*** [4]. She has also impressed upon the aspect that under the Punjab Civil Services Rules (for short, "Rules") the respondent is not entitled to the benefit inasmuch as the Rules unequivocally prescribe for denial of benefit.

6. Mr. Rawat, learned counsel for the respondent, while defending the order impugned, would contend that the assumption of the State that the said Rules impose conditions in the negative is fundamentally erroneous.

According to him, the pronouncements which have been relied upon are not applicable to the facts of the instant case and, therefore, the decision rendered by the High Court cannot be found fault with. He would further contend that the respondent was relieved from the substantive post and worked in the higher posts and carried out the responsibilities of the said posts and, therefore, denial of the benefits to him would be travesty of justice and further permit the State to pave the path of infidelity to the real legal position. That apart, submits the learned counsel, the language used in the order passed by the employer would crush the essential spirit of the Rule.

7. In the beginning, it is seemly to state that there is no factual dispute with regard to the appointments or the posts. That being the position, we think it appropriate to refer to the orders of appointment as Ms. Babbar, learned counsel for the appellant-State of Punjab, would harp on the same. The order dated 09.12.2004 reads as follows:

"ORDER

On the retirement of Smt. Chand Prabha, Superintendent Grade I on 31.07.2004 the post of Superintendent Grade I had become vacant. On

[2] (2003) 6 SCC 123, [3] (2007) 8 SCC 279, [4] (2014) 13 SCC 283

that vacant post Sh. Kewal Singh Supdt. Gr. II is promoted as Superintendent Grade I in his own scale.

On account of promotion of Sh. Kewal Singh, Supdt. Gr. II as Superintendent Grade I and on account of proceeding on earned leave of Shri Bhinder Singh Supdt. Gr. II w.e.f. 07.9.2004 Shri Ashwani Kumar Sr. Assistant (Officiating Superintendent Gr. II) and Sh. Dharam Pal (Officiting Supdt. Gr. II) are promoted as Superintendent grade II.

The official will work in their own pay scale and above promotions will be subject to the recommendations of the Departmental Promotion Committee. On the approval of the above committee they will be given financial benefits. On the basis of these orders the officials will not claim any seniority etc. " On the basis of the aforesaid order, the respondent functioned as the official Superintendent Grade II.

8. As stated earlier, while he was officiating on the said post, he was promoted on officiating basis to function in the post of Superintendent Grade I. The relevant portion of the said order reads as follow:

"The official will work in their earlier own pay scale and above promotions will be subject to the recommendations of the Departmental Promotion Committee. On the approval of the above committee they will be given financial benefits. On the basis of these orders the officials will not claim any seniority etc."

9. The said orders have to be tested on the anvil of the Rules. It needs no special emphasis to state that if the orders are in consonance with the Rules indubitably the respondent cannot put forth a claim unless the Rules are declared unconstitutional. Our attention has been invited to Rule 4.13 which occurs under the heading "Pay of Officiating Government Employees". The relevant part of the said Rule reads as follows:

"**Rule 4.13**. (1) Subject to the provisions of rules 4.22 to 4.24, a Government employee who is appointed to officiate in a post shall not draw pay higher than his substantive pay in respect of a permanent post, other than a tenure post, unless the post in which he is appointed to officiate is one enumerated in the schedule to this rule or unless the officiating appointment involves the assumption of duties and

responsibilities of greater importance than those attaching to the post, other than a tenure post on which he holds a lien:

Provided that the competent authority may exempt from the operation of this rule, any service which is not organised on a time-scale basis and in which a system of acting promotions from grade to grade is in force at the time of the coming into force of these rules:

Provided further that the competent authority may specify posts outside the ordinary line of a service the holders of which may, notwithstanding the provisions of this rule and subject to such conditions as the competent authority may prescribe, be given any officiating promotion in the cadre of the service which the authority competent to order promotion may decide and may thereupon be granted the same pay (whether with or without any special pay, if any, attached to such posts) as they would have received if still in the ordinary line.

(2) For the purpose of this rule, the officiating appointment shall not be deemed to involve the assumption of duties or responsibilities of greater importance if the post to which it is made is on the same scale of pay as the permanent post, other than a tenure post, on which he holds a lien, or on a scale of pay identical therewith."

10. Certain Notes have been appended to the said Rule but they are not relevant for adjudication of the present controversy. On a close scrutiny, it is noticeable that the said Rule postulates that the government employee appointed to an officiating post shall not draw pay higher than his substantive pay in respect of a permanent post unless the post in which he is appointed to officiate is one enumerated in the Schedule to the Rules and further the officiating appointment involves assumption of duties and responsibilities of greater importance than those attached to the post. It is not in dispute that the posts of Superintendent Grade II and Grade I are covered under the Schedule. Be it mentioned, the extension of benefit is subject to the provisions of Rules 4.22 and 4.24.

11. In view of the aforesaid Rule position, it is necessary to reproduce Rule 4.22 and Rule 4.24. They read as follows:

"Rule 4.22. The competent authority may appoint one Government employee to hold substantively, as a temporary measure or to officiate

in, two or more independent posts at one time. In such cases, the Government employee shall draw the highest pay to which he would be entitled if his appointment to one of the posts stood alone:

Provided that the employee must fulfil the requisite qualifications and conditions for services for both the posts.

Rule 4.24. When a Government employee holds current duty charge of another post, in addition to that of his own substantive post, he does not officiate in the former post and as such is not entitled to any additional remuneration."

12. As we understand the said Rules, they categorically convey that the employee who holds the higher post must fulfil the requisite qualifications and conditions for service for both the posts. It is not controvered at the Bar that the respondent was eligible to hold the post of Superintendent Grade II and Grade I. In this context, the learned counsel for the appellants has commended us to Rule 4.16. The said Rule reads as follows:

"**Rule 4.16**. A competent authority may fix the pay of an officiating Government employee at an amount less than that admissible under these rules.

Note 1.–One class of cases falling under this rule is that in which a Government employee merely holds charge of the current duties and does not perform the full duties of the post.

Note 2.–When a Government employee is appointed to officiate in a post on a time-scale of pay but has his pay fixed below the minimum of the time-scale under this rule he must not be treated as having effectually officiated in that post within the meaning of rule 4.4 or having rendered duty in it within the meaning of rule 4.9.

Such a Government employee, on confirmation, should have his initial pay fixed under rule 4.4 (b) and draw the next increment after he has put in duty for the usual period required, calculated from the date of his confirmation.

Note 3.–The power conferred by this rule is not exercisable save by a special order passed in an individual case and on a consideration of the facts of that case. A general order purporting to oust universally the operation of rule 4.14 would be *ultra vires* of this rule. Although,

the practice of passing ostensibly special order on every individual case would not be *ultra vires* of this rule it would constitute the grossest possible fraud thereon."

13. On a careful scrutiny of the aforesaid prescription, it is perceptible that the said Rule envisages a different situation altogether. The present factual matrix is quite different. We are inclined to so hold as the respondent herein was holding higher posts and further he was performing the duties of higher responsibility attached to the posts. Thus analysed, we arrive at the conclusion that the Rules do not bolster the proposition advanced by the learned counsel for the State.

14. Having analysed the Rule position, we may allude to the authorities that have been commended to us. First, we shall dwell upon the decision in ***Pritam Singh Dhaliwal*** (supra) that has been relied upon by the High Court in the impugned order. In the said case, the Division Bench of the High Court had placed reliance upon ***Smt. P. Grover v. State of Haryana and another***[5] and ***Selvaraj v. Lt. Governor of Island, Port Blair and others*** [6] and earlier decisions of the High Court and analyzing the Rule position opined that the officer therein had been asked to officiate as Deputy Director with effect from 14.03.1996 and he had been continuously posted to equivalent posts such as Additional Deputy Commissioner (D) and till his superannuation the officiating charge was never withdrawn and hence, his entitlement to claim higher pay scale for the post for which he was asked to officiate and perform his duties till his superannuation would not be negatived.

15. As the reasoning of the High Court is fundamentally based on enunciation of law propounded by the Court in ***Smt. P. Grover*** (supra), we think it apt to appreciate the ratio laid down in the said case. A two-Judge Bench of this Court was dealing with the fact situation wherein keeping in view the policy decision, the appellant therein was promoted as an acting District Education Officer. The order of promotion contained a superadded condition that she would draw her own pay scale which apparently meant she would continue to draw her salary on her pay scale prior to promotion. The claim was put forth by the appellant that she was entitled to the pay of District Education Officer and there was no justification for denying the same to her. A Writ Petition was filed before the High Court and the State filed the counter affidavit contending, *inter alia*, that she was promoted to the post of acting District Education Officer as there was no Class I post and hence, she

5 AIR 1983 SC 1060, 6 1999 (2) SCT 286

was not entitled to be paid the salary of District Education Officer. Appreciating the fact situation, the Court held:

> "… We are unable to understand the reason given in the counter-affidavit. She was promoted to the post of District Education Officer, a Class I post, on an acting basis. Our attention was not invited to any rule which provides that promotion on an acting basis would not entitle the officer promoted to the pay of the post. In the absence of any rule justifying such refusal to pay to an officer promoted to a higher post the salary of such higher post (the validity of such a rule would be doubtful if it existed), we must hold that Smt Grover is entitled to be paid the salary of a District Education Officer from the date she was promoted to the post, that is, July 19, 1976, until she retired from service on August 31, 1980."

16. In ***Tilak Raj*** (supra), the issue arose regarding justification of grant of minimum pay in the scale of pay applicable to the regular employees to the daily wagers.

A two-Judge Bench referred to various decisions and came to hold thus:

> "11. A scale of pay is attached to a definite post and in case of a daily-wager, he holds no posts. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-à-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.
>
> "12. Equal pay for equal work" is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated into a mathematical formula."

On a careful perusal of the said decision in its entirety, we are of the considered opinion that it is not an authority for the proposition canvassed by the learned counsel for the appellants. It remotely does not support the principle that is assiduously sought to be built by the State.

17. In ***S.C. Chandra*** (supra), the appellants therein had filed a Writ Petition in the High Court of Jharkhand seeking a writ of mandamus against the respondent Nos. 3 to 6 to release the pay, DA with arrears along with interest and further a direction not to close the school or in the alternative, to issue a direction to respondent Nos. 1 to 2 to take over the management and control of the school in question. The writ petitioners before the High Court were teachers and non-teaching staff of the school and claimed themselves to be the employees of Hindustan Copper Limited (HCL). The Court, after going through the judgment of the High Court, came to hold that solely because the management of HCL was giving financial aid that by itself cannot be construed that the school was run by the management of HCL and accordingly, the Court dismissed the appeal. We have no hesitation in opining that the principle that has been laid down in the said judgment has no applicability to the facts at hand.

18. In ***A. Francis*** (supra), the Court was dealing with the entitlement of the appellant to the salary in higher pay of Assistant Manager wherein he had worked from 28.02.2001 till 31.05.2005. The employer had denied certain benefits and the employee preferred a Writ Petition before the High Court which was allowed by the learned Single Judge. The Corporation filed Letters Patent Appeal which reversed the judgment of the learned single Judge. The appellant before this Court placed reliance on ***Secretary-cum-Chief Engineer, Chandigarh v. Hari Om Sharma and others***[7]. On behalf of the Corporation terms of the order were pressed into service contending that there were specific conditions stipulated in the order with regard to salary and emoluments and, therefore, the claim with regard to higher post was not tenable in law.

19. The Court appreciating the factual score held thus:

> "The order dated 28-2-2001, by which the appellant was allowed to discharge duties in the post of Assistant Manager had made it clear that the appellant would not be entitled to claim any benefit therefrom including higher salary and further that he would continue to draw his salary in the post of Assistant Labour Welfare Officer. If the above

[7] (1998) 5 SCC 87

was an express term of the order allowing him to discharge duties in the higher post, it is difficult to see as to how the said condition can be overlooked or ignored. The decision of this Court in Secy.-cum-Chief Engineer was rendered in a situation where the incumbent was promoted on ad hoc basis to the higher post. The aforesaid decision is also istinguishable inasmuch as there was no specific condition in the promotion order which debarred the incumbent from the salary of the higher post. Such a condition was incorporated in an undertaking taken from the employee which was held by this Court to be contrary to public policy."

20. In ***Hari Om Sharma*** (supra), the respondent was promoted as a Junior Engineer I in 1990 and had been continuing on that post without being paid salary for the said post and without being promoted on regular basis. It was in this situation, he approached the Central Administrative Tribunal which allowed the claim petition with the direction that the respondent shall be paid salary for the post of Junior Engineer I. That apart certain other directions were also issued. The Court took note of the fact that the respondent was promoted on a stop-gap arrangement as Junior Engineer I and opined that this by itself would not deny his claim of salary for the said post. In that context, the Court held:

"… If a person is put to officiate on a higher post with greater responsibilities, he is normally entitled to salary of that post. The Tribunal has noticed that the respondent has been working on the post of Junior Engineer I since 1990 and promotion for such a long period of time cannot be treated to be a stop-gap arrangement."

21. After so stating, the Court proceeded to opine thus:

"Learned counsel for the appellant attempted to contend that when the respondent was promoted in stop-gap arrangement as Junior Engineer I, he had given an undertaking to the appellant that on the basis of stop-gap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post. The argument, to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. The respondent being an employee of the appellant had to break his period of stagnation

> although, as we have found earlier, he was the only person amongst the non-diploma-holders available for promotion to the post of Junior Engineer I and was, therefore, likely to be considered for promotion in his own right. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872."
>
> [Emphasis added]

The principle postulated in the said case is of immense significance, for it refers to concept of public policy and the conception of unconscionability of contract.

22. In the instant case, the Rules do not prohibit grant of pay scale. The decision of the High Court granting the benefit gets support from the principles laid down in ***Smt. P. Grover*** (supra) and ***Hari Om Sharma*** (supra). As far as the authority in ***A. Francis*** (supra) is concerned, we would like to observe that the said case has to rest on its own facts. We may clearly state that by an incorporation in the order or merely by giving an undertaking in all circumstances would not debar an employee to claim the benefits of the officiating position. We are disposed to think that the controversy is covered by the ratio laid down in ***Hari Om Sharma*** (supra) and resultantly we hold that the view expressed by the High Court is absolute impeccable.

23. In view of the aforesaid premises, we do not perceive any merit in this appeal and accordingly the same stands dismissed without any order as to costs.

Appeal dismissed.

2017 (II) ILR - CUT-739 (S.C.)

SUPREME COURT OF INDIA

DIPAK MISRA, J. , R.K. AGRAWAL, J. & PRAFULLA C. PANT, J.

CIVIL APPEAL NO. 632 OF 2008

STATE OF PUNJAB & ORS. ……..Appellants

.Vrs.

THE SENIOR VOCATIONAL STAFF MASTERS ASSOCIATION & ORS. ……...Respondents

SERVICE LAW – Parity in employment – "Equal pay for equal work" – A differential scale on the basis of educational qualifications and the nature of duties is permissible – However, if two categories of employees are treated as equal and their basic qualifications and the job requirements continued to be identical as they were initially laid down, they should continue to be so treated and the court shall be reluctant to accept the action of the authority in according a differential treatment unless some good reasons are disclosed.

In this case the Vocational Masters and vocational lecturers are teaching the same classes and their nature of work, responsibilities and duties being identical and their pay scales having been kept same since 1978, there was no rationale in making a discrimination between the two – Held, the High Court has rightly quashed the impugned order Dt 16.07.2003 and declared that the Vocational Masters are entitled to the pay scale of Rs. 6,400-10,640/- at par with vocational lectures as per the Notification Dt 31.03.1995. (Paras 18 to 22)

Case Laws Referred to :-

1. (1989) 3 SCC 191 : V. Markendeya and Others vs. State of Andhra Pradesh & Ors.
2. (1989) 1 SCC 121 : State of U.P. and Others vs. J.P. Chaurasia & Ors.
3. (1994) 2 SCC 521 : Shyam Babu Verma and Others vs. Union of India & Ors.
4. (2004) 1 SCC 347 : Government of W.B. vs. Tarun K. Roy & Ors.
5. (2007) 1 SCC 408 : IndianDrugs & Pharmaceuticals Ltd. vs. Workmen, Indian Drugs & Pharmaceuticals Ltd.
6. (2003) 11 SCC 646 : State Bank of India and Others vs. K.P. Subbaiah & Ors.
7. AIR 1994 SC 2480 : Bhagwan Shukla vs. Union of India & Ors.

For Appellants : Mr. Karan Bharihoke, AOR, Mr.Ajay Pal, AOR,

For Respondents : Mr. Neeraj Kumar Jain, Mr.Tarun Gupta, AOR
Ms. Parul Sharma,
Mr.Varinder Kumar Sharma, AOR,
Mr. Aditya Kumar Choudhary, Mr. Ajit Pathak,
Mr. Akhil Anand, AOR, Mr. Ashok K. Mahajan, AOR
Mr. Nidhesh Gupta. (Senior Counsel)

Date of judgment: 18.08.2017

JUDGMENT

R.K. AGRAWAL, J.

1) The above appeal has been filed against the impugned common judgment and order dated 23.05.2006 passed by the High Court of Punjab & Haryana at Chandigarh in L.P.A. No. 66 of 2006 in CWP No. 10928 of 2003 and L.P.A. No. 67 of 2006 in CWP No. 7527 of 1995 whereby the Division Bench while dismissing the appeals filed by the appellants herein upheld the order dated 27.04.2005 passed by learned single Judge of the High Court in CWP Nos. 10928 of 2003 and 7527 of 1995.

2) **Brief facts:**

(a) The Senior Vocational Staff Masters Association-the respondent Association represents the Vocational Masters in the State of Punjab appointed during the years 1975, 1982, 1983 and thereafter. The respondents were appointed on their respective posts by the State of Punjab in the year 1975 on *ad-hoc* basis. In the year 1978, the Punjab Public Service Commission advertised 132 posts of Vocational Masters to be filled up by way of regular appointment. These posts were to be filled up under the Punjab School Education (PSE) Class III (School Cadre) Rules. The minimum educational qualification for the posts of Vocational Masters was degree or post graduation except very few courses where the educational qualification was Diploma under the advertisement.

(b) In the year 1992-93, the State Government decided to revise the minimum qualification for being appointed as vocational masters and Diploma was provided as the minimum educational qualification in place of Degree for some courses. Due to revision, there were two classes of Vocational Masters in the State, viz., Diploma holder vocational masters and degree holder vocational masters or post-graduate vocational masters. The

State Government, taking note of the fact that the unequals are being treated as equals due to the revision in qualification, vide Notification dated 31.03.1995, re-designated degree holder vocational masters and post-graduate vocational masters as vocational lecturers with the rider that their present responsibilities and financial matters will have no change. It is also pertinent to mention here that Diploma holder vocational masters were also provided an opportunity to re-designate as vocational lecturers as and when they acquire the degree or post-graduate qualification.

(c) The said notification dated 31.03.1995 was challenged before the High Court in CWP No. 7527 of 1995 by the remaining Vocational Masters for a direction to the appellants to grant the designation of Vocational Lecturers to all the Vocational Masters in the State of Punjab. During the pendency of the said writ petition, the State Government made rules to amend the Punjab State Education Class III (School Cadre) Service Rules, 1978 prescribing separate qualification for vocational masters and vocational lecturers.

(d) On the onset of 4th Punjab Pay Commission, the Commission had not treated Vocational Masters separate from Masters of General Studies and the Vocational Lecturers from the Lecturers of General Studies and merged the Vocational Masters with that of the School Masters and Vocational Lecturers with School Lecturers by amendment, viz., Punjab Civil Services (revised pay)(first amendment) Rules, 1998 wherein School Lecturers were granted the pay scale of Rs. 6,400-10,640/- and School Masters were given the pay scale of Rs. 5,800-9,200/-. It is pertinent to mention here that earlier the Vocational Masters and Vocational Lecturers were given the same pay scales.

(e) The respondents herein, being aggrieved by the disparity in pay scales granted by the 4th Pay Commission, approached the State Government claiming that they should be granted pay scales at par with the Lecturers. Vide Notification dated 07.11.2002, the Government of Punjab, Department of Education clarified that "the Vocational Masters appointed on or after 08.07.1995 neither can be designated as Vocational Lecturers based upon the educational qualification nor the revised scale of Rs. 6,400-10,640/- in place of Rs. 5,800-9,200/- be granted to them with effect from 01.01.1996. In other words, the benefit of higher scale will be admissible to those who were in service prior to 08.07.1995".Vide a subsequent notification dated 16.05.2003, the State Government reiterated the stand taken in the Notification dated 07.11.2002 and also sought for strict compliance of the same.

(f) The Government of Punjab, Department of Education, vide Notification dated 16.07.2003, cancelled the Notifications dated 07.11.2002 and 16.05.2003 clarifying the position that only those Vocational Masters who were appointed prior to 08.07.1995 and those who acquired the qualification of post-graduate or degree in engineering by 08.07.1995 would be eligible for scale of pay of Rs. 6,400-10,640/- with effect from 01.01.1996 and also issued a direction to recover the excess amount being paid to any ineligible vocational master on the basis of the earlier Notifications.

(g) Being aggrieved by the Notification dated 16.07.2003, the respondents herein preferred CWP No. 10928 of 2003 before the High Court. Learned single Judge of the High Court, vide a common judgment and order dated 27.04.2005 in CWP Nos. 10928 of 2003 and 7527 of 1995, quashed the Notification dated 16.07.2003 and directed the State Government to give the benefit of Notification dated 31.03.1995 to all the Vocational Masters recruited prior to 08.07.1995.

(h) Aggrieved by the order dated 27.04.2005, the State Government preferred L.P.A. No. 66 of 2006 in CWP No. 10928 of 2003 and L.P.A. No. 67 of 2006 in CWP No. 7527 of 1995 before the High Court. The Division Bench of the High Court, vide common judgment and order dated 23.05.2006, dismissed the appeals filed by the appellants herein.

(i) Aggrieved by the order dated 23.05.2006, the appellants have preferred this appeal by way of special leave.

3) Heard the arguments advanced by Mr. Karan Bharihoke, learned counsel for the appellants and Mr. Neeraj Kumar Jain and Mr. Nidhesh Gupta, learned senior counsel for the respective respondents and perused the records.

Point(s) for consideration:-

4) The only point for consideration before this Court is whether in the present facts and circumstances of the case, the Notification dated 16.07.2003 is valid in the eyes of law or not?

Rival submissions:

5) Learned counsel for the appellants contended before this Court that the respondents do not fulfill the basic qualification of Lecturer. It was further contended that the High Court has not considered the fact that the

respondents could not have challenged the Notification dated 31.03.1995 as the said Notification has been superseded by the Statutory Rule dated 08.07.1995. He further contended that the High Court has recorded an erroneous finding of fact that the Notification dated 16.07.2003 is violative of principles of natural justice and there is no question of recovering the excess amount paid as salaries and allowances to the respondents. Learned counsel further contended that it is a well settled proposition of law that the pay scales of a class of employees are determined by the State Government keeping in view the qualifications, responsibilities, nature of work and resources of the State and the High Court ought not have granted the pay scale of Rs. 6,400-10,640/- to the respondents herein-Vocational Staff Masters. Learned counsel further contended that in order to rectify the error committed earlier, the Notification dated 16.07.2003 was issued by the State Government withdrawing the pay scale of Rs. 6,400-10,640/- to the vocational masters w.e.f. 01.01.1996 which was inadvertently given vide Notification dated 07.11.2002, and there is no foul play on the part of the State to hamper any legitimate right of the respondents as it is the prerogative of the State. Learned counsel finally contended that the orders passed by the High Court are erroneous and are in flagrant violation of the statutory rules and be set aside by this Court. In support of his submissions, learned counsel has relied upon the following decisions of this Court which are as under:-

(i) In ***V. Markendeya and Others*** vs. ***State of Andhra Pradesh and Others*** (1989) 3 SCC 191, it was held as under:-

> **"10.** In *Randhir Singh case* and later in *Dhirendra Chamoli case*, *Surinder Singh case*, *Bhagwan Dass case*, *Jaipal case* and *P. Savita case*, this Court implemented the principle of "equal pay for equal work". The court granted relief on the principle of equal pay on the basis of same or similar work performed by two classes of employees under the same employer even though the two classes of employees did not constitute the same service. But in all the aforesaid cases relief was granted only after it was found that discrimination was practised in giving different scales of pay in violation of the equality clause enshrined in Articles 14 and 16 of the Constitution. The principle of equal pay for equal work was enforced on the premise that discrimination was practised between the two sets of employees performing the same duties and functions, without there being any rational classification. The principle of "equal pay for equal work" is

not an abstract one, it is open to the State to prescribe different scales of pay for different cadres having regard to nature, duties, responsibilities and educational qualifications. Different grades ace laid down in service with varying qualifications for entry into particular grade. Higher qualification and experience based on length of service are valid considerations for prescribing different pay scales for different cadres. The application of doctrine arises where employees are equal in every respect, in educational qualifications, duties, functions and measure of responsibilities and yet they are denied equality in pay. If the classification for prescribing different scales of pay is founded on reasonable nexus the principle will not apply. But if the classification is founded on unreal and unreasonable basis it would violate Articles 14 and 16 of the Constitution and the principle of equal pay for equal work, must have its way. In the decisions reference to which have been made by the learned counsel for the appellants, this Court granted relief, after recording findings that the aggrieved employees were discriminated in violation of the equality clause under Articles 14 and 16 of the Constitution, without there being any rationale for the classification.

11. In a number of decisions of this Court the claim for equal pay for equal work has been negatived on the ground that the different pay scales prescribed for persons doing similar or same work is permissible on the basis of classification founded on the measure of responsibilities, educational qualifications, experience and other allied matters. In *Federation of All India Customs and Central Excise Stenographers* (*Recognised*) v. *Union of India*, Justice Sabyasachi Mukharji said:

"... there may be qualitative differences as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. One cannot deny that often the difference is a matter of degree and that there is an element of value judgment by those who are charged with the administration in fixing the scales of pay and other conditions of service. So long as such value judgment is made bona fide, reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. It is important to emphasise that equal pay for equal work is a concomitant of Article 14 of the

Constitution. But it follows naturally that equal pay for unequal work will be a negation of that right."

The learned Judge further observed:

"The same amount of physical work may entail different quality of work, some more sensitive, some requiring more tact, some less — it varies from nature and culture of employment. The problem about equal pay cannot always be translated into a mathematical formula. If it has a rational nexus with the object sought for, as reiterated before a certain amount of value judgment of the administrative authorities who are charged with fixing the pay scale has to be left with them and it cannot be interfered with by the court unless it is demonstrated that either it is irrational or based on no basis or arrived mala fide either in law or in fact."

12. In *State of U.P.* v. *J.P. Chaurasia*, this Court negatived the claim of Bench Secretaries for equal pay for equal work on the basis of reasonable classification based on merit, experience and seniority though both sets of employees were performing the similar duties and having similar responsibilities. In *Mewa Ram Kanojia* v. *AIIMS* this Court refused to grant relief to the petitioner for parity in pay on the application of the principle of "equal pay for equal work" on the ground of reasonable classification on the basis of educational qualifications.

13. In view of the above discussion we are of the opinion that where two classes of employees perform identical or similar duties and carrying out the same functions with the same measure of responsibility having same academic qualifications, they would be entitled to equal pay. If the State denies them equality in pay, its action would be violative of Articles 14 and 16 of the Constitution, and the court will strike down the discrimination and grant relief to the aggrieved employees. But before such relief is granted the court must consider and analyse the rationale behind the State action in prescribing two different scales of pay. If on an analysis of the relevant rules, orders, nature of duties, functions, measure of responsibility, and educational qualifications required for the relevant posts, the court finds that the classification made by the State in giving different treatment to the two classes of employees is founded on rational basis having nexus with the objects sought to be achieved, the classification must be upheld. Principle of equal pay for equal work is applicable among equals, it cannot be applied to unequals. Relief to an aggrieved person seeking to enforce the principles

of equal pay for equal work can be granted only after it is demonstrated before the court that invidious discrimination is practised by the State in prescribing two different scales for the two classes of employees without there being any reasonable classification for the same. If the aggrieved employees fail to demonstrate discrimination, the principle of equal pay for equal work cannot be enforced by court in abstract. The question what scale should be provided to a particular class of service must be left to the executive and only when discrimination is practiced amongst the equals, the court should intervene to undo the wrong, and to ensure equality among the similarly placed employees. The court however cannot prescribe equal scales of pay for different class of employees."

(ii) In ***State of U.P. and Others*** vs. ***J.P. Chaurasia and Others*** (1989) 1 SCC 121, it was held as under:-

"20. The second question formulated earlier needs careful examination. The question is not particular to the present case. It is pertinent to all such cases. It is a matter affecting the civil services in general. The question is whether there could be two scales of pay in the same cadre of persons performing the same or similar work or duties. All Bench Secretaries in the High Court of Allahabad are undisputedly having same duties. But they have been bifurcated into two grades with different pay scales. The Bench Secretaries Grade I are in a higher pay scale than Bench Secretaries Grade II. The entitlement to higher pay scale depends upon selection based on merit-cum-seniority. Can it be said that it would be violative of the right to equality guaranteed under the Constitution?

31. In the present case, all Bench Secretaries may do the same work, but their quality of work may differ. Under the rules framed by the Chief Justice of the High Court, Bench Secretaries Grade I are selected by a Selection Committee. The selection is based on merit with due regards to seniority. They are selected among the lot of Bench Secretaries Grade II. When Bench Secretaries Grade II acquire experience and also display more merit, they are appointed as Bench Secretaries Grade I. The rules thus make a proper classification for the purpose of entitlement to higher pay scale. The High Court has completely overlooked the criterion provided under the Rules. The merit governs the grant of higher pay scale and that merit will be evaluated by a competent authority. The classification made under the

Rules, therefore, cannot be said to be violative of the right to have equal pay for equal work."

6) *Per contra*, learned senior counsel for the respondents-Vocational Staff Masters Association submitted that since beginning the educational qualification for appointment as Vocational Masters had been a degree or a diploma with three years' experience as both the qualifications were placed at par. The process of selection as well as the nature of the job was same. There was no such difference or distinction brought about between the persons so appointed. Learned senior counsel further submitted that the State Government sought to bring about an arbitrary distinction amongst people who had been appointed to teach the same classes of 10+1 and 10+2 and such arbitrary action is contrary to law and has rightly been directed to be rectified by the High Court. Learned senior counsel further submitted that there cannot be any discrimination between similarly situated persons whether by way of a government notification or by any amendment in the Rules. The plea that there was an inadvertent mistake is contrary to the record and it is a deliberate distinction in law sought to be brought about by the appellants. Learned senior counsel finally contended that the High Court was right in upholding the order passed by the learned single Judge and the present appeal is liable to be dismissed.

7) Learned senior counsel appearing for the vocational lecturers (Respondent Nos. 5 and 7) submitted that the State Government, while exercising powers under Section 309 of the Constitution, framed Punjab Civil Services (Revised Pay) (First Amendment) Rules, 1998. As per the said Rules, different scales of pay have been prescribed for Vocational Lecturers and Vocational Masters. The government, after examining various factors including different qualifications required for both the posts, has prescribed higher pay scale for Vocational Lecturers than the Vocational Masters. The said differentiation is made bona fide, reasonably on an intelligible criterion, which has a rational nexus with the object of differentiation. Notably, the said Rules were not assailed by the Vocational Masters before the High Court. Thus, there are statutory rules which hold the field and different pay scales for both the posts have been prescribed on the basis of the said Rules. However, the High Court without even noticing the said rules, by way of order, erroneously struck down the action of the government in not granting the pay scales of Vocational Lecturers to Vocational Masters.

8) Learned senior counsel further submitted that it has been held in a catena of cases of this Court that the doctrine of 'equal pay for equal work' has no mechanical application in every case and Article 14 permits reasonable qualification based on qualities or characteristics of persons recruited and grouped together, as against those who are left out. For claiming the benefit of the doctrine of 'equal pay for equal work', the concerned employee has to establish that the qualification, eligibility, mode of selection/recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. In support of this claim, learned senior counsel pointed out the judgments of this Court in ***Shyam Babu Verma and Others*** vs. ***Union of India and Others*** (1994) 2 SCC 521 and ***Government of W.B.*** vs. ***Tarun K. Roy and Others*** (2004) 1 SCC 347.

9) Learned senior counsel further stressed upon the point that the matters concerning pay fixation etc. exclusively falls within the domain of Expert Committees constituted by the government and court should refrain from interfering with the decisions regarding fixation of pay arrived at by such Committees. So long as the decision of those who are charged with the administration in fixing the scales of pay and other service conditions etc. is made bona fide, reasonably on an intelligible criterion, which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. The determination as to whether two posts are equal or not is the job of Expert Committee and the Court should not interfere with the same. In support of this submission, learned senior counsel point out the following judgment of this Court, viz., ***Indian Drugs & Pharmaceuticals Ltd.*** vs. ***Workmen, Indian Drugs & Pharmaceuticals Ltd.*** (2007) 1 SCC 408 and ***State Bank of India and Others*** vs. ***K.P. Subbaiah and Others*** (2003) 11 SCC 646.

10) Learned senior counsel finally submitted that in the absence of wholesome identity between the Vocational Masters and the Vocational Lecturers, the High Court erred in quashing the order dated 16.07.2003 passed by the State Government whereby it has decided not to extend the benefit of higher pay scales to those Vocational Masters who did not acquire the qualification of post graduate or degree in engineering by 08.07.1995. The said decision of the Government was in consonance with the statutory rules and had been made bona fide, reasonably on an intelligible criterion which has a rational nexus with the object of differentiation. Hence, the High

Court erred in quashing the same and that too without even noticing much less adverting to the statutory rules which govern the field.

Discussion:

11) The respondents herein are claiming the pay scale of Rs. 6,400-10,640/- with effect from 01.01.1996 which would be at par with the scale granted to the lecturers. It is their claim that when they were initially appointed as Vocational Masters on *ad-hoc* basis and were placed in the pay scale of Rs. 300-600/- a degree in Engineering was the necessary qualification for teaching students in the Engineering trade and for non-engineering trade, a candidate was required to have the qualification of B.A. with ITI Diploma. These qualifications were at par with Lecturers under the PES Class III Rules. It is also on record that at the relevant time, the posts of Lecturers were in the lower scale of Rs. 250-550/-. The scale which had been given to Vocational Masters was equivalent to the scale which had been enjoyed by the Head Masters. In the year 1978, the Pay Commission recommended the pay scale of Rs. 700-1300/- both for lecturers as well as for vocational masters. Thus, the vocational masters and lecturers were placed in the same scale. The parity in pay continued even in the subsequent pay revision and both the categories were placed in the pay scale of Rs. 1,800-3,200/-. In this view of the matter, the nature of duties of the Lecturers and Vocational Masters has not undergone any change.

12) However, when the pay scales were revised in the year 1998 with effect from 01.01.1996, a disparity was created between the pay scales of Lecturers and Vocational Masters. Whilst the Lecturers were granted the pay scale of Rs. 6,400-10,640/-, the respondents herein-Vocational Masters were fixed in the converted pay scale of Rs. 5,800-9,200/-. It is also on record that the Vocational Masters, who were appointed earlier to 08.07.1995 claimed that they cannot be granted a pay scale lesser than the Lecturers. Vide Notification dated 07.11.2002, the State Government issued a clarification that the Vocational Masters appointed on or after 08.07.1995 neither can be designated as Vocational Lecturers based upon the educational qualification nor can be granted the revised scale of Rs. 6,400-10,640/- to them with effect from 01.01.1996 stating that the higher scale will be admissible to those who were in service prior to 08.07.1995. In view of the Notification dated 07.11.2002, the higher scale was given to the Vocational Masters. On 21.05.2003, the State Government granted a quota of 15% to the Vocational Masters for being considered for promotion to PES Class II. In the meantime,

on 16.07.2003, the State Government, by way of subsequent Notification, superseding earlier Notifications dated 07.11.2002 and 16.05.2003, directed that the designations and pay scale of Rs. 6,400-10,640/- with effect from 01.01.1996 will be admissible to only those Vocational Masters who have been appointed prior to 08.07.1995 and had the qualification of post-graduate or degree in engineering by 08.07.1995. On the basis of the said Notification, the State Government passed orders to recover the excess amount paid to Vocational Masters after following the due procedure under the Rules. However, the claim of the respondents herein to re-designate all the Vocational Masters as Vocational Lecturers was still pending.

13) As the name suggests, vocational courses are those courses in which teaching is not on regular basis. Vocational courses play a very important role in the grooming of students in different fields. It trains young people for various jobs and helps them acquire specialized skills. Vocational education can also be termed as job-oriented education. It helps a person in becoming skilled in a particular filed at a comparatively lower age. In the present case, the State Government, in the year 1975, felt the need of Vocational courses and accordingly made the suitable provisions for the regulation of these courses. As per the government orders, initially, except very few subjects, the minimum educational qualification for the appointment to the post of "Vocational Masters" was Degree or Post Graduation.

14) It is a cardinal principle of law that government has to abide by rule of law and uphold the values and principles of the Constitution. Respondents herein alleged that creating an artificial distinction between the persons in the same cadre would amount to violation of Article 14 i.e. equality before law and hence, such an act cannot be sustained. The doctrine of equality is a dynamic and evolving concept having many dimensions. Articles 14-18 of the Constitution, besides assuring equality before the law and equal protection of the laws, also disallow discrimination which lacks the object of achieving equality, in matters of employment. It is well settled that though Article 14 forbids class legislation but it does not forbid reasonable classification. When any rule of statutory provision providing classification is assailed on the ground that it is contrary to Article 14, its validity can be sustained if it satisfies two tests, namely, that the classification was to be based on an intelligible differentia which distinguishes persons or things grouped together from the others left out of the group, and the differentia in question must have a reasonable nexus to object sought to be achieved by the rule or statutory provision in question. In other words, there must be some

rational nexus between the basis of classification and the object intended to be achieved by the Statute or the Rule.

15) It is evident that at the time of initial appointment, both the degree holders and the Diploma holders were appointed by a common process of selection where for the engineering trade a degree was required and for the non-engineering trade a diploma was considered as the appropriate qualification. A common advertisement was issued and a common process of selection led to the appointment of all persons who were designated as Vocational Masters. They were appointed on a pay scale higher than the general lecturers. They continued to draw a higher scale till the year 1978 when the pay scale of the general lecturers was brought at par with the pay scale of the Vocational Masters. It is only in the year 1995 that an effort was made by the State Government to create a distinction between the degree holders as vocational lecturers and diploma holders as vocational masters.

16) Further, since the very inception, the educational qualification for appointment as Vocational Masters had been a degree or a diploma with three years' experience as both the qualifications were placed at par. All persons were appointed by a common process of selection and they teach the same classes, performing the same work. No distinction can be brought about between the persons so appointed. It is only subsequently that the appellants designated some of the Vocational Masters as Vocational Lecturers and brought about an artificial distinction between the two. Even on account of re-designation of the degree holders and post graduates as vocational lecturers, there was no change in the responsibilities and the financial matters as between the degree holders and diploma holders before the alleged Notification which fact is duly admitted by the State. There is no distinction between the vocational lecturers and vocational masters and they form one unified cadre and class. There cannot be any discrimination between similarly situated persons, whether by way of a government notification or any amendment in the Rules. As far as nature of work is concerned, it is stated that the vocational masters are discharging their duty in the Senior Secondary Schools in the Engineering/non-Engineering trades and have the technical qualifications while the vocational lecturers are also discharging the same duties in the same schools. Both vocational masters and lecturers are teaching the same classes, i.e., 10+1 and 10+2 and hence the nature of work, responsibilities and duties being identical and the pay scales were also kept identical since 1978 onwards.

17) The principle of equality, is also fundamental in formulation of any policy by the State and the glimpse of the same can be found in Articles 38, 39, 39A, 43 and 46 embodied in Part IV of the Constitution of India. These Articles of the Constitution of India mandate that the State is under a constitutional obligation to assure a social order providing justice- social, economic and political, by *inter alia,* minimizing monetary inequalities, and by securing the right to adequate means of livelihood and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections. Meaning thereby, if the State is giving some economic benefits to one class while denying the same to other then the *onus* of justifying the same lies on the State specially in the circumstances when both the classes or group of persons were treated as same in the past by the State. Since Vocational Masters had been drawing same salary as Vocational Lecturers were drawing before the application of 4th pay commission, any attempt to curtail their salary and allowances would amount to arbitrariness which cannot be sustained in the eyes of law if no reasonable justification is offered for the same.

18) We are conscious of the fact that a differential scale on the basis of educational qualifications and the nature of duties is permissible. However, it is equally clear to us that if two categories of employees are treated as equal initially, they should continue to be so treated unless a different treatment is justified by some cogent reasons. In a case where the nature of duties is drastically altered, a differential scale of pay may be justified. Similarly, if a higher qualification is prescribed for a particular post, a higher scale of pay may be granted. However, if the basic qualifications and the job requirements continued to be identical as they were initially laid down, then the Court shall be reluctant to accept the action of the authority in according a differential treatment unless some good reasons are disclosed. Thus, the decisions relied upon by learned senior counsel are clearly distinguishable and are not applicable to the facts of the present case.

Conclusion:

19) In view of the forgoing discussion, we are of the considered opinion that the High Court was fully justified in declaring that the vocational masters are entitled to pay scale of Rs. 6,400-10,640/- on the ground that the nature of duties being discharged by the vocational masters are the same as vocational lecturers and that there was no rationale behind making a classification between the two especially when both the categories were treated as one and

the same in all the previous pay revisions since 1978 onwards. Vide notification dated 31.03.1995, only the nomenclature of vocational masters was changed without changing their nature of duties and pay scales. Further, the impugned order dated 16.07.2003 deserves to be quashed on the short ground that it has been passed without complying the rules of natural justice. The same could not have been passed without giving an opportunity of hearing to the concerned employees.

20) It is by now well settled that no orders causing civil consequences can be passed, without observing rules of natural justice as it was held in ***hagwan Shukla*** vs**. *Union of India & Ors.*** AIR 1994 SC 2480 wherein it was held as under**:**

> "3. We have heard learned counsel for the parties. That the petitioner's basic pay had been fixed since 1970 at Rs, 190 p.m. is not disputed. There is also no dispute that the basic pay of the appellant was reduced to Rs. 181 p.m. from Rs. 190 pan. In 1991 retrospectively w.e.f. 1812.1970. The appellant has obviously been visited with civil consequences but he had been granted no opportunity to show cause against the reduction of his basic pay. He was not, even put on notice before his pay was reduced by the department and the order came to be made behind his back without following any procedure known to law. There, has, thus, been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge financial loss without being heard. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the concerned to notice and giving him a hearing in the matter. Since, that was not done, the order (memorandum) dated 25.7.1991. which was impugned before the Tribunal could not certainly be sustained and the Central Administrative Tribunal fell in error in dismissing the petition of the appellant. The order of the Tribunal deserves to be set aside. We, accordingly, accept this appeal and set aside the order of the Central Administrative Tribunal dated 17.9,1993 as well as the order (memorandum) impugned before the Tribunal dated 25.7.1991 reducing the basic pay of the appellant From Rs. 190 to Rs. 181 w.e.f. 18.12,1970."

21) The order dated 16.07.2003 came to be made behind the back of vocational masters without following any procedure known to law. Thus,

there has been a flagrant violation of the principles of natural justice and the respondents had been made to suffer huge financial loss without being heard. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the concerned to notice and giving him a hearing in the matter.

22) In our considered view, the High court while dealing with the matter on merits, has rightly quashed the letter dated 16.07.2003 and directed the State government to give benefits of the Notification dated 31.03.1995 to all the Vocational Masters.

23) In view of above discussion, we are not inclined to interfere in the decision passed by the High Court. Accordingly, the appeal is dismissed with no order as to costs.

Appal dismissed.

2017 (II) ILR - CUT- 754 (S.C.)

SUPREME COURT OF INDIA

ADARSH KUMAR GOEL, J. & UDAY UMESH LALIT,J.

CIVIL APPEAL NO. 11158 OF 2017

AMARDEEP SINGH .....Appellant

.Vrs.

HARVEEN KAUR .....Respondent

HINDU MARRIAGE ACT, 1955 – S. 13-B (2)

Whether the minimum period of six months stipulated U/s 13 B (2) of the Hindu Marriage Act 1955 for a motion for passing a decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations ? – Held, the period mentioned U/s 13 B (2) is not mandatory but directory.

However, where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period U/s 13-B (2), it can do so after considering the following:

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

Held, since the period mentioned in Section 13 B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case when there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation. (Paras 18,21)

Case Laws Referred to :-

1. (2016) 13 SCC 383 : Nikhil Kumar vs. Rupali Kumar
2. (2010) 4 SCC 393 : Manish Goel versus Rohini Goel
3. (2010) 4 SCC 460 : Poonam versus Sumit Tanwar
4. (2010) 6 SCC 413 : Neeti Malviya versus Rakesh Malviya
5 (2002) 10 SCC 194 : Manish Goel (supra) and Anjana Kishore versus Puneet Kishore.
6. AIR 1986 AP 167 (DB) : K. Omprakash vs. K. Nalini
7. AIR 1994 Kar 12 (DB) : Roopa Reddy vs. Prabhakar Reddy
8. AIR 1990 Del 146 : Dhanjit Vadra vs. Smt. Beena Vadra
9. AIR 2005 MP 106 (DB) : Dinesh Kumar Shukla vs. Smt. Neeta
10. AIR 2010 Ker 157 : M. Krishna Preetha vs. Dr. Jayan Moorkkanatt
11. (2005) 4 SCC 480 : Kailash versus Nanhku and ors.

For Appellant(s) : Mr. T. R. B. Sivakumar, AOR
For Respondent(s) : Shri Abhishek Kaushik, Vrinda Bhandari & Mukunda Rao Angara (Amicus curiae)

Date of judgment: 12.09.2017

JUDGMENT

ADARSH KUMAR GOEL, J.

1. The question which arises for consideration in this appeal is whether the minimum period of six months stipulated under Section 13B(2) of the

Hindu Marriage Act, 1955 (the Act) for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations.

2. Factual matrix giving rise to this appeal is that marriage between the parties took place on 16th January, 1994 at Delhi. Two children were born in 1995 and 2003 espectively. Since 2008 the parties are living separately. Disputes between the parties gave rise to civil and criminal proceedings. Finally, on 28th April, 2017 a settlement was arrived at to resolve all the disputes and seeks divorce by mutual consent. The respondent wife is to be given permanent alimony of Rs.2.75 crores. Accordingly, HMA No. 1059 of 2017 was filed before the Family Court (West), Tis Hazari Court, New Delhi and on 8th May, 2017 statements of the parties were recorded. The appellant husband has also handed over two cheques of Rs.50,00,000/-, which have been duly honoured, towards part payment of permanent alimony. Custody of the children is to be with the appellant. They have sought waiver of the period of six months for the second motion on the ground that they have been living separately for the last more than eight years and there is no possibility of their re union. Any delay will affect the chances of their resettlement. The parties have moved this Court on the ground that only this Court can relax the six months period as per decisions of this Court.

3. Reliance has been placed *inter alia* on decision of this Court in ***Nikhil Kumar vs. Rupali Kumar***[1] wherein the statutory period of six months was waived by this Court under Article 142 of the Constitution and the marriage was dissolved. The text of Section 13B is as follows:

> *"13-B. Divorce by mutual consent.— (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.*
>
> *(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on*

[1] (2016) 13 SCC 383

being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that theaverments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

4. There is conflict of decisions of this Court on the question whether exercise of power under Article 142 to waive the statutory period under Section 13B of the Act was appropriate. In ***Manish Goel versus Rohini Goel***[2], a Bench of two-Judges of this Court held that jurisdiction of this Court under Article 142 could not be used to waive the statutory period of six months for filing the second motion under Section 13B, as doing so will be passing an order in contravention of a statutory provision. It was observed :

"14. *Generally, no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide State of Punjab v. Renuka Singla[(1994) 1 SCC 175], State of U.P. v. Harish Chandra [(1996) 9 SCC 309], Union of India v. Kirloskar Pneumatic Co. Ltd. [(1996) 4 SCC 453], University of Allahabad v. Dr. Anand Prakash Mishra [(1997) 10 SCC 264] and Karnataka SRTC v. Ashrafulla Khan [(2002) 2 SC 560]*

15. *A Constitution Bench of this Court in Prem Chand Garg v. Excise Commr.[AIR 1963 SCC 996] held as under: (AIR p. 1002, para 12)*

"12. … An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws." (emphasis supplied)

The Constitution Benches of this Court in Supreme Court Bar Assn. v. Union of India [(1998) 4 SCC 409] and E.S.P. Rajaram v. Union of India [(2001) 2 SCC 186] held that under Article 142 of the Constitution, this Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure."

[2] (2010) 4 SCC 393

5. This Court noted that power under Article 142 had been exercised in cases where the Court found the marriage to be totally unworkable, emotionally dead, beyond salvage and broken down irretrievably. This power was also exercised to put quietus to all litigations and to save the parties from further agony[3]. This view was reiterated in ***Poonam versus Sumit Tanwar[4].***

6. In ***Neeti Malviya versus Rakesh Malviya[5],*** this Court observed that there was conflict of decisions in ***Manish Goel (supra)*** and ***Anjana Kishore versus Puneet Kishore[6]***. The matter was referred to bench of three-Judges. However, since the matter became infructuous on account of grant of divorce in the meanwhile[7].

7. Without any reference to the judgment in ***Manish Goel (supra),*** power under Article 142 of the Constitution has been exercised by this Court in number of cases[8] even after the said judgment.

8. We find that in ***Anjana Kishore (supra),*** this Court was dealing with a transfer petition and the parties reached a settlement. This Court waived the six months period under Article 142 in the facts and circumstances of the case. In ***Anil Kumar Jain versus Maya Jain[9],*** one of the parties withdrew the consent. This Court held that marriage had irretrievably broken down and though the civil courts and the High Court could not exercise power contrary to the statutory provisions, this Court under Article 142 could exercise such power in the interests of justice. Accordingly the decree for divorce was granted.

[3] Para 11 ibid, noting earlier decisions in Romesh Chander v. Savitri (1995) 2 SCC 7; Kanchan Devi v. Promod Kumar Mittal (1996) 8 SCC 90; Anita Sabharwal v. Anil Sabharwal (1997) 11 SCC 490; Ashok Hurra v. Rupa Bipin Zaveri (1997) 4SCC 226; Kiran v. Sharad Dutt (2000)10 SCC 243; Swati Verma v. Rajan Verma (2004) 1 SCC 123; Harpit Singh Anand v. State of W.B. (2004) 10 SCC 505; Jimmy Sudarshan Purohit v. Sudarshan Sharad Purohit (2005) 13 SCC 410; Durga Prasanna Tripathy v. Arundhati Tripathy (2005) 7 SCC 353; Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558; Sanghamitra Ghosh v. Kajal Kumar Ghosh (2007) 2 SCC 220; Rishikesh Sharma v. Saroj Sharma (2007) 2 SCC 263; Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511 and Satish Sitole v. Ganga (2008) 7 SCC 734

[4] (2010) 4 SCC 460 , [5] (2010) 6 SCC 413, [6] (2002) 10 SCC 194

[7] Order dated 23rd August, 2011 in Transfer Petition (Civil)No. 899 of 2007

[8] Priyanka Singh v. Jayant Singh(2010) 15 SCC 390; Sarita Singh v. Rajeshwar Singh (2010) 15 SCC 374; Harpreet Singh Popli v. Manmeet Kaur Pople (2010) 15 SCC 316; Hitesh Bhatnagar v. Deepa Bhatnagar (2011) 5 SCC 234; Veena v. State (Govt of NCT of Delhi) (2011) 14 SCC 614; Priyanka Khanna v. Amit Khanna (2011) 15 SCC 612; Devinder Singh Narula v. Meenakshi Nangia (2012) 8 SCC 580; Vimi Vinod Chopra v. Vinod Gulshan Chpra (2013) 15 SCC 547; Priyanka Chawla v. Amit Chawla (2016) 3 SCC 126; Nikhil Kumar v. Rupali Kumar (2016) 13 SCC 383

9 (2009) 10 SCC 415

9. After considering the above decisions, we are of the view that since ***Manish Goel (supra)*** holds the field, in absence of contrary decisions by a larger Bench, power under Article 142 of the Constitution cannot be exercised contrary to the statutory provisions, especially when no proceedings are pending before this Court and this Court is approached only for the purpose of waiver of the statute.

10. However, we find that the question whether Section 13B(2) is to be read as mandatory or discretionary needs to be gone into. In ***Manish Goel (supra),*** this question was not gone into as it was not raised. This Court observed :

> ***"23.*** *The learned counsel for the petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed under Section 13-B(1) of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/appellate jurisdiction."*

11. Accordingly, vide order dated 18th August, 2017, we passed the following order :

> *"List the matter on 23rd August, 2017 to consider the question whether provision of Section 13B of the Hindu Marriage, Act, 1955 laying down cooling off period of six months is a mandatory requirement or it is open to the Family Court to waive the same having regard to the interest of justice in an individual case.*
>
> *Mr. K.V. Vishwanathan, senior counsel is appointed as Amicus to assist the Court. Registry to furnish copy of necessary papers to learned Amicus"*

12. Accordingly, learned *amicus curiae* has assisted the Court. We record our gratitude for the valuable assistance rendered by learned *amicus* who has been ably assisted by S/Shri Abhishek Kaushik, Vrinda Bhandari and Mukunda Rao Angara, Advocates.

13. Learned *amicus* submitted that waiting period enshrined under Section 13(B)2 of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in ***K. Omprakash vs. K. Nalini***[10], Karnataka High Court in ***Roopa Reddy vs. Prabhakar Reddy***[11]**,** Delhi High Court in ***Dhanjit Vadra vs. Smt. Beena Vadra***[12] and Madhya

[10] AIR 1986 AP 167 (DB), [11] AIR 1994 Kar 12 (DB), [12] AIR 1990 Del 146

Pradesh High Court in ***Dinesh Kumar Shukla vs. Smt. Neeta***[13]. Contrary view has been taken by Kerala High Court in ***M. Krishna Preetha vs. Dr. Jayan Moorkkanatt***[14]**.** It was submitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2). Thus, the Court should consider the questions:

i) How long parties have been married?

ii) How long litigation is pending?

iii) How long they have been staying apart?

iv) Are there any other proceedings between the parties?

v) Have the parties attended mediation/conciliation?

vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

14. The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

15. We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

16. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to

[13] AIR 2005 MP 106 (DB), [14] AIR 2010 Ker 157

enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

17. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's *"Principles of Statutory Interpretation" (*9th Edn., 2004), has been cited with approval in ***Kailash versus Nanhku and ors.***[15]as follows:

> *"The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is andatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.'*
>
> *" 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated*

15 (2005) 4 SCC 480

or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

21. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

22. Needless to say that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice.

23. The parties are now at liberty to move the concerned court for fresh consideration in the light of this order. The appeal is disposed of accordingly.

Appeal disposed of.

2017 (II) ILR - CUT- 763

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

W.P.(C) NO. 19914 OF 2016

GANGADHAR JENA ……Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp. Parties

TENDER – Tender Evaluation Committee in its meeting Dt 20.06.2016 found the petitioner technically qualified but subsequently disqualified him on 16.09.2016 on the ground that he has no experience of having completed similar nature of works as a result of which O.P.No.2 cancelled the tender call notice Dt 18.03.2016 without assigning any reason and issued fresh tender call notice on the same day i.e. on 28.10.2016 – Hence the writ petition – Power of judicial review – Tender Evaluation Committee did not have the power to review its own order behind the back of the petitioner as his interest would be adversely affected – Moreover, tender call notice Dt 18.03.2016 was with regard to experience of "execution" of similar nature of work but not "completion" of similar nature of work – Further, explanation given subsequently in the counter affidavit after passing of the order of cancellation is not to be taken into account in the absence of any reason assigned in the cancellation order – Held, the impugned order Dt 28.10.2016 cancelling the tender call notice Dt 18.03.2016 as well as the subsequent tender call notice issued on the same day are quashed – The petitioner shall be entitled to all consequential benefits. (Para 21)

Case Laws Referred to :-

1. AIR 2001 SC 3887 : Union of India v. Dinesh Engineering Corporation & Anr.
2. 2016 (II) OLR 237 : M/s Shree Ganesh Construction v. State of Orissa & Ors.
3. 2016 (II) OLR 558 : M/s. D.K. Engineering & Construction v. State of Odisha and another.
4. 2017 (I) OLR 666 : Chandra Sekhar Swain v. State of Odisha & Ors.
5. AIR 2016 SC 3366 : State of Jharkhand and others v. M/s. CWE-SOMA Consortium.
6. AIR 1978 SC 851 : Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi
7. AIR 1952 SC 16 : Commissioner of Police, Bombay v. Gordhandas Bhanji.
8. (1998) 7 SCC 602 : AIR 1999 SC 37 : Rajendra Pratap Singh v. Rameshwar Prasad.

9. AIR 1971 Guj 96 : Mistry Babulal Tulsidas v. Sayla Gram Panchayat, District Surendranagar.
10. AIR 1968 SC 647 : State of Orissa v. Sudhansu Sekhar Misra & Ors.

For Petitioner : M/s. Bibhu Prasad Das, S.N. Das & D.Mohanty

For Opp. Parties : Mr. B.P. Pradhan, A.G.A.
M/s. D.K. Dwibedi, S.S. Padhi & S. Dwibedi

Decided on : 17.08.2017

JUDGMENT

VINEET SARAN, CJ.

The challenge in this writ petition is to the order dated 28.10.2016 passed by the opposite party no. 2 whereby the Tender Call Notice dated 18.03.2016 has been cancelled.

2. The primary question involved in this petition is as to whether the Tendering Authority would be justified in cancelling the Tender Call Notice, without assigning any reason, even after the Tender Evaluation Committee found two tenders to be valid, and the price bids were opened and recommendation made to the State Government for acceptance of the tender of the lowest bidder. The other question to be considered is whether the reason assigned in the counter affidavit for passing the cancellation order can now be looked into and considered or not; and if yes, then the reasons so assigned in the counter affidavit were justified or not.

3. The brief facts of the case are that in response to the Tender Call Notice dated 18.03.2016 issued by opposite party no.2-Chief Engineer, World Bank Project, Odisha, for *"Construction of H.L. Bridge over river Paika near Tipiri on Rahama-Khosalplur-Gobardhanpur road in the district of Jagatsinghpur under NABARD Assistance RIDF-XXII"*, three bidders had submitted their bids, which included the petitioner as well as C.P.Mohanty & Associates (private opposite party no.4) and one Eastern India Construction Private Limited. The Tender Evaluation Committee, vide its report dated 20.06.2016, found the bid of the opposite party no.4 to be technically invalid and, as such, the price bids of the other two bidders, found to be technically qualified (i.e. the petitioner and Eastern India Construction Private Limited,) were opened on 21.06.2016. The price quoted by the petitioner was found to be the lowest, which was 4.39% above the estimated cost. The petitioner was thereafter called for negotiation for lowering his bid price, to which the petitioner responded and assigned reasons for being

unable to lower the price offered by him for execution of the work. After the petitioner declined to lower his bid, which was conveyed lastly by communication dated on 5.7.2016, the opposite party no.2-Chief Engineer, on 02.08.2016, recommended to the State Government for finalization of the contract in favour of the petitioner, who was the lowest bidder. There was no communication with the petitioner after 05.07.2016, by which the petitioner had expressed his inability to negotiate the price. Then, after a gap of nearly three months, on 28.10.2016, the impugned order cancelling the Tender Call Notice dated 18.03.2016 was passed by the opposite party no.2. Challenging the same, this writ petition has been filed, with a further prayer to award the contract in favour of the petitioner.

4. We have heard Shri B.P. Das, learned counsel for the petitioner, and Shri B.P. Pradhan, learned Addl. Government Advocate appearing for the State-opposite parties no.1, 2 and 3, as well as Shri S. Dwibedi, learned counsel for the private opposite party no.4 at length and carefully perused the record. Pleadings between the parties have been exchanged and with consent of learned counsel for the parties, this writ petition is being disposed of at the admission stage.

5. The submission of the learned counsel for the petitioner is that the impugned order has been passed without assigning any reason whatsoever. It is contended that the reasons assigned in the counter affidavit cannot be looked into and considered for deciding this case. Learned counsel submits that it is settled legal position that the explanation given subsequently in the counter affidavit, after passing of the order of cancellation, is not to be taken into account, in the absence of any reason assigned in the cancellation order. It is contended that in the counter affidavit it is disclosed that after the bid was accepted by the Tendering Authority and sent for approval of the State Government on 02.08.2016, an enquiry was got conducted, which was on the basis of a complaint dated 16.08.2016 received by the opposite party no.3. The said complaint was to the effect that the petitioner had not furnished any certificate of experience with regard to completion of the construction work, as the performance certificate submitted was only with regard to ongoing projects, and not completed projects. It was also the ground taken in the complaint that the petitioner did not have any experience for execution of any "bridge work."

5.1. Learned counsel for the petitioner contends that in the Tender Call Notice, the requirement for the bidder was to have “executed” similar nature

of work, as would be clear from Clause 121.3(b) of the Tender Call Notice, where the word used is "executed" and not "completed". It is further contended that the execution of work included the "work in progress" as well as the "completed work" relating to "Civil Engineering Construction Works", as has been clearly spelt out in Clause 121.3(a) of the Tender Call Notice. It is thus submitted that since the petitioner had work experience of having executed works as required in the Tender Call Notice, he fulfilled all the criteria and was thus rightly found to be technically qualified by the Tender Evaluation Committee on 20.06.2016, after which the financial bid of the petitioner was opened, along with that of the other qualified bidder.

5.2. Mr. B.P. Das, learned counsel for the petitioner further submits that the Tender Evaluation Committee did not have the power to review its own order/recommendation made on 20.06.2016, and that too behind the back of the petitioner, without giving him any opportunity, as has been done in the present case. By the subsequent report of the Tender Evaluation Committee dated 16.09.2016, the petitioner has been held to be technically disqualified on the ground that he has no experience of having "completed" similar nature of works. On such basis, the impugned order is said to have been passed on 28.10.2016, without assigning any reasons. Learned counsel vehemently contends that the petitioner had the technical qualification of having successfully "executed" similar nature of work of "Civil Engineering Construction" as was required by the Tender Call Notice dated 18.03.2016.

5.3. It has lastly been submitted that cancellation of the tender, after the price bid has been opened, would put the petitioner at a disadvantage in the subsequent tender, as the price quoted by the petitioner (who was the lowest bidder) would be known to all. It is thus urged that the impugned order dated 28.10.2016 is unreasonable and wholly illegal, as even if the reasons given in the counter affidavit are to be considered, then also the impugned order has been passed on grounds which are contrary to the conditions laid down in the Tender Call Notice dated 18.03.2016 and, as such, the same is liable to be quashed and the tender of the petitioner is liable to be accepted. To substantiate his contention, he has relied upon the judgments of the apex Court in ***Union of India v. Dinesh Engineering Corporation and another***, AIR 2001 SC 3887, as well as of this Court in ***M/s Shree Ganesh Construction v. State of Orissa and others***, 2016 (II) OLR 237 and ***M/s. D.K. Engineering & Construction v. State of Odisha and another***, 2016 (II) OLR 558.

6. *Per contra*, Shri B.P. Pradhan, learned Additional Government Advocate appearing for the State-opposite parties has submitted, that as per the conditions laid down in the Tender Call Notice, the Tendering Authority has the right to cancel the tender without assigning any reason, and as such no interference by this Court is warranted in the present case. He, however, has submitted that though reasons may not have been assigned in the impugned order, but from perusal of the averments in the counter affidavit, it would be clear that there were sufficient reasons for cancellation of the tender as the petitioner, who may have been the lowest bidder, but was later found not to be qualified as he had no experience of having "completed" any "bridge work"", and after enquiry, a fresh report was obtained on 31.08.2016, in which it was opined that the tender of the petitioner should be rejected for not having the pre-requisite qualification of having done any "bridge work". It was on such basis that in the proceeding of the subsequent Tender Evaluation Committee, in its meeting on 16.09.2016 reevaluated the tender of the petitioner at Item no.4 of its report, and recommended for obtaining the approval of the State Government for cancellation of tender and for invitation of fresh tender. Further, the Committee required the Tendering Authority to ensure that henceforth, the work experience of "completed work" alone be taken into account while assessing the experience of "similar nature of work".

It has thus been submitted by learned Additional Government Advocate that there was sufficient reason on record for cancellation of the tender of the petitioner, and thus prayed that the writ petition be dismissed. To substantiate his contention, he has relied upon the judgment of this Court in ***Chandra Sekhar Swain v. State of Odisha and others***, 2017 (I) OLR 666.

7. Shri S. Dwibedi, learned counsel for private opposite party no.4 has submitted, that in the subsequent Tender Call Notice issued on the same date on which the cancellation order was passed, i.e. on 28.10.2016, opposite party no.4 has been found to be the lowest bidder and, as such, his bid should be accepted, being lower than that of the petitioner submitted in response to the Tender Call Notice dated 18.3.2016, which has been cancelled. It is, however, not denied that in response to the earlier Tender Call Notice dated 18.03.2016; the opposite party no.4 had participated and was found to be disqualified by the Tender Evaluation Committee in its first meeting itself held on 20.06.2016. He has, however, urged that since acceptance of the bid of the petitioner would cause financial loss to the Government, as after the cancellation of the earlier tender call notice, a fresh Tender Call Notice has

been invited in which the bid of the petitioner was lower, the same would adversely affect the revenue interest of the State, and, as such, this Court should thus not interfere with the cancellation order. To substantiate his contention, he has relied upon the judgment of the apex Court in ***State of Jharkhand and others v. M/s. CWE-SOMA Consortium***, AIR 2016 SC 3366.

8. It is a fact that in the impugned order dated 28.10.2016, no reason has been assigned for cancellation of the Tender Call Notice dated 18.03.2016. It is settled law that reasons assigned subsequently in the counter affidavit are not to be taken into consideration in view of the Constitution Bench judgment of the apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi***, AIR 1978 SC 851, wherein it has been held as follows:

> *" …… 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."*

Orders are not like old wine becoming better as they grow old.

Similarly 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."*

We are thus of the opinion that reasons given in the counter affidavit are not to be taken into account for considering the correctness of the impugned order of cancellation.

9. However, even if we are to consider the same, then from the counter it is evident that the order of cancellation has been passed on the basis of an enquiry report submitted on 31.08.2016, which was on the complaint made

by certain persons on 16.08.2016. It is firstly not understood as to how such complaint could have been entertained after the Tender Evaluation Committee had submitted its report on 20.06.2016, where after the Tendering Authority has accepted the bid of the petitioner and forwarded the same to the State Government for its approval. Admittedly, the complaint was entertained without the petitioner having been given any opportunity, as even the copy of the same was not furnished to the petitioner. Thereafter, an enquiry was conducted, which was also admittedly behind the back of the petitioner and without affording him an opportunity to participate in the enquiry proceedings. As such, in the facts of the case, we are of the view the enquiry proceedings, held behind the back of the petitioner, were not proper, and thus no action could have been taken on the basis of such enquiry report.

10. Further, even if it is presumed that a proper enquiry was held on the basis of which a report was submitted on 31.08,2016, then we have to now consider as to whether there was any valid reason given in the said report for reviewing its earlier report dated 20.06.2016 and declaring the tender of the petitioner to be technically disqualified.

In the subsequent report dated 31.08.2016, the Chief Engineer-opposite party no.2 has accepted that the petitioner has work experience of having "executed" works of "Construction of Civil Engineering" of substantially higher amount than what was required in the Tender Call Notice dated 18.03.2016. According to the said report, the experience should have been that of "bridge of work" which had been "completed". While considering the work experience of the petitioner, the Chief Engineer has, in its report, quoted and considered only sub-clauses (b) and (c) of Clause 121.3 of the Tender Call Notice, but avoided to either quote or consider sub-clause (a) of the said Clause 121.3, which was also relevant for determination of the qualification of the tenders.

For proper appraisal and ready reference, Clause 121.3 of the Tender Call Notice is reproduced as under:

> ***"121.1 ----------***
> ***121.2 ----------***
> ***121.3. General Experience***
>
> *The applicant shall meet the following minimum criteria:*
> *a) Average annual turnover (defined as billing for works in progress and completed in all classes of Civil Engineering Construction works*

only) over the last five years of 40 percent of the value of contract/contracts applied for.

The works may have been executed by the Applicant as prime contractor or as a member of joint venture or sub contractor. A sub contractor, he should have acquired the experience of execution of all major items of works under the proposed contract. In case a project has been executed by a joint venture weightage towards experience of the project would be given to each joint venture in proportion to their participation in the joint venture.

For these a certificate from the employer shall be submitted along with the application incorporating clearly the name of the work, contract Value, billing amount, date of commencement of works, satisfactory performance of the Contractor and any other relevant information.

b) Executed in any year, in the last five years of the base year as per Para 121.2 above, any item of work as indicated in Contract Data. To arrive at this criteria, experience certificates issued by principal employer as per Para 121.3 (a) during last five years will be considered for evaluation.

c) For evaluation on experience as required at 121.3 (b) above, the bidder must have experience as a prime contractor or nominated sub-contractor in a similar item of work for which the information should be furnished as per requirement of Clause 13 above and in the forms in Schedule- D1 & D2 supported with experience certificate not below the rank of Executive Engineer.

121.4 - - - - - - - - - - - - - - "

11. From a conjoint reading of sub-clauses (a), (b) and (c) of the Clause 121.3 of the Tender Call Notice relating to General Experience, it is clear that what was required, was experience of "execution" of "similar nature of work"; and not "completion" of "similar nature of work". Sub-clause (a) clearly mentions that "work in progress" as well as "completed work" should be taken into account while evaluating the experience. Sub-clause (a) further clarifies that the class of work which was to be considered for such experience was "Civil Engineering Construction Work". Clause 13 of the Tender Call Notice also speaks of similar work, which has to be read along with Clause 121.3(a), and cannot be read in isolation. Sub-clause (c) of

Clause 121.3 also speaks of similar nature of work, which is also to be read along with sub-clause (a), which specifies the nature of the work to be "Civil Engineering Construction Works". Learned counsel for the opposite parties have not been able to point out that how the "bridge work" is to be treated as "similar nature of work", which is nowhere mentioned in the Tender Call Notice.

12. The word "complete" means as follows:

"To finish; accomplish that which one starts out to do."

"With no part, item or element lacking [S.4, Indian Contract Act (9 of 1872)]; [S. 64(2), Sale of Goods Act,

(3 of 1930)]; brought to an end; to accomplish."

In ***Chhotey Lal Bharany v. CIT,*** (1986) 161 ITR 552 (Del.), while dealing with the provisions contained under Income-tax Act (43 of 1961), S. 145, the Delhi High Court held that the word 'complete' in the context of Section 145 of the Act means free from deficiency, entire or perfect.

Similarly, the word "execute" means as follows:-

"*Execute. Carry into effect (as, to execute a plan or command : to execute a decree or order of a Court; to execute a judicial sentence); To make a legal instrument valid (as, to execute a deed is to give it validity by signing or signing and sealing as required by law; to discharge functions (as, execute an office); inflict capital punishment or (as, the execution of a prisoner on whom sentence of death has been pronounced.*

A command to the system to perform a function. You usually need to set the function up; when you execute the command, the function occurs. Some systems have a special : "execute" or "enter" key; others use the return key as the execute key".

In ***Rajendra Pratap Singh v. Rameshwar Prasad,*** (1998) 7 SCC 602 : AIR 1999 SC 37, the apex Court held that the word 'execute' means ' to complete as a legal instrument; to perform what is required to give validity to.

In ***WILLIAM R. ANSON***, Principles of the Law of Contract 26 n. (ARTHUR L. CORBIN ed., 3d Am. ed. 1919), The term 'executed' means 'executed' is a slippery word. Its use is to be avoided except when accompanied by explanation. Executed consideration is also used to mean

past consideration as opposed to present or future. A contract is frequently said to be executed when the document has been signed, or has been signed, sealed, and delivered. Further, by executed contract is frequently meant one that has been fully performed by both parties.

In ***Mistry Babulal Tulsidas v. Sayla Gram Panchayat, District Surendranagar***, AIR 1971 Guj 96, it has been held that "executed" would mean 'making or bringing into existence' a contract by going through the formalities necessary to the validity thereof. It does not necessarily mean that whenever a word 'execute' is employed it must refer to a document in writing.

Taking into consideration the meaning of the words "complete", "execute" and "executed" mentioned above, and applying the same to the present context, this Court has to examine the conditions stipulated in the tender documents.

13. Further, the subsequent report of the Tender Evaluation Committee dated 16.09.2016, wherein recommendation has been made for cancellation of the Tender Call Notice dated 18.03.2016, also recommends that it should be ensured that henceforth the work experience of "completed work" be taken into account while assessing the experience of "similar nature of works". This would clearly go to show that the work experience, which was required by the Tender Call Notice dated 18.03.2016, was with regard to "executed work" and not "completed work". It is clear from the wordings of the Tender Call Notice that execution of work includes work experience of executed ongoing works, as would be clear from sub-clause (a) of Clause 121.3. If "completed work" is now substituted for "executed work", it would clearly amount to changing the rules of the game, after the game is already in progress or over. It can be presumed that the rules of the game have been changed in this case to suit a particular player. The Tender Evaluation Committee in its meeting held on 20.06.2016, had examined the technical qualification of the bidders and found the petitioner to be qualified and thereafter the financial bid had also been opened, in which the bid of the petitioner was the lowest. The same had also been accepted by the Tendering Authority, which had, on 02.08.2016, recommended to the State Government for acceptance of the bid of the petitioner. Holding of the further enquiry and then cancelling the Tender Call Notice, without there being any valid reason, cannot thus be justified in law.

14. In the aforesaid facts of the case, we are of the clear opinion that the requirement in the Tender Call Notice dated 18.3.2016 was clearly with regard to "execution" of work, which included the work in progress, for which the petitioner was duly qualified, and that the said condition could not have been changed subsequently to provide that it should be read as "completed work". Further, the requirement of having "executed" or "completed" the "bridge work" was nowhere a part of the tender condition, and by subsequently changing such condition from "Civil Engineering Construction Works" to "bridge work" would clearly amount to changing the rules of the game after the play has begun or is over. The contention of learned counsel for the petitioner, that after the financial bid has been opened, the petitioner has been put to disadvantage, has force, as in the subsequent Tender Call Notice the bidders would know the price bid of the petitioner. The financial bid of the petitioner could have been opened only when he was technically qualified. The Tender Evaluation Committee in its meeting held on 20.06.2016 had found the petitioner to be technically qualified. Thereafter, it is not understood as to how the same could have been reviewed (that too without notice to the petitioner, whose interest would be adversely affected) and the petitioner held to be technically disqualified, by wrongly interpreting the conditions of the Tender Call Notice, which interpretation is not acceptable by this Court.

15. Much reliance has been placed by Mr. B.P. Pradhan, learned Addl. Govt. Advocate on ***Chandra Sekhar Swain*** (supra). It is urged that the ratio decided in the said case is directly applicable to the present context and, as such, when a mistake has been detected by the authority, the same has been rectified. Thereby, no illegality or irregularity has been committed by the authority concerned.

16. The Constitution Bench of the apex Court in ***State of Orissa v. Sudhansu Sekhar Misra and others***, AIR 1968 SC 647 held as follows:-

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it."*

The above being the law laid down by the apex Court, as it appears, in the case of ***Chandra Sekhar Swain*** (supra), pursuant to the tender call notice dated 30.04.2016, the petitioner therein furnished the affidavit of

authentication and agreement for hiring machineries with one Subala Behera, which was valid for a period of twelve months commencing from 04.07.2016. The said agreement dated 04.07.2016 was extended up to 02.11.2018 vide agreement dated 29.10.2016 covering the period of 03.06.2017 to 02.11.2018. While the consideration pursuant to such tender notice was on, the same was cancelled on 30.11.2016, without assigning any reason, and a notice was issued on the very same day, i.e., 30.11.2016 inviting fresh tenders. The cancellation of tender call notice dated 30.04.2016 and issuance of fresh tender call notice dated 30.11.2016 were subject-matter of challenge in the said writ application. As pursuant to tender call notice dated 30.04.2016 the tender committee, having erroneously considered the documents, recommended the case of the petitioner therein for approval and the competent authority, instead of approving the same, directed for reconsideration, which was well within its jurisdiction, the said writ application was dismissed by this Court. Furthermore, the order of cancellation passed on 30.11.2016 although was cryptic one, the reasons for such cancellation had been indicated in the official website of the authority and, therefore, such order of cancellation was not construed to be a cryptic one. This fact was dealt in paragraphs-21 and 22 of the judgment itself. Therefore, the factual matrix of the case of ***Chandra Sekhar Swain*** (supra) is totally different from that of the present one, and that case, having been decided on its own merits, has no application to the present context.

17. Mr. S. Dwibedy, learned counsel for opposite party no.4 has relied upon the judgment in ***State of Jharkhand*** (supra), wherein the apex Court has taken into consideration the pre-bid meeting of ten tenderers participated in the bid and after conclusion of pre-bid meeting as a result of stringent conditions prescribed in Clauses 4.5 (A) (a) and 4.5 (A) (c), from clause of SBD (Standard Bidding Documents) only three tenderers could participate in the bidding process and submit their bid. Upon scrutiny two were found non-responsive. In order to make the tender more competitive, Tender Committee in its collective wisdom has taken the decision to cancel and re-invite tenders in the light of SBD norms. Same was reiterated in a subsequent meeting of Committee. Therefore, the High Court was not justified to sit in judgment over the decision of Tender Committee and substitute its opinion on the cancellation of tender. Consequentially, the apex Court held that it was not proper for High Court to presume that there was adequate competition. At the same time, the apex Court held that while exercising judicial review in the matter of government contracts, the primary concern of the Court is to see

whether there is any infirmity in the decision making process or whether it is vitiated by mala fide, unreasonableness or arbitrariness.

The ratio decided in the above case may not have any application to the case of opposite party no.4, rather it has got some application to the case of the petitioner. But learned counsel for opposite party no.4 relied upon paragraph-12 of the aforesaid judgment wherein reference has been made to some of the judgments of the apex Court and it has been decided that so long the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour. More so, it is contended that the State was well within its right to reject the bid without assigning any reason thereof. There is no dispute on the proposition which has been referred to in paragraphs-12 and 13 of the judgment itself, but that itself has to be taken into consideration while exercising the power under judicial review to the extent that whether there is any infirmity in the decision making process or whether it is vitiated by mala fide, unreasonableness or arbitrariness. Applying the same to the present context, there is no dispute that there is infirmity in the decision making process, as a consequence thereof, it is vitiated by arbitrary exercise of power by the authority concerned.

18. In ***Dinesh Engineering Corporation*** (supra), the apex Court in paragraph-15 of the judgment categorically held as follows:

> "Coming to the second question involved in these appeals, namely, the rejection of the tender of the writ petitioner, it was argued on behalf of the appellants that the Railways under Clause 16 of the Guidelines was entitled to reject any tender offer without assigning any reasons and it also has the power to accept or not to accept the lowest offer. We do not dispute this power provided the same is exercised within the realm of the object for which this clause is incorporated. This does not give an arbitrary power to the Railways to reject the bid offered by a party merely because it has that power. This is a power which can be exercised on the existence of certain conditions which in the opinion of the Railways are not in the interest of the Railways to accept the offer. No such ground has been taken when the writ petitioner's tender was rejected. Therefore, we agree with the High Court that it is not open to the Railways to rely upon this clause in the Guidelines to reject any of every offer that may be made by the writ petitioner while responding to a tender that may be called for supply of spare parts by the Railways. Mr. Iyer, learned

senior counsel appearing for the EDC, drew our attention to a judgment of this Court in Sterling Computers Ltd. v. M/s. M. and N. Publication Ltd., (1993) 1 SCC 445 which has held :

"Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the Courts, such decisions are upheld on the principle laid down by Justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

19. In ***M/s. Shree Ganesh Construction*** (supra), this Court has already held that the cancellation of tender having been made by a cryptic order, the subsequent explanation given by way of filing counter affidavit is not permissible in law. As no reason was assigned in the impugned order, the same was quashed. In view of the law laid down in ***Mohinder Singh Gill*** and ***Commissioner of Police, Bombay*** (supra), this question no more remains res integra. Since by a cryptic order the cancellation of tender has been done, even if the reason has been explained by filing subsequent affidavit which is not permissible in law, the same cannot sustain in the eye of law.

20. In ***M/s. D.K. Engineering & Construction*** (supra), this Court has taken into consideration the application of principle of judicial review to exercise of contractual powers of government bodies in order to prevent arbitrariness or favoritism. Right to refuse the lowest and any other tenderer is always available to the government, but the principles laid down under Article 14 of the Constitution of India have to be kept in view, while refusing to accept the tender. In paragraph-10 of the said judgment, this Court held as follows:-

"The freedom of Government/authority to enter into contracts is not uncanalised or unrestricted, it is subject to the golden Rule under Article 14 of the Constitution of India. The Government has to act impartially and in accordance with the terms and conditions of the tender. In accepting the contract, it is not always necessary to accept the highest offer. The choice of the person to whom the contract is granted has to be dictated by public interest and must not be unreasoned or unprincipled. The choice cannot be arbitrary or fanciful."

21. In view of the above factual and legal analysis and taking into consideration the application of principle of judicial review to exercise of contractual powers, since the cancellation of tender has been made by a cryptic order, this Court has jurisdiction to interfere with the same. Therefore, we are of the clear opinion that this petition deserves to be allowed. Accordingly, the writ petition stands allowed and the order dated 28.10.2016 passed by opposite party no.2-Chief Engineer, whereby the Tender Call Notice dated 18.03.2016 has been cancelled, is quashed. Further, the subsequent tender call notice, issued on the same date is also quashed. The petitioner shall be entitled to all consequential benefits.There shall be no order as to costs.

Writ petition allowed.

2017 (II) ILR - CUT-777

VINEET SARAN, C.J. & K.R. MOHAPATRA, J.

W.P.(C) NO. 13220 OF 2017

M/S. GVV-NMTPL (JV) .....Petitioner

.Vrs.

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

TENDER – Notice issued by East Coast Railway – Petitioner, as the joint venture company submitted its tender – Tender rejected for non-compliance of para 15.3(a) of the notice inviting tender – Hence the writ petition – Specific requirement of para 15.3(a) is, there should be a notarized certified copy of the resolution of the Board of Directors of the companies permitting the respective companies to enter into a joint venture agreement – In this case except authorizing a particular person/officer of the company to participate in the tender, there was no authorization permitting the company to enter into a joint venture agreement – Moreover, after submission of tender documents the lacunae can not be permitted to be made good by permitting the Board of Directors of the respective companies to pass such resolutions – Held, there is no infirmity in the impugned order rejecting the tender of the petitioner. (Paras 6 to 8)

For Petitioner : Mr. Manoj Ku. Mishra, Senior Advocate
M/s. Debendra Ku. Dwibedi, S.S.Padhy & S.Dwibedi

For Opp. Parties : M/s. D.K.Sahoo & B.K.Behera

Decided on 07.07.2017

JUDGMENT

VINEET SARAN, CJ.

The opposite party-East Coast Railway had issued a tender call notice dated 06.02.2017 inviting tenders for certain work. The case of the petitioner is that in response to the same, opposite parties No.4 and 5 constituted a joint venture Company and the petitioner, as the joint venture Company, had submitted its tender on 17.03.2017. By order dated 05.06.2017 of the opposite party-East Coast Railway (received by the petitioner from the said opposite party vide email), it was intimated that the bid of the petitioner has been found to be unsuitable because of it being ineligible. On the representation made by the petitioner to provide details of reasons for disqualification, on 20/21.06.2017, the petitioner is said to have been informed that it was technically unsuitable because the petitioner has *"not complied with the provision mentioned in para 15.3(a) of Guidelines for participation of Joint Venture Firms in works tender under Chapter-07 of E-tender document.*"

Being aggrieved by the said order of rejection of its tender, the petitioner has approached this Court.

2. Heard Mr.Manoj Kumar Mishra, learned Senior Counsel along with Mr.S.Dwibedi, learned counsel for the petitioner as well as Mr.D.K.Sahoo, learned counsel appearing for opposite parties No.1 to 3 and perused the record.

3. Submission of learned counsel for the petitioner is that for the purpose of the present tender, opposite parties 4 and 5, which are both private limited companies, entered into a joint venture agreement on 16.03.2017 and thereafter the petitioner submitted the tender on 17.03.2017. According to the petitioner, there had been substantial compliance of the provisions/ requirements of Clause-15.3 (a) of the Guidelines for participation of joint venture firms in works tender and their tender has wrongly been rejected.

For proper appraisal, the relevant Clause-15.3(a) of the Guideline is reproduced here under:

> "*15.3 In case one or more members is /are limited companies, the following documents shall be submitted:*
> *(a) Notary certified copy of resolutions of the Directors of the Company, permitting the company to enter into a JV agreement,*

authorizing MD or one of the Directors or Managers of the Company to sign JV Agreement, such other documents required to be signed on behalf of the Company and enter into liability against the company and/or do any other act on behalf of the company.

xx xx xx"

The condition in the Clause-15.3(a) is that notarized certified copy of the resolutions of the Board of Directors of the Company to enter into a joint venture agreement was to be furnished. The Managing Director or any one of the Directors or Managers of the Company, who would be required to sign the joint venture agreement, was also required to be incorporated in the joint venture resolution.

4. A perusal of resolution of the Board of Directors of the GVV Construction Pvt. Ltd. (O.P. No.4) dated 16.03.2017 would go to show that the said Board of Directors of the Company had *"…authorized Mr.CH PRADEEP REDDY, Manager of the company as an authorized person on behalf of the company for all purpose including to PARTICIPATE IN THE ABOVE TENDER WORK AND TO SUBMIT PRE QUALIFICATION FINANCIAL AND TECHNICAL BID DOCUMENTS AND FOR ISSUANCE OF POWER OF ATTORNEYS/AUTHORIZATIONS TO THIRD PARTIES IF REQUIRED…*" A plain reading of the aforesaid resolution of the Board of Directors of the opposite party No.4-Company would go to show that said Mr.Reddy was authorized to participate in the tender process on behalf of the Company and there was no mention of the Board of Directors having resolved to be a part of the joint venture agreement with opposite party No.5.

5. Similarly, resolution of the Board of Directors of Nirupama Mining & Transporting Pvt. Ltd. (O.P. No.5) dated 16.03.2017 has also been filed, where by Mr.Ashish Samal, one of the Directors of the Company, was authorized and given the responsibility to sign all the documents of the above tender. In the said resolution also, there was no authorization permitting the Company to enter into a joint venture agreement.

6. From perusal of the aforesaid two resolutions of the Board of Directors of both the Companies, what is evident is that the same were mere authorization to a particular person/officer of the Company to participate in the tender process, which would be on behalf of the respective Companies. The specific requirement under the Guidelines, which forms part of the tender call notice, was that there should be a notarized certified copy of the resolution of Board of Directors of the Companies permitting the respective Companies to enter into a joint venture agreement. Admittedly, there was no

such resolution of the Board of Directors of either of the two Companies. In such view of the matter, when the said requirement was not complied with and even though the two representatives of the Companies may have signed the joint venture agreement, but the same would not be sufficient compliance of the terms as set out in the Guidelines of the notice inviting tender, provided in Clause-15.3(a).

7. Mr. Manoj Ku. Mishra, learned Senior Counsel appearing on behalf of the petitioner has vehemently argued that the said condition would not be an essential condition and could only be classified as an ancillary condition, which could be rectified by the petitioner-joint venture Company on being asked to provide such resolution of the Board of Directors of the respective Companies for entering into the joint venture agreement. We are afraid that the said submission is not worthy of acceptance because the resolutions of the Board of Directors of the respective Companies were required to be passed prior to entering into the joint venture agreement by persons who were duly authorized by the Board of Directors of the respective Companies in that regard. There is no resolution of the Board of Directors prior to filing of the tender documents, which was 17.03.2017, for entering into a joint venture agreement. The only authorization was with regard to filing of the tender by the respective authorized persons of the Companies. The same cannot be read as to mean that the said persons were authorized to enter into a joint venture agreement. After the tender documents have already been filed on 17.03.2017, the lacunae cannot be permitted to be made good by permitting the Board of Directors of respective Companies to pass such resolutions.

8. The condition in Clause-15.3(a) of the notice inviting tender was certainly an essential condition to be complied at the time of filing of tender documents. It would have been a different matter, if such a resolution had already been passed by the Company prior to 17.03.2017 and had not been filed, in which case they may have been permitted to file it subsequently. But in absence of there being any such resolution of the Board of Directors of the respective Companies prior to constitution of the joint venture Company on 16.03.2017, no opportunity was required to be given to the petitioner to make good the deficiency as provided in Clause-15.3(a) of the Guideline.

9. In such view of the matter, we do not find any infirmity with the order of the opposite party-East Coast Railways in rejecting the tender of the petitioner. Accordingly, the relief sought for in the writ petition does not deserve to be granted. The writ petition stands dismissed. No costs.

Writ petition dismissed.

2017 (II) ILR - CUT-781

VINEET SARAN, C.J. & K.R. MOHAPATRA, J.

W.P.(C) NO. 13089 OF 2017

MANISHA RATH ……..Petitioner

.Vrs.

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

EDUCATION – Petitioner admitted into Bio-Medical Engineering course in the spot selection – She applied for change of branch as there are vacancies in other branches – No action by the authorities – Hence the writ petition – Change of branch denied to the petitioner merely on technical ground – Since specialization course begins after the 2nd semester, there will be no loss to any of the parties if there will be change in the branch from Bio- Medical Engineering to one of the three choices given by the petitioner is allowed – Direction issued to O.P.No.2-Institute to change the branch of the petitioner depending on the availability of seats for the relevant academic session.

For Petitioner : M/s. Amiya Mohanty,R.K.Behera, P.Nayak.
For Opp. Parties : Mr. Aurovinda Mohanty, M.K.Pradhan, C.G.C.

Date of Order : 03.08.2017

ORDER

VINEET SARAN, CJ.

Learned counsel for the opposite parties state that they have received instructions. By consent of the learned counsel for the parties, this writ petition is disposed of at the stage of admission.

Admitted facts of the case are that the petitioner was admitted to Bio-Medical Engineering course in NIT, Rourkela on 12.07.2016 after having qualified in the JEE Main Examination, 2016. It is submitted that the first two semesters have common course and thereafter the specialized courses start. It is not disputed by the parties that for the year 2016-17, out of 890 seats in the institute, there were only 789 students who have taken admission in the institute and 101 seats remained vacant. The petitioner thus made a representation to the NIT, Rourkela for change of her branch to one of the following three branches i.e., Chemical Engineering, Mechanical Engineering and Electronics and Communication Engineering and the said application not having been decided, petitioner filed W.P.(C) No.16263 of 2016 which was disposed of on 18.05.2017 with the direction to the opposite party no.3 to decide the application of the petitioner for change in allocation of the branch. Pursuant thereto on 19.06.2017 opposite party no.3 has passed an order

wherein it has been stated that after the counseling for the year 2016-2017 was over and candidates were allotted institutions, role of opposite party no.3-Central Seat Allocation Authority was over and that the appropriate authority for change of the branch would be the institute, where the petitioner is pursuing her studies.

In the light of the aforesaid facts, this writ petition has been filed challenging the order dated 19.06.2017 and also seeking for a direction to the opposite party no.2-NIT Rourkela to upgrade the choice of the branch of the petitioner for her B.Tech. studies.

We have heard Shri Amiya Mohanty, learned counsel for the petitioner, Shri Aurovinda Mohanty, learned counsel for the opposite party no.1-Union of India and Shri M.K.Pradhan, learned counsel for the Director, National Institute of Technology,Rourkela-opposite party no.2 and Chairman, Central Seat Allocation Authority-opposite party no.3 and perused the record.

Shri M.K.Pradhan, learned counsel appearing for the opposite parties 2 & 3 has submitted that though earlier there was a provision for change of branch after 2nd semester but the said practice has been discontinued after 2010-2011.

The admitted fact is that there are vacancies in other branches than the branch in which the petitioner is studying. It would not harm any of the parties nor would it serve any purpose if seats lie vacant in a particular branch where student wants to take admission but is being denied so, merely on technical ground. The petitioner is already studying in the same institute and pursuing Bio-medical Engineering course.

Learned counsel for the parties do not dispute that the specialization course begins after the 2nd semester. As such, in our view, there will be no loss caused to any of the parties if the change in the branch from Bio-medical Engineering to one of the three choices given by the petitioner, is allowed by the opposite party no.2-institute. Accordingly we direct that in case there is any vacancy in respondent no.2-institute, i.e., NIT, Rourkela in the branches of Chemical Engineering, Mechanical Engineering or Electronics and Communication Engineering, for the relevant academic session, NIT, Rourkela shall consider the application of the petitioner for such change depending on the availability of seats in such particular course. This writ petition is allowed to the extent indicated above in the light of the observation made.

Writ petition allowed.

2017 (II) ILR - CUT-783

VINEET SARAN, C.J. & K.R. MOHAPATRA, J.

O.J.C. NO. 11280 OF 2001

G.M, IB VALLEY AREA, MAHANADI COALFIELDS LTD. ……..Petitioner

.Vrs.

THE P.O., CENTRAL GOVT INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, BHUBANESWAR & ANR. ……..Opp. Parties

INDUSTRIAL DISPUTES ACT, 1947 – S.36 (4)

There is no absolute bar for a legal practitioner to represent a party before the Labour Court or Industrial Tribunal, which is subject to the restrictions provided U/s. 36(4) of the Act – At times, assistance of a legal practitioner becomes inevitable to interpret an intricate provision of law and assist the Labour Court to come to a just conclusion – So the Labour Court while dealing with a petition filed by a party to the reference for being represented by a legal practitioner, should take into consideration the facts and circumstances of the case and pass a reasoned order – Moreover it being an equitable relief, the Tribunal should always try to maintain a balance in the matter of representation of the parties.

In this case as the Workers' Union is represented by an advocate of this court in the capacity of its Vice President the management-petitioner made a petition before the Tribunal to grant him leave to engage an Advocate which was rejected – Hence the writ petition – In order to maintain equity, learned Tribunal ought to have allowed the prayer of the management to be represented by a legal practitioner – Held, the impugned order is set aside – Permission granted to the management-petitioner to be represented by a legal practitioner. (Paras 7,8,9)

Case Laws Referred to :-

1. AIR 1977 SC 36 : Paradip Port Trust, Paradip -V- Their Workmen
2. AIR 2012 SC 1310 : N.K.Bajpai -V- Union of India

For Petitioner : M/s. S.Mohanty, N.C.Sahoo, D.Mohanty, S.Nanda, R.R.Swain & B.Banerjee

For Opp. Parties : Mr. R.K.Mohapatra, Govt. Adv. M/s. H.M.Dhal, P.K.Tripathy

Decided on 03.08.2017

JUDGMENT

K.R. MOHAPATRA, J.

Heard Mr. N. C. Sahoo, learned counsel for the petitioner, Mr.R.K.Mohapatra, learned Government Advocate for Opposite Party No.1 and Mr. H.M. Dhal, learned counsel for the opposite party No.2-Workers' Union.

2. The Management of Mahanadi Coalfields Ltd., Ib Valley Area, Brajrajnagar, has filed this writ petition assailing the order dated 24.08.2001 (Annexure-1) passed by learned Presiding Officer Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar (for short, 'CGIT') in Tr. I.D. Case No. 97 of 2001, whereby an application filed by the Management-petitioner to grant permission to be represented by a Legal Practitioner was rejected.

3. Briefly stated the relevant facts for adjudication of this case are as follows:

The Brajranjagar Coalfields Workers' Union (for short 'the Workers' Union') had raised dispute before the Conciliation Officer with regard to regularization of 60 (sixty) contract labourers, who were engaged in permanent and perennial nature of work for more than ten years, under the Management-petitioner. Conciliation being failed, the matter was referred to the Industrial Tribunal, Rourkela and registered as I.D. Case No.24 of 1999 (C). Subsequently, it was transferred to the learned CGIT in Tr. I.D. Case No.97 of 2004. Before the learned CGIT, the Workers' Union was being represented by Sri Debendra Mohanta, a Legal Practitioner of the High Court of Orissa, in the capacity of Vice-President of the Workers' Union. Hence, the Management-petitioner had filed a petition on 16.07.2001 (Annexure-1) before the CGIT to be represented by a Legal Practitioner as per the provision of Section 36(4) of Industrial Disputes Act, 1947 (for short, the ID Act'). It was stated, *inter alia* in the petition that, since Mr. Mohanta, a seasoned legal practitioner of High Court of Orissa is representing the Workers' Union, the Management-petitioner should be permitted to be represented through a Legal Practitioner. The Workers' Union had filed objection to the said petition contending *inter alia* that Mr. Mohanta was representing as Vice President of the Workers' Union and not in the capacity of a Legal Practitioner. Hence, the ground on which permission of the learned CGIT is

sought for engaging a Legal Practitioner should not be accepted. As such, they prayed for rejection of the petition under Annexure-1.

4. Learned CGIT taking into consideration the rival contentions of the parties held that when the Union has objected for engagement of an Advocate by the Management, petition filed by the Management to grant leave of the Tribunal for engagement of an Advocate to defend their case stands rejected. Assailing the said order dated 24.08.2001, this writ petition has been filed.

5. Mr. N.C. Sahu, learned counsel for the petitioner submitted that Section 36 (4) of the I.D. Act provides that in any proceeding before the learned Labour Court or the Tribunal a party to a dispute may be represented by a Legal Practitioner with consent of the other party to the proceeding and with the leave of the Labour Court and Tribunal, as the case may be. Since, the Workers' Union has already been represented by a seasoned Legal Practitioner having specialty in the field of Labour Laws, learned CGIT should have permitted the Management-petitioner to be represented by a Legal Practitioner of its choice. Learned CGIT, without assigning any cogent reason, rejected the petition under Annexure-1 only on flimsy ground that the Workers' Union had objection to such representation. It is his submission that the objection raised by the Workers' Union would not hold good, inasmuch as it is being represented by a seasoned Legal Practitioner of High Court of Orissa having specialty in Labour Laws. He, therefore prayed for setting aside the impugned order under Annexures-1 and 2 and for permiting the Management-petitioner to engage a Legal Practitioner of its choice.

6. Mr. Dhal, learned counsel for the opposite parties stoutly denied contention raised by Mr. Sahu, learned counsel for the petitioner. Mr. Dhal strenuously argued that there is no restriction for appointment of a Legal Practitioner as an Office bearer of Workers' Union. In the case at hand, Mr. Mohanta, is an office bearer of the Workers' Union as its Vice-President and thus, he can appear for the Workers' Union. The Management-petitioner is also being represented by its legal Manager, who is a graduate in law and is being assisted by a battery of Legal Assistants. Thus, the learned CGIT has rightly rejected the petition filed by the Management-petitioner taking into consideration the objection raised by the Workers' Union. He, therefore prays for dismissal of the writ petition.

7. Having heard learned counsel for the parties and on perusal of record, it is clear that the Workers' Union is being represented by Mr. D. Mohanta, who is a Legal Practitioner and has specialty in Labour Law. Hon'ble

Supreme Court in the case of ***Paradip Port Trust, Paradip vs Their Workmen***, reported in AIR 1977 SC 36 had the occasion to deal with right of the Legal Practitioners to represent the employers before the learned Industrial Tribunal, that too only with the consent of the opposite party and leave of the Tribunal. It has been held therein that the restriction is limited in its scope and impact and same is not violative of the right of the Legal Practitioners as provided under Section 30 of the Advocates Act, 1961. Further, in the case of ***N.K. Bajpai –v- Union of India,*** reported in AIR 2012 SC 1310, the Hon'ble Supreme Court held the provision of Section 36 (4) of the I.D. Act to be *intra vires*. However, there is no absolute bar for the Legal Practitioner to represent a party before the Labour Court or the Industrial Tribunal. It is subject to the restrictions provided under Section 36(4) of the I.D. Act. Thus, the Labour Court or Tribunal, while dealing with a petition filed by a party to the reference for being represented by a Legal Practitioner, should take into consideration the facts and circumstances of the case and pass a reasoned order. It being an equitable relief, learned Labour Court/Tribunal should always try to maintain a balance in the matter of representation of parties. At times, assistance of a Legal Practitioner becomes inevitable to interpret an intricate provision of law and assist the Labour Court or Industrial Tribunal to come to a just conclusion.

8. In the case at hand, the Workers' Union is being represented by Mr. D. Mohanta in the capacity of its Vice-President, who is none other than a seasoned Practitioner of this Court having specialty in Labour Laws. Thus, possibility of putting the Management-petitioner in a difficult position while interpreting the provisions of law, cannot be ruled out. Thus, in order to maintain equity, learned CGIT ought to have allowed the prayer of the Management-petitioner for being represented by a Legal Practitioner. Even otherwise, the impugned order under Annexure-2 is a non-speaking order.

9. In that view of the matter, we have no hesitation to set aside the impugned order Annexure-2 and permit the Management-petitioner to be represented by a Legal Practitioner of its choice.

10. This Court while issuing notice in the matter, vide order dated 06.09.2001 passed in Misc. Case No. 11543 of 2001, has directed stay of further proceedings in Tr. I.D. Case No. 97 of 2001 pending before the Presiding Officer, CGIT until further orders. The said order is still in force. Thus, taking into consideration that the reference is of the year 1999 and is pending before the learned CGIT since 2001, this Court, while vacating the

interim order, directs learned CGIT to permit the Management-petitioner to engage an Advocate of its choice and answer the reference, as expeditiously as possible preferably within a period of six months from the date of production of certified copy of this order. Parties are directed to cooperate learned CGIT for early disposal of the matter. The Writ petition stands allowed with the aforesaid directions. No order as to costs.

Writ petition allowed.

2017 (II) ILR - CUT- 787

VINEET SARAN, C.J. & K.R. MOHAPATRA, J.

W.P.(C) NO. 6434 OF 2015

SUNAKAR SAHOO ……Petitioner

.Vrs.

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

TENDER – Notice inviting applications for settlement of Sand Sairats through Registered Post/Speed Post – Admittedly, the petitioner's application was received in time but it was through ordinary post – Non-consideration of his application – Hence the writ petition – When the authority concerned invited applications for settlement of minor minerals they are the best judge to decide the eligibility conditions which can not be waived by the Court nor it be a subject matter for judicial review, unless it is proved to be malafide or against public interest – Held, there is no infirmity in the impugned order, calling for interference by this Court. (Paras 11,2,13)

Case Laws Referred to :-

1. AIR 1991 SC 1579 :M/s. Poddar Steel Corporation –v- M/s. Ganesh Engineering Works.
2. (2007) 14 SCC 517 : Jagadish Mandal Vs. State of Orissa.
3. (1993) 1 SCC 455 : Sterling Computers Ltd. -v- M & N. Publication Ltd.
4. AIR 1996 SC 11 : Tata Cellular -v- Union of India.
5. (1999) 1 SCC 492 : Raunaq International Ltd. -v- I.V.R. Construction Ltd.

For Petitioner : M/s. Bigyan Ku. Sharma & A.U.Senapati

For Opp. Parties : M/s. D.R.Mohapatra, S.R.Mohapatra, K.K.Jena & B.D.Biswal
Mr. P.K.Muduli, Addl. Govt. Adv.

Date of Judgment: 17.07.2017

JUDGMENT

K.R. MOHAPATRA, J.

This writ petition has been filed seeking for a direction to consider the application filed by the petitioner in Form-J of Orissa Minor Mineral Concession Rules, 2004 (as amended in 2014) (for short 'the Rules') pursuant to the notice inviting application for settlement of different Sand Sairats vide Notice No. 467 dated 19.02.2015, including 'Kusabhadra River Sand Source in village Bhubanpur in the district of Khurda' (for short, 'Kushabhadra Sand Sairat'), for which the petitioner had applied.

2. Pursuant to the advertisement dated 19.02.2015 published in two local daily newspapers, namely, 'Dharitri' and 'Samaj' on 24.2.2015 inviting applications for settlement of various sand sairats, 5 numbers of applications were received by the Tahasildar, Balianta-opposite party no.2 for Kushabhadra Sand Sairat, out of which 3 (three) applications were received through registered post/speed post and 2 (two) applications, including that of the petitioner and one Smt. Baijayantimala Baliarsingh, were received through ordinary post. It was made clear in the notice itself that the application should be sent by registered/speed post. The relevant portion of the Notice is reproduced hereunder:

> *"As per Orissa Minor Minerals Concession Rules, 2004 and Odisha Minor Minerals Concession (Amendment) Rules, 2014, this is for the information of the General Public that Revenue and Disaster Management Department of Government of Odisha invites application as described below from the interested parties for long term lease of Sairat Sources (Minor mineral) mentioned below under Balianta Tahasil from the financial year 2015-2016 to 2019-2020 for 5 years. Interested parties/ companies can apply according to OMMC (Amendment) Rules 2014 in prescribed Form J with required documents and certificates like Treasury challan of Rs. 1000.00 (Rupees One Thousand Only) (**Head of The Account-0853-Non-ferrous mining and metallurgical industries-102-mineral concession fees, rent and royalties**). Name of the sairat source applied and its tahasil name with boundary details. An affidavit stating that no mining due payable under the Act and the Rules made thereunder, is outstanding against the applicant. Solvency certificate and a list of immovable properties and any other required information which the applicant intends to furnish, such as, technical knowledge, experience, machinery under possession, financial*

position etc. in a sealed cover to the office of the undersigned Tahasil office through registered post/speed post.....”

(emphasis supplied)

3. Although the application of the petitioner and that of Smt. Baliarsingh were received by the opposite party no. 2 in time i.e. on 10.03.2015, the last date of submission of the application, the said two applications were not considered for the reason that the same were not sent through registered post/speed post. Accordingly, the other three applications, which were received through registered post/speed post, were taken into consideration and the offer of opposite party no. 3, namely, Shri Sunakar Pradhan, who had quoted the highest royalty @ Rs. 42/- per cum, was accepted and long term lease was settled in his favour on 11.3.2015. Assailing the action of the opposite party no.2 in not considering the application of the petitioner, he has filed this writ petition for the aforesaid relief.

4. Mr. B.K. Sharma, learned counsel for the petitioner strenuously argued that the Rules do not provide for any mode of submission of the application for settlement of long term lease of minor minerals including sand sairat. Hence, prescribing a condition to send the application through registered post/speed post was contrary to the provisions of the Rules. The petitioner had, in fact, posted his application by ordinary post, which reached the opposite party no. 2 within the stipulated time. On 11.3.2015, the sealed covers of the applications, received through registered/speed post, were opened in presence of the petitioner as well as other applicants. The petitioner had also signed in the minutes of the proceeding. But, application cover of the petitioner was not opened solely on the ground that it was not sent by registered post/speed post. The petitioner had quoted the highest rate of royalty of Rs.44/- per cum. As per sub-rule (3) of Rule 26 of the Rules, the query lease should have been settled in favour of the petitioner, who had quoted the highest rate of royalty. He further submitted that the condition of sending application by registered post/speed post cannot be treated as an essential condition and the same can, at best, be treated to be an ancillary condition for determining the eligibility of the applicants.

5. Mr. P.K. Muduli, learned Addl. Government Advocate for the State referring to the separate counter affidavits filed by opposite parties no. 2 and 3 submitted that instruction in the advertisement was very specific which stipulated that the applications of intending applicants should be sent in sealed cover to the office of Tahasildar, Balianta through registered

post/speed post. The said condition was incorporated in the advertisement with an intention to maintain fairness and sanctity in the process for settlement of Kusabhadra Sand Sairat. The application of petitioner was sent by ordinary post which violates the conditions of the advertisement. Since the condition for sending the application through registered post/speed post was consciously incorporated in the advertisement for maintaining fairness and sanctity in the process of settlement of Kusabhadra Sand Sairat, the same cannot be said to be an ancillary condition. On the other hand, it was an essential condition and non-compliance of the same has rendered the petitioner ineligible to participate in the process of settlement of Kusabhadra Sand Sairat. He further submitted that amongst the eligible applicants, the opposite party no.3 had quoted the highest rate of royalty of Rs.42/- per cum and accordingly, the long term lease of sand sairat in question was settled in favour of opposite party no.3 vide order dated 11.3.2015. Subsequently, the Collector, Khurda, has already approved the settlement of Kusabhadra Sand Sairat in favour of opposite party no.3. The opposite party no.3 has already deposited the EMD of Rs.4,08,000/- pursuant to the approval of settlement of long term lease in his favour. He, therefore, submitted that no fault can be found with the opposite parties in not considering the application of the petitioner. Hence, he prayed for dismissal of the writ petition.

6. Mr. D.R. Mohapatra, learned counsel for the opposite party no.3, supporting the arguments advanced by Mr. Muduli, learned Addl. Government Advocate, prayed for dismissal of the writ petition.

7. Having heard learned counsel for the parties and on perusal of the records, the only question which arises for consideration is as to whether non-compliance of the condition in the advertisement with regard to sending the application through registered post/speed post, would render the petitioner ineligible to participate in the selection process for settlement of Kusabhadra Sand Sairat. The Hon'ble Supreme Court in the case of ***M/s. Poddar Steel Corporation –v- M/s. Ganesh Engineering Works***, reported in AIR 1991 SC 1579 held that the requirement in a tender notice can be classified into two categories, i.e. firstly those which lay down the essential eligibility conditions and the other, which are merely ancillary or subsidiary with the main object to be achieved by the condition.

8. In the instant case, it is the specific case of opposite parties 1 and 2 that in order to maintain fairness and sanctity in the selection process for settlement of Kusabhadra Sand Sairat, the authorities have consciously decided that persons interested to participate in the proceeding for settlement

of Kusabhadra Sand Sairat should send their applications by registered post/speed post. Admittedly, the application of petitioner was received through ordinary post on the last date of receipt of the application, i.e., on 10.03.2015. It is submitted by Mr. Muduli, learned Addl. Government Advocate that the application of the petitioner was posted on the very same day, i.e., on 10.03.2015 at the local post office and the same was also not disputed by Mr. B.K. Sharma, learned counsel for the petitioner. Sending an application through registered post/speed post is more secured than sending it by ordinary post. Envelop or cover sent through registered post/speed post are always sealed, which cannot be secured if the envelop or cover is sent through ordinary post. There is every likelihood of tampering with the application sent by ordinary post, which can be avoided in a postage through registered post/speed post. Moreover, postage of application of the petitioner on 10.03.2015, i.e., on the last date of receipt of application and reaching the addressee on the very same day, castes a reasonable doubt on the conduct of petitioner. No doubt, the provision of the Rules does not provide for submission of the application for settlement of minor minerals in a particular mode, i.e., through registered post/speed post. But, the authorities inviting applications from the intending persons can impose/incorporate the conditions to secure the documents sent by applicants as well as to maintain fairness and sanctity in the process of settlement of minor minerals, as long as it is not opposed to the statutory provisions of the Rules.

9. In the case of *Poddar Steel Corporation (supra)*, the Hon'ble Apex Court while distinguishing an 'essential condition' from 'ancillary/subsidiary condition, held as follows:-

> *"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank the clause no. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non- compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be*

required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in GJ Fernandez v. State of Karnataka 7 Ors., [1990] 2 SCC 488 a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. ....."

10. Taking into consideration the discussions made above, there cannot be any second opinion that the condition of sending the application through registered post/speed post was an essential condition and not an ancillary or subsidiary one, as contended by Mr. Sharma, learned counsel for the petitioner. In that view of the matter, the submission of Mr. Sharma in that regard does not hold good.

11. Scope of judicial review in the matters of commercial transactions and contracts, has been a subject matter of scrutiny in number of occasions before the Hon'ble Apex Court. In the case of ***Jagadish Mandal Vs. State of Orissa***, reported in (2007) 14 SCC 517, the Hon'ble Apex Court taking into consideration the ratio decided in ***Sterling Computers Ltd. -v- M & N. Publication Ltd***., reported in (1993) 1 SCC 455, ***Tata Cellular -v- Union of India***, reported in AIR 1996 SC 11, ***Raunaq International Ltd. -v- I.V.R. Construction Ltd.***, reported in (1999) 1 SCC 492 and several other case laws came to the following conclusion.

"19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor

with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

12. The authority inviting applications for settlement of minor minerals is the best judge to decide the eligibility conditions and the same cannot be waived by Court or cannot be a subject matter for judicial review unless the same falls within any of the categories as laid down in *Jagdish Mandal (supra)*. The petitioner has not made out a case under any of the aforesaid categories which would warrant a judicial review.

13. We, therefore, find no infirmity in the decision of the opposite party no. 2 in not considering the application of the petitioner for settlement of Kusabhadra Sand Sairat. Thus, this writ petition being devoid of any merit is accordingly dismissed, but in the circumstances, there shall be no order as to cost.

Writ petition dismissed.

2017 (II) ILR - CUT-794

S. PANDA, J. & S.N. PRASAD, J.

CRLA NO. 50 OF 1999

RAMA RAO PATIKA @ PATRO & FIVE ORS. ……..Appellants

.Vrs.

STATE OF ORISSA ……..Respondent

EVIDENCE ACT, 1872- S.32

Dying declaration – If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration – However, it is not to be rejected merely because it does not contain details of the occurrence.

In this case the deceased made verbal dying declaration before the I.O.(P.W.15),which was reduced into writing – The deceased was in sense and capable of giving answers at that time – The I.O. recorded the dying declaration as he apprehended his death shortly – The deceased could not put his signature or thumb impression as there was serious injuries and severe pain on his fingers – Such dying declaration also corroborates the evidence of P.W.s 1 & 2 – Deceased did not utter the name of appellant-No.1 in his dying declaration – Held, the appeal is allowed in respect of appellant No.1 and dismissed in respect of appellant Nos. 2 & 3. (Paras 15,16,17)

Case Law Referred to :-

1. (2009) 11 SCC 217 : Satish Ambanna Bansode v. State of Maharashtra.

For Appellants : M/s : A.K. Nanda, D. Rath, S.K. Bhanjadeo.
M/s : N.C. Pati, A.K. Mohapatra, S. Mishra, P.K. Khuntia, S. Mohanty, S.K. Acharya

For Respondent : Additional Standing Counsel.

For Informant : M/s : Devasish Panda, D. Pr. Dhal, A. Kr. Parida

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Date of Judgment: 29.08.2017

JUDGMENT

S. PANDA, J.

This Criminal Appeal is directed against the judgment dated 19.01.1999 passed by the learned Addl. Sessions Judge, Rayagada in Sessions Case No. 15 of 1997 in convicting the appellants for commission of offence under Sections 148, 149 and 302 of the Indian Penal Code and

sentencing them to undergo R.I. for three years for commission of the offence under section 148 IPC and imprisonment for life for commission of offence under Sections 149/302 IPC and it was also directed that the sentences are to run concurrently.

2. The prosecution case in brief is that on 15.11.1995 at about 5 P.M. the deceased Raghumani Patra had been to village Podalpadar in a bicycle from village Bangi for collection of labourers to cut the paddy from the lands situated at village Podalpadar. At about 6.30 P.M. while he was returning with his bicycle, near Bangi junction on the main road suddenly accused Natabara Guru, Trinath Guru, Gupteswar Behera, Chandeswar Behera, Malikeswar Behera and others being armed with Lathi, Kati, Tangia etc. attacked and assaulted, as a result of which he sustained profuse bleeding injuries on different parts of his body. He fell down at that spot on the ground. In the meantime Chandrapur Bus reached at the said spot and by that time all the accused persons ran away from the said spot. P.W.2-Trinath Naik, P.W.8-Kumurika Nabina and P.W.9-Madangi Rama Murty, who were going in the bus got down from the bus and saw that the deceased sustaining profuse bleeding injuries was lying on the ground. P.W. 2 told P.W.8 to inform the family member about the incident. Accordingly P.W.8 came to the informant Pradeep Kumar Patra, P.W.1, the younger brother of the deceased and informed about the occurrence in question. Immediately P.W.1 rushed to the spot and found that his brother Raghunath Patra was lying on the ground in the pool of blood. He saw cut injuries on both his legs at the level of ankle, on his head, knee joint, fingers of both hands, left thigh etc. Being asked by the informant as to who assaulted him, the injured narrated in detail about the incident and at the time P.Ws. 2 and 9 were also present. While the complainant along with others were present at the spot, the police vehicle came from Gumuda side and on seeing the gathering, the said vehicle stopped and S.I. Utkal Ranjan Das, P.W.15, the then Second Officer of Gunupur Police Station, who was coming in connection with the investigation of an Atrocity case, halted there. P.W. 1 verbally reported to him in detail about the occurrence which he ascertained from P.W.8 and also from his injured brother-Raghumani Patra. The S.I. P.W.15 reduced the same into writing. He immediately shifted the injured to his jeep to take him to Gunupur Hospital for treatment. While the injured was in jeep on the way to hospital, he recorded the declaration made by the injured. The injured succumbed to injury on the way and he was declared as such at the hospital. The declaration made by the injured was marked as Ext.5 and the same was

proved as the dying declaration. P.W.15 was entrusted with the investigation by the higher authority. The FIR was marked as Ext.1 and registered as such. P.W.15 held inquest over the dead body at the hospital and sent the same for post mortem examination. P.W.14, the Medical Officer of conducted autopsy over the dead body. On completion of investigation, the I.O. submitted the charge-sheet against the accused persons for commission of offences under Sections 148, 149 and 302 IPC.

4. The appellants' defence plea was one of complete denial. According to them, appellant no.1 is son of one Dalimba through Nilambar, the father of the deceased, being his concubine. Said Nilambar called a Panchayat in the village Bangi and decided that Dalimba and appellant no.1 will take three acres of land for their maintenance. However the deceased snatched away the said land from appellant no.1 for which there were inimical terms between them. Since appellant no.1 and their relations and friends protested such action, they have been falsely foisted in this case. According to them, deceased being assaulted by somebody else and died in the spot and he had no sense when the police reached, therefore, there were no such dying declaration.

5. In order to bring home the charge, during trial the prosecution examined as many as fifteen witnesses including the informant-P.W.1. P.Ws. 2, 8 and 9 are the post occurrence witness among whom, P.W.8 has informed the informant about the incident. P.W.15 is the I.O. and P.W.14 is the Medical Officer, who conducted autopsy over the dead body. Prosecution also exhibited many documents, including Ext. 1 is the FIR, Ext.5 the dying declaration of the deceased, Ext. 22 is the Post Mortem Report. On the other hand, the defence had examined four witnesses, but did not exhibited any document. The prosecution also proved 18 Material Objects including weapons of offence.

6. The learned Addl. Sessions Judge after threadbare discussion of the materials available on record came to a conclusion that the prosecution has substantially brought home the charges against the accused persons beyond all reasonable shadow of doubt. The Trial Court relied on the evidence of P.Ws. 1, 2, 4, 5 and 9, so also the FIR under Ext.1 which corroborate the evidence of P.Ws. 1, 2 and 9 in whose presence the dying declaration was made by the deceased. Accordingly, the Trial Court convicted all the accused persons for commission of the offence punishable under section 148, 149/302 IPC and imposed the sentence as indicated above.

7. Learned counsel for the appellants submits that the impugned judgment of conviction and sentence is against the law and weight of evidence on record. According to him the evidence of the witnesses P.Ws. 4 and 5 being contradictory to each other, their statements should not have been accepted treating them as the eye witness to the occurrence. His further stand was that the Doctor, who conducted the autopsy opined that the death might be instantaneous taking hemorrhage, shock and neurogenic shock, the patient must have unconscious within five minutes and the death may be possible within ten minutes. But the story of the prosecution that the informant came to the spot after being informed by the P.W.8 and thereafter Police staff reached and recorded the statement is not believable and the Court below should not have relied on such statement as dying declaration. Therefore, the impugned order of conviction and sentence is illegal and liable to be set aside and the appellant is entitled for acquittal.

8. Learned Additional Standing Counsel strongly contended that the evidence of P.W.2, 8 and 9 who got down from the bus at the time of occurrence is specific and corroborative with each other. That apart, the deceased has narrated the detail incident in presence of P.W.1, 2 and 9. He had also made the dying declaration before the I.O., who incidentally reached the spot while he was coming in connection with another case. Since the accused persons have animosity with the deceased, they had come with a motive to kill the deceased being armed with deadly weapons. P.Ws. 4 and 5 are the eye witness to the occurrence. The evidence of P.Ws. 4 and 5 corroborates the dying declaration given by the deceased as well as the evidence of P.Ws. 1, 2 and 9 before whom the deceased has narrated the incident. The evidence of P.W.14, the Doctor who conducted autopsy over the dead body and as well as the evidence of P.W.15, before whom the deceased has made the dying declaration are enough for the Trial Court to hold the accused persons to have committed the crime. Therefore, the sentence imposed on the appellants has been properly assessed by the Trial Court and as such, the same calls for no interference by this Court.

Learned counsel appearing for the informant supported the prosecution case and submitted that since the evidence of P.Ws. 1, 2 and 9 are specific and corroborates with each other so also with the FIR, therefore, the Court below has rightly convicted the accused persons. Therefore, the interference with the judgment and sentence is not warranted.

9. Perused the L.C.R. and went through the evidence on record carefully.

The prosecution basically founded its case on the evidence of the eye witnesses P.W.4 and 5, the evidence of P.Ws. 1, 2 and 9 before whom the deceased narrated the incident and also the dying declaration of the deceased made before P.W.15, the I.O. of the case. The prosecution has also relied on the evidence of the Doctor who conducted post mortem examination over the dead body.

10. P.W.1, the informant and the brother of the deceased, in his examination-in-chief has stated that they had no coordinal relationship with the accused persons due to some landed property. On earlier occasion, i.e. on 01.09.1994 and 07.04.1994 the accused had attempted to cut and remove their paddy, for which they had lodged FIR. Due to such animosity they had left the village Bangi and settled at Gumuda village. On the day of occurrence, his brother had been to village Podalpadar by a bicycle for the purpose of arranging labourers to cut the paddy. While he was in the house, P.W.8 came and told him that his brother has been murdered and lying on the road being cut into pieces. He went immediately by riding the bicycle to the spot, which is 1 km from his house. On reaching there, he found that his brother was lying in a pool of blood with multiple cut injuries on his body. He found cutting of veins to both the legs below the knee joint and injuries on the thigh, the right wrist was also cut and the fingers have already cut. His brother was in life and started to cry looking at him. He enquired about the incident and accordingly his brother told that the accused persons, Natabar Guru, Trinath Guru, Chandreswar Behera, Malikeswar Behera, Gupteswar Behera suddenly came from the bushes and dealt Kati and axe blows and also assaulted with lathi. When Chadrapur Bus came, they fled away from the spot. There were also other associates, whom he could not identify. While his brother was narrating the incident, P.W.2 and 9 were all along present at the spot. In the meantime, the Police Vehicle was coming from Gumuda side and it stopped there observing such gathering. The informant narrated the incident and thereafter police enquired from his injured brother, who was in life then and he has described in detail while in the police vehicle to Gunupur Hospital. He could not sign the statement due to cutting of all his fingers. In the Hospital, the Doctor declared him dead. In his cross examination he denied to have snatched certain property from the accused or have filed false cases against the accused persons. He had stated that due to non-allotting their land for Bhag cultivation to them, enmity developed. The accused persons have attempted to cultivate their land forcible, for which he had filed F.I.R. against them. The statements made in the FIR corroborates

the evidence of P.W.1. However in his evidence, the P.W.1 has neither named appellant no.1 nor stated about the overt act performed by him.

11. P.W.2, in the examination-in-chief had deposed that he got down from Chadrapur Bus at 6.45 P.M. at a little distance from Bangi Junction. He found the deceased in a bleeding condition. Being asked he told that some persons assaulted him with deadly weapon. P.W.8 was present there being got down from the bus along with P.W.2. The deceased told him to give this information at his house. P.W.2 picked up the cycle and gave to P.W.8 to go to the house of the injured. P.W.8 went to the house of the injured and immediately the informant, P.W.1 reached there. P.W.1 asked his brother and enquired about the incident in presence of P.W.2. He told that while he was coming from Padalpadar, some persons caused the injuries by means of Kati, Lathi and axe and he could able to identify the assailants like Gupteswar Behera, Malikeswar Behera, Chandrawar Behera, Trinath Guru and Natabar Guru. Thereafter A.S.I. of Police while returning from Gumunda stopped there observing the gathering and asked P.W.1, who narrated the incident. The Police when asked the injured about the incident, the injured also narrated the same thing to the Police inside the Jeep while he was taken to the hospital. P.W.2 was also accompanying with the deceased in the vehicle to the hospital. In his cross-examination, he denied that the deceased was dead when he got down from the bus. However, he had also not named the appellant no.1 in the incident.

12. P.W.4 and 5 in their depositions have stated that while they were traveling in *Tiptop Maa Janaki* bus they saw some persons holding Kati, Lathi and axe assaulting the deceased in an open place near Bangi junction. They saw the assault through the bus. Admittedly they have been examined eight days after the occurrence. The prosecution has not properly explained the examination of those witnesses at a belated stage. Thus, their evidence cannot be relied on.

13. P.W.15, the I.O. had deposed that while he was proceeding from Gumuda side towards Bamanaguda in the police jeep in connection with the investigation of an atrocity case, he found the injured lying on the side of the road. P.W.1 was available in the spot, who verbally reported to him, which he reduced into writing. The deceased was in sense and he was capable of giving answers to him at that time. He recorded his statement under Ext.5, since he apprehended his death shortly. The deceased could not put his signature or thumb impression as severe pain and injuries on his fingers. He shifted him to

Gunupur hospital in the police vehicle. Inside the police vehicle, he had regained sense and answered to the questions put by P.W.15. He was declared dead in the hospital. He searched the house of the accused persons and recovered the weapon of offences. Appellant No.1 arrived at the police station and made certain disclosure statement. He led the I.O. to his house and gave discovery of the hidden article, *Khanati* and blood stained *Lungi*. He had examined P.W.9, who had stated before him that P.W.1 inquired from his brother about the occurrence in his presence and he had named the accused persons to have assaulted the deceased. In his cross examination he denied the fact that the deceased was dead at the time he reached the spot. He denied the dying declaration to be false.

14 P.W. 14, who conducted the autopsy over the dead body found the following injuries.

1. Average build elderly male, left eye was closed, right eye was opened, mouth is half opened, features of rigor mories were present.
2. cut injury of size 2 " x bone depth over posterior aspect of lower end of left leg at the level of the ankle. The injury was cut through the Tendo Achilis and tibial arteries.
3. Cut injury of size 3 " x 2 " and bone depth over posterior aspect lower end of right leg at the level of ankle. The injury has cut through the Tendo achilis and tibial arteries.
4. Incised wound over distal interphalangeal crease of the right middle finger of size of 1" x ½" x bone depth causing fracture of the middle phalnx of right middle finger.
5. Contusion over the dorsal aspect of right hand of size 4" x 3" x 1/2"
6. Contusion over the dorsal aspect of right fore arm of size 6" x 3" x 1/2".
7. One parallel bruise of size 5" x 1 ½" x ½" over right knee with abraded surface.
8. One incised wound over the left parietal region of scalp of size 3" x ½" x bone depth.
9. One incised would of size 1 ½" x ½" x bone depth ovewr anterior aspect of right leg 3" below the knee joint.
10. One incised would of size 1" x 1/4" x ¼" over anterior aspect of right leg just below the ankle joint.

11. One incised would of size 1" x ¼" x ¼" over right ring finger.

12. One incised would of size 1" x 1 1/2" x ¼" over the left middle finger.

13. One incised would of size 1" x ¼" x ¼" over the middle interphalangeal crease of the left right finger.

14. One incised would of 1" x ½" x ¼" over anterior aspect of left thigh.

P.W.14 has opined that all the injuries are ante-mortem in nature and the injuries could have been possible with sharp cutting weapons. He opined that the death is homicidal in nature and the injury nos.1 and 2 were sufficient in ordinary course of nature to cause death and cumulative effect of all the injuries were sufficient to cause death.

15. In the case of ***Satish Ambanna Bansode v. State of Maharashtra*** reported in ***(2009) 11 SCC 217***, the Apex Court has reiterated the principles governing the dying declaration at paragraph-14 of the judgment as follows:-

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See: Munnu Raja v. State of M.P. (1976) 3 SCC 104].

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See: State of U.P. v. Ram Sagar Yadav (1985) 1 SCC 552, and Ramawati Devi v. State of Bihar (1983) 1 SCC 211].

(iii) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See: K. Ramachandra Reddy v. Public Prosecutor (1976) 3 SCC 618].

(iv) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See: Rasheed Beg v. State of M.P., (1974) 4 SCC 264.]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See: Kake Singh v. State of M.P., (1981) Supp. SCC 25.]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See: Ram Manorath v. State of U.P., (1981) 2 SCC 654.]

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. [See State of Maharashtra v. Krishnamurti Laxmipati Naidu, (1980) Supp. SCC 455.]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See: Surajdeo Ojha v. State of Bihar, (1980) Supp. SCC 769]

(ix) Normally, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See: Nanhau Ram v. State of M.P., (1988) Supp. SCC 152.]

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See: State of U.P. v. Madan Mohan (1989) 3 SCC 390.]

(xi) Where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See: Mohanlal Gangaram Gehani v. State of Maharashtra, (1982) 1 SCC 700.]"

16. The principle enumerated in the famous legal maxim of the Law of Evidence, i.e. *nemo moriturus praesumitur mentire* which means a man will not meet his Maker with a lie in this mouth. Our Indian Law also recognizes this fact that "a dying man seldom lies" or in other words "truth sits upon the lips of a dying man"

In the instant case, there is only one dying declaration under Ext.5, which has been recorded just few moments before his death while he was shifted to the hospital. Such dying declaration also corroborates the evidence of P.W.1 and 2.

17. On close scrutiny of the evidences on record and as discussed in above paragraphs, we are of the opinion that there is no material against appellant no.1-Rama Rao Patika @ Patro. P.Ws. 1, 2 and 9, the so called witnesses in whose presence the deceased had made dying declaration have neither uttered the name of appellant No.1 nor stated the overt act committed by him. Thus, he is acquitted from the charges. So far as the appellants 2 and

3 are concerned, this Court is of the opinion that the Court below has rightly held that they are the authors of crime and accordingly we are not inclined to interfere with the impugned judgment of conviction and sentence imposed on them. Since appellants 4, 5 and 6 have already expired during pendency of the Criminal Appeal, the Criminal Appeal stands abated as against those appellants.

In view of the above, the Criminal Appeal is partly allowed so far as Appellant No.1- Rama Rao Patika @ Patro is concerned and he be set at liberty forthwith. The Criminal Appeal is dismissed so far as Appellant No.2-Gupteswar Behera and Appellant No.3-Chandeswar Behera is concerned.

The appellants 2 and 3 were released on bail pursuant to the order of this Court dated 01.09.2006. In view of the dismissal of the appeal so far as Appellant No.2-Gupteswar Behera and Appellant No.3-Chandeswar Behera is concerned, their bail bonds so furnished be cancelled and they be taken into custody forthwith.

Appeal, partly allowed.

2017 (II) ILR - CUT- 803

S. PANDA, J. & S.N. PRASAD, J.

O.J.C. NO. 13172 OF 1999

KAILASH ROULA & ORS. ……..Petitioners

.Vrs.

M.D., O.F.D.C.LTD., BHUBANESWAR & ORS. ……..Opp. Parties

SERVICE LAW – Regularisation – Even if the appointment of daily rated employees is irregular but they are serving continuously for a period of ten years without any support from any interim order passed by any court of law, against sanctioned post, they are entitled to be regularized by the authorities.

In this case pleadings in the writ petition is not clear that the appointment of the petitioners are against sanctioned post – They have also not completed 10 years continuous service – Moreover when the authorities have taken a specific stand that there is no work available due to withdrawal of the sponsored scheme, it would not be appropriate for this court to interfere with the impugned decision taken by the authority – Held, writ petition is dismissed.

(Paras 11,12,13)

Case Laws Referred to :-

1. (2006) 4 SCC 1 : Secretary, State of Karnataka& Ors. vrs. Umadevi(3) & Ors.
2. (2010) 9 SCC 247: State of Karnataka & Ors. –vs- M.L.Kesari & Ors.
3. AIR 1979 SC 429 : The Manager, Govt. Branch Press and another -vs- D.B.Belliappa.

For Petitioners : M/s. N.C.Panigrahi, S.C.Das, G.S.Das

For Opp. Parties : M/s. S.K.Patnaik & U.C.Mohanty

Date of hearing :12.07.2017
Date of judgment:12.07.2017

JUDGMENT

S. N. PRASAD, J.

This writ petition is under Articles 226 and 227 of the Constitution of India wherein the order dated 12.10.1999 passed by the Orissa Forest Development Corporation Limited is under challenge whereby and whereunder the authorities have rejected the claim of the petitioners for their reinstatement in service due to having no scope to accommodate them in employment.

2. The fact leading to approach this Court by way of the instant writ petition is that the petitioners were working at Orissa Forest Development Corporation Limited, Berhampur Plantation-A Division to the satisfaction to their superiors but all of a sudden their services have been dispensed with against which they had approached this Court in O.J.C.No.7320 of 1998, this Court while disposing of the writ petition vide order dated 30.6.1998 has directed to consider grievance of the petitioners in the light of the said order, the authorities have taken decision by rejecting the claim of engagements on account of the fact that the work area and the workload of the Orissa Forest Development Corporation have been squeezed consequent upon withdrawal of the sponsored scheme and there is no scope to accommodate the petitioners in employment, hence disengaged with effect from 25.10.1999.

3. Learned senior counsel representing the petitioners has submitted that the authorities while taking decision have not taken into consideration the principle of first come last go since workers engaged under the Division after engagement of the petitioners have been retained in service and as such it cannot be said that there is no work available under the Berhampur Plantation-A Division.

He submits that the petitioners have been discriminated only to accommodate others. He further submits that even after retrenchment, compensation as referred in the impugned order has not yet been paid.

4. Learned counsel representing the Orissa Forest Development Corporation has vehemently opposed the submission of the learned Senior Counsel representing the petitioners. He submits that after the judgment rendered in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others** reported in (2006) 4 SCC 1 the authorities cannot be compelled to retain the petitioners in service in view of the specific stand taken by them that there is no work for them.

He further submits that the authorities have taken decision in the light of the order passed in O.J.C.No.7320 of 1998 wherein well reasoned order has been passed.

He further submits that the contention raised by the petitioners that persons junior to them are continuing is absolutely incorrect. He submits that whatever statement made in the affidavit filed by the petitioners regarding juniors have been retained in service and working prior to issuance of the order impugned or disengaged since 25.10.1999 is not correct.

5. We have heard learned counsel for the parties and perused the documents available on record.

6. Admittedly the petitioners have been appointed on daily rated capacity under the Orissa Forest Development Corporation. While they were continuing, their services have been dispensed with against which they have approached this Court vide O.J.C.No.7320 of 1998. This Court, while disposing of the writ petition vide order dated 30.6.1999, has directed the Orissa Forest Development Corporation to take decision by passing speaking order.

The petitioners have filed representation in the light of the direction passed by this Court in O.J.C.No.7320 of 1998. The Management, with a view to give reasonable opportunity, has requested the petitioners to appear before the Managing Director for personal hearing, accordingly chances of personal hearing have been given. The authorities have rejected the claim of the petitioners on the ground that the work area and the workload of the Orissa Forest Development Corporation have been squeezed consequent upon withdrawal of the sponsored scheme and as such there is no scope to accommodate them on employment hence disengaged from service. The said decision of the authorities is before us for its judicial scrutiny.

7. We, before scrutinizing the decision of the authorities, have examined the judgment rendered by the Apex Court in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra) wherein at paragraph-53 the Hon'ble Apex Court has been pleased to hold that illegal appointment is not to be regularized, however, if the appointment is irregular and if the daily rated employee is serving continuously for a period of 10 years without any support from any interim order passed by any court of law and working against sanctioned post, the State Government is to take decision for their regularization by way of taking one time exercise to be completed within period of six months from the date of pronouncement of the judgment of the said case. The Hon'ble Supreme Court in para-53 of the said judgment has left the matter upon the State Government that if the State Government or the authorities are in requirement of services of the daily rated employees whose services are irregular, they can be regularized in their service. The judgment further stipulates that the court of law should not pass any direction for regularization in service.

Difference in between illegal appointment and irregular appointment have been discussed in the judgment in the case of **State of Karnataka & others –vs- M.L.Kesari & others**, reported in (2010) 9 SCC 247, wherein the Hon'ble Apex Court while taking into consideration the ratio of the judgment rendered in the case of **Umadevi-3** has discussed the difference in between illegal appointment and irregular appointment. According to the said judgment, if process in making appointment have not been followed, such appointment will be said to be irregular but if the workers have been appointed without any post having sanctioned or not eligible to hold the post, such type of appointment is said to be illegal. The Apex Court in the judgment rendered in the case of **State of Karnataka & others –vs- M.L.Kesari & others**(supra) has clarified the position by directing the State Government to regularize such irregular appointment by completing exercise in its entirety.

So far as the fact in hand is concerned, it is not clear from the pleadings that the appointments are against sanctioned post or not. The petitioners have not completed 10 years of continuous service and more specifically the authority have taken ground that there is no work available due to withdrawal of the sponsored scheme.

8. Learned counsel for the petitioners relied upon the judgment of the Hon'ble Apex Court in the case of **The Manager, Govt. Branch Press and**

another -vs- D.B.Belliappa, reported in AIR 1979 SC 429. We have examined the judgment rendered in the said case and found that the Hon'ble Apex Court has passed the judgment taking into consideration the specific stand taken by the appellant before it that the persons who had come after him, have been retained in employment and as such the decision of the authorities has been held to be in the teeth of the provision contained in para-14.

We, on appreciation of the facts involved in the instant case, are of the view that the petitioners has failed to make out a case of discrimination since no detail of the persons appointed after them, have been disclosed, rather a vague statement has been given as discussed in the previous paragraph and as such in that view of the matter, the judgment relied upon by learned senior counsel for the petitioners, is of no help.

9. So far as the contention raised by the learned counsel representing the petitioner that juniors have been retained in service and to that effect statements have been made in the affidavit but no specific names have been mentioned that who are the persons appointed after the petitioners and what is their date of appointment, rather a vague statement has been made at para-5 of the affidavit filed on 30.3.2000 in support of the same, Annexure-17 has been annexed showing names of some persons who stated to have been appointed after appointment of the petitioners, but after perusal of Annexure-17 annexed to the affidavit, we have found that the said list is of 14.3.1996 and the decision to disengage the petitioners has been taken in the month of October,1999, in such circumstances, the claim of the petitioners have seriously been disputed by the authorities.

10. In view of the disputed question of fact and considering the ratio of the judgment in the case of Umadevi-3 and specific submission has been made by the authorities that no work is available, it would not be appropriate for this Court to interfere with the decision taken by the authorities which is impugned in the instant writ petition. Accordingly, the writ petition lacks merit. In the result, the writ petition is dismissed.

Writ petition dismissed.

2017 (II) ILR - CUT- 808

S.C. PARIJA, J. & D. DASH, J.

W.P.(CRL.) NO. 155 OF 2016

LAKHE @ LAXMAN BAG ……..Petitioner

.Vrs.

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

NATIONAL SECURITY ACT, 1980 – S.3(2)

Preventive detention – It is not to punish a person, for something he has done, but to prevent him from doing it – The detention order must be based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances – So the live and proximate link must exist between the past conduct of a person and the imperative need to detain him – However, a detention order which is founded on stale incidents, must be regarded as an order of punishment for a crime, passed without a trial – Held, merely because an accused is likely to be released on bail and he will again engage himself in antisocial/criminal activities in the area, an order of detention should not have been passed on mere apprehension.

In this case the petitioner is in active politics who contested as MLA in the last election – The detention order do not disclose any serious offences and the criminal cases cited relates to incidents took place four years prior to the passing of the impugned order and the allegations made therein relates to offences against individuals and all the allegations are omnibus in nature and no specific overt act is attributed to the petitioner – No reason assigned that involvement of the petitioner in those criminal cases amount to threat to public order – Order of detention should not have been passed on mere apprehension in absence of any cogent and credible material in support of it – Held, impugned order of detention is quashed. (Paras 19 to 25)

Case Laws Referred to :-

1. AIR 1998 SC 1013) : Smt. Tarannum v. Union of India.
2. AIR 1970 S.C.852 : Pushkar Mukherjee and others v. The State of West Bengal
3. 80(1995) CLT 804 : Sri Sadasiva Apat @ Sada v. State of Orissa & anr.
4. (1985) 4 S.C.C. 232 : Ramesh Yadav v. District Magistrate, Etah & Ors.
5. 2004 (I) OLR 561 : Rakan @ Rakesh Biswal v. State of Orissa and Ors.
6. AIR 1989 SC 2027 : N. Meera Rani v. Govt. of Tamil Nadu.
7. (2012) 7 SCC 181 : Huidrom Konungjao Singh v. State of Manipur.
8. 2012 (I) OLR (SC) 550 : Yummah Ongbi Lembi Liema v. State of Manipur.

For Petitioner : M/s. Y.Dash, Senior Advocate, Rajjeet Roy, S.K.Singh, S.Sourav & A.Pradhan

For Opp. Parties : Mr. P.C.Das, Addl. Standing Counsel

Date of Judgment: 04.09.2017

JUDGMENT

S.C. PARIJA, J.

The petitioner, who is a detenu under the National Security Act, 1980, has filed this writ petition in the nature of habeas corpus, challenging the order of his detention dated 19.10.2016 (Annexure-1), passed by the District Magistrate, Balangir, and the order of the Government of Odisha in the Department of Home (Special Section) dated 26.10.2016 (Annexure-2), confirming the said order of his detention as illegal and unconstitutional, with a prayer to direct his release from custody forthwith.

2. Relevant portion of the detention order dated 19.10.2016, passed by the District Magistrate, Balangir, under Section 3 (2) of the National Security Act, reads as under:-

> "Whereas, I, District Magistrate, Balangir is subjectively satisfied and convinced from the incidents and occurrences as enumerated below about your habitual involvements in the criminal activities. Having weighed the evidences provided, I consider it expedient to detain you with a view to prevent you from acting any manner pre-judicial to the maintenance of public order in the police limits of Kantabanji Police Station, Turekela Police Station and other parts of the district. I, therefore, pass this order for your detention U/s. 3(2) of National Security Act, 1980.
>
> It is clear that, you are a die-hard criminal and your criminal and antisocial activities have come to notice since 2009. You are involved in as many as 11 G.R. Cases and under trial in the courts of law. You have constantly unleashed a reign of terror in the area of Kantabanji and Turekela Police Stations as well as other parts of Balangir district and your such activities have become a matter of concern for maintenance of public order in those areas. You have developed association with other notorious anti-socials for earning easy money from innocent labourers by sending them to outside states to work as bonded labourers. You do not have any known source of income but

use to spend lavishly. Your activities are clearly detrimental for the maintenance of Public order and peace. You are in habit of indulging yourself in creating hatredness in the mind of innocent people against the members of minority community at Kantabanji. You are also involved in other heinous crime like kidnapping, threatening to Govt. Officials, deterring them from discharging lawful duties being armed with deadly weapons like lathi, sword etc. Your anti-social activities went to an extreme height that on 7.9.2016 at 9.30 PM, the anti-social along with your associates namely, Omkar Behera, Nageswar Deep, Partham Behera, Narendra Sandh, Sushanta Mohapatra and others entered inside the premises of Kantabanji Police Station, manhandled the IIC, Kantabanji PS deterring him from discharging lawful duty and could dare to snatch away one of the accused namely Debaraj Behera from the Police custody who was detained in Kantabanji PS Case No. 193/2016. You are so desperate that you are simply ignoring the binding of law of land for which the people are not coming forward out of fear to raise any complain against you. In spite of all measures taken by the Police, you did not stop your activities and went on committing crime one after another even while under bail. Due to your such criminal activities with the support of your associates, the public order is completely disturbed in the above mentioned areas and is likely to further deteriorate, if you are not detained under the NATIONAL SECURITY ACT-1980."

3. With the above observations, the detaining authority has cited thirteen criminal cases in which the petitioner is alleged to have been involved, which are as under:

Sl.No.	Case numbers with dates	Offences U/Secs.
1.	Khariar P.S. No. 09, dt. 07.01.2009	365/368/34 IPC
2.	Kantabanji P.S. No.100, dt. 14.08.2012	341/294/323/147/148/ 506/149 IPC
3.	Kantabanji P.S. No.39, dt. 02.3.2014	294/507 IPC
4.	Turekela P.S. No.30, dt. 09.4.2014	147/148/341/294/323/ 427/325/171-C/307/ 149 IPC & 25/27 Arms Act
5.	Turekela P.S. No.109, dt. 03.11.2015	336/353/294/355/34 IPC
6.	Kantabanji P.S. No.37, dt. 25.2.2016	294/507 IPC
7.	Turekela P.S. No. 45, dt.01.5.2016	147/148/294/354/323/ 506/149 IPC & 3(1)(x) SC & ST (PA) Act
8.	Kantabanji P.S. No.192, dt. 07.9.2016	143/341/332/353/506/ 294/225/307/323/149 IPC & 7 Cr. L.A. Act
9.	Kantabanji P.S. No.193, dt. 07.9.2016	143/336/427/153(A)/149 IPC
10.	Titilagarh GRPS Case No.34m, dt. 08.9.2016	143/427/379/149 IPC
11.	Titilagarh CRPS Case No.35, dt. 08.9.2016	143/144/294/323/379/506/427/149 IPC
12.	Kantabanji P.S. non-FIR No.157, dt.26.9.2016	110 Cr.P.C.
13.	Kantabanji P.S. SDE No.62, dt.29.9.2015	

4. The detaining authority has then proceeded to observe as under:

"You were arrested by the IIC, Kantabanji P.S. on 7.9.2016 in connection with Kantabanji P.S.Case No.192 dated-7.9.2016 U/s 143/341/332/353/ 506/294/225/307/323/149 IPC/7 Cr.L.A. Act (Vide G.R.No. 393/2016) in the file of JMFC, Kantabanji and remanded to judicial custody on 8.9.2016 U/s. 167 Cr.P.C. by JMFC, Kantabanji. You got the bail in the case on 29.09.2016. You have been remanded to judicial custody, Kantabanji in P.S.Case No. 193 dated- 7.9.2016 U/s.143/336/427/153(A)/149 IPC and presently housed in the Sub-jail, Kantabanji. You have applied for bail in this case and your bail petition has already been scheduled for hearing in the court of Addl. Session Judge, Kantabanji. There is every possibility of your release

> on bail shortly and certainly after your release on bail, you will again engage yourself in usual anti-social and criminal activities in the area creating disturbance in public order and creating reign of menace and terror in the area."

5. On the basis of the facts and circumstances detailed above, the detaining authority has come to the following conclusion:

> "Your criminal background as discussed above is enough to show that the ordinary law of the land is not sufficient to prevent you from becoming a threat to public order and tranquility in Kantabanji and Turekela PS area as well as other areas of the district and only option left is to invoke the extra ordinary provisions of National Security Act, 1980 so as to prevent you from coming out of jail and acting in a manner pre-judicial to the maintenance of public order. Hence, the detention order."

6. The said detention order has been approved by the State Government vide its order dated 26.10.2016, in exercise of powers conferred under Section 3(4) of the National Security Act, 1980.

7. Learned counsel for the petitioner submitted that the petitioner is a permanent resident of village Khutulumunda under Turekela police station, in the district of Balangir, where the petitioner resides with his family members, consisting of his wife and two children. It was submitted that the petitioner along with his wife have been in public life since the year 2000 and his wife Smt. Lili Bag was a candidate of Bharatiya Janata Party for the post of member of Balangir Zilla Parishad from Zone-11 constituency. It was submitted that the petitioner has been associated with many philanthropic works in the district and on account of his goodwill, the Bharatiya Janata Party had given him a ticket to contest for Kantabanji Assembly Constituency for the Orissa Legislative Assembly Election-2014. It was submitted that the petitioner holds the post of President of Yadav Samaj of Balangir District and he is the Vice-President of Bharatiya Janata Party, Balangir District. It was submitted that being in public life, he has been falsely implicated in many criminal cases on fabricated and frivolous allegations, which are politically motivated.

8. Learned counsel for the petitioner submitted that the detaining authority has taken into consideration many stale cases, which have no proximity with the impugned order of detention. It was submitted that out of

the thirteen criminal cases registered against the petitioner, as detailed above, four criminal cases have been registered on the same day i.e. 07.9.2016 on omnibus allegations, with no specific overt act being attributed to the petitioner. It was submitted that even accepting the allegations made in the criminal cases under item nos.8 to 11 of the impugned detention order, the same may at best make out a case of breach of 'law and order' and not 'public order'.

9. It was further submitted that the detaining authority has passed the order mechanically and without application of mind inasmuch as, no reasons have been assigned as to how the involvement of the petitioner in the aforesaid criminal cases amount to threat to public order. It was further submitted that the findings of the detaining authority recorded in the impugned detention order that the petitioner has already been granted bail on 29.9.2016 in connection with Kantabanji P.S. Case No.192, dt. 07.9.2016 and he having applied for bail in Kantabanji P.S. Case No.193 dt. 07.9.2016, there was every possibility of he being released on bail and once again engaging himself in usual antisocial and criminal activities, is without any basis. It was submitted that the order of preventive detention could not have been passed on mere apprehension, in absence of any cogent and credible material in support of the same. It was further submitted that such approach of the detaining authority in resorting to preventive detention of the petitioner amounts to circumventing the ordinary process of criminal law.

10. It was accordingly submitted that as the criminal cases registered against the petitioner, as detailed above, are on the basis of false and frivolous allegations, made on extraneous political consideration and most of them are stale cases, having no proximity with the impugned order of detention, the same cannot be sustained in law and is liable to be quashed.

11. Learned counsel for the State with reference to the counter affidavit filed on behalf of opposite party nos.1 and 2 submitted that the impugned order of detention has been passed under Section 3(2) of the National Security Act, 1980, on proper analysis of the materials placed before the detaining authority, in order to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order. It was submitted that the petitioner is a habitual offender and has several criminal antecedents, as has been detailed in the detention order, which have proximity with the issuance of the detention order. In this regard, it was submitted that the antisocial and criminal activities of the petitioner are prejudicial to the

maintenance of the public order. It was further submitted that on the basis of the criminal antecedents of the petitioner, it was felt that the punitive and preventive provisions available under the ordinary criminal law are not deterrent enough to curb his activities and restore public order in the locality. It was accordingly submitted that as the impugned detention order has been passed in consonance with the statutory norms and on the basis of the materials available on record, the same cannot be faulted.

12. Law is well settled that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Therefore, since the detention order passed on the allegation of involvement of the detenu in a number of criminal cases without disclosing any material in the report of the Superintendent of Police or materials available before the detaining authority that there is likelihood of breach of public order, the detention order cannot be sustained. The detaining authority at the time of passing the order of detention as well as the State Government while confirming the same should take into consideration the nature of allegations and offences alleged in the grounds of detention to examine whether the same relates to 'public order' and the normal law cannot take care of such offences and that the acts of the detenu mentioned in the grounds of detention are prejudicial to maintenance of public order or they only relate to "law and order". (See-***Haradhan Saha v. State of West Bengal,*** (1975) 3 SCC 198 and ***Smt. Tarannum v. Union of India,*** AIR 1998 SC 1013)

13. The apex Court in ***Pushkar Mukherjee and others v. The State of West Bengal,*** AIR 1970 Supreme Court 852, while dealing with an order of preventive detention passed under Section 3(2) of the Preventive Detention Act, 1950, has observed as under:

> "The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection a line of demarcation must be drawn between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals, and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act. xxx."

14. This Court in ***Sri Sadasiva Apat @ Sada v. State of Orissa and another,*** 80(1995) CLT 804, having referred to the decision of Apex Court in cases of *Ram Manohar Lohia Vs. State of Bihar*, AIR 1966 SC 740; *Arun Ghose Vs. State of West Bengal*, AIR 1970 SC 1228; *Dipak Bose @ Haripada Vs. State of West Bengal*, AIR 1972 SC 2686 and *Kuso Sah Vs. State of Bihar*, AIR 1974 SC 155, formulated the factors to be borne in mind while determining whether the disturbance or disorder amounts to breach of 'law and order' or 'public order', which are:-

(i) The contravention of law always affects order, but before it can be said to affect the public order, it must affect the community or the public at large;

(ii) Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality;

(iii) It is the degree of disturbance and its effect on the life of the community in the locality, which determine whether that disturbance amounts to breach of law and order or public order;

(iv) Any Act by itself is not determinant of its own gravity. In its quality, it may not differ from another, but in potentiality it may be very different;

(v) Whether a man has committed breach of law and order or has acted in a manner likely to cause disturbance of the public order is a question of degree and the extent of the reach of the act on the society;

(vi) Every assaulting a victim is likely to cause horror and even panic and terror in those who are the spectators. But that does not mean that all such incidents do necessarily cause disturbance or dislocation of the community life of the localities in which they are committed.

(vii) It is well established that stray and unorganized crimes of theft and assault are not matters of pubic order since they do not tend to affect the even flow of public life;

(viii) Whether disturbance or disorder has led to breach of law and public order is a question of fact, in which case there is no formula by which one case can be distinguished from another.

15. Coming to the detention of the petitioner under Section 3(2) of the National Security Act, 1980, on the apprehension that he may be released

on bail in Kantabanji P.S. Case No.193, dt. 07.9.2016, the law is well settled that such order of detention passed on mere apprehension that the detenu, if released on bail, would again carry on with his criminal activities in the area is not sustainable in law. The Apex Court in ***Ramesh Yadav v. District Magistrate, Etah and others,*** (1985) 4 Supreme Court Cases 232, while dealing with a case of similar nature, where the detaining authority had issued an order of preventive detention on the ground that the detenu, after being released on bail, may indulge in activities which would be prejudicial to the maintenance of the public order, has observed as under:

> "6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in series of cases relating to preventive detention. The impugned order, therefore, has to be quashed."

16. In ***Rakan @ Rakesh Biswal v. State of Orissa and others***; 2004 (I) OLR 561, where the detenu was in custody at the time of passing of the order of his detention and the detaining authority had entertained an apprehension that the detenu might be released on bail and once enlarged on bail, he would again indulge in further antisocial activities prejudicial to the maintenance of public order, this Court has referred to the judgment of the Apex Court in ***N. Meera Rani v. Govt. of Tamil Nadu***; AIR 1989 SC 2027, wherein the Hon'ble Court has observed as under:

> "We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. ordinarily it is not

needed when the detenu is already in custody; the detaining authority must show its awareness to the facts of subsisting custody of the detenu and take that factor into account while making the order; but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release. This appears to us to be the correct legal position."

Accordingly this Court had observed that the detaining authority while passing the order of detention, in a case where a detenu is already in custody, should take the following facts into consideration:

(i) the detaining authority must show his awareness to the fact of subsisting custody of the detenu; and

(ii) while making the order, the detaining authority is to be reasonably satisfied on cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities.

17. The Apex Court in ***Huidrom Konungjao Singh v. State of Manipur,*** (2012) 7 SCC 181, held that three cumulative and additive nature of requirements are to be satisfied to pass the order of detention; they are:

(i) The authority was fully aware of the fact that the detenu was actually in custody;

(ii) There was reliable material before the said authority on the basis of which it could have reason to believe that there was real possibility of his release on bail and being released he would probably indulge in activities, which are prejudicial to public order;

(iii) Necessity to prevent him for which detention order was required.

18. The Apex Court in ***Yummah Ongbi Lembi Liema v. State of Manipur,*** 2012 (I) OLR (SC) 550, referring to its earlier decision in *Haradhan Saha* (supra), held that only on the apprehension of the detaining authority that after being released on bail, the petitioner-detenu will indulge in similar activities, which will be prejudicial to public order, the detention

order should not ordinarily be passed. Preventive detention is not meant for punishing a detenue for something he has done but to prevent him from doing it.

19. The detention order must be based on a reasonable prognosis of the future behaviour of a person based on his past conduct in light of the surrounding circumstances. The live and proximate link that must exist between the past conduct of a person and the imperative need to detain him must be taken into consideration for passing an order of detention. A detention order which is founded on stale incidents, must be regarded as an order of punishment for a crime, passed without a trial, though purporting to be an order of preventive detention. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing so. (See-***G. Reddeiah v. Government of Andhra Pradesh and Anr***., (2012) 2 SCC 389).

20. We are conscious of the legal position that while reviewing a detention order, a Court does not substitute its judgment for the decision of the executive. Nonetheless, the Court has a duty to enquire that the decision of the executive is made upon matters laid down by the statute as relevant for reaching such a decision. For what is at stake, is the personal liberty of a citizen guaranteed to him by the Constitution and of which he cannot be deprived, except for reasons laid down by the law and for a purpose sanctioned by law.

> The grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the statute. If the authority has taken into account, it may even be with the best of intention, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad.

21. In the present case, it is seen that the criminal cases cited at sl.nos.1 and 2 of the detention order relate to incidents which are stated to have taken place more than 4 years prior to the passing of the impugned order of detention. Moreover, the allegations made therein relates to offences against individuals. The criminal cases cited at sl.nos.3 and 4 of the detention order are also for offences alleged to have been committed against the individual

informants in those cases. Moreover, omnibus allegations have been made therein, with no specific materials to attribute any overt act against the petitioner. The criminal cases detailed in sl.nos.5 to 7 of the detention order do not disclose any serious offences having been committed by the petitioner and no specific overt act has been attributed to him.

22. As regard the criminal cases cited at sl. nos.8 to 11 of the detention order, those relate to incidents which took place on the same day, i.e. 07.9.2016, which is alleged to have taken place at different point of time. All the allegations made therein are omnibus in nature and no specific overt act is attributed to the petitioner, except the fact that he along with his supporters had committed the criminal acts detailed therein. It is further seen that in some of the criminal cases, the F.I.R. has been registered against the unknown person. Though the petitioner is a public figure in active politics and had contested the Assembly Election from Kantabanji Constituency in the year 2014, it is not understood as to how the informants in those cases could not identify the petitioner as the person, who had committed the offences alleged.

23. Coming to the case cited at sl. no.12, which is under Section 110 Cr.P.C., it is seen that the same has been registered on 26.9.2016, when the petitioner was admittedly in jail custody. Criminal case cited at sl. No.13 is relating to an entry in the Station Diary dt. 29.9.2015, which relates to a 'bundh call' alleged to have been given by the petitioner, protesting the action of the accused persons involved in Kantabanji P.S. Case No.162 of 2015.

24. As regard the observations of the detaining authority that the petitioner's bail application in Kantabanji P.S. Case No.193, dt. 07.9.2016 has been scheduled to for hearing in the Court of Addl. Session Judge, Kantabanji and there is every possibility of his release on bail and after his release, he will again engage himself in antisocial and criminal activities in the area is without any basis. To reiterate the observations of the apex Court in the case of *Ramesh Yadav* (supra) that merely on the ground that an accused in detention was likely to get bail, an order of detention should not have been passed on mere apprehension.

25. Applying the principles of law as discussed above to the facts of the present case, the conclusion is irresistible that the impugned order of detention dated 19.10.2016, passed by the District Magistrate, Balangir, under Section 3(2) of the National Security Act, 1980, is not sustainable in

law and the same is accordingly quashed. The petitioner be set at liberty forthwith, if his detention is not required in connection with any other case.

Writ petition allowed.

2017 (II) ILR - CUT- 820

B.K. NAYAK, J.

CRLMC NOs. 1272 OF OF 2016
WITH BATCH

SURENDRANATH MISHRA ……..Petitioner

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 – S.102 (1)

Police Officer's power to seize property – Whether Bank account of the accused or his relations is "property" within the meaning of section 102 Cr.P.C. ? Held, a police officer in course of investigation can seize or prohibit the operation of the said account if the same has direct link with the commission of the offence for which the police officer is investigating into the case. (Paras 7,8)

Case Law Referred to :-
1. (1999) 7 SCC 685 : State of Maharashtra -V- Tzapas D.Neogy

For Petitioner : M/s. Ganeswar Rath, Senior Advocate,
M/s. Ramdas Achary, N.Barik,T.Barik,
S.Hidayatullah, .R.K.Patra, A. Sethy, S.R.Ojha

For Opp. Parties : Mr. Janmejay Katkia, Addl. Govt. Advocate

Date of hearing :16.12.2016
Date of judgment:19.05.2017

JUDGMENT

B. K. NAYAK, J.

In all these applications under section 482, Cr.P.C., the petitioners challenge the orders passed by the learned S.D.J.M., Chatrapur in different applications under section 457, Cr.P.C. filed by the petitioners in G.R. Case No.258 of 2015, arising out of Chatrapur P.S. Case No.119 of 2015, which was later converted to CID, CB, Cuttack P.S. Case No.28 of 2015, rejecting

such applications of the petitioners for release of their different bank and postal accounts, which were frozen by the CID, CB, Cuttack in connection with the investigation of the case. The impugned orders in CRLMC No.1038, 1039, 1040 and 1037 of 2016 were passed by the learned S.D.J.M. on 05.02.2016, whereas in respect of other applications the impugned orders were passed on 16.02.2016. The main accused is Surababa @ Surendranath Mishra, the petitioner in CRLMC No.1272 of 2016, and the other petitioners are family members such as, wife, sons, daughter and daughter-in-law of the said main accused. The impugned orders have been passed in one G.R. case on identical grounds and all the Section 482, Cr.P.C. applications were heard analogously and, therefore, all these petitions are disposed of by this common judgment.

2. The G.R. Case, corresponding to Chatrapur P.S. Case No.119 of 2015 was registered on the basis of F.I.R. lodged by the informant alleging to the following effect:-

The informant started visiting the Ashram of Surababa @ Surendranath Mishra, namely, Trahi Achyut Ashram at Jhinti for treatment of his insane son. The accused Surendranath Mishra assured that by performing some pooja he can cure the son of the informant. Accordingly he treated the informant's son for three to four days by performing some pooja in the Ashram. There the petitioner asked the informant to donate some land at Chatrapur for opening a branch of petitioner's ashram. In view of the promise given by accused Surendranath Mishra to cure his son, the informant agreed to donate A 0.970 of land appertaining to different plots situated at Chatrapur bypass road in favour of Trahi Achyut Ashram Trust. It is further alleged that accordingly accused Trilochan Mishra, S/o- accused Surendranath Mishra and another person, namely, Debiprasad Rath of Trahi Achyut Nagar came to the office of Sub-Registrar, Chatrapur on 12.04.2014 for the purpose of execution and registration of the gift deed by the informant. They prepared the deed and got the signatures of the informant and his son on the same leading them to believe that it was a deed of gift. At a subsequent point of time the informant came to know that accused Trilochan Mishra and his companion fraudulently prepared a sale deed and got the signatures of the informant and his son thereon, with the recitals that a consideration of ` 26,84,570/- was paid to the informant towards the sale consideration, though the informant had never received a single rupee. The informant's son was however not cured and when the informant intimated the said fact to accused Surendranath Mishra and also about the fraud committed in the transfer of the

property, the said accused turned a deaf ear and that accused Trilochan Mishra and Debiprasad Rath also threatened the informant that in case he discloses the fact to anybody, he and his son would lose their lives.

On the basis of the aforesaid allegations in the F.I.R. case was registered for commission of offences under sections 420/423/467/468/471/406/506/120-B/34 IPC.

3. During investigation the Crime Branch took over investigation of the case as per the CID, CB Office Order dated 04.09.2015 and registered CID, CB, Cuttack P.S. Case No.28 of 2015 for offences punishable under sections 420/423/467/468/471/506/120-5 read with section 34 of the IPC. During such investigation it came to light that about more than three decades back the accused Surendranath Mishra declared that he had received a 'POTHI' of Mahapurusha Achyutananda from one Sadhubaba and he could predict the future of people and offer remedial measures consulting the so-called 'POTHI' and that creating such belief he was collecting huge money from the public by making false predictions and remedial measures. He proclaimed himself as a 'Guru' and inducted disciples by giving 'Gurumantra' to them, all with a view to deceive people for personal gain. He also formed a trust as "Shree Shree Mahapurusha Achyutanand Ashram Trust" of which he was the founder-trustee. Accused Trilochan Mishra, his oldest son was the Chairman-cum-Managing Trustee, his younger son, Biranchi Narayan Mishra was the Vice-Chairman and some others including accused, Debi Prasad Rath were also the trustees.

Large number of people from different parts of the State and outside became his disciples and devotees, from whom money was collected by the trust on different pretexts. In the process the trust collected crores of rupees from the common people by inducement and cheating.

4. Accused, Surendranath Mishra and the other petitioners (his family members) had opened bank accounts in different banks and post offices at different places which were seized (frozen) by the investigating agency. The petitioners, therefore, filed petitions before the learned S.D.J.M., Chatrapur under section 457, Cr.P.C. for release of those accounts, which have been rejected by the impugned orders.

5. The applications were registered as Misc. Cases. The number of misc. cases filed before the learned S.D.J.M. under section 457, Cr.P.C. by each of the petitioners and the Bank/Postal account numbers of each of them are indicated in the following table:

Sl. No.	CRLMC No.	Petitioner	Account Number with name of Bank	Misc. Case Number U/s.457, CrPC
1.	1272/2016	Surendranath Mishra (self)	i) S/B 9569 of Indian Bank, Mausima Temple Branch. ii) S/B 30747667267 SBI, Trahi Achyut Nagar Branch	09/2016
2.	1227/2016	Biranchi Narayan Mishra, S/o-Surendranath Mishra	30736351074, SBI, Trahi Achyut Nagar Branch	10/2016
3.	1271/2016	Trilochan Mishra, S/o-Surendranath Mishra	i) S/B 5003968650-4 & 2043848002-5 of Allahbad Bank, Sahid Nagar ii) S/B 555310310000044 of Bank of India, Chandaka Branch iii) S/B 30730711136 SBI, Trahi Achyut Nagar	11/2016
4.	1037/2016	Jyosnamyee Mishra, W/o-Trilochan Mishra	i) R.D. 32010249753 of SBI, Trahi Achyut Nagar Branch. ii) S/B 30936738598 SBI, Trahi Achyut Nagar Branch	01/2016
5.	1038/2016	Simran Mishra, W/o-Biranchi Narayan Mishra	i) S/B 34511817894 of SBI, Trahi Achyut Nagar Branch. ii) Postal R.D-291158 (P.R. No.40) of Trahi Achyut Nagar Branch	02/2016
6	1039/2016	Soudamini Mishra, D/o-Surendranath Mishra	i) S/B 30850468422 of SBI, Trahi Achyut Nagar Branch Branch ii) Postal R.D. 320329	03/2016
7.	1040/2016	Bidulata Mishra, W/o-Surendranath Mishra	i) S/B 457370506 of Indian Bank, Mausima Temple Branch. ii) S/B 80012200024158 of Syndicate Bank, BBSR iii) S/B 30747653913 of SBI Trahi Achyut Nagar Branch iv) S/B 02009 of Khurda Co-operative Bank, Balkati Branch v) Postal Account 320309, Trahi Achyut Nagar Branch.	04 of 2016

6. It was contended on behalf of the petitioners by the learned Senior Advocate that power of the Police Officer to seize property under section 102, Cr.P.C. does not include the power to seize (Freeze) bank accounts. It was further contended that originally the case has been registered against Surendranath Mishra, Trilochan Mishra and Debi Prasad Rath of Trahi Achyut Nagar and that preliminary charge-sheet has already been filed for the alleged offences against accused Surendranath Mishra and Trilochan Mishra keeping the investigation open, but so far as the other petitioners are concerned, namely, the wife, daughters-in-law, another son and the married daughter of Surendranath Mishra, they have not been arrayed as accused and there is no allegation that the ill-gotten money of the Mahapurusha Achyuta Nanda Trust was diverted to their bank accounts, and as such, freezing of their accounts by the police was illegal.

7. The learned Additional Government Advocate, on the other hand, submitted that investigation is still continuing by the CID, CB, Orissa, Cuttack and that in the meantime the Enforcement Directorate has registered a case under section 3 and 4 of the Prevention of Money Laundering Act, 2002 against Surendranath Mishra and others, and that the Enforcement Directorate has directed to furnish all informations with documents as regards the activities as well as the properties including cash and bank accounts of accused Surendranath Mishra and his family members which have been supplied to the Enforcement Directorate, and, since there is a suspicion that the money in the various accounts of the accused Surendranath Mishra and his family members are proceeds of crime, the prayer for their release has been rightly rejected by the learned S.D.J.M., Chatrapur. It was also submitted that in case the bank accounts are released, the petitioners would withdraw and take away the money from their accounts, which will defeat the ends of justice. It is stated that in case the petitioners so like they are free to open new bank accounts and operate the same for their transactions. It was finally submitted that the Investigating Officer has the power under section 102, Cr.P.C. to seize bank accounts in case of any suspicion that the money kept in the accounts are the proceeds of related to crime.

8. After considering the divergent views of different High Courts with regard to the power of seizure under section 102 of the Cr.P.C. and whether bank account can be held to be 'property' within the meaning of the said section the Hon'ble Supreme Court in the case of ***State of Maharashtra Vrs. Tapas D. Neogy: (1999) 7 SCC 685*** held as follows:-

> " Having considered the divergent views taken by the different High Courts with regard to the power of seizure under Section 102 of the Code of Criminal Procedure, and whether the bank account can be held to be "property" within the meaning of the said Section 102(1), we see no justification to give any narrow interpretation to the provisions of the Criminal Procedure Code. It is well known that corruption in public offices has become so rampant that it has become difficult to cope up with the same. Then again the time consumed by the Courts in concluding the trials is another factor which should be borne in mind in interpreting the provisions of Section 102 of the Criminal Procedure Code and the underlying object engrafted therein, inasmuch as if there can be no order of seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be the

> outcome of the illegal gratification, could be withdrawn by the accused and the courts would be powerless to get the said money which has any direct link with the commission of the offence committed by the accused as a public officer. We are, therefore, persuaded to take the view that the bank account of the accused or any of his relations is "property" within the meaning of Section 102 of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into……..."

In view of the aforesaid dictum of the Hon'ble Supreme Court, the contention of the learned counsel for the petitioners that bank accounts, particularly that of the relations of the accused are not liable to be seized or frozen is untenable.

9. During the course of argument the learned Additional Government Advocate filed copies of documents to show that the income and expenditure of the Mahapurusha Achyutananda Trust were audited by a Chartered Accountant and as per the audit report money has been shown to have been spent towards purchase of the land from the informant by paying consideration amount as recited in the sale deed, though according to the prosecution no such payment has been made to the informant towards sale consideration. The fact that heavy amount of money was shown as expenditure of the trust, the same can be reasonably suspected to have been diverted and misappropriated and parked in some accounts of the accused and their relations. The statement of the Chartered Accountant concerned recorded during investigation clearly supports his audited report. Documents have also been filed to show that the Enforcement Directorate has registered case under the Prevention of Money Laundering Act and is proceeding with investigation. It also appears that the Income Tax Department is also conducting an inquiry about the income and assets of the Ashram which is run by the accused persons and that the Principal Director of Income Tax, Bhubaneswar has written a letter to the Additional DG of Police CID, CB, Cuttack, Odisha requesting not to release cash, bank locker and bank accounts seized by the police since that may adversely affect the investigation process and the interest of the revenue.

10. The learned S.D.J.M., Chatrapur, in his impugned orders, has given good reasons for rejecting the petitions for release of the accounts. The

seizing or freezing of the accounts has the effect of prohibiting further operation or transaction in respect of those accounts. But the money lying in the account is not being taken away by anybody, though withdrawal of the same by the account holder is prohibited temporarily. In case, on the conclusion of investigation or on conclusion of the trial it has found that no offence in relation to the money in the seized accounts has been committed, the account holders will get back their money. Therefore, no serious prejudice can be said to have been caused to the petitioners for seizure of the accounts during investigation.

11. In the aforesaid analysis, I find no merit in these applications under section 482, Cr.P.C. filed by the petitioners. Accordingly the CRLMCs are dismissed.

Petitions dismissed.

2017 (II) ILR - CUT- 826

S. K. MISHRA, J.

W.P.(C) NO. 18981 OF 2016

PREM SAGAR NAIK .....Petitioner

.Vrs.

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

O.C.S.(REHABILITATION ASSISTANCE) RULES, 1990 – RULE – 2(a)(b)

Appointment under rehabilitation assistance scheme – Duty of the authority is to see if the spouse of the deceased employee is alive and intends to avail the benefit – If he or she is ineligible for overage or ailment etc. second preference will be given to sons – However, Rules do not provide that only the elder son should be given appointment and not the younger son.

In this case, petitioner's father died in harness while working as Laboratory Attendant in Kuchinda College, a fully aided Educational Institution – Petitioner applied for appointment under the scheme – His application was rejected on the ground that when widow and elder son of the deceased are there petitioner being the youngest son, his application is not acceptable – Hence the writ petition – Once it is found that the spouse of the deceased employee can not be appointed due to overage and ailments in a Government service, the second

preference is the son of the deceased employee – It is also not the case of the opposite parties that the elder brother of the petitioner is working somewhere else and has sufficient means to manage the family – Moreover the petitioner has filed two affidavits sworn by his mother and elder brother that they have no objection if the petitioner is appointed under the scheme – So when the petitioner comes under the second category of preferential family members and only because he has an elder brother, it can not be said that petitioner's case will not be considered – Held, the impugned order is quashed – Direction issued to opposite party No. 1 to accord necessary administrative approval for appointment of the petitioner under the Rehabilitation Assistance Scheme. (Paras 7 to13)

Case Law Referred to :-

1. 1998 (II) OLR 452 : Smt. Ketaki Manjari Sahu v. State of Orissa & ors.

For Petitioner : M/s. Sushanta Ku. Pradhan, J.K.Swain & P.R.Mishra

For Opp. Parties : Addl. Government Advocate

Date of judgment : 21.08.2017

JUDGMENT

S.K.MISHRA, J.

The petitioner happens to be the son of late Ushatram Naik, who died in harness while working as a Laboratory Attendant in Kuchinda College, Kuchinda, which is a fully aided educational institution. The petitioner's father was a regular employee of the college and was discharging his duties since 04.11.1994. He died on 03.03.2009. At that time, the petitioner was a minor. The deceased employee of the aforesaid College was succeeded by his wife-Anuchhaya Naik(1), married daughters-Jasmita Naik(2) and Madhusmita Naik(3), sons Milan Naik(4) and the present petitioner - Prem Sagar Naik(5). At the time of death of the deceased, the petitioner was 16 years old. After attaining majority, the petitioner filed an application before the Principal of Kuchinda College for his appointment under the Rehabilitation Assistance Scheme to be appointed as a Peon in the said College. The Principal of that College, as per his letter No. 796 dated 08.08.2013, forwarded his application along with all the documents to the District Magistrate and Collector, Sambalpur to enquire and report whether the family of the deceased Government servant is in financially distress condition. The Collector, Sambalpur on 01.08 2014 returned the application

along with documents and the report and certificate to the effect that the annual income of the family from all sources excluding pension and T.I. is Rs.30,000/- for the year 2014 and also certified that the family of the deceased employee is in distress. On receipt of such report and certificate from the district Magistrate and Collector, Sambalpur, the Principal of the College forwarded the same to the Director, Higher Education, Orissa, Bhubaneswar requesting him to take necessary action as per letter dated 12.08.2014.

2. The Director, Higher Education as per his letter dated 06.08.2015 directed the Principal of the College to submit correct Income Certificate. On receiving the aforesaid letter along with the documents, the petitioner applied for another income certificate from the office of the Tahasildar and filed the same before the Principal of the College. The Principal also forwarded the same to the Director, Higher Education for appointment of the petitioner under the Rehabilitation Assistance Scheme. However, the Director, Higher Education did not consider the application of the petitioner favorably and the Joint Secretary communicated the rejection of his application vide order dated 04.04.2016 i.e. Annexure-9 on the ground that Rehabilitation Assistance is meant to help a family in distress and is not in the nature of a transferable right. The petitioner challenges the said letter dated 04.04.2016 i.e. Annerxure-9 on the ground that it is a cryptic order and contrary to the statutory provisions of the O.C.S. (Rehabilitation Assistance) Rules, 1990. Hence, he prayed that Annexure-9 should be quashed and the opposite parties be directed to give appointment to the petitioner as a Peon in the aforesaid College within a reasonable time.

3. The Deputy Director, Higher Education, opposite party no.2 being authorized by the Director, Higher Education, Orissa filed a counter affidavit. In the counter affidavit the opposite party has taken a plea that the Rehabilitation Assistance Scheme is meant for to save a family from distress condition due to death of an employee as per Rule 2(b) of the O.C.S. (R.A.S.) Rule, 1990. It is stated that first preference is to be given to the wife/husband for the said benefit, then the elder son will be considered for this purpose. In the instant case, the youngest son has applied for appointment under the Rehabilitation Assistance Scheme, which is not acceptable, as the Rehabilitation Assistance Scheme is not in the nature of a transferable right. After due consideration of the proposal in favour of the petitioner, the Government have rejected the same.

4. The specific case of the opposite parties is that while considering the case of the petitioner, the Higher Education Department took note of the fact that the 1st to 4th legal heirs, who are elders to the petitioner, have not applied for the same benefit. It is proposed that the third legal heir, who happens to be the elder brother of the petitioner could have applied for the same benefit. It is stated that there are two other elder legal heirs are available namely Jasmita Naik and Madhusmita Naik, but they have not applied for the said benefit, but the youngest son has applied for such benefit, which is not correct. Hence, the Government have rejected the proposal of the petitioner. It is further pleaded that though the Collector, Sambalpur has declared the family of the deceased to be in financially distress condition and the Principal of the College has not recommended for appointment of the petitioner under the Rehabilitation Assistance Scheme, rather he has only submitted report to the Government in the Higher Education Department for consideration and after due consideration the Government have rejected the application holding that the appointment under the Rehabilitation Assistance Scheme is not a transferable right rejected the claim.

5. The counter affidavit filed by the opposite party no.2 appears to be contrary in law in the sense that at paragraph 9 the opposite party has taken the plea that "xxx Principal recommended for appointment of the petitioner." On the next sentence, the opposite party has taken the plea: "This Opp.Parties has not recommended for appointment of the petitioner rather this Opp.Parties only submitted report to Govt. in Higher Education Department for consideration." In any case, the Principal of the College cannot recommend for appointment of the petitioner. It is the duty of the State Government to accord administrative approval for appointment of the petitioner as the same is required. On such plea, learned Addl. Government Advocate submitted that the application of the petitioner should be rejected.

6. In his rejoinder affidavit the petitioner has averred that the opposite party no.2 in their counter affidavit mentioned that first preference should be given to the wife/husband then the elder son will be considered for this purpose. It is further pleaded that because of the fact that the widow of the deceased was 55 years of age at the time of death of the deceased, which is evident from Annexure-3 and she is suffering from old age diseases, she could not be appointed. Thus, she has already been over age to hold employment and she is not willing to take an appointment. As far as the elder

brother of the petitioner is concerned, he has no objection if the rehabilitation assistance is given to the petitioner.

7. Section 2(a) of the O.C.S. (Rehabilitation Assistance) Rules, 1990 defines "deserving case". A deserving case has been defined to mean that a case where the appointing authority is satisfied, after making such enquiry as may be necessary:-

(i) that the death of the employee has adversely affected his familyfinancially because the family has no other alternative mode of livelihood:

(ii) that there is existence of distress condition in the family after death of the employee;

(iii) that none of the family members of the employee who has died while in service is already in the employment of Government/Public or Private Sector or engaged in independent business with an earning capable to tide over the distress condition of the family arising out of the sudden death of the employee; and

(iv) that the family does not have adequate income from the immovable properties to earn its livelihood.

8. "Family members" has been defined under Rule 2(b) of the aforesaid Rules. It means and include the following members in order of preference :-

(i) Wife/Husband;
(ii) Sons or step sons or sons legally adopted through a registered deed:
(iii) Unmarried daughters and unmarried step daughters;
(iv) Widowed daughter or daughter-in-law residing permanently with the affected family.
(vi) brother or unmarried Government servant who was wholly dependent on such Government servant at the time of death.

A plain reading of the aforesaid provision reveals that Rehabilitation Assistance to the family members, who are eligible for appointment under Rehabilitation Assistance Scheme, should be provided in order of preference as indicated above. Thus, a plain reading of the provisions means that a person who is entitled to any appointment under the Rehabilitation Assistance Scheme, the authority has to see if the spouse of the deceased employee is alive and intends to avail the benefit under the Rehabilitation

Assistance Scheme. If he/she is ineligible for over age, ailment or cannot be given appointment under the Rehabilitation Assistance Scheme, as per the scheme, the second preference will be given to the sons. The Rules do not provide that a younger son should not be treated in a preferential manner and the elder son should be given appointment. There is no provision in the said Rules that while considering the second category of persons, the elder son should be given appointment and the younger son cannot be appointed. However, the State government has devised an expression namely "transferable right" and has taken a stand that since the spouse of the deceased is alive, elder son is living there, right cannot be transferred in favour of the petitioner. The decision taken by the opposite parties 1 and 2 is illegal and contrary to the basic scheme of the aforesaid Rules.

9. Moreover, it is seen that in this case while applying for appointment under the Rehabilitation Assistance Scheme, the petitioner has annexed two affidavits; one sworn by his mother Anuchhaya Naik, who was 58 years of old at the time of swearing the affidavit and she has no objection if the petitioner is appointment under the Rehabilitation Assistance Scheme and another is sworn by his elder brother Milan Naik, who has stated on oath that he has no objection if his younger brother Prem Sagar Naik is appointed under the Rehabilitation Assistance Scheme as he is looking after the affairs of the family. While scrutinizing the records, the authorities should have taken into consideration the reluctance of the spouse of Late Ushat Ram Naik, i.e. Anuchhaya Naik that she is 58 years old and she is not able to take up the employment because originally the age of retirement was 58, which has recently been enhanced to 60 years. But in the year when the application was filed i.e. in the year 2013, the age of retirement is 58 years. Once it is held that the spouse of the deceased employee cannot be appointment in a Government service, the second preference is son of the employee who died in harness. It is not a case of the opposite parties that the elder brother of the petitioner is working somewhere else and has sufficient means to manage the affairs of the family. Only on the ground that the elder brother has not applied and he could have applied under the Rehabilitation Assistance Scheme, the application of the petitioner was rejected on the ground that Rehabilitation Assistance is not a transferable right.

10. Transferable right means any right of an individual over goods, properties etc., which can be transferable in favour of any person either for consideration or as a gift. As far as appointment under the Rehabilitation Assistance Scheme is concerned and the present petitioner comes under the

second category of preferential family members and only because Milan is elder to the petitioner, it cannot be said that the petitioner's case will not be considered and only the case of Milan, the elder brother of the petitioner is to be considered and in case he refused to accept the Rehabilitation Assistance, appointment of the petitioner will be transferred as a right from the elder brother Milan in favour of the petitioner.

11. Rule 16 of the aforesaid Rules provides that the State Government where satisfied that the operation of all or any provisions of these rules causes undue hardship in any particular case, it may dispense with or relax the provisions to such extent as it may consider necessary for dealing with the case in a just and equitable manner. Relying upon this provision, a Division Bench of this Court in **Smt. Ketaki Manjari Sahu v. State of Orissa and others,** 1998 (II) OLR 452, has held that in some abnormal cases when the petitioner wants to help the family in distress, even the rule can be relaxed to give rehabilitation assistance to an alternate candidate if the facts and circumstance of the case justifies the same. Rule 16 of the aforesaid Rules is in fact an extension of the principle of the Government being a model employer looking after the welfare of the citizens of the State. Even in cases, where Rules do not permit, the State Government may relax the Rules to extend the benefit to the deserving persons in a just and equitable manner.

12. Keeping in view the aforesaid consideration, this court is of the opinion that rejection of the representation of the petitioner for appointment on the Rehabilitation Assistance Scheme due to death of his father is illegal on the face of it and is liable to be quashed.

13. Accordingly, the writ petition is allowed. The order dated 04.04.2016 of the Joint Secretary to Government as at Annexure-9 is hereby quashed. Opposite party no.1 is hereby directed to accord necessary administrative approval for appointment of the petitioner in the Rehabilitation Assistance Scheme because of death of his father, who was working as Laboratory Attendant in Kuchinda College, Kuchinda, within twenty-one working days from the date of receipt of certified copy of this order or production of the certified copy of this order, whichever is earlier. On receipt of administrative approval from the O.P.no.1, the O.P. no.3 shall immediately issue letter of appointment by following the relevant procedure. Keeping in view the facts of the case, there shall be no order as to costs.

Writ petition allowed.

2017 (II) ILR - CUT- 833

S. K. MISHRA, J.

W.P.(C) NO. 8464 OF 2017

PURNENDU KU. SATPATHY ……..Petitioner

.Vrs.

STATE OF ORISSA ……Opp. Party

COURT FEES ACT, 1870 – S.19-H (1)

Where an application for probate or letters of administration is made to any court other than a High Court, the Court shall cause notice of the application to be given to the Collector and it is the Collector, who has jurisdiction to report regarding the valuation of the property, even after resorting to section 19-H (3) and (4)

In this case the learned District Judge, Khurda adopted an erroneous approach in fixing the valuation of the Test Case by calling for a report from the D.S.R but the Sub-Registrar, Jatani submitted such report to him – Held, the impugned orders Dt. 20.05.2016 and Dt. 02.09.2016 are quashed – Direction issued to the learned District Judge to call for a report from the Collector and fix-up the valuation U/s. 19-H of the Act. (Paras 3,4)

For Petitioner : M/s. Suvashish Pattanaik, S.Mohanty, M.Moharana, Subash Ku. Satpati & A.Barik

For Opp. Party :

Date of Order : 22.08.17

ORDER

S. K. MISHRA, J.

1. Heard learned counsel for the petitioners and learned Addl. Government Advocate for the State.

2. The petitioners in this case assail the order dated 02.9.2016 passed by learned District Judge, Khurda at Bhubaneswar in Test Case No.219/2014 assessing the duty money of Rs.57,81,905/- to be deposited by the petitioners. It is apparent from the record that the petitioners have valued the Test Case at Rs.1,40,00,000/- and, accordingly, filed a set of challan tendering Rs.10,47,600/-. Thereafter the learned District Judge, Khurda at Bhubaneswar called for a report from the Collector on 14.10.2015 and on 20.5.2016 the learned District Judge had recorded in his order that the valuation report has not yet received from the Collector, Khurda. Hence he called for the bench mark valuation report from the concerned DSR. On 2.7.2016 the Office of the District Judge received letter No.847 dated 27.6.2016 along with th present Bench Mark Valuation report with respect to Mouza Ramachandrapur,

Uparabasta and Badanuagaon from the office of the Sub-Registrar, Jatani. On 2.9.2016, the learned District Judge recorded that the duty money has been assessed for Rs.57,81,905/-. Thereafter adjourned the case to 23.9.2016 for hearing regarding payment of duty money. Learned District Judge, Khurda at Bhubaneswar has committed two errors. First error is that he called for a report from the DSR and curiously enough the Sub-Registrar, Jatani has submitted a report to the learned District Judge, Khurda. Second error is that by observing the duty money assessed for Rs.57,81,905/- and posted the case for hearing regarding payment of duty money.

3. Mr. Patnaik, learned counsel appearing for the petitioners, drawing attention of the Court to Section 19-H of the Court Fees Act, 1870 (hereinafter referred to as the "Act" for brevity) submits that where an application for probate or letters of administration is made to any Court other than a High Court, the Court shall cause notice of the application to be given to the Collector and it is the Collector, who has jurisdiction to report regarding the valuation of the property. However, the same has not been done. It is appropriate to quote Section 19-H of the Act:-

> "19-H-where an application for probate or letters of administration is made to any Court other than a High Court, the Court shall cause notice of the application to be given to the Collector and it is the Collector."

4. It is seen from sub-Section (3) of Section 19-H of the Act that the Collector shall give report regarding the valuation of the suit property in a Test Case and when there is any dispute regarding the same the Collector has the jurisdiction to hear that matter by issuing notice to the petitioner and if the Collector does not agree with the valuation made by the petitioner, he may take evidence, inquire into the matter and may require the petitioner to amend the valuation. Sub-section (4) of Section 19-H of the Act further provides that if the petitioner does not amend the valuation to the satisfaction of the Collector, the Collector may move the Court before which the application for probate or letters of administration was made, to hold an inquiry into the true value of the property, provided that no such motion shall be made after the expiration of six months from the date of exhibition. It is apparent from the record that the learned District Judge has adopted an erroneous approach in fixing the valuation of the Test Case. Hence, this Court has no hesitation in quashing the orders dated 20.5.2016 and 02.9.2016 passed by the learned District Judge, Khurda at Bhubaneswar. Learned District shall do well to call for a report from the Collector and follow the law prescribed under Section 19-H of the Act and fix the valuation.

5. With such observation, the writ petition is disposed of.

6. A free copy of this order be given to the learned Addl. Government Advocate for compliance.

Writ petition disposed of.

2017 (II) ILR - CUT-835

S.K.MISHRA, J. & DR. D.P.CHOUDHURY, J.

JCRLA NO. 133 OF 2005

PRAVAKAR BHOI @ MILLAN ……...Appellant

.Vrs.

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 – Ss. 302, 304

Murder – Intention of the accused – Had there been no intention of the accused to cause death, there could have been a single blow but not double blows by Katari causing absolute dislocation of artery, vain and other interior organs of the neck – Moreover, when the deceased was unarmed and tried to pacify the quarrel, it can not be said that out of tussle between the accused and the deceased, the assault was made by the accused on a fit of anger due to sudden provocation – Submission of the learned counsel for the appellant that the offence would at best come U/s. 304 IPC, instead of section 302 IPC is untenable – Held, the impugned judgement of conviction and sentence is confirmed. (Paras 31, 32, 33)

Case Laws Referred to :-

1. AIR 1999 SC 2416 : Mohammad Zahid Vs. State of Tamilnadu.
2. AIR 1998 SC 2896 : (Rajendra Kumar vs. State of Uttar Pradesh)
3. AIR 1973 SC 944 : Jose vs. The State of Kerala.
4. AIR 2011 SC 3380 : State of Rajasthan Vs. Arjun Singh & Ors.
5. AIR 2008 SC 1198 : Vijay Shankar Shinde & Ors. V. State of Maharashtra.
6. AIR 2009 SC 2263 : Joginder Singh V. State of Punjab.
7. AIR 1957 SC 199 : Mangal Singh and Ors. Vs. State of Madhya Bharat.
8. AIR 2008 SC 175 : Bhagga & Ors. v. State of Madhya Pradesh.
9. (2010) 45 OCR (SC) 195: Sharad V. State of Maharashtra.
10. (2010) 45 OCR 316 : Dharamu Sahu V. State of Orissa.
11. (2010) 45 OCR 320 : State of Orissa V. Tatana@ Om Tatsat Acharya
12. 2010 (Supp.II) OLR 206: Sukura Hantal Vs. State of Orissa

For Appellant : Smt. Diptimayee Dhal
For Respondent : Mr. S.B.Mohanty, Addl. Standing Counsel

Date of Judgment : 08.05.2017

JUDGMENT

DR. D.P. CHOUDHURY, J.

The captive appeal is assailed against the judgment of conviction and sentence dated 27.06.2005 passed by the learned Addl. Sessions Judge, Angul under which the appellant has been sentenced to undergo R.I. for life.

FACTS :

2. The factual matrix leading to the case of the prosecution is that one Jasoda is the sister of Pandab Nahak and deceased Panchu Nahak. Jasoda has married the accused Pravakar Bhoi @ Millan. It is alleged, inter alia, that after the marriage the accused used to pick up quarrel with his wife Jasoda and assault her. On 06.03.2003 while accused was quarrelling with his wife Jasoda, deceased Panchu Nahak intervened and asked the accused not to assault her. Then the accused being enraged assaulted on the neck of deceased by means of a Katari causing bleeding injuries to the deceased and finally he succumbed to the injuries. The informant, who is the brother of the deceased, submitted written F.I.R. before the Police. After registering the case Police took up investigation. After due investigation charge sheet was submitted against the appellant-accused.

3. The plea of the appellant-convict as appearing from the cross-examination made to the P.Ws. and the statement recorded under section 313 Cr. P.C. that he is innocent and while the deceased tried to assault the convict by Katari, same hit the deceased on his neck causing death.

4. Learned Sessions Judge after examining 12 witnesses on behalf of the prosecution and verifying different documents adduced by the prosecution came to a conclusion that it is appellant-convict who is perpetuated of the crime and as such convicted him under section 302 of IPC. Consequently, he sentenced the convict thereunder by awarding the sentence of life imprisonment.

SUBMISSIONS

5. Learned counsel for the appellant submitted that the judgment passed by the learned trial Court is perverse, illegal and against the weight on evidence. Learned trial Court has erred in law by taking into consideration the evidence of witnesses who are related to the deceased. Even if the learned trial Court had relied upon their evidence but their evidence are not to be considered because of the presence of discrepancies in their evidence. He further submitted that weapon of offence recovered has been wrongly observed to have been used for the commission of offence. The report of the chemical examiner cannot be said to be on full proof to prove the

circumstantial evidence against the convict. Learned trial Court has failed to appreciate the injury on the person of the accused which goes unexplained by the prosecution. On the other hand, the injury on the person of the convict amply proves that he was being assaulted by the deceased and his group members and falsely the case has been filed against him.

6. It is submitted by the learned counsel for the appellant that the motive has not been proved by the prosecution but learned trial Court has failed to appreciate such point of law before finding the appellant guilty. No independent witness has been examined in this case for which the learned trial Court ought to have disbelieved the case of the prosecution. On the whole, it is submitted by the learned counsel for the appellant that the judgment and order passed by the learned trial Court being wrong, illegal and non-application of judicial mind, same should be set aside and convict should be acquitted.

7. Learned Addl. Standing Counsel for the State submitted that there are direct evidence and circumstantial evidence amply proved the case of prosecution. It is submitted by learned counsel for the State that P.Ws.2 and 3 being relatives have adduced the unequivocal evidence to prove the occurrence and guilt of the accused. Although they are relatives but it was well settled in law that evidence of relatives cannot be discarded merely because they are relatives whereas their evidence requires close scrutiny by the learned trial Court. Similarly, there is enough evidence of inquest and medical evidence to show that the death of the deceased was homicidal having sustained multiple injuries on his person. Besides, the seizure of the blood-stained weapon of offence and blood-stained cloth from the spot purportedly corroborate the case of the prosecution. On the whole, learned Addl. Standing Counsel for the State absolutely supports the impugned judgment and order passed by the learned trial Court.

8. POINT FOR DETERMINATION

(i) As to whether the appellant-convict committed murder of the deceased Panchu Nahak by intentionally causing his death?

DISCUSSIONS :

9. It is revealed from the evidence of P.W.3 that in his presence inquest over the dead body of Panchu Nahak (deceased) was held vide Ext.3. Similarly evidence of P.W.7 shows that the Police has made inquest over the dead body of the deceased and put his signature thereon vide Ext.3/2. Ext.3

shows that deceased has got bleeding injury on his neck and P.Ws.4 and 7 are found to be witnesses to the inquest report.

10. P.W.11, who is the doctor has revealed that on Police requisition on 7.3.2003, he conducted post mortem examination over the dead body of the deceased and his observations are as follows:-

"i) Rigor mortis present on upper and lower limbs, mouth was semi opened, eyes were semi closed.

ii) One sharp cutting injury on the left side of the neck of size 4"*3"*2" at the level of thyroid cartilage left side common carotid atery turned into 2 pieces and left internal jugular vein turned into two pieces, left platysma and left steroo cleidomastoid and left sterno-hyoid muscle cut into two pieces.

iii) Both chambers of the heart were empty.

Cause of death- Death was due to syncope due to bleeding due to injury to major vessels to neck. Time since death-within 24 hours to 48 hours from the date and time of conducting post mortem examination."

He proved the post mortem report vide Ext.10. In cross-examination, it is only revealed that the injury mentioned in the post mortem report may be caused by one blow or more than one blow by Katari. So, in the cross-examination there is no any material brought out to shake the testimony of the doctor. On the other hand, the post-mortem report vide Ext.10 also supports the evidence of P.W.11 as nature of injury and cause of death. There is nothing found any inconsistency or any discrepancy to the evidence of P.W.11 and the post mortem report.

11. It is reported in **Mohammad Zahid Vs. State of Tamilnadu;** AIR 1999 SC 2416, at para-24 where Their Lordships have observed in following manner:-

> "24. We are aware of the fact that sufficient weightage should be given to the evidence of the doctor who has conducted the post mortem, as compared to the statements found in the text books, but giving weightage does not ipso facto mean that each and every statement made by a medical witness should be accepted on its face value even when it is self-contradictory……."

With due respect to such decision, it is made clear that there is no contradiction between t he statement of P.W.11, the doctor and his report.

Moreover, the nature of injury on the body of the deceased amply finds support from the evidence of P.W.11. It is, therefore, conclusively proved that the death of the deceased was homicidal and it was caused by sharp cutting weapon as available from the evidence of P.W.11 read with post mortem report.

12. In the Text Book of ***Woodroffe and Amir Ali's Law of Evidence*****,** 17th Edition, Vol.I, page-375, it is stated thus:-

> "The English Rule of Common Law *Unus Nullus* that one is equal to none governed strictly at one time the effect of evidence. Testimony usually was counted not weighed, one oath in any case being insufficient. In Anglo-Saxon and Norman times, proof was according to the importance of the case made six-handed, twelve-handed etc., and he who had the greater number of witnesses prevailed. This rule came to be greatly relaxed, and in England now the general rule is the same as enacted in section 134 of the Indian Evidence Act."

Thus, under Section 134 of Evidence Act no particular number of witnesses shall in any case be required for prove of any fact. So, evidence of single witness can be relied on to prove the fact if it is unimpeachable.

13. It is also reported in AIR 1998 SC 2896 (**Rajendra Kumar vs. State of Uttar Pradesh**) at para-7, where Their Lordships have observed as follows:-

> "….When the evidence on record is sufficient to prove beyond doubt the case of the prosecution, the failure to examine another person does not affect the credibility of the prosecution. "

14. It is also reported in **Jose vs. The State of Kerala**;AIR 1973 SC 944 at para-5, where Their Lordships have observed as follows:-

> "……. According to the learned Counsel it is not safe to base a conviction for murder on the testimony of a single witness. We are not inclined to accept this contention of Mr. Ramachandran. There is no impediment in law in a conviction being based upon the testimony of a single witness provided the Courts come to the conclusion that his evidence is honest and trustworthy……."

With due respect to above decision we observe that it is the quality not quantity of evidence which matters. We hasten to observe that if the

prosecution evidence on record is creditworthy and sufficient, the question of extending benefit to the said accused is non-est.

15. Keeping in mind of the principles of law as delineated above let the evidence on record be re-appreciated and find out whether the appreciation of evidence by learned trial Court is correct and legal. It is the duty of the First Appellate Court to evaluate the evidence of witnesses and to observe whether trial Court has appreciated material on record with proper perspective to concur his/her finding.

16. From the evidence of P.W. 2, who is the brother of the deceased, reveals that the accused was a labourer and used to cutting date Palm trees. On the date of occurrence while accused assaulted his sister Jasoda, they intervened. Accused then went away to his house and brought out Katari and cut date Palm tree standing near their house. Then accused abused his wife Jasoda in obscene language and when deceased asked accused to keep away the Katari, accused dealt blows by such Katari to the neck of the deceased causing bleeding injury. Thus, the deceased died due to profuse bleeding from his neck. It is stated that the F.I.R. was lodged having been scribed by one Narahari under the instruction of P.W.2. Since, he has put his L.T.I. he did not prove the document. It is for the public prosecutor who is duty bound to prove the F.I.R. through the informant P.W.2. However P.W.4 admitted to have scribed the F.I.R. as per instruction of P.W.2 & proved the F.I.R. vide Ext.2. He has been cross-examined at length. In para-7 of the cross-examination he narrated that after the accused inflicted Katari blow on the neck of the deceased, he requested the accused to take steps to save the life of Panchu (deceased). The plea of defence was suggested to P.W.2 to which denied about the assault to deceased by Katari. Reiterating his evidence he stated that the accused inflicted two Katari blows on the neck of deceased holding the Katori on his right hand. Thus, the statement of P.W.2 after being scrutinized is found to be credible and above the approach to be relied upon solely. So, it appears from the evidence of P.W.2 that he has seen the accused bringing Katari from his house and assaulted the deceased on his neck causing death in spite of their protest.

17. Similarly, P.W.3 is the brother of the deceased. It is revealed from his examination-in-chief that the accused was quarrelling with his wife Jasoda and brought Jasoda to the house of P.W.3. When deceased requested accused to take food, the accused inflicted blows on the neck of deceased by Katari causing bleeding injures on his person, then accused went away. There is

cryptic cross-examination to these two witnesses. Only during cross-examination P.W. 3 could not say when the quarrel took place between the accused and his wife. On the other hand, the evidence of P.W.3 could not be well shaken by the defence.

18. On the other hand, the evidence of P.Ws. 2 and 3 have adduced consistently that after quarrel between accused and his wife Jasoda, the accused inflicted Katari blow to the deceased causing injures on his person. It is true that P.Ws. 2 and 3 are related to deceased.

19. P.W.5 who is also brother of deceased revealed that he had intervened to settle the matter between the accused and his wife, but accused went to his house to bring Katari and finally inflicted two blows on the neck of deceased for which the deceased died. In para-4 of the cross-examination it is stated that he has not seen Panchu dragging the hands of the accused, but Panchu and accused were going closely. The accused was behind Panchu at the relevant time. It is also revealed at Para-4 of the cross-examination that he has seen accused Pravakar was armed with Katari on the right hand. There is no any fruitful cross-examination to the witness. Nothing has been brought in the cross-examination to array him as partisan or interested witness. Thus, he also admittedly supports the case of the prosecution to lend the corroboration to the evidence of P.Ws.2 and 3.

20. The Hon'ble Apex Court in the case of **State of Rajasthan Vs. Arjun Singh & Ors ;** AIR 2011 SC 3380 at para-14 where Their Lordships have observed as follows:-

> "…….This Court, in a series of decisions, has held that the testimony of such eye-witnesses should not be rejected merely because witnesses are related to the deceased. This Court has held that their testimonies have to be carefully analysed because of their relationship and if the same are cogent and if there is no discrepancy, the same are acceptable vide **Abdul Rashid Abdul Rahiman Patel & Ors.vs. State of Maharashtra** (2007) 9 SCC 1……."

21. It is reported in **Vijay Shankar Shinde & Ors. V. State of Maharashtra;** AIR 2008 SC 1198 at para-9 where Their Lordships observed in the following manner:-

> "…….As a matter of fact, the evidence of injured person who is examined as a witness lends more credence, because normally he

would not falsely implicate a person thereby protecting the actual assailant."

22. It is reported in **Joginder Singh V. State of Punjab;** AIR 2009 SC 2263 where Their Lordships observed at para-9:-

"We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased, we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in _'Rameshwar v. State of Rajasthan'(AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

23. It is also reported in **Mangal Singh and Ors. Vs. State of Madhya Bharat**; AIR 1957 SC 199 where Their Lordships observed at para-7:-

"It was suggested that when the two eye-witnesses to the occurrence were interested persons there should be corroboration of their evidence by independent witnesses. It seems to us that this is a proposition which cannot be of universal application……."

It is also reported in **Bhagga & Ors. v. State of MadhyaPradesh**;AIR 2008 SC 175 where Their Lordships observed at para-15:-

"…. As held by both the courts below, the mere fact that all the said eye-witnesses belong to one family cannot be a reason to disbelieve their evidence, since they were all on the spot or nearby the spot when the incident occurred……."

With due respect to the decisions, it is clear that relationship is not sufficient to dub a witness as interested but their evidence have to be scrutinized with caution. Keeping in mind the principles, it is found that P.Ws.2, 3 and 5 even if related to deceased have been scrutinized to the extent and found to be truthful. Since they are eye witnesses to the occurrence and their evidence are not in any way full of conjecture, it must be held that they have amply proved the occurrence of assault by accused to deceased by means of Katari, a sharp cutting weapon on the neck of the deceased.

25. Thus, after due scrutiny evidences P.Ws.2, 3 and 5 are accepted and there is consistent direct evidence to prove that the accused assaulted deceased by Katari on his neck causing brutal injury which lead to his death. Keeping in mind the principle of law as enunciated by the Hon'ble Supreme Court, their evidence after scrutiny are found to be trustworthy, cogent and above approach to prove the occurrence and overt act of accused. Thus the submission of learned counsel for the appellant that they are related and their evidence cannot be accepted is out of bound.

26. P.W.6 who is one outsider corroborating P.Ws.2, 3 and 5 stated that while he was sitting in the Varandah of deceased Panchu, the accused came with his wife to the house of Panchu assaulting his wife. When Panchu intervened, accused went to his house and brought out his Katari and Panchu requested accused to take food, but instead of taking food, accused dealt blow on left side of neck of Panchu by Katari and there is no fruitful cross-examination to the witness. Rather, it is revealed from the cross-examination of P.W.6 that Panchu intervened and during alteration between Panchu and deceased, Panchu used his right hand to drag the accused. There is no other meaningful cross-examination to the witness. Hence P.W.6 being an outsider is found to have lent support to P.Ws.2, 3 and 4 to prove the occurrence and the assault made by accused to deceased, causing death of deceased thereby.

27. It is revealed from the evidence of P.Ws.7 and 12 that the blood-stained earth, sample earth, one blood-stained Katari were seized from the spot. Similarly, P.W.12 has proved the seizure of blood-stained rope used by accused to climb the date palm tree just before the occurrence from the spot. Of course, the wearing apparel of the deceased on examination are found to have stained with human blood of group 'B' and at the same time the report of the chemical examiner vide Exts. 15 and 16 show that the seized jute rope used by accused for climbing the date palm tree has got human blood but

without grouping of latter it is not sure that such jute was stained with group 'B' human blood so as to support the case of prosecution. However, the seized jute stained with human blood lends assurance to the case of prosecution.

28. It is revealed from the evidence of P.Ws.2, 7 and 12 read with Ext.5 that the napkin (gamucha) of accused stained with blood was seized from spot, Exts.15 and 16 show that such napkin of accused has group 'B' blood-stain which is also blood group of deceased. Of course blood group of accused has not been conducted but seizure of wearing apparel of accused showing blood group 'B' amply corroborates the direct evidence to strengthen the case of prosecution. Unless there is occurrence involving accused, there could not be blood-stained jute rope or the blood-stained wearing apparel of the accused. Be that as it may, the evidence of witnesses coupled with opinion of the chemical examiner also lend corroboration to the case of prosecution to prove the occurrence and culpability of the accused.

29. The evidence of P.W.12 revealed that the weapon of offence i.e., Katari has been seized from spot vide Ext.4 and same is produced in Court vide M.O.I. P.W.12 stated that the Katari stained with blood was seized but the chemical examiner report vide Ext.16 does not show that the weapon of offence was stained with blood. Due to lapse of time of nine months between the date of occurrence and date of Serological examination, it is quite probable for chemical examiner for not finding any blood-stain on seized Katari. But the said weapon of offence was sent to P.W.11 for opinion and it has opined that one or more blow by Katari (M.O.I) will cause the injuries as found by him on the person of deceased. Thus, it can safely be concluded that the seized Katari (M.O.I.) was used by the accused to cause the death of the deceased.

30. It is submitted by learned counsel for the appellant that accused has sustained injury on his person and it has not been explained by prosecution for which he is entitled to benefit of doubt. The evidence of P.Ws.2 and 10 read with Ext.8 shows that it is superficial injury caused while he was tied by the witnesses to a date Palm tree. Such explanation has been noted in the impugned judgment. Therefore, such explanation is probable and it cannot be disastrous to the case of prosecution.

31. Learned counsel for the appellant submitted that even if the occurrence is proved but due to sudden quarrel between the parties, the assault was made by the accused to the deceased as revealed from the

statement of the witnesses, for that the appellant could be convicted under section 304 of IPC but not under section 302 of IPC. In support of her contention, she cited decision in **Sharad V. State of Maharashtra,** (2010) 45 OCR (SC) 195. In this case during quarrel the appellant assaulted the deceased causing injury on his left side chest and same is superficial in nature and having regard to the fact and circumstances of that case the appellant was convicted under section 304 part-I IPC, but not under section 302 of IPC. Similarly in the case of **Dharamu Sahu V. State of Orissa;** (2010) 45 OCR 316, where Their Lordships held that in absence of any immediate cause for accused to cause stab blow, the offence would be under section 304 part-I of IPC instead of under section 302 of IPC. Similarly, she cited the decision reported in (2010) 45 OCR 320; **State of Orissa V. Tatana@ Om Tatsat Acharya,** where Their Lordships observed that in absence of any pre-meditation to cause death or intention to inflict the particular injury, accused was guilty under section 304 part-II of IPC. Similarly, decision reported in (2010) 0 Supreme (Ori) 316**;Babula Patro V. State of Orissa** , where this Court observed that at fit of anger when accused person assaulted deceased causing injury, the offence is covered under section 300 "thirdly" of IPC and hence the appellant in that case was guilty for culpable homicide not amount to murder under section 304 Part-I of IPC. It is also reported in 2010 (Supp.II) OLR 206; **Sukura Hantal Vs. State of Orissa**, where Their Lordships observed that in such case the appellant would be guilty under section 304 Part-II of IPC but not under section 302 of IPC as occurrence took place due to sudden provocation. There are other decisions on the same proposition cited by the learned counsel for the appellant. All these decisions have got unique observation that in absence of any pre-meditation or strong preparation, the death caused by the culprit on sudden provocation cannot be said to be culpable homicide amounting to murder but same would be culpable homicide not amount to murder. Decisions have been rendered basing on the facts and circumstances of each case. In the instant case P.Ws.2, 3 and 5 being occurrence witnesses have categorically revealed that when the quarrel was going on between the accused and his wife, the deceased asked the accused not to quarrel but accused went inside the house and brought out two Kataris. It is further revealed from the evidence that the accused abused the children of deceased and brought out one Katari from his back side and assaulted with two Katari blows to the left side neck of deceased when deceased asked the accused to keep the Katari in the house and protested the quarrel of accused with his wife (sister of deceased) and abuse to deceased's children. Had the accused no intention to cause death

there could have been single blow but not double blows by Katari causing absolute dislocation of artery, vain and other interior organ of the neck as per post mortem report of the doctor. It is evidence of doctor (P.W.11) that injuries were in ordinary course of nature to cause death. When deceased was un-armed and tried to pacify the quarrel, it cannot be said that out of tussle between accused and the deceased, the assault was made on a fit of anger or on a sudden provocation by the accused.

32. So, it is not a case of pre-meditation or sudden provocation to inflict injury at the instance of accused to the deceased. On the other hand, facts and circumstances of the decisions cited by learned counsel for the appellant are different from the facts and circumstances of the present case. So, we are unable to apply the decisions to the present case. On the other hand, the submission of learned counsel for the appellant that the offence is under section 304 of IPC but instead under section 302 of IPC has been proved against accused-appellant is untenable.

CONCLUSION

33. In view of the aforesaid analysis, we are of the view that direct evidence and circumstantial evidence are proved against the appellant convict. The submission of learned counsel for the appellant appears to have no sufficient force to strengthen the plea of defence. On the other hand, the learned Addl. Standing Counsel for the State placed the above materials and strenuously urged to reject the criminal appeal. For the foregoing discussions, we find force with the submission of learned Addl. Standing Counsel for the State whereas the learned counsel for the appellant convict could not convince to discard the case of prosecution. However, we place our appreciation on record about endeavour made by learned Amicus Curiae for defending appellant. We, therefore, of the view that there is nothing to interfere with the finding of the learned trial Court. We, hereby, agree with the finding of the learned trial Court and confirm the conviction and sentence passed by learned trial Court. Accordingly, the Jail Criminal Appeal being devoid of merit stands dismissed.

Appeal dismissed.

2017 (II) ILR - CUT- 847

DR. A.K. RATH, J.

C.M.P. NO. 487 OF 2016

BIJAYALAXMI PATTANAIK ……..Petitioner

.Vrs.

BISHNUPRIYA PATTNAIK & ORS. ……..Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-22, R-4

Death of defendant No. 1 during the pendency of the suit – Defendant Nos. 2, 3 and 5 being the children of defendant No. 1, though set exparte in the suit, made application for substitution – Application allowed – Order challenged – Held, learned trial court rightly allowed the application for substitution – However, defendant Nos. 2, 3 and 5 are entitled to claim reliefs only on the basis of original claim made by the defendant No. 1. (Para 8)

Case Law Referred to :-

1. AIR 2015 Orissa 43 : Piyush Hasmukhlal Desai -V- International Society for Krishna Counsciousness (ISKON)
2. AIR 1922 Madras 49 : Inaganti Venkatarama Row -V- U.R.R.D.K. Venkatalingama
3. (1896) ILR 19 Madr 345 : Subbaraya Mudali v. Manicka Mudaliar,
4. (1894) ILR 22 Cal 92 : Sham Chandgiri v. Bhayaran Panday
5. ILR 36 Cal. 799 : Sarat Chandra Banerjee v. Nani Mohan Banerjee
6. AIR 1981 Orissa 63 : Radhakrishna Padhi v. Bhajakrishna Panda & Ors.

For Petitioner : Mr. Bibekananda Bhuyan

For Opp. Parties : Mr. Ramakanta Mohanty, Sr. Adv.
Ms. Sumitra Mohanty

Date of hearing : 28.06.2017
Date of judgment: 10.07.2017

JUDGMENT

DR. A.K.RATH, J

By this application under Article 227 of the Constitution of India, challenge is made to the order dated 10.2.2016 passed by the learned 2nd Addl. Civil Judge (Senior Division), Cuttack in T.S. No.26 of 2000 whereby and whereunder learned trial court granted leave to substitute defendants 2,3,5 and 6 as against deceased defendant no.1.

2. Petitioner as plaintiff instituted T.S. No.26 of 2000 in the court of the learned 2nd Addl. Civil Judge (Senior Division), Cuttack for declaration of right, title and interest and permanent injunction impleading her mother and opposite parties 1 to 6 as defendants. Her mother was defendant no.1. Defendant no.1 filed the written statement-cum-counter claim for eviction. Defendants 2 to 6 were set ex parte. During pendency of the suit, defendant no.1 died leaving behind her two sons i.e. defendant nos.2 and 3, daughters-defendant no.5, plaintiff and two other daughters, who were not parties to the suit. Be it noted that defendant no.4 son of defendant no.1 died. The plaintiff filed an application to substitute two daughters of defendant no.1 as defendant no.1(a) and 1(b). The same was allowed. While the matter stood thus, defendants 2,3 and 5 filed an application purported to be under Order 22 Rule 1 CPC for substitution and to prosecute the lis. The plaintiff filed an objection. Learned trial court came to hold that legal representative including the person who are not the legal heir, but represent the estate of the deceased. The legal representative is to continue litigation as the cause of action sued upon and cannot set up a new or individual right. Held so, it allowed the application.

3. Heard Mr. Bibekananda Bhuyan, learned counsel for the petitioner and Mr. Ramakanta Mohanty, learned Senior Advocate along with Ms. Sumitra Mohanty, learned counsel for the opposite parties.

4. Mr. Bhuyan, learned counsel for the petitioner, submitted that defendant no.1 is the mother of the plaintiff and other defendants. She filed a written statement-cum-counter claim. She died during pendency of the suit. Thereafter, an application was filed by the plaintiff to substitute two daughters, who were not parties to the suit. The same was allowed. The other defendants were set ex parte. They cannot continue the litigation in view of the fact that they were set ex parte. He relied on the decision of Piyush Hasmukhlal Desai v. International Society for Krishna Consciousness (ISKCON), AIR 2015 Orissa 43.

5. Per contra, Mr. Mohanty, learned Senior Advocate for the opposite parties, submitted that defendant no.1 died leaving behind defendants 3 to 6, plaintiff as well as two daughters. The application for substitution filed for substitution of two daughters has been allowed. Since other defendants are already on record, they can continue the litigation. He further submitted that though defendant no.1 died, but her right to sue survives.

6. In Piyush Hasmukhlal Desai (supra), this Court held that the words "right to sue" occurring in Order 22 CPC mean the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death. The decision is distinguishable on facts.

7. In Inaganti Venkatarama Row v. U.R.R.D.K. Venkatalingama, AIR 1922 Madras 49 during pendency of the suit, the plaintiff having died his legal representative was brought on record. Thereafter, he filed an application to amend the plaint asserting of a title by the legal representative hostile to the person whom he purports to represent. Taking a cue from the decisions in the case of Subbaraya Mudali v. Manicka Mudaliar (1896) ILR 19 Madr 345, Sham Chandgiri v. Bhayaran Panday (1894) ILR 22 Cal 92 and Sarat Chandra Banerjee v. Nani Mohan Banerjee ILR 36 Cal. 799, the Madras High Court held that in cases where there is a conflict of interests between the deceased plaintiff and his legal representative and where the latter claims that he is not bound by the transactions of the deceased plaintiff, the proper course is for the legal representative to file a separate suit to enforce his rights, and that it is not open to the legal representative in his capacity, as such, to repudiate the transactions, which have been admitted by the deceased to be valid and on the footing of the validity of which the deceased claimed certain reliefs in the plaint. Order XXII R.3 CPC enacts that where the right to sue survives the Court shall, on the application made in that behalf, cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. So that it is clear from the above rule that all that the legal representative can do is to take up the suit at the stage at which it was left by the deceased plaintiff and to continue the proceedings as legal representative. It is not open to him to assert any individual and hostile rights, which he may have against the deceased plaintiff and those claiming through or under him and to seek to enforce those individual and paramount rights under the guise of an application to amend the plaint.

8. In Radhakrishna Padhi v. Bhajakrishna Panda and others, AIR 1981 Orissa 63, this Court held that where during pendency of the suit the plaintiff dies and his legal heirs are substituted, the legal representatives are entitled to continue the suit on the basis of the claim laid by the original plaintiff. They are not entitled to plead to the contrary and obtain reliefs which the plaintiff himself was not entitled to, i.e., the substituted legal representatives are not entitled to claim independent title of their contrary to what had been claimed in the suit.

9. The order passed by the learned trial court cannot be said to be perfunctory or flawed warranting interference of this Court under Article 227 of the Constitution. The petition is dismissed. No costs.

Petition dismissed.

2017 (II) ILR - CUT- 850

DR. A.K. RATH, J.

C.M.P. NO. 590 OF 2014

HALU @ HALURI JENA .....Petitioner

.Vrs.

MANMOHAN DAS & ANR. .....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-26, R-10

Report of Commissioner – Commissioner has not measured the land from fixed point but from an imaginary point – Objection filed – Trial court accepted the report – Hence this petition – Fixed points in survey operations are paramount fixtures and if the fixed points were not available near the disputed plot, the commissioner has to find out other permanent structures such as temples, old trees or the like near about the plot and take the measurement and if that was not possible, then to carry out the measurement commencing it from the fixed point available and reach the disputed plot – Besides, if fixed point is available but the line is not visible from such point to the disputed plot, the survey should not have been made by chain method but should have been made by other method of survey suitable for the purpose – However, in no circumstances, the commissioner should have set up imaginary points with reference to the map by which process there can not be any guarantee of accuracy of the measurement – Held, the impugned order is quashed and the learned trial court shall appoint a fresh commissioner for measurement of the disputed land.

(Paras 6,7)

Case Law Referred to :-

1. AIR 1990 Orissa 32 : Badan Prasad Jaswal -V- Bira Khamari & Anr.

For Petitioner : Mr. H.N. Mohapatra
For Opp. Parties : Mr. T.K. Mishra

Date of hearing :19.07.2017
Date of judgment:19.07.2017

JUDGMENT

DR. A.K.RATH, J

By this application under Article 227 of the Constitution, challenge is made to the order dated 19.3.2014 passed by the learned Civil Judge (Junior Division), Khurda in C.S. No.52 of 2006 whereby and whereunder learned trial court accepted the report of the survey knowing commissioner.

2. Opposite party no.1 as plaintiff instituted the suit for declaration of right, title and interest as well as mandatory injunction impleading the petitioner and opposite party no.2 as defendants. The defendants filed a written statement denying the assertions made in the plaint. While the matter stood thus, the plaintiff filed an application under Order 26 Rule 9 CPC for deputation of a survey knowing commissioner to ascertain as to whether the suit land is a part and parcel of the plaintiff's homestead suit plot no.1378 or defendants' homestead plot no.1379. Learned trial court allowed the same and deputed a survey knowing commissioner. The commissioner submitted the report along with field book and map. The defendants filed an objection contending, inter alia, that the commissioner has not measured the land from fixed point. He had taken an imaginary fixed point and measured the land. Learned trial court overruled the objection filed by the defendants and accepted the report.

3. Heard Mr. Mohapatra, learned counsel for the petitioner and Mr. Mishra, learned counsel for the opposite party no.1.

4. Mr. Mohapatra, learned counsel for the petitioner, submits that the commissioner has not measured the land from fixed point. He has taken an imaginary fixed point and measured the land. In view of the same, learned trial court is not justified in accepting the report of the commissioner.

5. Per contra, Mr. Mishra, learned counsel for the opposite party no.1, submits that both the parties have agreed that the land should be measured from the imaginary point. Thus no fault can be found from the report of the commissioner.

6. In Badan Prasad Jaswal v. Bira Khamari and another, AIR 1990 Orissa 32, the report of the civil court commissioner having been accepted, the petitioner approached this Court. A contention was raised that since the

very report of the commissioner shows that he has not taken the measurement from any fixed point and taken such measurements from two imaginary points set up by him, the report should have been held to be not of any worth and should have been discarded. The report revealed that it had no fixed point near the tri-junction of plots though not far away from the disputed plot, yet since the line was not properly visible from it, it was not possible to carry out the measurement with reference to such fixed point. He set up two Mustakil Chandra as 'ka' and 'kha' near the disputed plots with the help of the map and established such points in 'Khaka'. The measurement was carried out with reference to such fixed points set up by the commissioner. This Court held that the procedure adopted by the commissioner was extraordinary, since fixed points in survey operations are paramount fixtures and if the fixed points were not available near about the disputed plot, the commissioner was to find out other permanent structures such as the temples, old trees or the like near about the plot and take the measurement and if that was not possible, then to carry out the measurement commencing it from the fixed point available and reach the disputed plot. Besides, if the fixed point was available but the line was not visible from such point to the disputed plot, the survey should not have been made by chain method but should have been made by other method of survey suitable for the purpose. In no circumstances, the commissioner should have set up imaginary points with reference to the map by which process there cannot be any guarantee of the accuracy of the measurement.

7. In the wake of the aforesaid, the order dated 19.3.2014 passed by the learned Civil Judge (Junior Division), Khurda in C.S. No.52 of 2006 is quashed. Learned trial court shall appoint a fresh commissioner for measurement of the disputed land. The petition is allowed.

Petition allowed.

2017 (II) ILR - CUT- 853

DR. A.K. RATH, J.

S.A. NO. 338 OF 1999

PRASANTA KUMAR MISHRA …….Appellant

.Vrs.

SMT. SURYAMANI MISHRA …….Respondent

HINDU MARRIAGE ACT, 1955 – S.13(1)(ia)

Divorce – Cruelty – Respondent-wife confessed to have conceived through other before marriage – She insisted the appellant-husband for staying separate from her parents-in-law five months after marriage and when he refused she threatened to commit suicide – It is highly undesirable on the part of the husband to live in peace with the company of an insensible wife – Nothing more is required to prove mental cruelty – The learned trial court ignored such material evidence on record and dismissed the suit for divorce – Learned lower appellate court is also not justified in mechanically accepting the findings of the trail court without making any effort to re-appreciate the evidence adduced by the parties – Held, judgments and decrees of the learned courts below are set aside and the plaintiff's suit for dissolution of marriage is decreed. (Paras 15,17)

Case Laws Referred to :-

1. AIR 2002 SC 2582 : V. Bhagat vs. Mrs. D. Bhagat, AIR 1994 SC 710, Praveen Mehta vs. Inderjit Mehta.
2. (2004) 4 SCC 511 : Samar Ghosh vs. Jaya Ghosh.
3. (2011) 12 SCC 1 : Pankaj Mahajan vs. Dimple @ Kajal.

For Appellant : Mr. Gautam Mukherji
For Respondent : Ms. D.K.Mohapatra

Date of Hearing : 28.07.2017
Date of Judgment: 11.08.2017

JUDGMENT

DR. A.K. RATH, J.

Plaintiff is the appellant against confirming judgment in a suit for dissolution of marriage.

2. The case of the plaintiff is that both the parties are Hindus. The marriage between the plaintiff and respondent was solemnized in accordance with the Hindu Rites and Customs on 10.2.1991. After marriage, the

respondent came to her matrimonial house. On 17.10.1991, she gave birth to a male child. Five months after marriage, the respondent picked up quarrel with the plaintiff and insisted to leave her matrimonial house. She threatened to commit suicide in the event the plaintiff will not leave the quarter where his father resides. Her behaviour towards the father of the plaintiff was indecent. On 28.2.1992, the respondent and her father abused the plaintiff. The respondent disclosed that she had been conceived before marriage. Thereafter she went to her father's house. The conduct of the respondent inflicted unbearable mental pain. The plaintiff lost his mental balance and as a result of which he met with an accident. On 17.3.1992, the respondent came to her matrimonial house. She showed indecent behaviour. Due to negligence of the respondent, the child fell down and became unconscious. She again picked up quarrel with the plaintiff and threatened to commit suicide. She left to her father's quarter. Thereafter her father came to the house of the plaintiff, picked up quarrel, assaulted the plaintiff and inflicted injury on his mother. The plaintiff lodged an F.I.R. in the Police Station. The respondent and her father lodged F.I.R. against the plaintiff alleging demand of dowry. While the matter stood thus, on 27.4.1992, the respondent deserted the plaintiff without any reasonable cause and deprived the plaintiff from the conjugal relationship. All the persuasions made by the plaintiff ended in a fiasco. It was further pleaded that the respondent instituted a case under Sec.125 Cr.P.C. against the petitioner in the court of the learned S.D.J.M., Talcher. According to the plaintiff, the respondent persistently and repeatedly threatened him with cruelty, which caused reasonable apprehension in the mind of the plaintiff that will be harmful and injurious for him. The reprehensible conduct of the respondent towards plaintiff was grave and weighty which constitute mental cruelty. With this factual scenario, the plaintiff instituted the suit seeking the releifs mentioned supra.

3. Pursuant to issuance of summons, the respondent entered appearance and filed written statement denying the allegations made in the plaint. The specific case of the respondent is that the plaintiff had made frivolous allegations besmirching her character. The plaintiff demanded dowry and tortured her. He assaulted the respondent on several occasions and drove her out from her matrimonial house. She was willing to join with the plaintiff. Their marriage had not been broken down without any rhyme and reason.

4. Stemming on the pleadings of the parties, learned trial court struck seven issues. Both parties led evidence, oral and documentary, to prove their respective cases. On an anatomy pleadings and evidence on record, learned

trial court came to hold that respondent had not made any attempt to commit suicide. The marriage between the plaintiff and respondent was solemnized on 10.2.1991. Thus it was not improbable to deliver a baby child within the aforesaid time span. No independent witness was examined to prove the allegation that the respondent had uttered harsh words to the plaintiff. The plaintiff had not made any sincere attempt to bring back the respondent. The plaintiff had failed to establish his plea of cruelty and as such he is not entitled to a decree of divorce. Held so, it dismissed the suit. The unsuccessful plaintiff challenged the judgment and decree of the learned trial court before the learned Additional District Judge, Angul in T.A. No.4 of 1997/27 of 1998, which was eventually dismissed.

5. The second appeal was admitted on 17.2.2000 on the following substantial questions of law enumerated in paragraph nos.13(a), (b), (c), (d), (f) and (k) of the appeal memo. The same are quoted hereunder.

> "13(a) Whether the lower appellate court has committed an illegality by not scanning and scrutinizing the evidence on record ? Whether the lower appellate court was justified in arbitrarily accepting the findings of facts, rendered by the trial court, without assigning any reason, and by so doing has failed to discharge his obligation as a final court of fact?
>
> (b) Whether the trial court is justified in ignoring vital pieces of material evidence on record and whether the lower appellate court is justified in accepting the findings of the trial court without making any effort to re-appreciate the evidence adduced by the parties ?
>
> (c) Whether the respondent's plea to reside separately with her husband discarding her parents-in-law amounts to cruelty ?
>
> (d) Whether the attempt of the respondent to commit suicide amounts to cruelty ?
>
> (f) Whether the respondent's admission that she had conceived the child prior to her marriage to the appellant amounts to mental cruelty ?
>
> (k) Whether the lower appellate court has committed an illegality by not taking into consideration the appellant's application U/o 41, Rule 27 C.P.C. at the time of final disposal of the appeal ?"

6. Heard Mr. Gautam Mukherji, learned counsel for the appellant and Mr. D.K. Mohapatra, learned counsel for the respondent.

7. Mr. Mukherji, learned counsel for the appellant submitted that the marriage between the appellant-plaintiff and respondent was solemnized on 10.2.1991. She delivered a child on 17.10.1991. She disclosed that she conceived before marriage. In her cross-examination, the respondent had also admitted the said fact. He further submitted that the respondent had given repeated threats to commit suicide. The behaviour of the respondent was unruly. She left the matrimonial house on March, 1992 and lived separately. The aforesaid act constituted mental cruelty. To buttress his submission, he relied on the decision of the apex Court in the cases of *V. Bhagat vs. Mrs. D. Bhagat,* AIR 1994 SC 710, *Praveen Mehta vs. Inderjit Mehta,* AIR 2002 SC 2582, *Samar Ghosh vs. Jaya Ghosh,* (2004) 4 SCC 511, *Pankaj Mahajan vs. Dimple @ Kajal,* (2011) 12 SCC 1.

8. Per contra, Mr. Mohapatra, learned counsel for the respondent submitted that the plaintiff had made scandalous remarks besmirching the character of the respondent. The allegations made in the plaint are vague and without any basis. There is no foundational fact with regard to attempt to commit suicide. There was hot exchange of words between the couple during quarrel. It is not unusual on the part of the couple to exchange hot words during quarrel. The same cannot constitute metal cruelty. The respondent is still ready and willing to join companion to the plaintiff. Both the courts on a threadbare analysis of the evidence on record dismissed the suit. There was no perversity or illegality in the findings of the court below.

9. Cruelty simpliciter is a ground for divorce under Sec.13 of the Hindu Marriage Act (Act 25 of 1955). Section 13 provides, so far it is material:

> "13.Divorce.-(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—
>
> (i) xxx xxx xxx
>
> (i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or
>
> xxx xxx xxx"

10. In *Shobha Rani vs. Madhukar Reddi,* AIR 1988 SC 121, the apex Court held thus:

"4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, (1966) 2 All ER 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to

the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."

11. In *V. Bhagat* (supra), the apex Court held thus:

"17. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

12. The apex Court enumerated instances of human behaviour which may be relevant in dealing with the cases of mental cruelty in *Samar Ghosh* (supra). The instances are only illustrative and not exhaustive. The apex Court held thus:

"101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

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(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

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(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

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13. In *Pankaj Mahajan* (supra), the apex Court held that giving repeated threats to commit suicide amounts to cruelty.

14. In *Praveen Mehta* (supra), the apex Court held thus:

"21. Cruelty for the purpose of Section 13(1)(ia) is to be taken as a behavior by one spouse towards the other which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty the mental cruelty is difficult to establish by direct

> evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

15. On a cursory perusal of the plaint, it is evident that the plaintiff pleaded that the respondent had threatened to commit suicide and the respondent had disclosed that she had conceived before marriage. The plaintiff in his evidence had stated that five months after, the respondent insisted him for staying separate. When he refused, she threatened to commit suicide. She had even attempt to commit suicide. In cross-examination, the respondent admitted that there was a quarrel between her and her husband. On 28.02.1992, she disclosed that she was conceived through other. What more is required to prove the mental cruelty ? The plaintiff will suffer the ignominy throughout his life. He cannot live in peace. It is highly undesirable on the part of the husband to live with the company of an insensible wife. There is a sanskrit sloka; "Aja yuddha, rishi shradha, prabhate meghadambaru, dampatya kalahesachiba bahwadambare laghu kriya" (fight of goats, shhradha of rishis, quarrel between spouses and morning clouds start with a bang but end with a whimper). But then the quarrel between the spouses reached to the extent of attempting to commit suicide by wife. Confession of the respondent before the plaintiff that she had conceived before marriage and repeated threats to commit suicide constitute mental cruelty. Both the courts did not delve into the same in its proper perspective. The findings of the courts below are perverse.

16. The next question crops up as to the amount the respondent is entitled to towards permanent alimony. In course of hearing, an affidavit has been filed by the appellant-plaintiff stating therein that he has paid an amount of Rs.93,100/- towards maintenance to the respondent. During conciliation, he

offered an amount of rupees three lakhs towards permanent alimony. But the conciliation failed. He filed the salary slip of April, 2017 issued by the Manager (Personnel) Ananta OCP, Mahanadi Coalfields Limited. The same indicates that he is getting Rs.41,203/- towards salary. When the suit was filed in the year 1993, the respondent was 23 years of age. She is at present 47 years. Considering her age and status of her husband, this Court feels that ends of justice shall be better served, if an amount of Rs.12,36,000/- (rupees twelve lakhs thirty-six thousand), i.e., 25% of the salary x 12 x 10 years is granted to the respondent towards permanent alimony. The said amount is calculated keeping in view the interest that would fetch in the event the amount is invested in any nationalized Bank in fixed deposit keeping in view the present rate of interest. The amount so granted shall be paid by the appellant to the respondent within three months, failing which, the respondent may recover the amount by executing decree.

17. In the result, the judgments and decrees of the courts below are set aside. The plaintiff's suit is decreed. The appeal is allowed to the extent indicated above. No costs.

Appeal allowed in part.

2017 (II) ILR - CUT- 861

DR. A.K. RATH, J.

C.M.P. NO. 831 OF 2016

BANCHHANIDHI DAKUA .....Petitioner

.Vrs.

M/S. H.S.C.L. LTD. .....Opp. Party

CIVIL PROCEDURE CODE, 1908 – S.96

Dismissal of appeal for non-furnishing of security amount – Order challenged – For non-furnishing of security amount, the court may not grant stay of execution but can not invent a penal consequence in the statute by dismissing the appeal – Learned appellate court dehors its jurisdiction in dismissing the appeal – Held, the impugned order is quashed. (Paras 8, 9)

Case Laws Referred to :-

1. (2016) 13 SCC 124 : Union of India -V- K.V.Lakshman & Ors.
2. 80(1995) C.L.T. 978 : Jugal Kishore Meher -V- Bijaya Kumar Agarwalla

For Petitioner : Mr. B.S.Rayaguru
For Opp. Party : Mr. S.K.Sarangi

Date of Hearing :25.07.2017
Date of Judgment:04.08.2017

JUDGMENT

DR. A.K. RATH, J.

By this application under Article 227 of the Constitution of India, challenge is made to the order dated 22.6.2015 passed by the learned 1st Additional District Judge, Rourkela in R.F.A. No.06 of 2015, whereby and whereunder learned appellate court dismissed the appeal for non-depositing of security amount of Rs.2 lakhs.

02. The petitioner was an employee of the opposite party. He was residing in a quarter provided by the employer. He retired from services on 31.01.2001. Since he did not vacate the quarter, the opposite party as plaintiff instituted C.S. No.114 of 2009 in the court of the learned Civil Judge (Sr. Divn.), Rourkela for eviction and recovery of house rent impleading the petitioner as defendant. The defendant filed a counter claim. The suit was decreed. Learned trial court directed the defendant-petitioner to deliver the vacant possession of the premises and to pay Rs.3,87,181/- which includes arrear house rent, electricity charges and damages within three months. He filed R.F.A. No.6 of 2015 before the learned 1st Additional District Judge, Rourkela. There was delay in filing the appeal. An application for condonation of delay was filed. On 16.5.2015, the learned 1st Additional District Judge, Rourkela directed the petitioner to furnish a bank security of Rs.2 lakhs as a condition precedent for admitting the appeal, failing which the appeal shall stand dismissed. Since the amount was not deposited by 22.6.2015, the appeal was not admitted. This petition seeks to lacinate both the orders.

03. Heard Mr. B.S. Rayaguru, learned counsel for the petitioner and Mr. S.K. Sarangi, learned counsel for the opposite party.

04. Mr. Rayaguru, learned counsel for the petitioner submitted that the appeal is a valuable right. For non-furnishing of security amount, the court may not grant stay of execution, but cannot dismiss the appeal. He relied on the decision of the apex Court in the case of *Union of India vs. K.V. Lakshman and others,* (2016) 13 SCC 124 and this Court in the case of *Jugal Kishore Meher vs. Bijaya Kumar Agarwalla,* 80 (1995) C.L.T. 978.

05. Per contra, Mr. Sarangi, learned counsel for the opposite party submitted that there was delay in filing the appeal. In view of the same, learned appellate court directed the petitioner to furnish a bank security of Rs.2 lakhs within a stipulated time. The petitioner failed to comply the said order. Learned appellate court has rightly not admitted the appeal. He further submitted that in a money decree, the court can grant stay of execution on imposition of certain conditions.

06. In *Union of India* (supra), the apex Court held thus:

> "21. It is a settled principle of law that a right to file first appeal against the decree under Section 96 of the Code is a valuable legal right of the litigant. The jurisdiction of the first appellate court while hearing the first appeal is very wide like that of the trial court and it is open to the appellant to attack all findings of fact or/and of law in first appeal. It is the duty of the first appellate court to appreciate the entire evidence and may come to a conclusion different from that of the trial court.
>
> 22. Similarly, the powers of the first appellate court while deciding the first appeal are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra. It is apposite to take note of the law on this issue.
>
> 23. As far back in 1969, the learned Judge—V.R. Krishna Iyer, J. (as his Lordship then was the Judge of Kerala High Court) while deciding the first appeal under Section 96 CPC in *Kurian Chacko v. Varkey Ouseph,* reminded the first appellate court of its duty to decide the first appeal. In his distinctive style of writing with subtle power of expression, the learned Judge held as under:(SCC On Line Ker paras 1-3)
>
> "*1.* The plaintiff, unsuccessful in two courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property so also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.

2. An appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate court.

Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation."

(emphasis supplied)"

07. In *Jugal Kishore Meher* (supra), this Court held:

"4. Although Order 41, Rule 1, sub-rule (3), C.P.C. has laid down that the "appellant shall, within such time as the appellate court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit" it has not provided for consequences of non-compliance with the said provision. The consequence has been indicated in Order 41, Rule 5, sub-rule (5). It has been laid down therein "Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree." It is obvious from the language of Order 41, Rule 5, sub-rule (5) that the only consequence contemplated is that in case of failure to make the deposit or to furnish the security as provided in sub-rule (3) of rule 1, the Court shall not grant stay of the execution of the money decree.

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6……For the purpose of enforcement of its order Court cannot invent a penal consequence not provided for in the statute. Moreover, Order 41 of the C.P.C. has expressly prescribed the consequence in Rule 5(5) and the Court's power has been accordingly circumscribed. Court's power cannot extend beyond the limit set out by the provisions of the Act. In case it is found that the judgment-debtor's conduct amounts to an undertaking before the Court for depositing the decretal amount he becomes liable to be appropriately dealt with under the provisions of the Contemp t of

> Courts Act for any willful disregard of his undertaking before the Court. Non-compliance with the direction of the Court under Order 41, Rule 1(3) by itself does not invite any consequence other than that mentioned in Rule 5(5) of Order 41.
>
> 7. The legislative history and the express language of the relevant provisions of the Civil Procedure Code make it quite clear that the court of appeal below had no jurisdiction to dismiss the appeal for non-compliance with sub-rule (3) of Rule 1 of Order 41, C.P.C. Accordingly the impugned order is liable to be set aside." (emphasis laid)

The ratio in the case of *Jugal Kishroe Meher* (supra) applies with full force to the facts of the case.

08. The logical sequitur of the analysis made in the precedent paragraphs is that if the appellant fails to make the deposit as provided in sub-rule(3) of Rule 1 of Order 41 C.P.C., the court shall not grant stay of execution of money decree. For enforcement of its order, the court cannot invent a penal consequence not provided for in the statute. The power of court is circumscribed under Rule 5(5) of Order 41 C.P.C. Non-compliance of the direction of the court made under Rule 1 (3) of Order 41 C.P.C. by itself does not invite any consequence. Learned appellate court dehors its jurisdiction in dismissing the appeal for non-compliance of the said provision.

09. In wake of aforesaid, the impugned orders are quashed. Learned appellate court shall proceed with the appeal. The petition is allowed. No costs.

Petition allowed.

2017 (II) ILR - CUT- 866

BISWAJIT MOHANTY, J.

JCRLA NO. 77 OF 2011

RAM HANSADA …….Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

(A) PENAL CODE, 1860 – S. 376(2)(g)

Gang rape – Out of three accused persons, two are acquitted by the trial Court – Now it can not be termed as a gang rape case but a case of rape simpliciter – Held, Conviction of the appellant U/s 376 (2) (g) I.P.C. is set aside and he is convicted U/s 376 (1) I.P.C. and sentenced to the period already undergone. (Paras 7,13)

(B) PENAL CODE, 1860 – S. 376(1)

Rape – Victim (P.W.5) is a married lady – No reason for her to make false accusation affecting her own image – Her statement that she was not shouting for help, not trying to run away from the spot and not biting the appellant at the time of rape was due to the undisputed background of her intoxicated state after taking liquor – Moreover the appellant on the date of occurrence asked the victim to accompany him with the false pretext that her husband was lying drunk at a distant place and gave her liquor on the way, shows his evil intention to rape – So the submission of the learned counsel for the appellant that this is a case of sexual intercourse on consent can not be accepted – Held, the prosecution has succeeded in proving that the appellant had made sexual intercourse with P.W. 5 against her will and consent – The appellant is found guilty U/s 376 (1) I.P.C. – Since P.W. 5 was 23 years of age at the time of rape this Court directed the District Legal Services Authority, Balasore to pay her proper compensation.

(Paras 12,13,14)

Case Laws Referred to :-

1. (2003) 11 SCC 736 : Rajesh v. State of Goa

For Appellant : Mr. Siba Prasad Mishra
For Respondent : Ms. Saswata Pattnaik, A.G.A.

Date of Judgment:16.08.2017

JUDGMENT

BISWAJIT MOHANTY, J.

The appellant has preferred the present appeal challenging the judgment dated 27.7.2011 pronounced by the learned Ad hoc Additional

Sessions Judge (F.T.C.-II), Balasore in Sessions Trial No.70/107 of 2009 convicting the appellant under Section – 376(2)(g), I.P.C. The appellant has also challenged the sentence imposed on him whereby he has been directed to undergo R.I. for 10 years.

2. A thumb nail sketch of the prosecution case is that the victim/informant (P.W.5) is a married lady and she belongs to village Bisipur under Udala Police Station in the district of Mayurbhanj. She, her husband and her elder brother-in-law came to Gandibed village under Khaira Police Station in the District of Balasore to do labour work during harvesting season. P.W.5 and her husband were residing in the house of the appellant. On 15.11.2008 at about 7.00 P.M., the appellant told P.W.5 that her husband was lying in a drunken condition at Hatpada (Gandibed) and asked her to accompany him to that place. Accordingly, P.W.5 went with the appellant and found her husband in a normal condition and not under influence of liquor. Her husband sent her back to home with the appellant. While P.W.5 and the appellant were returning, the appellant purchased a liquor pouch and gave her to take the same. Then the appellant took her (P.W.5) in a different route and ultimately took her inside a half constructed thatched roof mud house. There, the appellant made her naked, laid her down on the ground and forcibly committed rape on her. After committing rape on her, the appellant called two acquitted persons, namely, Gurubha Murmu and Ramesh Murmu, who also committed rape on her. On being raped, she became unconscious. At around 3 A.M. in the morning, when she regained her senses, she found the appellant sleeping by her side. She came back to the house of appellant and searched for her husband. Around 11.00 A.M. of 16.11.2008, her husband reached the house and she (P.W.5) disclosed the incident to him. On 17.11.2008, around 12.00 Noon, P.W.5 lodged a written report which was registered as Khaira P.S. Case No.129 of 2008 under Section 376(2)(g), I.P.C. against the appellant and two above named acquitted persons. After completion of investigation, charge-sheet was submitted by P.W.6 against the appellant and two other acquitted persons. Accordingly, the appellant and two acquitted persons were put to trial. The plea of the appellant was complete denial and false implication on account of previous ill feeling.

3. The prosecution in order to bring home the charge, examined as many as 9 witnesses and exhibited 15 documents. Sari and saya of P.W.5 and lungi of the appellant were marked as M.Os. on behalf of the prosecution. P.W.5 is the victim & informant in this case, P.W.8 the scribe of the F.I.R., P.Ws.9 & 6 respectively are the 1st and 2nd Investigation Officers in this case. P.W.6

has proved Forwarding Report under Ext.8 and Chemical Examination Report under Ext.9. P.W.3 is the Medical Officer, who examined P.W.5 and P.W.2 is the Medical Officer, who had examined the appellant and two other acquitted persons. P.Ws.1,4 & 7 are the seizure witnesses.

4. The defence examined two witnesses but did not exhibit any documents.

5. Learned counsel for the appellant submitted that a combined reading of the evidence of P.Ws.3,5 & 9 clearly throws a cloud on the entire story of rape. According to him as per fact situation, it is not a case of rape but is a clear case of sexual intercourse on consent. In this context, he mainly highlighted the contradictions brought out in the evidence of P.W.9 vis-à-vis P.W.5. He also put much stress on the deposition of P.W.3, who on examining P.W.5 has stated that she did not find any external injuries on P.W.5 and on the private parts of P.W.5 appeared to be normal. There was no staining, bleeding or matting on pubic hair of P.W.5. Further, as per the opinion of P.W.3 sign of sexual intercourse was remote. In such background, learned counsel for the appellant contended that all these belie the prosecution story relating to rape. Accordingly, he contended that the learned court below has gone wrong in convicting the appellant. Secondly, he contended that since out of three accused persons only one namely the appellant has been convicted and other two have been acquitted, even conceding for the sake of argument but not admitting that the present is a case of rape, then it can only be a case of rape simplicitor under sub-section (1) of Section-376, I.P.C. and cannot be a gang rape under Section 376(2)(g), I.P.C. Thirdly, he contended that though semen has been found on saya of P.W.5 and semen stains are there on the lungi of the appellant as seized under Exts.5 & 7 respectively, however, there exists no connection between the seminal stains found on the saya of P.W.5 and the lungi of the appellant. In fact, the chemical examination report under Ext.9 does not connect the said stains. He further submitted that the semen found on the saya of P.W.5 may be the semen of her husband, who has not been examined in this case. In such background, learned counsel for the appellant submitted that judgment of conviction required to be set aside and the appellant, who is a poor tribal and has suffered incarceration for more than 8 years, should be set at liberty.

6. Ms. S. Pattnaik, learned Additional Government Advocate defended the judgment and submitted that there exists enough material on record for which order of conviction passed by the learned Ad hoc Additional Sessions Judge (F.T.C.-II), Balasore should not be interfered with. She also submitted

that no lady, more particularly, a married lady would ever make a false allegation of rape in a society like ours so as to sully her own image. Lastly, she submitted that the core prosecution evidence of P.W.5 relating to rape has remained undemolished notwithstanding a lengthy cross-examination.

7. Before proceeding further, this Court thinks it proper to address at the outset to the second submission made by the learned counsel for the appellant with regard to non-making out of a case under Section 376(2)(g), I.P.C. after acquittal of other two accused persons. A perusal of records show that while initially three persons including the present appellant were charge-sheeted and stood trial; however, in the trial, the two other persons, namely, Gurubha Murmu and Ramesh Murmu have been acquitted. In such background, following the decision of the Supreme Court in the case of **Rajesh** v. **State of Goa** reported in **(2003) 11 SCC 736**, this Court has no hesitation to hold that the instant case cannot be termed as one of gang rape as other two accused persons have been acquitted. In that case like the present case, in view of acquittal of co-accused, the Supreme Court held that the said case cannot be a case of gang rape but would be a case of rape simplicitor. Thus, sub-clause (g) of sub-section (2) of Section 376, I.P.C. goes out of picture. Now, we have to see whether the evidence on record justifies/proves the allegation of rape. In order to appreciate this, we have to refer to Section 375, I.P.C., which is quoted hereunder:

> "**375. Rape**. - A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-
>
> First. - Against her will.
>
> Secondly - Without her consent.
>
> Thirdly. - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
>
> Fourthly. - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> Fifthly. - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any

stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. - With or without her consent, when she is under sixteen years of age.

Explanation. - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

A perusal of the above would show that in order to convict of a person for having committed the offence of rape following things are to be proved:

(i) There is sexual intercourse between man and woman,
(ii) Such sexual intercourse must be under circumstances falling under any of the six clauses of Section 375, IPC,
(iii) The woman concerned is not the wife of the accused & if wife, she is below 15 years of age.

8. In order to see whether above ingredients are proved, this Court has to scan the evidence of P.Ws.3,5 & 9 keeping in mind well settled principle that conviction in a case of rape is possible on the basis of sole testimony of the victim if such testimony is reliable and inspires confidence.

9. P.W.5 in her examination-in-chief has stated that at the relevant time she and her husband had come to Gandibed village in search of labour work during harvesting and they were staying in the house of the appellant. On the date of incident, i.e., during evening hour of 15.11.2008 at 7.00 P.M. while her husband had gone with the tractor and she was in the house of the appellant; the appellant informed her that her husband was lying in a drunken state at Hatpada and asked her to accompany him to that place. Accordingly, she went with the appellant and found her husband in a normal condition and not under influence of liquor. Her husband asked her about the reason of her coming and told her to go back home with the appellant. While the appellant and P.W.5 were returning, on the way, the appellant purchased a liquor pouch and forced her (P.W.5) to take the liquor. After taking liquor, she felt intoxicated. Thereafter, the appellant took her in a different route and ultimately took her inside a half constructed thatched-roof mud house. There, the appellant made P.W.5 naked and laid her on the ground and forcibly committed rape on her despite her objection and despite her giving him a

push. But as she was intoxicated, she could not resist him. After committing rape on her, the appellant shut her mouth and called two acquitted persons, namely, Gurubha Murmu and Ramesh Murmu, who reached there and forcibly committed rape on her one after another. After committing rape, both the acquitted persons went away. After being raped, she lost her sense and at about 3 A.M. in the morning she regained her sense and found herself in naked condition by the side of the appellant. She put on her saree and came back to house of the appellant alone. On account of rape, she sustained injuries on her back, knee joint and on left hand. After coming back, she could not find anybody in her house and waited for her husband. While waiting for her husband, the appellant came there and offered her money to leave the area. She refused to accept the offer and waited for her husband. At about 11.00 A.M. of 16.11.2008, when her husband arrived, she (P.W.5) disclosed the incident to him. After hearing the incident, her husband refused to keep her as his wife. Further, when P.W.5 asked him to accompany her to the Police Station, though initially reluctant; he accompanied her to Khaira Police Station and on her request one person scribed the F.I.R. at Police Station. Police sent her for medical examination. In her cross-examination, she stated that when she was taken to the spot, she was intoxicated and was walking abnormally. When she was being taken to the spot, which is situated in front of a Bank, though initially, she stated that she had seen some persons in front of the Bank, however, in the next breath, she stated that she had not seen any persons in front of the Bank. While the appellant was taking her to the spot, she told him to leave her as he had accepted her as his daughter. According to her, the appellant committed sexual intercourse twice with her, which was continued for about one hour. Thereafter, the two acquitted persons committed rape on her one after another for about 30 minutes. When the appellant pushed her into the spot, she had shouted. But while the appellant was committing rape on her, she could not shout. All the three persons, according to her, committed sexual intercourse for about two hours. During that two hours, she never shouted for any help. She further stated that though she was reluctant to go with the appellant, however, she did not run away and also that while passing by the Bank, she had not called the persons, who were present in front of the Bank. Initially, when the appellant removed her saree, she objected and shouted once but the appellant gave her a push and she fell down facing onwards. Thereafter, she did not shout. She has also stated that she did not try to run away from the spot and did not try to bite the appellant while he was committing rape on her except giving him a push. While the appellant was committing rape, he had pressed his both hands on

her hands and kissed her. Place of incident was a rough surface and her yellow colour saree was stained with blood. At that point of time she was wearing a yellow colour saree, one white colour saya and one red colour blouse. Such saree and saya were seized by the police. She further stated that she was examined by the police on the date of lodging of the F.I.R. She denied the suggestion that she had not stated to the police that as she was intoxicated she could not resist the appellant and that the appellant had offered her money to leave. She denied the suggestion that the appellant & Ramesh Murmu had not committed rape on her and that she was deposing falsehood.

10. P.W.3, who examined P.W.5 on 19.11.2008, i.e., almost four days after the occurrence, has stated that she did not find any external injuries on the person of P.W.5 and her private parts gave a normal look. She did not find any staining, bleeding or matting on pubic hair and she did not find any foreign substance on her pubic hair. Hymen was completely absent with surrounding radiating fibrous tears. It admitted two fingers easily. On pathological examination of vaginal swab, she did not find any dead or alive spermatozoa. As per her opinion, there was remote signs of sexual intercourse but sexual assault could not be ruled out. P.W.5 also stated before her that she had already changed her clothings and used toilets and bathed repeatedly. In her cross-examination, P.W.3 stated that in case of forcible sexual intercourse by more than one person to a lady, there might be injuries on her private parts. If rape is committed on a lady on a rough surface, there must be injuries on the person of the lady.

11. P.W.9, who happens to be the 1st Investigating Officer, admitted Ext.10 to be the F.I.R. Ext.10 was proved by P.W.8. In his deposition, P.W.9 has stated that he seized the wearing apparels of P.W.5, i.e., saya with semen stain and light yellow colour saree in presence of witnesses and accordingly, seizure list vide Ext.5 was prepared. He visited the spot and noticed mark of violence and found one pair of green and white colour Chapal of P.W.5 and one pair of blue colour Chapal alleged to be belonging to the appellant. He seized both the pairs of Chapals. The seizure of said Chapals were witnesses by P.W.1 and the seizure list was marked Ext.11. He arrested the appellant on 18.11.2008 and sent him for medical examination vide medical requisition under Ext.13. He also sent P.W.5 for medical examination vide Ext.14. On 27.2.2008, he handed over the charge of investigation to the O.I.C., Khaira Police Station on his retirement. In his cross-examination, he stated that he has not examined P.W.8. she has not shown the pair of Chapal either to the

appellant or P.W.5. He denied a suggestion that he has not noticed violence at the spot. However, with reference to P.W.5 he made it clear that she never stated before him that as she was intoxicated, she could not resist and about giving a push to the appellant. He also made it clear that P.W.5 has not stated that the appellant offered money to her, which was refused by her and after hearing the incident, her husband refused to keep her as his wife. On further cross-examination, he made it clear that P.W.5 has not stated before him that the appellant forced her to take liquor but she had only stated that the appellant gave her liquor to drink.

12. A collective analysis of evidence of P.Ws,3,5 & 9 would make clear that certain parts of deposition of P.W.5 cannot be believed on account of contradictions like her depositions relating to she being forced to take liquor, she giving a push to the appellant during rape, she being offered money by the appellant and refusal of her husband to keep her as wife. But that she felt intoxicated after taking liquor has been reiterated by her in her cross-examination. In her cross-examination, she clearly stated that on being intoxicated, she was walking abnormally. Similarly, her objection to rape as stated in Paragraph-3 of examination-in-chief has been reiterated in her cross-examination. In her cross-examination she has stated that "x x x Initially when accused Rama Hansada removed my saree, I objected, saying that how he could do the same being accepted me as his daughter. Thereafter, I shouted once. x x x". With regard to actual commission of offence while in examination-in-chief, P.W.5 stated that "x x x accused Rama Hansada made me naked and laid me on the ground and forcibly committed rape on me. x x x"; in cross-examination, she has reiterated that "x x x Accused Rama Hansada committed sexual intercourse twice on me and it continued for about one hour. x x x x When the accused Rama Hansada pushed me into the spot house, I shouted. x x x". Thus, notwithstanding some contradictions, the version of P.W.5, a tribal lady relating to forcible commission of the offence of rape on her by the appellant remains undemolished. In other words, the core prosecution story relating to rape committed against the will of P.W.5 and without her consent remains intact. The various contradictions do not shake the core prosecution story as deposed by P.W.5. Her various statements such as not shouting for help while rape was being committed, her not trying to run away from spot and not biting the appellant while rape was being committed have to be appreciated in the undisputed background of her intoxicated state after taking liquor. Once this background is kept in mind, there remains nothing unnatural about the above noted behavior of the

appellant. Further P.W.3 has made it clear that though signs of sexual intercourse is remote but she has not ruled out the sexual assault. Further one should not forget the fact that P.W.5 was made to leave her house (which ultimately led to rape) by the misleading and false statement of the appellant that her husband was lying drunk at a distance place and asking her to accompany him to that place. All these show evil intention of the appellant. Thus, a holistic view of the matter would be that though she initially objected and shouted, but later she could not do anything on account of intoxication. With regard to non-existence of external injuries on the body of P.W.5 as found by P.W.3, nothing much can turn on that as there was great delay in carrying out the medical examination of P.W.5. It may be noted here that while the occurrence took place on 15.11.2008, P.W.5 was medically examined only on 19.11.2008. Further, P.W.3 has nowhere opined that even if there is great delay in medical examination of the victim, still then the external injuries can be easily discernible. For all these reasons, the submission of the learned counsel for the appellant relating to this being a case of sexual intercourse on consent merits no acceptance and is liable to be rejected. Similarly non-connection between seminal stain appearing in saya and lungi cannot be a decisive factor for rejecting the testimony of the victim, i.e., P.W.5, when the core prosecution story as narrated by her relating to commission of rape remains undemolished. Moreover, it may be noted here that though the occurrence took place on 15.11.2008, the relevant saya and lungi were forwarded on 13.3.2009 vide Ext.8 for forensic examination. Ultimately, the chemical examination report under Ext.9 was sent on 28.1.2010. Thus, there was great delay in sending the specimen. Further, there exists no reason why a married lady like P.W.5 would raise false accusation of rape in a society like ours affecting her own image. In fact she has clearly denied the suggestion relating to false implication of appellant. Thus, the learned trial court has rightly come to a conclusion that a woman would not foist rape charge with a stranger unless clear motives come out from the evidence. Further, P.W.2 the doctor, who examined the appellant on 20.11.20008 has stated that he found nail scratch mark on back of the appellant and such injury was suggestive of forcible sexual intercourse.

13. Thus, the prosecution has succeeded in proving that there was sexual intercourse between the appellant and P.W.5 and such sexual intercourse which was clearly against her will and consent and there is no doubt that P.W.5 is not the wife of the appellant. For all these reasons, this Court does

record a finding that P.W.5 was ravished by the appellant and accordingly finds the appellant guilty under Section 376(1), IPC. It appears from the records and particularly from the statement recorded under Section 313, Cr.P.C. of the appellant that he was aged about 60 years on 7.6.2011. Therefore, at present, he must be around 66 years of old. The minimum sentence prescribed under Section 376(1), I.P.C. is seven years. Here the appellant has already undergone incarceration for more than seven years. In such background, keeping in mind the age of the appellant, this Court reduces the sentence of the appellant to the period already undergone. Thus, in the net, while setting aside the conviction of the appellant under Section 376(2)(g), I.P.C., this Court convicts him under Section 376(1), I.P.C. and sentences him to the period of incarceration which he has already undergone. In so far as punishment of fine is concerned, the learned trial court has not imposed the punishment of fine taking into account the economic condition of the appellant. However, with regard to such condition, there exists no evidence on record. In such background, this Court imposes on the appellant a fine of Rs.500/- (Rupees Five Hundred). In case, the appellant fails to pay the same he shall undergo rigorous imprisonment for a further period of five days. The sentence is accordingly modified.

14. It appears from the evidence on record that P.W.5 was a young woman of 23 years at the time of rape. Thus, P.W.5 has suffered indignity and mental trauma at a very young age despite being a married lady which might have also taken a toll on her married life. In such background, this Court is of the opinion that proper compensation should be paid to P.W.5 after due enquiry by District Legal Services Authority, Balasore in accordance with law as per the Victim Compensation Scheme. The entire exercise for this purpose should be completed within the time stipulated in the Scheme. Copy of this judgment be sent forthwith to the District Legal Services Authority, Balasore for compliance. The Jail Criminal Appeal is disposed of.

Appeal disposed of.

2017 (II) ILR - CUT- 876

DR. B.R. SARANGI, J.

W.P.(C) NO. 8401 OF 2016
WITH BATCH

DIGAMBAR BEHERA ……..Petitioner

.Vrs.

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

(A) SERVICE LAW – Whether Odisha Renewable Energy Development Agency (OREDA) is a PSU and, if so, whether resolution Dt. 02.08.2014 of the Government in Public Enterprises Department is applicable to it ?

Held, even if OREDA is not notified as PSU by the Government but since it discharged "Public Utility Service" for the benefit of the public at large and the administrative control lies with the State Government, the rules and regulations applicable to the State Government employees and its PSUs are also applicable to it.

(Paras 11, 12)

(B) SERVICE LAW – Whether the petitioners, who are the employees of OREDA should be extended with the benefit of retirement age from 58 to 60 years at par with their counter parts in similarly situated organizations under the administrative control of the Science & Technology Department and, if yes, what relief they are entitled to ?

Held, the petitioners are entitled to get the benefit of enhancement of retirement age from 58 to 60 years at par with their counter parts in the State Government and PSUs pursuant to resolution Dt. 28.06.2014 passed by the Government in Finance Department as well as the resolution Dt. 02.08.2014 passed by the Government in Public Enterprises Department together with the decision taken by the Governing Body of OREDA in its 10th meeting Dt. 18.04.1987 and 33rd meeting Dt. 02.06.2010 – Held, the petitioners who had approached this Court before completion of 58 years of age and during pendency of the writ petition were made to retire on attaining the age of 58 years, as well as who had approached this Court after retirement on attaining 58 years of age, the O.P.No.3-OREDA is directed to bring them back into service forthwith, if they have not attained the age of 60 years, and allow them to continue till they attain the age of 60 years and grant all the consequential service and financial benefits as due and admissible to them in accordance with law – Further the petitioners, who had approached this Court after

retirement on attaining the age of superannuation and in the meantime have attained the age of 60 years, shall not be entitled for arrears of salary – However, they will be deemed to be continuing in service upto the age of 60 years – In their case, OREDA shall treat their age of superannuation as 60 years, fix the pay accordingly and re-fix the retirement benefits like pension, gratuity etc. – On such calculation, they shall be entitled to arrears of retirement benefits after adjusting the amount already paid. (Paras 17.18)

Case Laws Referred to :-

1. AIR 1990 SC 1851 : The Oil & Natural Gas Commission v. The Association of Natural Gas Consuming Industries of Gujarat.
2. (2005) 6 SCC 657 : Binny Ltd. v. V. Sadasivan.
3. (2008) 9 SCC 720 : Leelabai Gajanan Pansare v. Oriental Insurance Company Ltd.
4. (2015) 12 SCC 611: Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission
5. (2013) 7 SCC 595 : State of Uttar Pradesh v. Dayanand Chakrawarty
6. (2015) (II) OLR 214 : Premalata Panda v. State of Odisha.
7. (2015) 120 CLT 1047 : Sarat Chandra Tripathy v. Odisha Forest Development Corporation,
8. (2015) 120 CLT 1047 : Sarat Chandra Tripathy v. Odisha Forest Development Corporation &Ors.
9. AIR 1973 SC 1088 : Purshottam Lal v. Union of Inida (UOI).
10. AIR 2006 SC 365 : Harwindra Kumar v. Chief Engineer, Karmik.
11. 2007 (11) SCC 507 :Chairman, Uttar Pradesh Jal Nigam v. Radhey Shyam Gautam

For Petitioner : Mr. R.K.Rath, Sr. Adv. and M/s. P.Rath & J.P.Behera
M/s.Susanta Ku.Dash, A.K.Otta, A.Dhalsamanta, B.P.Dhal & S.Das
M/s.B.Mohanty, B.Tripathy & B.Samantray.

For Opp. Parties : Mr. B.Senapati, Add.Govt.Adv.
M/s.B.K.Dash, M.P.Debanath, A.B.Mishra & S.R.Dash.

Date of hearing : 20.07.2017
Date of Judgment : 27 .07.2017

JUDGMENT

DR. B.R. SARANGI, J.

The petitioners, in all these writ petitions, are the employees of Orissa Renewable Energy Development Agency (for short "OREDA"). They have approached this Court seeking for a common relief. Therefore, these writ petitions were heard together and are being disposed of by this common judgment.

2. The background facts, for which the petitioners have been constrained to approach this Court, are succinctly stated as follows:

2.1. OREDA is an agency registered under the Societies Registration Act, 1860. It has been functioning under the administrative control of Science and Technology Department of the Government of Odisha, which provides financial assistance in the shape of grant-in-aid. With a view to streamlining the matters relating to recruitment and conditions of service in respect of posts of OREDA, its Governing Body formulated the Rules called "Orissa Renewable Energy Development Agency Service Rules, 1997 (in short "OREDA Rules, 1997"). As per Rule 51 (1) and (2), the employees shall have to retire from service on attaining the age of 58 years. In consonance with the OREDA Rules, 1997, the petitioners were to retire at the age of 58 years. Consequentially, notices were issued to them to be retired from their services on attaining the age of superannuation, i.e., 58 years as per Rule-51(2) of the OREDA Service Rules, 1997.

2.2. By the time such notices were issued, the Government in its Finance Department had passed resolution on 28.06.2014 and by amending Rule-71 of the Orissa Service Code, as well as Orissa Civil Services (Pension) Rules, 1992 (in short "OCS (Pension) Rules, 1992") extended the retirement age from 58 to 60 years. Pursuant thereto, the Government of Orissa in Department of Public Enterprises issued resolution dated 02.08.2014 enhancing the age of superannuation of the employees of the State PSUs from 58 to 60 years subject to fulfilling the conditions stipulated therein. It was also stipulated therein that the PSUs would prepare a detailed proposal which should be approved by the Board of Directors of the said PSU concerned and the proposal approved by the Board should be concurred by the Administrative Department and the Administrative Department should obtain appropriate Government approval before giving effect to the enhancement proposal.

2.3. Following the same, the Employees' Association of OREDA claimed for extension of the said benefit to its employees which was acceded to by the authority concerned and, accordingly, the Administrative Department of OREDA, namely, Science and Technology Department by its order dated 30.03.2016 extended the benefit of enhancement of the age of superannuation from 58 to 60 years to the employees of OREDA. As all the petitioners were supposed to retire in between 28.02.2015 and 28.02.2016, that is to say within 30.03.2016, they claim that, in view of the resolution passed by the Government of Orissa in its Public Enterprises

Department and approval made by the OREDA on 30.03.2016, the benefit of enhancement of retirement age from 58 to 60 years be extended to them with effect from the date, i.e. 28.06.2014 when decision was taken by the State Government to enhance the retirement age of its employees, or from the date, i.e., 02.08.2014 from which all the employees of PSUs have been extended with such benefits, or at best from the date, i.e., 27.11.2014 when the move was made by the Workers' Union of OREDA.

2.4. For the purpose of convenience and easy reference the details of the petitioners are set out in the chart hereunder:

Sl. No.	Name of the petitioner	Writ Petition	Made to retire on superannuation
1	Balaram Patra	WP(C) No. 5684 of 2015	31.03.2015
2	Arjuna Maharana	WP(C) No. 18981 of 2015	31.10.2015
3	Harihar Panda	WP(C) No. 18982 of 2015	30.04.2015
4	Muralidhar Panda	WP(C) No. 18983 of 2015	31.03.2015
5	Thabir Mohan Nayak	WP(C) No. 18985 of 2015	31.08.2015
6	Digambar Behera	WP(C) No. 8401 of 2016	28.02.2015
7	Krushna Chandra Maharana	WP(C) No. 8402 of 2016	28.02.2016
8	Umesh Chandra Nayak	WP(C) No. 8404 of 2016	30.06.2015

3. Mr. R.K. Rath, learned Senior Counsel appearing along with Mr. J.P. Behera, learned counsel for the petitioners at serial no.6 to 8 of the above table specifically urged that since the State Government in its wisdom decided to enhance the retirement age of its employees from 58 to 60 years, pursuant to resolution dated 28.06.2014, by amending the Rule 71(a) of the Orissa Service Code and also OCS (Pension) Rules, 1992 and, consequentially, pursuant to resolution dated 02.08.2014, the State Government in its Public Enterprises Department decided to extend such benefits to the employees of the PSUs which was implemented immediately and, such policy decision having been communicated to the Science and Technology Department which is the administrative department of OREDA, the non-extension of such benefit to the employees of the OREDA from the date, i.e., 02.08.2014 the Government in Public Enterprises Department decided by passing a resolution to extend such benefits to the PSUs amounts to arbitrary and unreasonable exercise of power and also discriminatory. It is contended that although OREDA has not been included in the list of PSUs maintained by the Government, for which apparently the resolution dated 02.08.2014 passed by the Government in Public Enterprises Department issuing direction to the PSUs to enhance the retirement age from 58 to 60 years has not been made applicable to it, as the nature of work discharged by

OREDA categorically constitute "public utility service", it should have been treated as a PSU and the benefits should have been extended from the date of passing of resolution by the State Government, i.e., with effect from 02.08.2014, as the similar benefits have already been extended by the State Government to the employees of PSUs. Considering the matter in proper perspective, non-extension of such benefit in the name of non-amendment of the service rule applicable to the OREDA employees and non-receipt of administrative approval from the Administrative Department is absolutely a fallacy and, as such, is contrary to the provisions of law and hit by Article 14 of the Constitution of India. To substantiate his contention, he has relied upon the judgments in ***The Oil & Natural Gas Commission v. The Association of Natural Gas Consuming Industries of Gujarat,*** AIR 1990 SC 1851; ***Binny Ltd. v. V. Sadasivan,*** (2005) 6 SCC 657; ***Leelabai Gajanan Pansare v. Oriental Insurance Company Ltd.,*** (2008) 9 SCC 720; ***Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission*** (2015) 12 SCC 611; ***State of Uttar Pradesh v. Dayanand Chakrawarty,*** (2013) 7 SCC 595; ***Premalata Panda v. State of Odisha*** (2015) (II) OLR 214 and ***Sukanta Kumar Das v. State of Odisha,*** W.P.(C) No. 4024 of 2016 disposed of on 08.04.2016.

4. Mr. S.K. Dash, learned counsel appearing for the petitioners at serial nos. 2 to 5 of the above table urged that pursuant to 10th Governing Body meeting of OREDA held on 18.04.1987 in item no.10 it was decided that the facilities available to State Government employees should be automatically accorded by OREDA to its staff except when different conditions are specifically prescribed as per rules of the Organization framed and Governing Body resolutions made from time to time. Therefore, once the Government of Odisha in Finance Department passed resolution dated 28.06.2014 to extend the age of retirement of its employees from 58 to 60 years by amending Rule 71(a) of the Orissa Service Code, as well as OCS (Pension) Rules, 1992, and subsequent resolution was passed on 02.08.2014 by the Public Enterprises Department extending such benefits to all the PSUs, even though OREDA has not been notified as one of the PSUs of the State Government, the duty discharged by OREDA being in the nature of "public utility service", which is akin to the duty discharged by the PSUs, in view of the resolution passed in the 10th Governing Body meeting dated 18.04.1987, the Government resolutions are applicable ipso facto and, as such, in case of **Sukanta Kumar Das** (supra) the similar benefits having already been extended, the petitioners should not have been discriminated. More so, the Governing Body of OREDA in its 36th meeting dated 12.03.2015 having already taken a decision for enhancement of age of superannuation from 58 to 60 years, the same should have been extended, though subsequently the administrative approval has been received from the Government. In reply to the submissions made by learned counsel for the opposite parties, he further contended that so far as reference made to the case of ***Sarat Chandra Tripathy v. Odisha Forest Development Corporation,*** (2015) 120 CLT 1047 is concerned, in that case no resolution was passed by OFDC to extend such benefits and as such is

distinguishable from the present one. However, applying the principle laid down by the apex Court in **Dayanada Chakrabarty** (supra) and by this Court in **Premalata Panda** (supra), the petitioners are entitled to get enhancement of retirement age from 58 to 60 years at par with their counterparts of the State Government and also PSUs. He further contended that Science and Technology Department is the Administrative Department of OREDA, as well as Odisha Hydro Power Corporation and Odisha Power Transmission Corporation. The employees of Odisha Hydro Power Corporation Ltd. and Odisha Power Transmission Corporation LTD. having been extended with the benefit of enhancement of retirement age with effect from 28.06.2014, even though the proposal for enhancement of age of retirement from 58 to 60 years had been taken by the Governing Body of OREDA on 12.03.2015 and it was kept pending for months together and approved subsequently on 30.03.2016, it cannot be said that it should be applicable prospectively with effect from 30.03.2016. It is further contended that the very same Administrative Department having granted concurrence on 28.06.2014 so far as employees of Odisha Power Transmission Corporation Ltd. and on 01.06.2014 so far as employees of Odisha Power Generation Corporation Ltd. are concerned, i.e., prior to 02.08.2014, the date of issuance of resolution by the Government in its Public Enterprises Department to extend the benefit to the employees of PSUs even prior to the date of submission of proposal, so far as the employees of OREDA are concerned they cannot be discriminated and should be extended with benefits at par with their counterparts of Odisha Power Generation Corporation and Odisha Power Transmission Corporation with effect from 28.06.2014.

5. Mr. B.B. Mohanty, learned counsel appearing for the petitioners at serial no.1 of the above table, while adopting the arguments advanced by Mr. R.K. Rath, learned Senior Counsel and also Mr. S.K. Dash, learned counsel appearing for the petitioners in other writ applications, stated that as a matter of policy decision if the Government has extended the benefit of enhancement of retirement age of its employees by resolution dated 28.06.2014, and the employees of the PSUs by resolution dated 02.08.2014 of the Public Enterprises Department, the OREDA, even though is an agency, having been controlled by the State authority, is also guided by the said resolutions. Consequentially, the benefit of enhancement of retirement age from 58 to 60 should be granted to the petitioners and, as such, the ratio decided in the case of **Premalata Panda** (supra) is fully applicable to the present context. Even though the grievance of the petitioners have been considered on the basis of the claims made by the employees union, merely an administrative decision has been taken subsequently, it cannot have any application rather it should be related back to the date the Government in Public Enterprises Department issued resolutions extending the benefit of enhancement of retirement age from 58 to 60 years, i.e., from 02.08.2014.

6. Mr. B. Senapati, learned Addl. Government Advocate appearing for State-opposite parties no. 1 and 2 although admitted that by virtue of the resolution passed by the Government on 28.06.2014 its employees have been extended with the benefit of enhancement of retirement age from 58 to 60 years by amending Rule 71 (a) of the Odisha Service Code and also OCS (Pension) Rules, 1992, and that the said benefit has also been extended to the PSUs of the State Government pursuant to resolution dated 02.08.2014, yet stated that OREDA is not a PSU nor governed by Department of Public Enterprises and, as such, it having been functioned under the administrative control of Science & Technology Department, which approved the proposal for enhancement of retirement age of its employees on 30.03.2016, the benefit claimed in the writ applications by the petitioners from the date of issuance of resolution by the Government applicable to PSUs, is not admissible. He further stated that the decision having been taken by the Board of Directors of the OREDA to enhance the retirement age and financial approval having been made by the Administrative Department, i.e., Science & Technology Department on 30.03.2016, it may have some prospective application but it cannot have any retrospective application so as to facilitate the petitioners to get the benefit from the date their counterparts in the PSUs of Government of Orissa pursuant to resolution dated 02.08.2014. To substantiate his contention, he has relied upon the judgment of this Court in ***Sarat Chandra Tripathy v. Odisha Forest Development Corporation and others,*** (2015) 120 CLT 1047.

7. Mr. B.K. Dash, learned counsel appearing for OREDA endorsed the contention raised by Mr. B. Senapati, learned Addl. Government Advocate for the State that OREDA is not a PSU but an agency registered under the Societies Registration Act, 1860 and, as such, to regulate the service conditions of its employees, the Governing Body of the OREDA has framed a Rule called the Orissa Renewable Energy Development Agency Service Rules, 1997. Under Rule 51(2), the petitioners are to retire on attaining the age of superannuation at the age of 58 years. So far as enhancement of retirement of age is concerned, it has only been resolved by the Governing Body of OREDA in its 36th meeting by sending a proposal on 12.03.2015, which was communicated to the Government in its Administrative Department, namely, Science and Technology Department on 20.03.2015 and request letter of Chief Executive, OREDA to the Additional Secretary to Government of Odisha, Science and Technology Department for necessary approval of enhancement of superannuation age of OREDA employees from 58 to 60 years along with expenditure statement was made on 05.11.2015. After complying with the requirement, the request was made by the OREDA on 24.02.2016 to place the matter before Government and to communicate the Governmental approval. Accordingly, the concurrence of Finance Department was made on 04.03.2016. The Government of Orissa on 30.03.2016 communicated to the Chief Executive of OREDA with regard to approval of the proposal for enhancement of superannuation age of the employees of OREDA from 58 to 60

years. Therefore, it is contended that since the Government approval was received on 30.03.2016 with regard to enhancement of retirement age of the employees of OREDA, it should be extended prospectively and it would not have any retrospective effect. Since the petitioners are not entitled to get such claims with retrospective effect, the writ applications are liable to be dismissed.

It is further contended that so far as applicability of judgment of **Sukanta Kumar Das** (supra), who is one of the employees of OREDA, to the present case is concerned, in the said case hearing was concluded on 30.03.2016 and the judgment was delivered on 08.04.2016 and, as he was continuing by virtue of the interim order passed by this Court, he was allowed to continue in service, even though his retirement age was 31.03.2015. But on the same day, i.e., 30.03.2016 the OREDA had issued office order allowing its employees to retire on attaining the age of 60 years instead of 58 years after approval from the Finance Department and Science and Technology Department of the Government and thus he got the benefit of Government order dated 30.03.2016. It is further contended that the ratio decided in the case of **Premalata Panda** (supra) has no application to the present case and the same is distinguishable. More so, the resolution dated 02.08.2014 issued by the Government in Department of Public Enterprises has no application to OREDA, as the same is only applicable to the statutory Corporations including PSUs registered under the Companies Act, 1952.

8. This Court by order dated 20.07.2017 directed learned counsel appearing for OREDA to produce the relevant files dealing with resolution passed with regard to enhancement of retirement age from 58 to 60 years. In compliance of the same, on 21.07.2017, learned counsel appearing for OREDA produced the relevant files for perusal of this Court.

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

10. On the above factual backdrop of the case, the following questions emerge for consideration:

(1) Whether OREDA is a PSU and, if so, whether resolution dated 02.08.2014 of the Government in Public Enterprises Department is applicable to it?

(2) Whether the petitioners should be extended with the benefit of retirement age from 58 to 60 years at par with their counterparts in similarly situated organizations under the administrative control of the Science and Technology Department?

(3) If so, what relief the petitioners are entitled to?

Question No.1. *Whether OREDA is a PSU and, if so, whether resolution dated 02.08.2014 of the Government in Public Enterprises Department is applicable to it?*

11.1. Admittedly, OREDA has been registered under the Societies Registration Act, 1860 and is a society. The Memorandum of Association of OREDA clearly indicates in Clause-3 the objectives for which it has been established. The objective mentioned in sub-clause (a) of Clause-3, being relevant for the purpose of the case, is extracted hereunder:

> *"3.(a) to identify small canal hands and drops in streams and thereafter generate power through Mini/Micro Hydel Projects with a view to augmenting the energy sources of the State and for making power available in the rural areas."*

Section 86(1)(e) of the Electricity Act, 2003, which is also of relevance to note at this juncture, reads thus:

> *"**86. Functions of State Commission.** – (1) The State Commission shall discharge the following functions, namely:-*
>
> *xx xx xx*
>
> *(e) Promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;"*

The objective of opposite party no.3 vis-à-vis the provisions contained under Section 86(1)(6) of the Electricity Act, 2003, as referred to above, clearly state that the nature of duty discharged by it is a "public utility service" as it is indulged in generation of power through Mini/Micro Hydel Projects with a view to augmenting the energy sources of the State and for making powers available in the rural areas. Once it is indulged in public utility service, it is discharging public functions. A body is performing 'public function' when it seeks to achieve some collective benefit for the public or a section of public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore, exercise public functions when they intervene or participate in social or economic affairs in the public interest.

11.2. In ***Binni Ltd.*** (supra), the apex Court has taken into consideration a book on ***Judicial Review of Administrative Action (5th Edn.)*** by de Smith, Woolf & Jowell, in Chapter 3, para 0.24 it is stated thus:

> *"A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in*

> *social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides 'public goods' or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purpose, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing."*

11.3. In ***Hindustan Zinc Ltd.*** (supra), the apex Court held that Regulations framed by Rajasthan Electricity Regulatory Commission in exercise of power under Section 86(1)(e) read with Section 181 of the Electricity Act, 2003 provides for promotion and cogeneration of electricity from renewable source of energy in the area and are reasonable restrictions within Article 19(6) of the Constitution. Thereby, the renewal energy is dealing with public field. Therefore, the development of transmission and sub-transmission infrastructure for evacuation from generating stations based on renewable energy sources are to be done in accordance with law. In view of the aforementioned provisions, and law discussed above, it is made clear that OREDA is discharging "public utility service".

11.4. In **Corpus Juris Secundum**, Volume 73 page 990, the "public utility" has been mentioned as follows:

> ***"Public utility.*** *A public utility has been described as a business organization which regularly supplies the public with some commodity or service, such as electricity, gas, water transportation or telephone or telegraph service. While the term has not been exactly defined, and, as has been said, it would be difficult to construct a definition that would fit every conceivable case, the distinguishing characteristic of a public utility is the devotion of private property by the owner or person in control thereof to such a use that the public generally, or that part of the public which has been served and has accepted the service, has the right to demand that the use or service, as long as it is continued shall be conducted with reasonable efficiency and under proper charges. The term is sometimes used in an extended sense to include a great many matters of general welfare to the State and its communities."*

The above meaning has been taken note of in ***Earth Builders v. State of Maharashtra,*** AIR 1997 Bom 148.

11.5. In ***Bharat Bhawan Nirman Sahakari Samiti v. State of Rajasthan,*** AIR 1979 Raj 209, the Rajasthan High Court held:

"Public utility means any work, project which is going to be useful to members of the public at large. The public benefit aided at or intended to be secured need not be to whole community but to a considerable number people."

11.6. Section 2(n) of the Industrial Disputes Act, 1947 elaborately deals with "public utility service", which means as follows:

" (i) any railway service or any transport service for the carriage of passengers or goods by air;

(ia) any service in, or in connection with the working of any major port of dock.

(ii) any section of an industrial establishment, on the working of which the safety of the establishment or the workmen employed therein depends;

(iii) any postal, telegraph or telephone service;

(iv) any industry which supplies power, light or water to the public;

(v) any system of public conservancy or sanitation;

(vi) any industry specified in the First Schedule which the appropriate Government may, if satisfied that public emergency or public interest so requires, by notification in the Official Gazette, declare to be a public utility service for the purposes of this Act, for such period as may be specified in the notification.

Provided that the period so specified shall not, in the first instance, exceed six months but may, by a like notification, be extended from time to time by any period not exceeding six months, at any one time if in the opinion of the appropriate Government public emergency or public interest requires such extension."

11.7. Section 22A(b) of Legal Service Authorities Act, 1987 deals with "public utility service", which means as follows:

"Public utility service" means any

(i) transport service for the carriage of passengers or goods by air, road or water; or

(ii) postal, telegraph or telephone service; or

(iii) supply of power, light or water to the public by any establishment; or

(iv) system of public conservancy or sanitation; or

(v) service in hospital or dispensary; or

(vi) insurance service. [Legal Services Authorities Act (39of 1987), S 22A(b)]"

11.8. In ***Oil and Natural Gas Commission*** (supra), the apex Court ruled that "public utility undertaking" includes any industry which supplies power, light or water to the public.

11.9. In view of the connotations, as discussed above, vis-à-vis the objectives of the Memorandum of Association and the provisions contained in the Electricity Act, 2003, an inference can safely be drawn that public utilities are those facilities without which life would be impossible, such as water-supply, electricity, sewerage and so on. Opposite party no.3 indulged in generation of power which essentially a "public utility service" and useful to the members of the public at large. The public benefit aided at or intended to be secured need not be to whole community but to a considerable number people.

11.10. Now coming to the concept "Public Sector Undertaking", explanation to Section 2(1)(ii) of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 states "public sector undertaking" means any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Section 617 of the Companies Act, 1956 which is owned, controlled or managed by the Central Government. Except this, there is no other meaning or definition of "public sector undertaking" prescribed anywhere.

11.11. Meaning of "public sector undertaking" had come up for consideration in ***Leelabai Gajanan Pansare*** (supra). In paragraph 63, 64 and 65 of the judgment, the apex Court observed as follows:

> *"63. One point may be noted at this stage. The concept of PSU and the concept of government company became relevant after introduction of economic reforms in 1991. With the said reforms, market orientation was given to our economy. It is around this time that the role of PSU became important. Both, the PSU as well as the government company, were given autonomy and flexibility in commercial sectors. Annexure-1 to the Report of the Study Team on PSUs dated 10-6-1967 indicates clearly that government companies stood covered under the concept of PSUs. In the present matter, the High Court has taken a view that government companies stand excluded from PSUs under Section 3(1)(b) as government companies are separate and distinct entities from PSUs, and since government company is not in the enumerated items in Section 3(1)(b) one cannot include the said entity within the meaning of the word "PSU". This view of the High Court is erroneous for the simple reason that the word "PSU" is not defined under any Act. The word PSU is indicated in various parliamentary committees on administrative reforms so that in financial, employment and in policy matters, the Central/State Government could evolve norms/standards.*

64. It is no doubt true that the public character of the functions performed by the undertaking determine the character of that undertaking. It is the public character of the functions of the undertaking which makes it a PSU. However, there is no conclusive test for determining the status of an undertaking as a PSU. In judging the character of an entity, the court has to keep in mind the context in which the word PSU is used in a given enactment. There are a number of tests which could be applied in judging the character of an entity, namely, the test of origin, the test of agency or instrumentality of the State, the functional test, the monopolistic status of an entity, test concerning areas of operations, the test of economies of scale, the test of control, the role of the entity in the priority sector etc. Therefore, there is no one conclusive test applicable to decide the character of an entity. For example, nationalized banks have been held to fall within the State by this Court on an application of the test of control. Similarly, the test of "agency or instrumentality" that came to be laid down brought the government companies, as defined under Section 617 of the 1956 Act, to be included within the concept of State for the purpose of Article 12 of the Constitution (see ***Som Prakash Rekhi v. Union of India****, (1981) 1 SCC 449). Therefore, none of the above tests is conclusive in itself. Suffice it to state that government companies under Section 617 are understood by the legislature to be a part of PSUs. Therefore, even on the website of the Central Government undertakings under the caption of PSUs/PSEs, we find government companies and State-owned government companies being listed under the caption of PSUs/PSEs. These items have been enumerated on the basis of legislative understanding.*

65. According to the book titled ***Growth of Trade, Commerce and PSUs*** *written by Shri Suresh Prasad Padhy, PSUs may be in the form of departmental units, corporations, government companies, autonomous bodies or authorities. Corporate governance, according to Geeta Gouri, is one of the major processes for putting PSEs and PSUs on the right track. In the list of PSUs published on the website of Central Government, BPCL is shown as a PSU. Similarly, MTNL and BSNL are government companies which are also shown as PSUs."*

In view of the law laid down by the apex Court, as discussed above, it is no doubt true that the public character of the functions performed by the undertaking determine the character of that undertaking. It is the public character of the functions of the undertaking which makes it a PSU. PSUs may be in the form of departmental units, corporations, government companies, autonomous bodies or authorities. All the important forms of organization for PSUs have certain advantages and certain limitations. A majority of PSUs in this form has been mainly that of autonomy. Similar is the case of statutory corporations which are also created to mitigate the drawbacks of departmental administration.

11.12. In view of such position, the OREDA may not be classified as PSU, as has been notified by the Government, but looking at its functioning, it can be safely inferred that it has all characteristics of a PSU and is discharging the "public utility service" for the benefit of public at large. If the functioning of OREDA is akin to the functioning of statutory PSUs and is discharging the public utility service, even though it has not been enlisted or notified as a PSU of Government, taking into consideration the characteristics of its functioning, an inference can be drawn that, since it functions for the benefit of public at large and the administrative control lies with the State Government, the rules and regulations applicable to the State Government employees and its PSUs are also applicable to it.

Question No.(2). *Whether the petitioners should be extended with the benefit of retirement age from 58 to 60 years at par with their counterparts in similarly situated organizations under the administrative control of the Science and Technology Department?*

12.1. The reason for enhancement of retirement age from 58 to 60 years is based on significant improvement in average life expectancy in recent years. As the Central Government enhanced the retirement age of its employees by revising it to 60 years, consequently some of the State Governments also followed the principle adopted by the Government of India in enhancing the retirement age of their employees. Therefore, the Government of Odisha in its Finance Department issued resolution on 28.06.2014, pursuant to which superannuation age of its employees were extended from 58 to 60 years by amending Rule 71(a) of the Odisha Service Code, as well as the Orissa Civil Services (Pension) Rules, 1992. Consequent upon the enhancement of the age of superannuation of the State Government employees from 58 to 60 years, on the demand of various service associations of the State PSUs, the State Government in Public Enterprises Department by resolution dated 02.08.2014 enhanced the age of superannuation of the employees of the State PSUs from 58 years to 60 years subject to fulfillment of the conditions mentioned therein.

12.2. Allured by the same, the OREDA Workers' Union moved the authorities on 27.11.2014 requesting to take immediate steps, by calling a Governing Body meeting, for amendment of Rule-51(2) of OREDA Service Rules, 1997 so that the employees of OREDA would be benefited for enhancement of the retirement age from 58 years to 60 years at the fag-end of their service career. It was categorically mentioned that OREDA was established in the year 1983 as an agency under the administrative control of Science and Technology Department, Government of Odisha. The aim and objectives of the agency were to popularize and promote the renewable energy in the different corners of the State of Odisha.

12.3. It is of relevance to mention here that the Governing Body of OREDA in its 10^{th} meeting held on 18.04.1987 resolved as follows:

*"**Item No. 10***

Facilities available to State Government Employees should be automatically accorded by OREDA to its staff except when different conditions are specifically prescribed as per rules of the Organisation framed and Governing Body resolutions made from time to time. For this reference to Governing Body every time is not needed."

Subsequently, OREDA Service Rules, 1997 were enacted and came into force with effect from 05.09.1997. Certain provisions of the said Rules, which are necessary for the purpose of the present case, are extracted hereunder:

"3(a) "Administrative Department" means the Department of the State Government of Orissa (Presently, the Department of Science and Technology) to which the affairs of the Orissa Renewable Energy Development Agency are entrusted by the State Government."

***"51. Tenure of Appointment:-** (1) An employee is normally expected to be in service till attainment of the age of superannuation.*

(2) OREDA employees other than those specified in sub-rule (3) shall retire from the service of the OREDA in the afternoon of the last day of the month when they attain the age of fifty eight years."

The said Service Rules of OREDA were subjected to amendment, pursuant to a single line proposal floated by the Governing Body of OREDA in its 33rd meeting held on 02.06.2010 to the following effect:

"Service Rules applicable to the employees of the Government of Odisha shall be made applicable to all employees of OREDA".

Thereafter, in the 34th Governing Body meeting of OREDA, it was clarified that the Governing Body would prepare specific proposal to adopt different Chapters of Orissa Service Rules, for its applicability to the employees and to submit the same before the Administrative Department, for necessary examination and concurrence. In the wake of enhancement of the age of superannuation for the employees working in the State Government, the Governing Body of OREDA in its 36th meeting decided as follows:

"As regards enhancement of retirement age from 58 years to 60 years of OREDA employees, it is decided by the Governing Body that a proposal will be placed before the Finance Department, Government of Odisha through Science & Technology Department for enhancement of retirement age from 58 years to 60 years. In this connection, the receipt and

> *expenditure position of the Origanization of last 5 years are required to be produced with the proposal. Also it is decided that the detailed financial implication for enhanced two years along with undertakings to the effect that it will not pose any burden to the financial position of the State Exchequer."*

In compliance of the said resolution, communication was also made enclosing the receipt and expenditure statement from 2010-11 to 2014-15 and financial implication statement from 2015-16 to 2019-20, as to if the age of superannuation of OREDA employees would be enhanced for 2 years more, OREDA could able to meet the additional requirement of fund from its own source and undertook to shoulder the liability without any Government assistance for enhancement of the age of superannuation from 58 to 60 years of its employees. Consequentially, the administrative approval was received from the Administrative Department on 30.03.2016.

In ***Purshottam Lal v. Union of Inida (UOI),*** AIR 1973 SC 1088, the apex Court held that the Government cannot make any discrimination in the matter of payment of emoluments between the Central Government employees and Union Territories employees.

12.4. Keeping in view the principles laid down by the apex Court in the aforementioned judgment and applying the same to the present case, as the State Government employees and PSU employees have already received the benefit of enhancement of retirement age from 58 to 60 years pursuant to the Government resolutions dated 28.06.2014 and 02.08.2014, merely because the resolution passed by OREDA on 12.03.2015 took a long time for administrative approval, which was admittedly accorded on 30.03.2016, that *ipso facto* cannot deprive the petitioners of getting the benefit of enhancement of retirement age with retrospective effect from 02.08.2014, since in answering question no.1 this Court has already held that, OREDA even though is not enlisted as a PSU but it functions for the benefit of public at large and administration lies with the State Government and the rules and regulations application to State Government employees and its PSUs are applicable to it and, therefore, its employees stood on the same footing like that of the State PSUs for whom such benefit has already been extended. Non-extension of such benefits to the present petitioners amounts to arbitrary and unreasonable exercise of power and violates Article 14 of the Constitution of India, and OREDA, being a model employer, cannot make such discrimination.

13. So far as the case of ***Sarat Chandra Tripathy*** (supra) is concerned, the petitioner in that case was an employee of Odisha Forest Development Corporation and he had approached this Court before any decision was taken or resolution being passed by the management of the said Corporation, for which this Court did not

entertain the said writ application. In the facts and circumstances, the said case is clearly distinguishable from the present one.

14. So far as the case of ***Sukant Kumar Das*** (supra) is concerned, this Court decided to extend the benefit to him pursuant to resolution dated 02.08.2014 of the Government in Public Enterprises Department, by specifically holding in paragraph 10 of the judgment as follows:

> *"10. Pursuant to the resolution dated 02.08.2014 of the Government of Odisha, vide Annexure-1, the Governing Body of OREDA, which has been constituted by the State Government in its Science and Technology Department to regulate the affairs of the agency, in its 36th meeting held on 12.03.2015, has decided to send proposal to the Finance Department through S & T Department for enhancement of age of retirement on superannuation of employees of OREDA from 58 to 60 years. A decision was taken that OREDA shall meet the additional requirement of fund from its own source. Accordingly, the proposal was submitted by OREDA. The proposal has been concurred by the government of Odisha in its Finance Department. Thus there is no impediment on the part of opposite party no.3 to amend the Rule so as to give benefit to its employees".*

15. In addition to above, since as a matter of principle, the Governing Body of the OREDA has already taken a decision in its 10th and 33rd meeting respectively held on 18.04.1987 and 02.06.2010 that the facilities available to the State Government employees should be automatically accorded by OREDA to its staff except when different conditions are specifically prescribed as per rules of the Organization framed and Governing Body resolutions made from time to time and that the service rules applicable to the employees of the Government of Odisha shall be made applicable to the employees of OREDA, so far as enhancement of retirement of age of the employees of OREDA is concerned, the same has to be in consonance of the decision of the Governing Body in its 10th and 33rd meeting, as discussed above.

16. In order to buttress the above view of this Court, it is apposite to refer to the judgment of the apex Court in ***Harwindra Kumar v. Chief Engineer, Karmik***, AIR 2006 SC 365, wherein their Lordships in paragraphs-9, 10 and 11 have held as follows:

> *"9. Reference in this connection may be made to a decision of this Court in the case of V.T. Khanzode and others v. Reserve Bank of India and another, AIR 1982 SUPREME COURT 917. In that case, under Section 58(1) of the Reserve Bank of India Act, powers were conferred upon the Central Board of Directors of the Bank to make regulations in order to provide for all matters for which provision was necessary or convenient for the purpose of giving effect to the provisions of the Act which section in the*

opinion of their Lordships included the power to frame regulation in relation to service conditions of the bank staff. In that case, instead of framing regulations, the bank issued administrative circulars in relation to service conditions of the staff acting under Section 7(2) of the Reserve Bank of India Act which was a general power conferred upon the bank like Section 15(1) of the present Act. It was laid down that "there is no doubt that a statutory corporation can do only such acts as are authorized by the statute creating it and that, the powers of such a corporation cannot extend beyond what the statute provides expressly or by necessary implication." It was further laid down that "so long as staff regulations are not framed under Section 58(1), it is open to the Central Board to issue administrative circulars regulating the service conditions of the staff, in the exercise of power conferred by Section 7(2) of the Act." As in the said case, no regulation was at all framed under Section 58 of the Reserve Bank of India Act, as such, the administrative circulars issued by the Central Board of Directors of the Bank under Section 7(2) of the Reserve Bank of India Act in relation to service conditions were held to be in consonance with law and not invalid.

10. In the present case, as Regulations have been framed by the Nigam specifically enumerating in Regulation 31 thereof that the Rules governing the service conditions of government servants shall equally apply to the employees of the Nigam,it was not possible for the Nigam to take an administrative decision acting under Section 15(1) of the Act pursuant to direction of the State Government in the matter of policy issued under Section 89 of the Act and directing that the enhanced age of superannuation of 60 years applicable to the government servants shall not apply to the employees of the Nigam. In our view, the only option for the Nigam was to make suitable amendment in Regulation 31 with the previous approval of the State Government providing thereunder age of superannuation of its employees to be 58 years, in case, it intended that 60 years which was the enhanced age of superannuation of the State Government employees should not be made applicable to employees of the Nigam. It was also not possible for the State Government to give a direction purporting to Act under Section 89 of the Act to the effect that the enhanced age of 60 years would not be applicable to the employees of the Nigam treating the same to be a matter of policy nor it was permissible for the Nigam on the basis of such a direction of the State Government in policy matter of the Nigam to take an administrative decision acting under Section 15(1) of the Act as the same would be inconsistent with Regulation 31 which was framed by the Nigam in the exercise of powers conferred upon it under Section 97(2)(c) of the Act.

> *11. For the foregoing reasons, we are of the view that so long Regulation 31 of the Regulations is not amended, 60 years which is the age of superannuation of government servants employed under the State of Uttar Pradesh shall be applicable to the employees of the Nigam. However, it would be open to the Nigam with the previous approval of the State Government to make suitable amendment in Regulation 31 and alter service conditions of employees of the Nigam, including their age of superannuation. It is needless to say that if it is so done, the same shall be prospective."*

In ***Dayanand Chakrawarty*** (supra), the apex Court taking note of the ***Harwinder Kumar*** (supra) held that so long as Regulation-31 is not amended, 60 years which is age of superannuation of the Government employees shall be applicable to the employees of the Nigam. It is further held that it was not possible for the Nigam to take an administrative decision pursuant to the direction of the State Government in the matter of policy issued under Section 89 of the Act and directing that the enhanced age of superannuation of 60 years applicable to the Government servants shall not apply to the employees of the Nigam. In view of such finding of the apex Court, the Nigam cannot act on the basis of the State Government orders on 29.09.2009 providing uniform age of superannuation as 58 years. Accordingly, the apex Court allowed the age of employees of Nigam to continue till the age of superannuation in view of the Regulation 31 and ordered that no recovery shall be made from those who continued till the age of 60 years. It was further observed by the apex Court that the employees who had not been allowed to continue after completing age of 58 years by virtue of the erroneous decision taken by the Nigam for no fault of theirs, they would be entitled to payment of salary for the remaining period up to the age of 60 years.

In **Chairman, Uttar Pradesh Jal Nigam v. Radhey Shyam Gautam,** 2007 (11) SCC 507, following the decision of Harwindra Kumar (supra) the apex Court also held that the employees of the Nigam would be entitled to full salary for the remaining period up to the age of 60 years.

17. Taking into consideration the above law laid down by the apex Court and this Court, while considering the case of Cuttack Development Authority in ***Premalata Panda*** (supra), this Court came to a conclusion that the petitioner therein was entitled to get the benefit of extension of retirement age from 58 to 60 years and also directed how to implement such benefit in respect of employees working under the CDA. In view of such position, and law discussed above, there is no iota of doubt that the petitioners are entitled to get the benefit of enhancement of retirement age from 58 to 60 years at par with their counterparts in the State Government and also PSUs pursuant to resolution dated 28.06.2014 passed by the Government in Finance Department, as well the resolution dated 02.08.2014 passed by the Government in Public Enterprises Department together with the decision taken by

the Governing Body of OREDA in its 10th meeting dated 18.04.1987 and 33rd meeting dated 02.06.2010.

18. **Question No.3**. What relief the petitioners are entitled to?

Since this Court has already answered questions no.1 and 2 in affirmative, in view of the analysis made above, the petitioners are entitled to the following reliefs:

(a) The petitioners, who had approached this Court before completion of 58 years of age and during pendency of the writ petition were made to retire on attaining the age of 58 years, as well as who had approached this Court after retirement on attaining 58 years of age, the opposite party no.3-OREDA is directed to bring them back into service forthwith, if they have not attained the age of 60 years, and allow them to continue till they attain the age of 60 years and grant all the consequential service and financial benefits as due and admissible to them in accordance with law.

(b) The petitioners, who had approached this Court after retirement on attaining the age of superannuation and in the meantime have attained the age of 60 years, shall not be entitled for arrears of salary. However, they will be deemed to be continuing in service up to the age of 60 years. In their case, the OREDA shall treat their age of superannuation as 60 years, fix the pay accordingly and re-fix the retirement benefits like pension, gratuity etc. On such calculation, they shall be entitled to arrears of retirement benefits after adjusting the amount already paid.

(c) Needless to say that the arrears of salary and arrears of retirement benefits should be paid to such employees within a period of six months from the date of receipt of copy of the judgment.

20. With the aforesaid observation and direction, the writ petitions are allowed. No order as to cost.

Writ petitions allowed.

2017 (II) ILR - CUT- 896

DR. B. R. SARANGI, J.

W.P.(C) NO. 9036 OF 2016

BIBHUTI BHUSAN PATNAIK …….;Petitioner

.Vrs.

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

ODISHA CIVIL SERVICE (REHABILITATION ASSISTANCE) RULES, 1990 – RULE 2(b)

Compassionate appointment – Widow of the deceased employee applied for appointment – Subsequently she relinquished her claim due to vision problem and requested to appoint the present petitioner, the son of the deceased – On consideration of the same joint Secretary to Government of Odisha, Women & Child Development Department vide letter Dt. 20.02.2015 required to furnish certain informations including fresh affidavit of the legal heirs of the deceased employee that they have no objection if the petitioner will get appointment – Petitioner filed all the informations after which inquiry was conducted, distress certificate was issued but finally the claim of the petitioner was rejected on the ground that since the widow is alive the son is not eligible for appointment as it contradict the provision of Rule 2(b) of the Rules – Hence the writ petition – Since the widow has relinquished her claim and son is the second priority for consideration under Rule 2(b) of the Rules 1990 the authority could not have rejected the application on the ground that it is hit by Rule-2(b) of the O.C.S. (R.A.) Rules, 1990 – Held, the impugned order is quashed – The matter is remitted back to the authority concerned for reconsideration of the case of the petitioner for compassionate appointment.

(Paras 11,12,13)

Case Laws Referred to :-

1. (1997) 8 SCC 85 : Haryana State Electricity Board v. Hakim Singh.
2. (2007) 2 SCC481:AIR 2007 SC1155 : National Institute of Technology v. Niraj Kumar Singh.
3. (2003) 7 SCC 704 :AIR 2003 SC3797 : State of Haryana v. Ankur Gupta.
4. AIR 1998 SC 2230 : Director of Education v. Pushpendra Kumar.
5. (2005) 7 SCC 206 : Commissioner of Public Instructions v. K.R. Vishwanath.

For Petitioner : M/s. S. Mishra, S.K.Samantaray & S.Modi.

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

Decided on : 05.07.2017

JUDGMENT

DR. B.R. SARANGI, J

The petitioner, who is the son of the deceased employee, has filed this writ petition assailing the communication dated 04.11.2015 issued by the Joint Secretary to Government in Women and Child Development Department to the Collector, Dhenkanal-opposite party no.3 rejecting his application for appointment under Rehabilitation Assistance Scheme.

2. The father of the petitioner, Siba Narayan Pattanayak, who was working as Peon under the Women and Child Development Department, Government of Odisha in the office of C.D.P.O., Odapada, died prematurely on 27.06.2007. After obtaining death certificate on 23.07.2007 and legal heir certificate on 29.09.2007, wife of the deceased employee applied for compassionate appointment under the OCS (Rehabilitation Assistance) Rules, 1990 vide application dated 01.12.2007 before the Collector and District Magistrate, Dhenkanal. Subsequently, the Collector, Dhenkanal forwarded her application to opposite party no.2-Child Development Project Officer, Odapada for consideration. While her application was pending, she became unfit because of defect in eye. Therefore, she requested that in her place, the case of the petitioner, who is the son of the deceased, to be considered for compassionate appointment under the OCS (RA) Rules, 1990. On consideration of the same, the Joint Secretary to Government of Odisha, Women and Child Development Department vide letter dated 20.02.2015 required to furnish certain information/documents including the fresh affidavit of the legal heir of deceased Siba Narayan Pattnayak (except the petitioner) that they have no objection if the petitioner is appointed under Rehabilitation Assistance Scheme, which was complied with by meeting the query. On that basis, following rules inquiry was conducted, distress certificate was issued, but finally vide order dated 04.11.2015, the claim of the petitioner was rejected on the ground that it contradicts the provisions of Rule-2(b) of the OCS (RA) Rules, 1990.

3. Mr. S. Mishra, learned counsel for the petitioner stated that as the mother of the petitioner faced ailments with regard to vision injury in eyes and was medically declared unfit for the nature of employment sought by her under the rehabilitation assistance scheme, in spite of she being the next candidate suitable for employment, the claim of the petitioner should not have been rejected by resorting to Rule 2(b) of the OCS (RA) Rules, 1990. His further contention is that the impugned order dated 04.11.2015 in Annexure-15, having been passed by the very same Joint Secretary, who had made all the correspondences for consideration of the case of the petitioner, suffers from bias and non-application of mind and, as such, is liable to be set aside.

4. Mr. B. Senapati, learned Additional Government Advocate appearing for opposite parties nos.1 to 4 relying upon counter affidavit stated that in view of the provisions contained in Rule-2(b) of the OSC (RA) Rules, 1990, the first priority for appointment is to be given to the wife of the deceased and thereafter the son. Since the widow is alive, the son is not eligible for compassionate appointment. Therefore, the action of the authority is justified in rejecting the application of the petitioner for compassionate appointment.

5. Heard learned counsel for the parties and perused the records. Pleadings have been exchanged between the parties, the writ petition is being disposed of at the stage of admission with the consent of learned counsel for the parties.

6. There is no nothing before this Court to dispute that the petitioner is the son of the deceased employee Siba Narayan Pattanayak, who died prematurely, while working as Peon, on 27.06.2007. Though, his wife made an application for compassionate appointment and the same was under consideration, as she was unfit to work because of her defect in eye, she relinquished herself giving proposal to consider the case of the petitioner for compassionate appointment. On consideration of the same, the authorities required to furnish certain information/documents including a fresh affidavit of the legal heir of deceased Siba Narayan Pattnayak (except petitioner) that they have no objection if the petitioner is appointed under Rehabilitation Assistance Scheme, which was obliged by the petitioner.

As there was full compliance of the provisions of OCS (Rehabilitation Assistance) Rules, 1990, meaning thereby after complying all the requirements pursuant to Annexure-12 dated 20.02.2015, the application submitted by the petitioner was recommended for verification by the competent authority.

7. In ***Haryana State Electricity Board v. Hakim Singh***, (1997) 8 SCC 85, the apex Court explained the rationale of the rule relating to compassionate appointment in following words:

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

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

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

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

10. In exercise of powers conferred by the proviso to Article 309 of the constitution of India, the Government of Odisha have made the following rules to regulate recruitment to the State services and posts as

a measure of rehabilitation assistance, i.e., the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990.

Rule-2(b) of the aforesaid Rules, reads as follows:

"Family Members" shall mean and include the following members in order of preference-

(i) Wife/Husband

(ii) Sons or step sons or sons legally adopted through a registered deed;

(iii)Unmarried daughters and unmarried step daughters;

(iv)[Widowed daughter or daughter-in-law residing permanently with the affected family.]

(v) Unmarried or widowed sister permanently residing with the affected family;

(vi)Brother of unmarried Government servant who was wholly dependant on such Government servant at the time of death."

The above named family members thus are eligible to receive compassionate appointment as has been indicated elaborately in the above rules. Sub-Clause (ii) of Clause (b) of Rule-2 states that family members includes sons or step sons or sons legally adopted through a registered deed. Sub-Clause (i) of Clause(b) of Rule-2 states that first preference is to be given to wife/husband.

11. In the instant case, the husband having been died, his wife to be given preference for compassionate appointment. Since she relinquished her claim because of her illness, recourse should have taken by the authority to Clause (ii) of Sub-Clause-(b) of Rule-2, i.e., second preference category to which the petitioner, who is the son of the deceased and his case should have been considered for such appointment. For that, all endeavours had been made by the State Government, particularly, the very same authority by calling upon the petitioner to produce the relevant documents and also no objection certificate from other legal heirs of the deceased employee. The same having been furnished, on subsequent stage instead of considering for giving appointment to the petitioner, the very same authority passed the

order impugned in Annexure-15 stating that the claim of the petitioner cannot be considered in view of the provisions contained in Rule-2(b) of the OCS (RA) Rules, 1990.

12. On perusal of the provisions contained in Rule 2(b) of the OCS (RA) Rules, it appears that the son is the second priority for consideration of compassionate appointment. If the widow has relinquished her claim, the case of the petitioner has to be taken into consideration. As such, the authority has accepted the request and required certain documents in that regard. The petitioner filed the required documents. At a belated stage, the authority could not have rejected the application of the petitioner for compassionate appointment stating that it is hit by Rule-2(b) of the OCS (RA) Rules, 1990.

13. In that view of the matter, this Court is of the considered view that the order dated 04.11.2015 in Annexure-15 passed by the authority is without application of mind and the same is liable to be quashed. Accordingly, the order dated 04.11.2015 is quashed and the matter is remitted back to the authority concerned for reconsideration of the case of the petitioner for appointment on compassionate ground as per the provisions contained in OCS(RA) Rules, 1990 as expeditiously as possible.

14. With the above observation and direction, the writ petition is disposed of. No order as to cost.

Writ petition disposed of.

2017 (II) ILR - CUT- 902

DR. B.R. SARANGI, J.

W.P.(C) NO. 13328 OF 2011
WITH BATCH

BISWAJEET MOHAPATRA ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp. Parties

SERVICE LAW – Fixation of cut-off date by Government for payment of UGC scale of pay after considering various aspects of the case – Not extending the said benefit to the similarly situated persons is discriminatory – Court can set aside cut-off date if it is arbitrary and unreasonable.

In this case, the petitioners were duly selected and appointed as lecturers by WALMI on 27.02.1992 in the UGC scale of pay – Pursuant to the fifth Pay Commission recommendation UGC scale of Pay of College and University teachers was enhanced w.e.f. 01.01.1996 but the petitioners were extended the said benefit w.e.f. 01.01.2004 – Hence the writ petition – Not extending the said benefit to the petitioners w.e.f. 01.01.1996 without any valid reason is not only discriminatory but also arbitrary, unreasonable and violative of Articles 14 & 16 of the Constitution of India – Held, direction issued to the opposite parties to extend the benefits of revised UGC scale of pay to the petitioners w.e.f. 01.01.1996 at par with their counterpart lecturers working in the department of Higher Education, Finance and Agriculture of the Government of Odisha with all consequential benefits as per law.

(Paras 16 to 20)

Case Laws Referred to :-

1. AIR 2003 SC 2189 : A.K. Bindal and another, v. Union of India & Ors.
2. AIR 1996 SC 1 : Maharashtra v. Manubhai Pragaji Vashi.
3. AIR 1975 SC 1436 : Jaila Singh v. State of Rajasthan.
4. AIR 1983 SC 130 : D.S. Nakara v. Union of India.
5. AIR 1985 SC 1367 : Dr. (Mrs.) Sushma Sharma v. State of Rajasthan
6. 1987 (2) SCC 453 : AIR 1987 SC 1772 : U.P.M.T.S.N.A. Samiti, Varanasi v. State of Uttar Pradesh.
7. AIR 1990 SC 1782 : Krishna Kumar v. Union of India.
8. AIR 1991 SC 1743 : State of Rajasthan v. Rajasthan Pensioner Samaj.
9. AIR 1992 SC 767 : All India Reserve Bank Retired Officers Association v. Union of India.
10. (1993) 2 SCC 174 :T.S. Thiruvengadam v. Secretary to the Government of India.
11. AIR 1994 SC 2750 : Union of India v. Sudhir Kumar Jaiswal.

12. (1996) 7 SCC 564 : AIR 1996 SC 2963 : M. C. Dhingra v. Union of India.
13. (1996) 10 SCC 536:University Grants Commission v. Sadhana Chaudhary.
14. AIR 1997 SC 782 : State of Rajasthan v. Amrit Lal Gandhi.
15. (2000) 5 SCC 262 : Bhupinderpal Singh v. State of Punjab.
16. (1997) 4 SCC 18 : Ashok Kumar Sharma v. Chandra Sekhar.
17. 1990) 2 SCC 669 : Andhra Pradesh Public Service, Commission v. B. Sharat Chandra,
18. (1993) 2 SCC 429 : M.V. Nair (Dr.) v. Union of India

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

For Opp. Parties : Mr. C.A.Rao, Sr. Adv. and M/s. Y.S.R.Murty & S.K.Behera

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Date of hearing : 11.08. 2017
Date of judgment: 17. 08.2017

JUDGMENT

DR. B.R.SARANGI, J.

The Water and Land Management Institute (WALMI), a society registered under the Societies Registration Act, 1860, is an autonomous institute under the Department of Water Resources, Government of Orissa. The Government in its resolution dated 30.12.1985 established WALMI in Orissa under the Development Credit Agreement for Subarnarekha Irrigation Project in order to improve the deficiency in the knowledge of agricultural practices especially crop, water requirement, survey, lay out, construction and management of distribution system including minor canals, water courses, field channels and drainage channels. The main objectives of the society was to promote advancement of science and acquisition of scientific knowledge, provide instructions and training in all branches of science both theoretical and applied and in particular in water management and land development for irrigation and agriculture. WALMI imparts training to the in-service Diploma, Degree and Master Degree holder practicing engineers and Agriculture Officers, Field Staff and Farmers. It also undertakes adaptive research and extension activities in irrigation command areas. It has also been recognized, as a centre for research by Utkal University for pursuing studies leading to award of Ph.D degree, by its letter dated 11.10.1995. It has also been accorded non-plan budget in budgetary allocation of the Department of Water Resources, Government of Odisha, as it has been recognized as the key

institute in transfer of technologies related to water and land development and management to officers of Department of Water Resources, Command Areas Development Agencies, Department of Agriculture, Lift Irrigation Corporation etc, field staff and farmers of the State.

2. WALMI, under the control of Department of Water Resources, is strictly following University Grant Commission (UGC) norms since its inception, while recruiting its Faculty Members, to maintain high quality teaching standard, by granting them UGC pay scales duly corroborated by Gazette Notification and subsequent Government Resolutions.

3. Pursuant to advertisement issued in Odia daily "The Samaj" on 20.07.1987, applications were invited by WALMI for three posts of Lecturers in Engineering Faculty so as to reach the same on or before 24.08.1987. It was mentioned therein that the scale of pay would be the existing UGC scale of pay of Rs.700-1600/- for Lecturers with usual foreign service terms and conditions and would be stationed at Bhubaneswar WALMI headquarters. The petitioners, having requisite qualification and satisfied the conditions stipulated in the advertisement itself, submitted their applications for the post of Lecturer in Engineering Faculty, and being duly selected, were appointed in the said post on 27.02.1992. Pursuant to resolution dated 18.08.1992, Department of Irrigation, Government of Odisha approved the revision of scale of pay of Faculty Members of WALMI, by which the scale of pay of the petitioners in Lecturer in Engineering Faculty was revised from Rs.700-1600/- to Rs.2400-4000/-. In conformity with the said resolution, the office order was issued on 28.08.1992 allowing the petitioners to draw their pay in the revised UGC scale of pay from the date they were entitled to get such benefit. Accordingly, the petitioners were also paid their increment. When there was revision of scale of pay pursuant to recommendation made by the Fifth Pay Commission, the benefit of UGC scale of pay was granted to the College teachers and University teachers with effect from 01.01.1996 by virtue of resolution of the Department of Higher Education, Government of Odisha dated 31.12.1999. Similarly, pursuant to resolution dated 21.10.2000 of the Department of Agriculture, Government of Odisha, teachers in Orissa University of Agriculture and Technology (OUAT) were extended the scale of pay recommended by the University Grants Commission w.e.f. 01.01.1996. Consequentially, the Lecturers who were getting scale of pay of Rs.2200-4000/- as per the recommendation of Fourth Pay Commission, their scale of pay was revised to Rs.8000-13500/- as per recommendation made by Fifth Pay Commission and that was given effect to from 01.01.1996.

4. The Finance Department, Government of Odisha vide notification dated 26.02.2001 framed a Rule called "Orissa Revised Scales of Pay (for College Teachers) Rules, 2001 by which the UGC scale of pay of the Government Lecturers was revised from 01.01.1996. The petitioners, having been appointed in the existing UGC scale of pay and discharged the responsibility of Lecturer in Engineering Faculty, also stood on the same footing and are entitled to get the revised UGC scale of pay as per report of the Fifth Pay Commission w.e.f. 01.01.1996. But the Department of Water Resources, Government of Odisha, by resolution dated 15.10.2004, granted UGC scale of pay w.e.f. 01.10.2004 prospectively. Accordingly, the petitioners' pre-revised scale of pay of Rs.2200-4000 was revised to Rs.8000-13500/- w.e.f. 01.10.2004, though they are entitled to get such benefit with effect from 01.01.1996 at par with their counterpart Lecturers of OUAT, College teachers and University teachers as well as Government Colleges of the State, pursuant to resolutions passed by the Department of Agriculture, Department of Higher Education and Department of Finance respectively. Though the petitioners had made grievances before the authorities, the same having not been taken into consideration, these applications have been preferred.

5. Mr. A.K. Mishra, learned Senior Counsel appearing along with Mr. D.K. Panda, learned counsel for the petitioners urged that there is no reason for fixing the cut-off date, i.e., 01.10.2004, while granting UGC scale of pay to the petitioners pursuant to the recommendations of the Fifth Pay Commission, though they stand on the similar footing with the Lecturers of the OUAT, College teachers and University teachers, as well as Government Lecturers, who have been granted UGC scale of pay with effect from 01.01.1996 pursuant to resolutions of the Department of Agriculture, Department of Higher Education and Department of Finance respectively. Fixation of such cut-off date, i.e., 01.10.2004, extending the benefit prospectively, has no reasonable nexus to the object sought to be achieved. As such, the authorities have, not only committed gross illegality and irregularity in fixing such cut-off date, but also created discrimination amongst the same class of teachers working in the same conditions with same qualification. Thereby, the action of the authorities violates Articles 14 and 16 of the Constitution of India. It is further contended that, in the name of financial crunch and policy decision, the rights of the petitioners to get UGC scale of pay ought not to have been curtailed by the authorities, which amounts to arbitrary and unreasonable exercise of power and warrants interference of this Court.

6. Mr. C.A. Rao, learned Senior Counsel appearing along with Mr. S.K. Behera, learned counsel for opposite party no.3 referring to paragraph-8 of the counter affidavit stated that WALMI, being a training institute, cannot be compared with a University, Government College or an aided College. It is an autonomous training institute, but not an educational institution, where implementation of the UGC scale of pay depends upon the administrative decision of the Governing Council which implements the policy of the State Government. It is further contended that fixation and grant of UGC scale of pay to the attached teachers with effect from 01.10.2004 was due to financial crunch and, therefore, the petitioner cannot and should not have made any grievance for extending such benefits from 01.01.1996. More so, the extension of UGC scale of pay with effect from 01.10.2004, so far as teaching staff of WALMI is concerned, being a policy decision, cannot be interfered with. In such view of the matter, the writ petition is liable to be dismissed. To substantiate his contention, he has relied upon the judgments of the apex Court in ***A.K. Bindal and another, v. Union of India and others***, AIR 2003 SC 2189; and of this Court in W.P.(C) No.9453 of 2005 and W.P.(C) No.213 of 2007 (***Mayadhar Pani v. Orissa State Financial Corporation and others***) decided on 20.01.2012.

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. Undisputedly, the petitioners, pursuant to advertisement dated 20.07.1987, having requisite qualification and eligibility criteria, participated in the process of selection and on being duly selected, appointed as Lecturers by office order dated 27.02.1992 in the existing UGC scale of pay of Rs.700-1600/- and had been discharging their duties from the date of their initial appointment. Pursuant to resolution dated 18.08.1992 of the Government of Orissa in the Department of Irrigation, the pay scale of the Lecturers was revised from Rs.700-1600/- to Rs.2200-4000/-. The petitioners, having come under the Lecturer category, were granted the revised UGC scale of pay admissible to the post, pursuant to office order dated 28.10.1992. When Fifth Pay Commission Recommendation was made, the UGC also revised the scale of pay. Accordingly, the Government of Orissa in the Department of Higher Education decided to extend UGC scale of pay to the College Teachers and University Teachers w.e.f. 01.01.1996 pursuant to resolution dated

31.12.1999; and Government of Orissa in Department of Agriculture also extended such UGC scale of pay to the Lecturers of the OUAT w.e.f. 01.01.1996 pursuant to resolution dated 21.10.2000. Similarly, the Department of Finance, Government of Orissa vide notification dated 26.02.2001 extended UGC scale of pay to the Lecturers of the Government colleges and aided colleges w.e.f. 01.01.1996. But the petitioners, having stood in the same footing with the Lecturers appointed in other departments, have been extended with the benefits of UGC scale of pay w.e.f 01.10.2004 prospectively instead of 01.01.1996. As such, fixing of such cut-off date, i.e., 01.10.2004 has no reasonable nexus to the object sought to be achieved by the authority concerned.

9. The reliance was placed on the decision of the apex Court in ***A.K. Bindal*** *(supra)*, by the learned counsel for opposite parties, where the question raised for consideration was that whether the employees of public sector enterprises had legal rights to claim that though the industrial undertakings or the companies in which they were working did not have the financial capacity to grant revision in pay scale, yet the Government should give financial support to meet the additional expenditure incurred in that regard. The apex Court answered the said question in negative and held that the policy decision taken by the Government that Public Sector Enterprises would have to generate their own resources to meet the additional expenditure incurred on account of increase in wages was neither illegal nor unconstitutional. Similar view has also been taken by following the said judgment in ***Sri Mayadhar Pani*** (supra). If the facts of those cases are taken into consideration, they are totally distinguishable from that of present one. As such, in ***A.K. Bindal*** (supra) the consideration was that if the company is sustaining losses continuously over a period and does not have the financial capacity to revise or enhance the pay scale, the petitioners therein cannot claim any legal right to ask for a direction to the Central Government to meet the additional expenditure which may be incurred on account of revision of pay scales. But this is not the case here. The factual matrix, as delineated above, is crystal clear that right accrues on the petitioners because they have been appointed as Lecturers in Engineering Faculty in UGC scale of pay and their pay have also been revised under the UGC Scale of pay. The claim of the petitioners is that similarly situated persons working in the Department of Higher Education, Department of Agriculture and Department of Finance of the Government of Odisha as Lecturers, having been extended with the benefits of UGC scale of pay from the date of revision of scale of pay i.e.

01.01.1996, they are entitled to such benefits from 01.01.1996. In the instant case, it is not a fact that the petitioners are not entitled to get the UGC scale of pay; they have been extended with the benefits but w.e.f. 01.10.2004 instead of 01.01.1996. As such, there is no reasonable nexus sought to be achieved by fixing such a cut-off date i.e., 01.10.2004 prospectively.

10. The only contention raised in the counter affidavit, as well as in course of arguments by learned counsel for opposite parties, is that due to financial crunch this benefit could not be extended from 01.01.1996. A similar question had come up for consideration before the apex Court in State of ***Maharashtra v. Manubhai Pragaji Vashi,*** AIR 1996 SC 1 that non-extending the grant-in-aid by State to Non-Government Law Colleges and at the same time extending such benefit to non-Government college with faculties viz., Arts, Science, Commerce, Engineering and Medicine (other professional non-Government colleges) was patently discriminatory. In that case, the aforesaid benefit had not been extended by pleading paucity of funds or otherwise, and the apex Court held that the plea of paucity of funds taken by the State would not be tenable as the paucity of funds can be no reason for discrimination.

In paragraph 12 of the aforesaid judgment, the apex Court specifically observed as follows:

> *"The facts stated above amply bring out the fact that recognised private law colleges alone were singled out for hostile discriminatory treatment. The recommendations of the committee (pages 198-208) to apply the new formula for the grant to private law colleges and the resolution adopted by the Government to extend the UGC scales to teachers of law colleges (pages 86-87) remained only in `paper' and no concrete steps were taken to implement them. It is not explained as to why recognised private law colleges alone are disentitled to receive grant-in-aid from the Government. The burden of proof cast on the State, that discrimination against recognised private law colleges is based on a reasonable classification having nexus to the object sought to be achieved, has not been discharged. The High Court has held so, placing reliance on the decisions of this Court reported in* ***Budhan Choudhary and others v. State of Bihar,*** *AIR 1955 SC 191* ***Express Newspaper Ltd. v. Union of India,*** *AIR 1958 SC 578,* ***Mehant Moti Das v. S.P.Sahi*** *AIR 1959 SC 942,* ***Babulal Amthalal Mehta V. Collector of Customs*** *AIR 1957 SC 877*

*and **D.S.Nakara v.Union of India**, AIR 1983 SC 130. We hold that the aforesaid reasoning and conclusion of the High Court is fully justified and no exception can be taken to the decision so arrived at by the High Court. The High Court has further referred to the plea of paucity of funds pleaded by the State and has held that paucity of funds can be no reason for discrimination placing reliance on the decision of this Court in **Municipal Council, Ratlam v. Vardhichand** AIR 1980 SC 1622. This reasoning of the High Court is also fully justified and no exception can be taken to the said proposition as well. We hold so.*"

11. The reason for fixation of cut-off date, i.e., 01.10.2004 to extend the benefit of revised UGC scale of pay to the petitioners of Rs.8,000-13500/- has no reasonable nexus to the object sought to be achieved. Therefore, the basic question is to be determined as to whether the fixation of such cut-off date is arbitrary, unreasonable or discriminatory.

12. When a cut-off date is fixed by the concerned authority, the Court is required to keep in mind that such a date must have been fixed by the authority after considering various aspects of the case and, therefore, there is very limited scope of judicial interference in such matters. This issue has been examined and considered by the Supreme Court time and again in a large number of cases, some of which are ***Jaila Singh v. State of Rajasthan***, AIR 1975 SC 1436; ***D.S. Nakara v. Union of India***, AIR 1983 SC 130; ***Dr. (Mrs.) Sushma Sharma v. State of Rajasthan,*** AIR 1985 SC 1367; ***U.P.M.T.S.N.A. Samiti, Varanasi v. State of Uttar Pradesh***,1987 (2) SCC 453 : AIR 1987 SC 1772; ***Krishna Kumar v. Union of India,*** AIR 1990 SC 1782; ***State of Rajasthan v. Rajasthan Pensioner Samaj***, AIR 1991 SC 1743; ***All India Reserve Bank Retired Officers Association v. Union of India***, AIR 1992 SC 767; ***T.S. Thiruvengadam v. Secretary to the Government of India***, (1993) 2 SCC 174; ***Union of India v. Sudhir Kumar Jaiswal***, AIR 1994 SC 2750; ***M. C. Dhingra v. Union of India***, (1996) 7 SCC 564 : AIR 1996 SC 2963; ***University Grants Commission v. Sadhana Chaudhary***, (1996) 10 SCC 536; ***State of Rajasthan v. Amrit Lal Gandhi***, AIR 1997 SC 782; and many others.

13. It is well settled in law that a cut-off date can be introduced, but it is not permissible to introduce such a date in an artificial manner resulting in discrimination between similarly situated persons. A cut-off date may be introduced by creating a fiction, but before fixing such cut-off date, the

consequences are required to be examined thoroughly and the date so fixed must have some nexus to the object sought to be achieved and should not result in making an artificial classification between similarly situated persons. If the choice of fixing a particular date is shown to be wholly arbitrary and introduces discrimination, which violates the mandate of Article 14 of the Constitution, such a cut-off date can be struck down for the reason that a purpose of choice unrelated to the object sought to be achieved cannot be accepted as valid. The Constitution Bench of the Supreme Court in ***Union of India v. M.V. Valliappan***, AIR 1999 SC 2526 held that a cut-off date cannot be held to be invalid unless it is shown to be capricious or whimsical and it cannot be held to be so merely in absence of any particular reason for choosing the same. The Court observed as under:

> *"It is settled law that the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances; while fixing a line of point is necessary and there is no mathematical date or way of fixing it, precisely the decision of the Legislature or its delegate must be accepted unless it is very wide of reasonable mark (**University Grants Commission v. Sadhana Chaudhary**: (1996) 10 SCC 536. The learned Counsel for the respondents was not in a position to point out any ground for holding that the said date is capricious or whimsical in the circumstances of the case."*

14. In ***Bhupinderpal Singh v. State of Punjab***, (2000) 5 SCC 262, the Supreme Court placed reliance upon large number of its earlier judgments, particularly in ***Ashok Kumar Sharma v. Chandra Sekhar***, (1997) 4 SCC 18; ***Andhra Pradesh Public Service, Commission v. B. Sharat Chandra***, (1990) 2 SCC 669 and ***M.V. Nair (Dr.) v. Union of India***, (1993) 2 SCC 429 and observed as under:

> *"The High Court has held that (i) the cutoff date, by reference of which the eligibility required must be satisfied by the candidate seeking a public employment, is the date appointed by the relevant rules and if there be no cut-off date appointed by the rules then such date, as may be appointed for the purpose in the advertisement seeking for application; (ii) that if there be no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed, by which the application has been received by the*

Authority. The view taken by the High Court is supported by several decisions of the Court and is, therefore, well settled and hence cannot be found fault with."

15. The said judgment was considered and approved by the Supreme Court in ***Jasbir Rani v. State of Punjab*** , (2002) 2 SCC 124. Similarly, in ***State of West Bengal v. West Bengal Government Pensioners Association***, (2002) 2 SCC 179, the Supreme Court approved the cut-off date fixed by the State for the purpose of revising the pay scale, observing that the cut-off date cannot be set aside unless on the facts it is proved to be arbitrary and unreasonable.

16. In view of the law laid down by the apex Court as mentioned above, nothing has been placed on record to indicate why such cut-off date, i.e., 01.10.2004 has been fixed by the authority concerned while granting revised UGC scale of pay to the petitioners, whilst similarly situated persons have been extended such benefits w.e.f. 01.01.1996. Thereby, the entire action of the authorities is arbitrary, unreasonable and contrary to the provisions of law.

17. In the name of policy decision of the Government, this cut-off date cannot also be fixed, because it amounts to arbitrary and unreasonable exercise of power, and is violative of Articles 14 and 16 of the Constitution of India.

18. In the case of ***Kapila Hingorani v. State of Bihar***, (2003) 6 SCC 1, the apex Court held that the Government companies/public sector undertakings being "States" would be constitutionally liable to respect life and liberty of all persons in terms of Article 21 of the Constitution of India. The power of the State in the sphere of exercise of its constitutional power including those contained in Article 298 of the Constitution of India inheres in it a duty towards public, whose money is being invested. Therefore, while carrying trade or business the State must fulfill its Constitutional obligations. Referring to the aforesaid judgment in respect of employees of working under the said organization, namely, WALMI, who have completed five years of service, this Court directed for regularization of service in the case of ***Binan Kumar Mohanty v. Water & Land Manageemnt Institute (WALMI)*** 2015(1) OLR 347.

19. In the name of policy decision of the Government, the action of the authority in fixing the cut-off date, i.e., 01.10.2004 prospectively, while

granting the benefit of UGC scale of pay to the petitioners, not only arbitrary, unreasonable and contrary to the provisions of law, but also violates Articles 14 and 16 of the Constitution of India. If any policy decision violates Articles 14 and 16 of the Constitution of India, the Court has got every right to interfere with the same. As such, the nature of policy decision has to be taken into consideration, while adjudicating the same in accordance with law.

20. In view of the discussions made above, this Court has no hesitation to hold that the fixation of cut-off date for extending the benefit of revised UGC scale of pay w.e.f. 01.10.2004 prospectively, is arbitrary, unreasonable and violates Articles 14 and 16 of the Constitution of India. Accordingly, the opposite parties are directed to extend the benefits of revised UGC scale of pay to the petitioners w.e.f. 01.01.1996 at par with their counterpart Lecturers working under the Department of Higher Education, Agricultural Department and Finance Department of Government of Odisha with consequential benefits, and the differential salary on that score be calculated and paid to them as expeditiously as possible, preferably within a period of four months from the date of communication of this judgment.

21. The writ petitions are thus allowed. There shall be no order as to cost.

Writ petitions allowed.

2017 (II) ILR - CUT- 912

DR. B.R. SARANGI, J.

O.J.C. NO. 11051 OF 2000

RAJENDRA KUMAR NAYAK ……..Petitioner

.Vrs.

ORISSA MININING CORPORATION LTD. & ORS. ……Opp. Parties

SERVICE LAW – Regularisation – If for any reason, an adhoc or temporary employee is continued for a long spell, the authorities should consider his case for regularisation, provided his service record is satisfactory, he is eligible and qualified as per the Rules and his appointment does not run contrary to the reservation policy of the state.

In this case eventhough the petitioner was appointed as Worksirkar Grade II, he is now discharging the duty of a Junior Assistant – Authorities allowed him to work continuously for the last 30 years, even persons appointed after him have already been regularized – Action is not only unreasonable but also arbitrary and discriminatory – Since the petitioner has worked for a long period it is presumed that there is need of a regular post and the petitioner is entitled to be regularized – Held, direction issued to the opposite parties to regularize the service of the petitioner and to grant him all consequential service and financial benefits as admissible to the post held by him. (Paras 8 to14)

Case Laws Referred to :-

1. (2006) 4 SCC 1 : Secretary, State of Karnataka v. Umadevi (3)
2. (2010) 9 SCC 247 : State of Karnataka v. M.L. Kesari.
3. (2015) 11 SCC 255 : Prem Ram v. Managing Director, Uttarakhand Pey Jal and Nirman Nigam, Dehradun.
4. (2014) 13 SCC 249 : Malathi Das (Retired) Now P.B. Mahishy v. Suresh
5. AIR 2014 SC 1716 : Amarendra Kumar Mohapatra and others v. State of Orissa.
6. AIR 1967 SC 1071 : State of Mysore v. S.V. Narayanappa.
7. (1972) 1 SCC 409 : R.N. Nanjundappa v. T. Thimmaiah.
8. (1979) 4 SCC 507 : B.N. Nagarajan v. State of Karnataka

For Petitioner : Mr. R.K.Rath, Sr. Adv. and M/s. Y.Das, N.C.Mohanty, R.Sahu, P.K.Dhal, B.B.Panda, A.K.Biswal & B.P.Mohapatra

For Opp. Parties : M/s. P.K.Mishra, A.K.Panda & S.S.Mishra

Date of hearing : 24.07.2017
Date of Judgment : 01.08.2017

JUDGMENT

DR. B.R. SARANGI, J

The Orissa Mining Corporation Limited (OMCL), a Government of Odisha Undertaking, by office order dated 11.04.1987 at Annexure-1, appointed the petitioner as Worksirkar Grade-II at Civil Section, Barbil for a period of 89 days with effect from 13.04.1987 to 10.07.1987 in the scale of Rs.750-1150/- with usual allowance as admissible subject to the terms and conditions mentioned therein. Pursuant thereto, the petitioner joined in the said post on 13.04.1987. The term of his service was extended from time to

time and, consequent upon the decision of the Board of Directors in its 297th meeting held on 24.12.1994 which was circulated on 14.07.1995, the petitioner is continuing in service till date without any break. Even though the petitioner was joined as Worksirkar Grade-II, he has been performing the duty of a Junior Assistant from the date of his joining.

2. The General Manager, OMCL, Barbil requested the Managing Director, OMCL on 12.04.1988 to give appointment to the petitioner in the post of Legal Assistant and to post him at Barbil, as he has got requisite qualification and experience at Bar including additional advantage of his service experience as a Junior Assistant in the office of the Advocate General. Time and again letters were issued by the authority, under which the petitioner was rendering service, to absorb him at least in the post of Junior Assistant taking into consideration his efficiency, qualification and nature of duty discharged by him. The Manager (Personal & Administration), by his letter dated 26.02.1992, intimated the Special Officer, OMCL that the OMCL had adopted a principle that persons occupying lower posts, if found qualified for the higher post, could be considered subject to vacancy and suitability, and that the case of the petitioner being one of such cases, since he had acquired sufficient knowledge about the industrial working and industrial disputes, his service would be useful to the Corporation, if he was considered for the post of Legal Assistant or Junior Assistant (Legal). Even though the petitioner made series of representations to absorb him, the authorities turned deaf ear. But by letter dated 01.03.2014, the persons appointed much after the petitioner have been regularized and, consequentially, the petitioner has been discriminated. Therefore, he has approached this Court by filing the present writ application seeking regularization of his service with all consequential and financial benefits as admissible to the post of Junior Assistant in the OMCL.

3. Mr. R.K. Rath, learned Senior Counsel appearing along with Mr. N.C. Mohanty, learned counsel for the petitioner contended that the petitioner, having rendered service since more than 30 years in a post, is entitled to be regularized with all consequential benefits, and the inaction of the authorities in regularizing the service of the petitioner amounts to arbitrary and unreasonable exercise of power, which violates Article 14 of the Constitution of India. It is further contended that the petitioner, even though was appointed as Worksirkar, was subsequently entrusted with the duty of Junior Assistant, which work he has been discharging for a quite long period, and that itself indicates that the vacancy is available. As such, there will be no

impediment if services of the petitioner are regularized, especially when the higher authorities from time to time have recommended for his continuance as Legal Assistant or Junior Assistant (Legal). It is also contended that, although several correspondences were made by the higher authorities indicating the efficiency, acquisition of qualification and nature of duty discharged by the petitioner on being assigned, the same have not been considered in proper perspective, as a result of which, for more than 30 years, the petitioner is languishing as a Worksirkar, and such act of the authorities amounts to exploitation of labour. It is also contended that, when juniors to the petitioner (the persons who had joined after the petitioner) have already been regularized, there is no justifiable reason or basis to deny such benefit to the petitioner, and as such the action of the opposite parties is discriminatory in nature. Therefore, the petitioner seeks for direction to the opposite parties to regularize his service and grant all consequential benefits admissible to the post held by him. To substantiate his contention he has relied upon the judgments in ***Secretary, State of Karnataka v. Umadevi (3),*** (2006) 4 SCC 1; ***State of Karnataka v. M.L. Kesari,*** (2010) 9 SCC 247; ***Prem Ram v. Managing Director, Uttarakhand Pey Jal and Nirman Nigam, Dehradun,*** (2015) 11 SCC 255; ***Malathi Das (Retired) Now P.B. Mahishy v. Suresh;*** (2014) 13 SCC 249 and ***Amarendra Kumar Mohapatra and others v. State of Orissa,*** AIR 2014 SC 1716.

4. Mr. P.K. Mishra, learned counsel appearing for the opposite parties though admitted, that the petitioner was appointed as Worksirkar and was permitted to assist the staff in the Establishment Section of the office of the General Manager, OMCL, Barbil, and that the Board of Directors of the Corporation, as well as State Government have approved the proposal to bring the temporary/weekly/DRMP employees of OMCL into non-permanent category of employees and as per the said proposal the petitioner was encadered in the non-payment group of employees, but stated that, since he joined as Worksirkar on casual basis and by virtue of such decision he was continuing as such till the date of his conversion to non-payment category of employees in the OMCL, the services of the petitioner cannot be regularized as Junior Assistant without observing the procedure envisaged under the OMCL R & P Rules and without following rigorous procedures of the CNV and the ORV Act. His further contention is that the recommendation of the higher authorities to regularize the services of the petitioner is not binding on the Corporation. So far as absorption of employees of M/s. Sirajuddin & Co. is concerned, they have been regularized on the basis of the award passed by

the Industrial Tribunal. The same is also not applicable to the petitioner, as he was not a party to the industrial dispute. In view of such position, it is contended that the relief sought by the petitioner cannot be granted and the writ petition is liable to be dismissed. It is further contended that the decisions relied upon on behalf of the petitioner, being taken on the facts of those cases, are not applicable to the present case and are distinguishable.

5. Having heard learned counsel for the parties and after going through the records, pleadings between the parties having been exchange, with the consent of learned counsel for the parties, this matter is being disposed of finally at the stage of admission.

6. On the basis of the facts pleaded above, there is no dispute that the petitioner was appointed as Worksirkar Grade-II on 13.04.1987 in OMCL. Subsequently, on being permitted, for having requisite experience and qualification to man the post, he has been discharging the duties of Junior Assistant/Legal Assistant, as is borne out from various correspondences made by the authorities under whom he was working. The materials available on record also reveal that the persons, who had been appointed after the petitioner, have already been regularized and paid regular scale of pay admissible to the post held by them, and the petitioner only has been singled out. As such, even though 30 years have passed in the meantime, his service has not been regularized in spite of the recommendations made by the authorities. Neither the representation of the petitioner has been considered in proper perspective, nor the benefit admissible to the post held by him has been extended, nor the nature of duties and responsibilities discharged by him as a Junior Assistant, having requisite qualification, has been recognized with. The plea taken is that he has not been recruited by following due procedure of recruitment as envisaged under the rules, but there is no denial that he is not discharging the duties as Junior Assistant even though he was appointed as Worksirkar Grade-II with effect from 13.04.1987. Furthermore, since the petitioner has been discharging the duties of Junior Assistant continuously without any break, that itself indicates that there is availability of post. If the post is available, against which the petitioner has been permitted to discharging the duties for a quite long period of near about 30 years, the authority cannot deny the benefit of his regularization on the plea that he has not come through a recruitment process conducted as per the Rules. With eyes wide open and to the knowledge of the authorities concerned, the petitioner, as a Junior Assistant, has been discharging the duties and responsibilities assigned to him for a quite long period. As such,

when the authorities, under which he is working, have recommended his case for regularization and, more so, the persons appointed after him have already been regularized, there is no justifiable reason available to the authority not to regularize the service of the petitioner and extend the benefit from the date of his initial appointment against the post of Junior Assistant. Therefore, such action of the authority is not only unreasonable and arbitrary but also discriminatory in nature and violates Articles 14 and 16 of Constitution of India.

7. Furthermore, non-consideration of grievance of the petitioner for such a long period, by allowing him to discharge the duty of Junior Assistant (even though he was appointed as Worksirkar Grade-II), is a clear case of exploitation of labour by the employer. Every employee, who is engaged by an employer, expects to continue on regular basis with all service benefits of at least increments, promotion and seniority in accordance with law. The legitimate expectation of an employee to continue in a particular post with its future prospects of promotion and other benefits have been denied to the petitioner in the present case. As such, why he is being deprived of getting such benefit irrespective of the recommendations made by the authorities under whom he has been discharging the duty, no plausible reasons have been assigned in the counter affidavit. Merely because the petitioner has not been appointed as per the rules, he cannot be deprived of subsequent regularization, particularly when such benefits have already been extended by the authority concerned to the persons appointed after the petitioner. To a query made by this Court, learned counsel for the opposite parties informed that because of pendency of this case the petitioner has not been regularized.

8. It is worthwhile to mention here that the Court comes into the picture only to ensure observance of fundamental rights, and to ensure the rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with requirements of Articles 14 and 16 of the Constitution, and that the authority should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. For this very reason, it is held that a person should not be kept in temporary or ad hoc status for a long period. Where a temporary or ad hoc appointment is continued for long, the Court presumes that there is need of a regular post and accordingly directs for regularization. While issuing direction for regularization, the Court must first ascertain the relevant fact, and must be cognizant of the several situations and eventualities that may arise on account of such direction. If for any reason, an

ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularization, provided he is eligible and qualified, according to rules, and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State. Even though a casual labourer is continued for a fairly long spell, say two or three years, a presumption may arise that there is regular need for his service. In such a situation, it becomes obligatory for the concerned authority to examine the feasibility of his regularization. While doing so, the authorities ought to adopt a positive approach coupled with empathy for the person. But here is a case where even though the petitioner is continuing in the post for last more than 30 years, his service has not yet been regularized, though persons appointed after him have already been regularized.

9. In ***Umadevi (3)*** (supra) the apex Court held as follows:

> *"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in* ***State of Mysore v. S.V. Narayanappa****, AIR 1967 SC 1071;* ***R.N. Nanjundappa v. T. Thimmaiah****, (1972) 1 SCC 409 and* ***B.N. Nagarajan v. State of Karnataka*** *(1979) 4 SCC 507 and referred to in para 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 the courts or of tribunals. The question of regularisation 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 regularise 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 the 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 regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."*

Further, in ***M.L. Kesari*** (supra), following the ratio decided in ***Umadevi (3)*** (supra), the apex Court in paragraphs 9 and 10 of the judgment held as follows:

> *"**9.** The term "one-time measure" has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi (3), each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularise their services.*
>
> ***10.** At the end of six months from the date of decision in Umadevi (3), cases of several daily-wage/ad hoc/casual employees were still pending before courts. Consequently, several departments and instrumentalities did not commence the one-time regularisation process. On the other hand, some government departments or instrumentalities undertook the one-time exercise excluding several employees from consideration either on the ground that their cases were pending in courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of para 53 of the decision in Umadevi (3), will not lose their right to be considered for regularisation, merely because the one-time exercise was completed without considering their cases, or because the six-month period mentioned in para 53 of Umadevi (3) has expired. The one-time exercise should consider all daily-wage/ad hoc/casual employees who had put in 10 years of continuous service as on 10-4-2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the one-time exercise in terms of para 53 of Umadevi (3), but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi (3), the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one-time exercise will be concluded only when all the employees who are entitled to be considered in terms of para 53 of Umadevi (3), are so considered."*

11. In ***Malathi Das*** (supra) relying upon the ratio decided in ***Umadevi(3)*** (supra), the apex Court held that refusing regularization of service cannot be countenanced to such decision and, therefore, clarified that the appellants therein so also all other competent authorities of the State would be obliged and duty bound to regularize the services of employees which will be done forthwith.

12. In ***Amarendra Kumar Mohapatra*** (supra) the apex Court clarified the ratio decided in ***Umadevi (3)*** (supra) at paragraphs 34 and 35 as follows:

> *"**34**. A Constitution Bench of this Court in Secretary, **State of Karnataka and Ors. v. Umadevi (3) and Ors**. (2006) 4 SCC 1 : (AIR 2006 SC 1806 : 2006 AIR SCW 1991) ruled that regularisation of illegal or irregularly appointed persons could never be an alternative mode of recruitment to public service. Such recruitments were, in the opinion of this Court, in complete negation of the guarantees contained in Articles 14 and 16 of the Constitution. Having said so, this Court did not upset the regularisations that had already taken place, regardless of whether such regularisations related to illegal or irregular appointments. The ratio of the decision in that sense was prospective in its application, leaving untouched that which had already happened before the pronouncement of that decision. This is evident from the following passage appearing in the decision:*
>
> *"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."*
>
> ***35**. The above is a significant feature of the pronouncement of this Court in Umadevi's case (supra). The second and equally significant feature is the exception which this Court made in para 53 of the decision permitting a one-time exception for regularising services of such employees as had been irregularly appointed and had served for ten years or more. The State Government and its instrumentalities were required to formulate schemes within a period of six months from the date of the decision for regularisation of such employees. This is evident from a reading of para 53 (of SCC) : (Para 44 of AIR, AIR SCW) of the decision which is reproduced in extenso:*

"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (AIR 1967 SC 1071) (supra), R.N. Nanjundappa (AIR 1972 SC 1767) (supra), and B.N. Nagarajan (AIR 1979 SC 1676) (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..."

13. So far as irregular appointment is concerned, the same has also been clarified in ***M.L. Kesari*** (supra) at paragraph-41 as follows:

"***41***. *As to what would constitute an irregular appointment is no longer res integra. The decision of this Court in* ***State of Karnataka v. M.L. Kesari and Ors***. *(2010) 9 SCC 247 : (AIR 2010 SC 2587 : 2010 AIR SCW 4577), has examined that question and explained the principle regarding regularisation as enunciated in Umadevi's case (supra). The decision in that case summed up the following three essentials for regularisation (1) the employees worked for ten years or more, (2) that they have so worked in a duly sanctioned post without the benefit or protection of the interim order of any court or tribunal and (3) they should have possessed the minimum qualification stipulated for the appointment. Subject to these three requirements being satisfied, even if the appointment process did not involve open competitive selection, the appointment would be treated irregular and not illegal and thereby qualify for regularisation. Para 7 in this regard is apposite and may be extracted at this stage:*

"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi, if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

14. The above being the settled principles of law, there is no iota of doubt that the petitioner, who has been continuing in service for more than 30 years, is entitled to be regularized, particularly when the persons appointed after him have already been regularized. Therefore, the opposite parties are directed to regularize the service of the petitioner and grant him all consequential service and financial benefits as admissible to the post held by him, i.e., Junior Assistant in accordance with law as expeditiously as possible, preferably within a period of three months from the date of communication of the judgment.

15. The writ petition stands allowed. No order as to cost.

Writ petition allowed.

2017 (II) ILR - CUT-923

DR. B.R. SARANGI, J.

W.P.(C) NO. 11236 OF 2010

DR. RAJALAXMI BEURA .....Petitioner

.Vrs.

VICE CHANCELLOR, OUAT & ORS. .....Opp. Parties

SERVICE LAW – Advertisement Dt. 10.08.2008 to fillup certain posts of Asst. Professor (Bio-Technology) – Whether during subsistence of the select list prepared pursuant to the advertisement Dt. 10.08.2008, if subsequent advertisement issued on 20.04.2010, and in the meantime a vacancy arose, the same can be filled up by the selected candidate of the select list prepared pursuant to the advertisement Dt. 10.08.2008 ?

Since a vacancy was created due to resignation of Dr. Chinmaya Pradhan, who stood first in order of the merit list prepared pursuant to advertisement Dt. 10.08.2008, the petitioner being placed at Serial No. 4 of the said merit list, should have been given substantive appointment against the said vacancy, as the candidate at Serial No. 2 had already been appointed during subsistence of the select list, and the candidate at Serial No. 3 had joined elsewhere – Held, direction issued to the authorities to give substantive appointment to the petitioner and regularize her services against the vacancy caused due to resignation of Dr. Chinmaya Pradhan and extend all consequential service benefits admissible to the post in accordance with law. (Paras 8 to 17)

Case Laws Referred to :-

1. (1997) 8 SCC 85 : Haryana State Electricity Board v. Hakim Singh.
2. AIR 1998 SC 2230 : Director of Education v. Pushpendra Kumar.
3. (2007) 2 SCC481 : AIR 2007 SC1155 :National Institute of Technology v. Niraj Kumar Singh
4. (2003) 7 SCC 704 : AIR 2003 SC3797 : State of Haryana v. Ankur Gupta.
5. (2005) 7 SCC 206 : Commissioner of Public Instructions v. K.R. Vishwanath.

For Petitioner : Mr. G.A.R.Dora, Sr. Adv. and M/s. (Mrs.) G.R.Dora and J.K.Lenka

For Opp. Parties : Mr. A.Mishra, Sr. Adv. and Mr. S.C.Rath. Mr. B.Routray, Sr. Adv. and M/s. S.Das, S.K.Samal,S.P.Nath, S.D.Routray & S.Jena

Date of hearing : 28.07.2017
Date of judgment: 08.08.2017

JUDGMNET

DR. B.R. SARANGI, J.

The Odisha University of Agriculture and Technology (OUAT) has been constituted under the provisions of the Odisha University of Agriculture and Technology Act, 1965. An advertisement was issued by the OUAT for recruitment to the post of Asst. Professor (Bio-Technology) on contractual basis in the College of Basic Science and Humanities, Bhubaneswar. The petitioner, having passed B.Sc. in First Class Distinction with Botany (Hons), M.Sc. (Botany) in First Division and acquired Ph.D. degree in Botany; and published 7 research papers in different journals of national/international repute and 5 scientific popular articles and also presented 10 research papers at national/international conferences, applied for the said post. The petitioner, among the 27 candidates appeared before the selection committee, was selected and engaged as Assistant Professor (Bio-Technology) on contractual basis with consolidated remuneration of Rs.8,000/- by office order dated 30.05.2005 in annexure-1. She discharged the duty assigned to her to the satisfaction of the higher authority, for which consecutively three Vice-Chancellors appreciating her work have granted certificates which have been placed on record as annexures-2, 3 and 4.

2. While the petitioner was so continuing, the OUAT issued an advertisement dated 10.08.2008 in annexure-6 for filling up of one regular post of Asst. Professor (Botany) in the General Category. Only 36 candidates, of 51 applied for the post, appeared at the interview and the selection committee prepared the panel/select list consisting of four candidates in order of merit and suitability on 01.07.2009 vide annexure-7 wherein the petitioner's name found place at serial no.4 in order of merit. Dr. Chinmaya Pradhan, whose name found place at serial no.1, was appointed as Assistant Professor (Botany) pursuant to office order dated 09.07.2009 in annexure-8. When another vacancy arose about 9 months later, the candidate at serial no.2 of the panel, namely, Dr. Debasis Dash was appointed vide office order dated 08.03.2010 in annexure-9, when Dr. Chinmaya Pradhan was continuing in service.

3. The OUAT issued another advertisement on 20.04.2010 in annexure-10, during the life time of the panel prepared in annexure-7, for filling up of one regular post of Asst. Professor (Botany) reserved for women. Dr.

Chinmaya Pradhan resigned from his post on 30.04.2010 after the advertisement was issued but during subsistence of the panel prepared on 01.07.2009 in annexure-7. Dr. Rabindra Kumar Mishra, who stood at serial no.3 of the panel prepared on 01.07.2009, having joined elsewhere, the petitioner being stood at serial no.4 was entitled to be appointed against the vacancy created for the post of Assistant Professor (Botany) on regular basis. Due to non-issuance of letter of appointment to the petitioner, during subsistence of the valid select list/panel, she has approached this Court by means of this application.

4. Mr. G.A.R. Dora, learned Senior Counsel appearing along with Mr. J.K. Lenka, learned counsel for the petitioner strenuously contended that during subsistence of the valid select list prepared pursuant to advertisement dated 10.08.2008, the subsequent advertisement dated 20.04.2010 could not have been issued. As such, though a person on the select list has no vested right to be appointed to the post for which he/she has been selected has a right to be considered for appointment and the appointing authority cannot ignore the select panel or decline to make an appointment on its whims. Therefore, a candidate in the waiting list in order of merit has a right to claim that he/she may be appointed if one or other selected candidate does not join. To buttress his argument, he has relied upon the judgments of the apex Court in ***Gujarat State Dy. Executive Engineers' Association v. The State of Gujarat and others***, 1994 (SUPP) 11 SCC 51, ***Surinder Singh and others v. State of Punjab and another***, AIR 1998 SC 18 and ***A.P. Aggarwal v. Govt. of N.C.T. of Delhi and another***, 2000(I) SLR 382.

5. Mr. A. Mishra, learned Senior Counsel appearing along with Mr. S.C. Rath, learned counsel for opposite parties no.1 and 2 specifically stated that merely because the petitioner's name finds place in the select list she has no right to claim for regular appointment unless a vacancy is available. As the vacancy caused due to resignation of Dr. Chinmaya Pradhan w.e.f. 30.04.2010 was not included in the advertisement issued on 20.04.2010, the petitioner has no right to challenge the same. As per advertisement dated 10.08.2008, the selected candidates having been appointed as Assistant Professor (Botany), the select list has become invalid. Therefore, due to resignation of Dr. Chinmaya Pradhan if any vacancy arose, the same cannot be claimed by the petitioner.

6. Mr. B. Routray, learned Senior Counsel appearing along with Mr. D. Routrary, learned counsel for the intervenor contended that the petitioner was

selected pursuant to advertisement dated 10.08.2008 for the post of Assistant Professor (Botany). She has approached this Court challenging the advertisement dated 20.04.2010 in annexure-10. During pendency of this writ petition, the OUAT issued another advertisement dated 18.10.2010 for two posts of Assistant Professor (Botany). The same was challenged by the petitioner in Misc. Case No.18340 of 2010 and by order dated 30.11.2010 this Court, as an interim measure, directed that the process of selection pursuant to advertisement dated 18.10.2010 so far as it relates to the post of Asst. Professor (Botany) under SEBC category may continue, but no appointment would be made without leave of this Court. Pursuant to such interim order, even though the intervenor-petitioner participated in the process of selection, she could not get any appointment. Therefore, she has filed an intervention application seeking to intervene and participate in the process of hearing.

7. This Court heard learned counsel for the parties and perused the records. Pleadings have been exchanged between the parties, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

8. So far as factual matrix of the case is concerned, there is no dispute. The only question that falls for consideration before this Court is whether during subsistence of the select list prepared pursuant to advertisement dated 10.08.2008, if subsequent advertisement issued on 20.04.2010, and in the meantime a vacancy arose, the same can be filled up by the selected candidate of the select list prepared pursuant to the advertisement dated 10.08.2008.

9. In ***A.P. Public Service Commission, Hyderabad v. B. Sarat Chandra*** (1990) 2 SCC 669, while considering the question of the meaning of selection, the apex court held as follows:

> "*If the word 'selection' is understood in a sense meaning thereby only the final act of selecting candidates with preparation of the list for appointment, then the conclusion of the Tribunal may not be unjustified. But round phrases cannot give square answers. Before accepting that meaning, we must see the consequences, anomalies and uncertainties that it may lead to. The Tribunal in fact does not dispute that the process of selection begins with issuance of advertisement and ends with the preparation of select list for appointment. Indeed, it consists of various steps like inviting*

applications scrutiny of applications, rejections of defective applications or elimination of ineligible candidates conducting examinations, calling for interview or viva-voce and preparation list of successful candidates for appointment."

In view of such position, the process of selection began with issuance of advertisement and ended with the preparation of selection list for appointment and following that the select list was prepared where the petitioner's name found place at serial no.4. When the said select list was in subsistence for a period of one year, merely because a subsequent advertisement was issued on 20.04.2010, that ipso facto cannot nullify the select list prepared pursuant to advertisement issued on 10.08.2008. Rather the effect of the said select list pursuant to advertisement dated 10.08.2008 can only be invalidated after selection pursuant to advertisement dated 20.04.2010 is complete by preparing the select list for appointment and, as a matter of fact, no such select list has been prepared pursuant to advertisement made on 20.04.2010. Therefore, when a vacancy arose due to resignation of Dr. Chinmaya Pradhan, who stood first in the select list pursuant to advertisement dated 10.08.2008, the petitioner, being the next candidate, should have been issued appointment letter, as in the meantime Dr. Debasis Dash who stood second in the merit list was already appointed and the candidate at serial no.3 had joined elsewhere.

10. In ***State of U.P. v. Rafiquddin***, AIR 1998 SC 162 the apex Court held that a select list prepared by the Public Service Commission on the basis of results of the competitive examination of a particular year should not normally be used after the results of a subsequent examination are declared. Admittedly, the petitioner in the instant case had been selected pursuant to advertisement dated 10.08.2008 and during validity of the select list within one year the advertisement dated 20.04.2010 was issued and, as such, no select list has been prepared by the authority pursuant to advertisement dated 20.04.2010. In such eventuality, the select list prepared pursuant to advertisement dated 10.08.2008 remains valid and operative.

11. No doubt, a select list operates only for a particular year if so stipulated and only those selected in that year can be enlisted and even if a list is prepared in the subsequent year for the selectees of the previous year it will relate back to the previous year. In ***State of U.P. v. Nidhi Khanna***, AIR 2007 SC 2074, the apex Court held that once a fresh select list is prepared pursuant to a subsequent advertisement, a person empanelled in the earlier

select list issued under an earlier advertisement is not entitled to be appointed. In effect there is a supersession of the earlier list. As the select list pursuant to advertisement dated 20.04.2010 has not been prepared and validity of the select list pursuant to advertisement dated 10.08.2008 is continuing, therefore, the petitioner is entitled to be considered for appointment on regular basis against the vacancy caused due to resignation of Dr. Chinmaya Dash, who stood first pursuant to advertisement dated 10.08.2008.

12. The purpose of preparation of the select list has got its own meaning. According to the post advertised, if the said post is filled up in order of merit and during validity of the said list if some of the persons those have been appointed in order of merit either resigned or quit the job for the reason some or other the consequential vacancy arose, the same shall be filled up by the rest of the candidates from the select list. That select list became a waiting list for the next persons, those who are waiting for job conducted by the authority concerned. The waiting list prepared in service matter by a competent authority is a list of eligible and qualified candidates, who in order of merit placed before the last selected candidate. Usually, it is linked with the selection or examination for which it is prepared. The said list was prepared taking into account not only the number of vacancies existing on the date when the advertisement is issued or applications are invited, but even those which are likely to arise in future within one year or so due to retirement etc.

13. In ***Gujarat State Dy. Executive Engineers' Association*** (supra), the apex court held that such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other read on or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. But once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided, then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it.

Referring to ***Gujarat State Dy. Executive Engineers' Association*** (supra), the apex Court in ***Surinder Singh*** (supra) held that a candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join.

14. In ***A.P. Aggarwal*** (supra), the apex Court held that though a person on the select panel has no vested right to be appointed to the post for which he has been selected has a right to be considered for appointment and at the same time the appointing authority cannot ignore the select panel or decline to make an appointment on its whims. The Court said that when a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, ordinarily there is no justification to ignore him for appointment and that there has to be a justifiable reason to decline to appoint a person who is on the select panel.

15. In view of factual and legal position, as discussed above, there is no iota of doubt that the petitioner's claim, against the vacant post caused due to resignation of Dr. Chinmaya Pradhan, in terms of the select list prepared pursuant to advertisement issued on 10.08.2008 is wholly justified. Therefore, she should have been absorbed on regular basis as she was selected by following due procedure of selection and has got requisite qualification to hold the post of Assistant Professor (Botany) on regular basis.

16. Considering the fact from other angle, in terms of Statute 49 of the Orissa University of Agriculture and Technology Statute, 1966 (for short "OUAT Statute, 1966"), the petitioner could have been considered for substantive appointment, as she was allowed to discharge her duty against a permanent post. Statute 49 of the OUAT Statute, 1966 is quoted below:

> *"Whenever a permanent post in any grade and pay scale is available for substantive appointment, the claim of any university employee holding a tenure post or temporary post continuously for a period exceeding two years in that grade and pay scale and possessing the qualifications required for the permanent post, shall be considered first for substantive appointment in that permanent post."*

In the instant case, the admitted fact is that the petitioner, on being selected by following due procedure of selection, was engaged on contractual basis as Assistant Professor (Botany) under the OUAT and is continuing as such. In the meantime, she has completed more than 13 years of service and her performance has been highly appreciated by three successive Vice-Chancellors of the University. Similar question had come up for consideration before this Court in ***Dr. Sarbanarayan Mishra v. OUAT*** in W.P.(C) No.14049 of 2006 and by judgment dated 17.07.2008 this Court directed to give substantive appointment to the petitioner therein against the vacant post in terms of Statute 49 of the Statute, 1966. Challenging the said

judgment, OUAT preferred Special Leave Petition which was subsequently converted into Civil Appeal No. 3940 of 2009, and the same was dismissed as withdrawn by order dated 03.08.2015. Thereby, the judgment in ***Dr. Sarbanarayan Mishra*** (supra) was confirmed by the apex Court. Relying upon the principle laid down by this Court in ***Dr. Sarbanarayan Mishra*** (supra), in ***Susanta Kumar Mohanty v. OUAT***, 2016 (1) OLR 565 this Court directed to appoint the petitioner therein substantively against the vacant post in Class II cadre in which he was discharging his duty and to extend all the consequential service benefits as due and admissible to him in accordance with law.

17. In view of the discussions made in the foregoing paragraphs, this Court is of the considered view that since a vacancy was created due to resignation of Dr. Chinmaya Pradhan, who stood first in order of the merit list prepared pursuant to advertisement dated 10.08.2008, the petitioner, being placed at serial no.4 of the said merit list, should have been given substantive appointment against the said vacancy, as the candidate at serial no.2 had already been appointed during subsistence of the select list, and the candidate at serial no.3 had joined elsewhere. The authorities are, therefore, directed to give substantive appointment to the petitioner and regularize her services against the vacancy caused due to resignation of Dr. Chinmaya Pradhan and extend all consequential service benefits admissible to the post in accordance with law. The entire exercise shall be completed within a period of three months from the date of receipt of the judgment.

18. The writ petition is accordingly allowed. No order as to cost.

Writ petition allowed.

2017 (II) ILR - CUT- 931

D. DASH, J.

W.P.(C) NO. 13805 OF 2009

KARUNAKAR PALAI & ORS. ……..Petitioners

.Vrs.

SMT. SATYABHAMA PALAI @ BEHERA & ORS. ……..Opp. Parties

(A) CIVIL PROCEDURE CODE, 1908 – O-22, R-4(4)

Provision under O-22, R-4(4) C.P.C. empowers the Court to exempt the plaintiff from the necessity of substituting the legal representatives of one of several defendants – However, such discretion can be used by the Court, being satisfied with few pre-conditions that the said defendant has not filed the written statement or has failed to appear and contest the suit and he must not have laid any defence in denying the plaint averments and resisting the plaintiff's claim – Purpose of the provision is that when a non-contesting defendant dies, his legal representatives are not necessarily to be brought with the arena of the suit to cause unnecessary delay in disposal of the suit. (Para 7)

(B) CIVIL PROCEDURE CODE, 1908 – O-22, R-4(4) r/w O-1, R-10 C.P.C.

Death of defendant Nos. 4 & 5 – Although right to sue against them survives, the plaintiff was exempted from substituting their legal representatives under order 22, Rule 4(4) C.P.C. – But subsequently the legal heirs of those defendants filed application under Order 1, Rule 10 C.P.C. to be impleaded as parties – Application rejected by the trial court – Hence the writ petition – Whether once exemption granted to the plaintiff under Order 22, Rule 4(4) C.P.C. forecloses the right of the legal representative to approach the Court to participate in the suit ? Held, No.

If grant of exemption will not foreclose the right of the legal representatives of the deceased defendants to participate in the suit, from which stage they will get that right to contest the suit, whether from the date of death of the defendants or from the date they are impleaded as parties in the suit ? Held, they will get opportunity to participate in the suit from the stage of the suit when they are added as parties but not from any anterior stage – However, there are certain exceptions where the legal representatives of the deceased defendants moved to be impleaded as parties and contest the suit from the date of

death of the defendants, if they establish any of the following conditions to the satisfaction of the court – (i) if they satisfy the court that such discretion has been arbitrarily and illegally exercised or the court has been led to so exercise the jurisdiction by suppression of material facts with an oblique purpose of closing the door of the court to the legal representatives of the deceased defendant at the behest of the plaintiff so as to take undue advantage; or (ii) that the deceased defendant had so connieved with the plaintiff in allowing the plaintiff to get a collusive decree in his favour, with the view in mind to deprive his own legal representatives of their legal rights for some reason or other best known to the deceased-defendant; or (iii) when these legal representatives have some independent right of their own over the subject matter of the suit and they do not wholly claim through the deceased defendant.

In this case the reasons assigned by the learned trial court while rejecting the application under Order 1, Rule 10 C.P.C. is untenable – Held, the petitioners are entitled to be impleaded as parties to the suit as defendants and they participate in the suit only from the stage they moved the court but not from any anterior stage in any manner.

(Paras 8,9)

For Petitioners : M/s. G.Rath, S. Rath & S.N.Mishra

For Opp. Parties : M/s. S.K.Nayak, D.D.Jena.
M/s. S.K.Pradhan & S.B.Mahanta

Date of Hearing : 26.10.2016
Date of Judgment : 06.12.2016

JUDGMENT

D. DASH, J.

1. In this application under Article 227 of the Constitution, the petitioners seek quashment of an order dated 26.6.2009 passed by learned Civil Judge (Sr.Divn.), Bhadrak in T.S. No. 118/1991-I whereby their application to be impleaded as parties through a petition under order 1 rule 10 of the Code of Civil Procedure (for short, 'the Code') has been rejected.

The opp. party no.1 as the plaintiff had filed the above noted suit for partition arraigning the opp. party nos. 2 to 35 as defendants including the father of the present petitioner nos. 1 to 4 as defendant no.3; father of present petitioner nos. 6 to 9 and husband of present petitioner no. 5 as defendant no.4.

During pendency of the suit when the defendant nos. 4 and 5 the predecessor-in-interest of the present petitioners died, the present opp.party no.1, the plaintiff of the suit instead of bringing, their legal representatives as defendants on record though the right to sue against them survives filed a petition under sub-rule 4 of rule 4 of order 22 of the Code in exempting her from the necessity of substituting the legal representatives of those deceased-defendants who are now the petitioners. This was allowed by order dated 1.8.2006. The suit then proceeded further. On 5.8.2008, these petitioners filed a petition under 1 rule 10 of the Code so as to be impleaded as parties being the legal representatives of those deceased defendant nos. 4 and 5. The grounds taken in the petition are that these petitioners were not aware of the legal proceeding and had no knowledge about it. So having come to know about the pendency of the suit, they have made the move.

The petition faced resistance from the side of the defendant nos. 1 and 23 of the suit who are here the opp.party nos. 2 and 24 respectively. They challenged the maintainability of the petition besides attacking the move to be for protracting the trial in depriving the plaintiff-opposite party no.1 as also others in getting the relief as prayed for partition.

2. I have heard learned counsel for the petitioners and learned counsel for the opp.party no.1 and learned counsel for the opp.party nos. 2 and 24 at length.

Perused the order in question as also the other connected orders, the petition under order 1 rule 10 of the Code and its objection including the prior petition filed by opp.party no.1 (plaintiff) under order 22 rule 4 (4) of the Code.

3. The trial court as is seen from the order has rejected the petition as devoid of merit merely taking the view that on the face of the provision of order 22 rules 3 and 4 of the Code, these petitioners cannot be impleaded with the aid of the provision order 1 rule 10 of the Code.

4. I am afraid to accept the reason as above. Here it is not the case that the opp.party no.1 being the plaintiff having not resorted to the provision of order 22 rule 4 of the Code is seeking to implead the petitioners who are the legal representatives of deceased defendant nos. 4 and 5 as parties to the suit with the aid of the provision of order 1 rule 10 of the Code. The present application is by those legal representatives of deceased defendant nos. 4 and 5. The plaintiff in the suit was earlier exempted from substituting the legal representatives of those defendant nos. 4 and 5 i.e. petitioners. Thus, the short

reason assigned by the trial court in rejecting the petition is contrary to the provision of law and its acceptance would lead to say that when the plaintiff does not substitute the legal representatives of a deceased- defendant, there remains no scope for the legal representatives of deceased-defendant for being arraigned as parties to participate in the suit. Such a view is not in consonance with the settled law. Thus said reason for rejection of the petition under order 1 rule 10 of the Code as stated by the trial court is a flawed one.

5. That view however does not bring an end to this proceeding . Now the question arises in this case is as to whether once the court has passed an order exempting the plaintiff from substituting the legal representatives of a deceased-defendant on being satisfied with regard to the pre-conditions laid down in sub-rule 4 of rule 4 of order 22 of the Code and has exercised the discretion as vested in law, if has no power to allow those legal representatives of the deceased-defendant to come to be arraigned as parties on their motion sometime after the death of that deceased-defendant and if those legal representatives of the deceased-defendant have thereby lost their right to approach the court to have their say in the suit. In other words, exemption to the plaintiff once granted as above under order 22 rule 4(4) of the Code whether forecloses the right of those legal representatives to approach the court to participate in the suit. To put it more clearly, once exercising the discretion as above and by proceeding with the suit and thereby effacing any fatal affect over the findings in the judgment and decree to be passed in the suit at the ultimatum as if having same force and effect if so pronounced before the death of those defendants, the Court whether can allow the entry of those legal representatives of deceased defendant in coming to the arena of the suit on their application to be so impleaded as parties.

In order to answer the above point, the fact has to be borne in mind that we are here concerned with a suit for partition. The next aspect we must have in view that when judgment and decree are passed in a suit affecting a party and that party dies thereafter, the Court cannot shut its door when the legal representative/s of that deceased party come/s to file appeal challenging the said judgment and decree and grant of leave to file appeal in that situation is the normal rule and is also given in a routine manner.

6. Pertinent it is to mention that such provision of sub-rule 4 rule 4 of order 22 has come to be introduced in the Code of procedure by amendment act of 1976 coming into force with effect from 1.2.77. The said sub-rule 4 of rule 4 order 22 reads as under:-

"xxx xxx xxx
xxx xxx xxx
xxx xxx xxx

4. The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

Even by a simple reading of the above provision, it is clearly seen that the word "may" has been placed after the word "Court". It has to be thus said that provision vests a discretion with the court to exempt the plaintiff from the necessity of substituting the legal representatives of a non-contesting defendant and if such discretion is exercised in favour of the plaintiff granting the exemption, the judgment delivered at the ultimatum containing the findings would remain as effective as has been passed when said deceased defendant was alive. At this juncture, it may be pointed out that Orissa High Court amendment had a similar provision in rule 4 even prior to the amendment in the Code by Amendment Act of 1976. In fact our High Court and few other High Court's Amendment has practically been inserted as sub-rule 4. Our High Court's amendment was there mainly to take care of the situation in finally arresting the delay in disposal of the suit.

7. Present provision of sub-rule 4 of rule 4 of order 22 of the Code empowers the court to use the discretion as above on being satisfied with few preconditions that the said defendant has not filed the written statement or has failed to appear and contest the suit. In other words, that the said defendant must not have laid any defence in denying the plaint averments and resisting the plaintiff's claim or thereafter had not appeared to contest the suit. Its an enabling provision permitting the court to exempt the plaintiff in that regard of substitution which he is otherwise under legal obligation to go for. It does not permit the party to exercise the discretion in not impleading the legal representatives of the said defendant. The purpose is that when a non-contesting defendant dies, his legal representatives are not necessarily to be brought within the arena of the suit as no need remains again to give them the scope to contest. In that situation by not bringing the legal representatives

of a non-contesting defendant is to see that there is no causation of unnecessary delay in disposal of the suit and in case the court exercises such a discretion, the judgment with the findings and the decree well bind that defendant being deemed under the provision, as if the decree has been passed when that defendant was alive thereby obviously going also to bind the legal representatives of said defendant. The decree thus stands well executable even against those legal representatives. The reason is quite obvious that when the predecessor-in-interest of a defendant through whom his legal representatives claim the right over the subject matter or who legally represent him in the suit being competent to do so and the right to sue survives in their favour, when has raised no controversy on the pleadings laid in the plaint thereby giving rise to no issue for being adjudicated and answered as between the plaintiff and said defendant or who has not come forward thereafter to contest the suit by failing to appear, his legal representatives are not required in law to be heard being not so necessary, in view of conduct expressed by the deceased-defendant in the suit as their presence would hardly make any difference. In that premises thus the suitor has been relieved of the obligation to substitute the legal representatives of the said deceased- defendant who has shown above such conducts in the suit being a defaulting or recalcitrant defendant and therefore, the final verdict therein would not be open to attack on the ground of abatement or being passed against a dead man as such a nullity having no legal impact much less to say even upon those legal representatives.

However, in my considered opinion the view that once the exemption as above has been granted by the court in exercise of its discretion being satisfied with the preconditions laid down in sub-rule 4 that forecloses the right of legal representatives to come forward and seek their impleadment in the suit is not permissible. That in my considered view cannot be said be in the direction of serving the very purpose behind such provision and the objective sought to be achieved thereby. The said standing provision is not meant to be stretched to that extent so as to be said that to serve also that purpose it has been brought into by amendment as that would again cause delay. The objective sought to be achieved is that of arresting unnecessary delay, when ultimately bringing those legal representatives of such a defaulting defendant would serve no meaningful purpose. It is not permissible to take such a view saying that it would not only cause further delay as would have happened had the exemption not been granted had the court not exercised the jurisdiction and as it may push the culmination of the

suit to an uncertainty. Therefore, we shall have to confine ourselves in saying that the exemption granted by a court to the plaintiff from substituting the legal representatives of a deceased-defendant is for the purpose of progress of the suit for its disposal in accordance with law without inviting the fatal effect of abatement and ultimately to see that the judgment and decree are immune from attack as having been passed against a dead person. But that has nothing to do with the right of the legal representatives to get themselves substituted or brought on record subsequently on their move in that regard in shutting the door of the court thereby to participate in the suit. Thus the grant of exemption as above cannot stand on the way of the Court to give opportunity to those legal representatives of the deceased party who come forward to be impleaded as parties to the suit.

8. With the above view, now the most crucial point arises for being addressed that while providing the opportunity as above, from which stage they will get that right to contest the suit whether from the day when that defendant died or from the day they come to the arena of the suit being impleaded as parties.

Before going to discuss that it may be stated that the very purpose of engrafting the provision under order 22 rule 4(4) of the Code is with the objective of arresting unnecessary delay for the reasons as already discussed in detail. Thus if the newly added legal representatives are given the opportunity to contest the suit from the date of death of deceased-defendant, it would certainly be running contrary to the intention of the legislature in making said provision. The plaintiff in that situation would be put to more sufferance had he not resorted to that provision in getting the exemption which can never be said to have been the intention behind. The exemption in that event would fall as a curse upon him. Instead of arresting the delay, the delay would be much more and that would perpetrate mischief that the legal representatives would be waiting till the fag end of the suit and then with the move having been successful be able to see that the valuable time and energy of all concerned spent till then be useless put the plaintiff in the position of the worst sufferer having resorted the said provision for early disposal of the lis and for absolutely no fault on his part. The intention of the legislature in bringing said provision would in that event be totally frustrated and rather it would stand to be taken advantage of in a counterproductive way. So normal course would be to provide them the opportunity from that stage of the suit when they come to be added as parties and they cannot claim their right to participate from any anterior stage having the effect of reopening of the suit

from any anterior date bringing all the progress of the suit in accordance with law till then as that of an exercise in futility.

However, there has to be culled out certain exceptions to the above normal course that in such a case the legal representatives coming forward to get them impleaded as parties in place of their predecessor-in-interest i.e. the deceased defendant can only so succeed to contest the suit from the date of death of that defendant. (i) if they satisfy the court that such discretion has been arbitrarily and illegally exercised or the court has been led to so exercise the jurisdiction by suppression of material facts with an oblique purpose of closing the door of the court to the legal representatives of the deceased defendant at the behest of the plaintiff so as to take undue advantage; or (ii) that the deceased defendant had so connieved with the plaintiff in allowing the plaintiff to get a collusive decree in his favour, with the view in mind to deprive his own legal representatives of their legal rights for some reason or other best known to the deceased-defendant; or (iii) when these legal representatives have some independent right of their own over the subject matter of the suit and they do not wholly claim through the deceased-defendant. If any of these conditions are placed and established to the Court's satisfaction, then only the opportunity is to be provided to them from that stage of the suit which was prevailing at the time of death of the deceased-defendant. In the instant case, the petitioners have neither projected their case in any such manner as above nor have so shown so as to bring it within any of the above excepted category for providing them the opportunity to participate in the suit from the time of death of their predecessor-in-interest i.e. defendant nos. 3 and 4.

9. In the upshot of above discussion and reasons, I sum up that the short reason assigned by the trial court in rejecting the petition filed by these petitioners under order 1 rule 10 of the Code is untenable in the eye of law and I find that the trial court by rejecting the said prayer of the petitioners has not acted within the bounds of his authority and its in breach of law. Therefore, the petitioners are to be impleaded as parties to this suit as defendants. But with such, it is made clear that they would have the opportunity to participate in the proceeding of the suit only from that stage as it was prevailing as on the date of their move but not from any anterior stage in any manner. To put it with clarity that by such order of impletion of the petitioners as parties to the suit they are not permitted to exercise said right of participation in the proceeding of the suit as it has already traversed till then. Their participation in the suit would arise only from that stage of the suit

when they have made the move to come to join therein as parties and that would continue as such till the culmination of the suit.

The application under Article 227 of the Constitution is hereby disposed of accordingly.

No order as to cost.

Viewing the age of the suit and its long pendency by now, the trial court is directed to proceed for early disposal of the suit in accordance with law preferably within a period of six months from the date of communication of this order or production of its certified copy whichever is earlier.

Writ petition disposed of.

2017 (II) ILR - CUT- 939

SATRUGHANA PUJAHARI, J.

CRA NO. 267 OF 1992

DOLA @ DOLAGOBINDA PRADHAN & ANR. .....Appellants

.Vrs.

STATE OF ORISSA .....Respondent

PENAL CODE, 1860 – S.376 (g)

Rape – Husband of the victim did not support the prosecution case – Defence alleged that it would be unsafe to convict the accused on her uncorroborated testimony – Held, duty of the Court is to consider "Probability factors".

When a grown-up and married woman deposed on oath in the Court that she was raped, it is not proper judicial approach to disbelieve her outright in the absence of corroboration from the oral testimony of her husband – In the present case, on the date of occurrence in the morning, the appellants along with a group of people assaulted the husband of the victim when he denied to shift his hotel from the weekly market, so it is probable as well as reasonable that the husband of the victim either out of fear of the appellants for further retaliation if he deposed against them in the Court or he is so emotional or sentimental that he felt ashamed to repeat the incident in Court to further stake their reputation – The entire circumstances also

do not disclose any strong motive to falsely involve the appellants – Moreover, a woman in rural surroundings like the victim would attach maximum importance to her chastity and would not easily be a party to facilitate her husband to continue business at that place which otherwise would jeopardize her reputation and lower her in the esteem of others – So the "probability factors" do not render her evidence unworthy of credit on any count and there is no reason to discard her testimony only because her husband for some reason or other expressed his reservation to describe in detail as to what the victim had narrated before her in that fateful evening – Held, testimony of the victim inspires confidence, on the basis of which alone, conviction can safely be sustained – The impugned judgment of conviction and sentence are confirmed. (Paras 8, 9,10)

PENAL CODE, 1860 – S.376 (g)

Rape – Victim is married, having two children – Absence of injury on the private part of the victim – Defence alleged there was no rape.

It must be taken note of that the reaction of the vaginal mucosa to a penetrating foreign body is to lubricate, so even in non-consenting intercourse there will be certain amount of lubrication produced during the act, if lubrication was lacking on initial penetration – So in case of sexually experienced women, who have born children, signs of, even, minor vaginal injury may be absent – Held, absence of injury on the female organs of the victim does not affect her testimony with regard to the allegation of rape. (Para 7)

Case Laws Referred to :-

1. AIR 1983 S.C. 753 : Bharwada Bhoginbhai Hirjibhai vrs. State of Gujarat.
2. (2001) 20 OCR 176 : Manas Ranjan Thakur vrs. State.
3. (1997) 12 OCR 259 : Lakhia @ Laxmidhar Sahu vrs. State.

For Appellants : M/s. D.P.Pattnaik & Associates

For Respondent : Mr. A.N.Das, Addl. Govt. Advocate

Date of Judgment : 10.05.2017

JUDGMENT

S.PUJAHARI, J.

The appellants in this appeal challenge the judgment of conviction and order of sentence dated 20.07.1992 passed by the learned Asst. Sessions

Judge, Bonai in S.T. No.65/2 of 1992-92 holding both of them guilty under Section 376(g) of the Indian Penal Code, 1860 (for short "the IPC") and sentencing each of them to undergo rigorous imprisonment for ten years.

2. The factual matrix of the prosecution case, in short compass, is that on 24.03.1990 around 8 p.m. when the victim was enroute home from her road side "Eating House" near Khuntagaon Weekly market, it is alleged no sooner she reached Talanali road, the appellants apparently concealed behind a "Mahula tree" suddenly emerged and finding her alone obstructed her movement, gagged her mouth by a napkin and in an erotic impulse they physically carried her to a road side date-palm clump where appellant – Akshya Pradhan at a knife point threatened her to kill if she dare to shout. Trembling in fear, the victim could not venture to raise alarm. The appellants laid her on the field. While appellant – Dolagobinda Pradhan pulled her hand upto head and gagged her mouth, appellant - Akshya Pradhan raised her legs and inserted his male organ inside the female genitalia of the victim, bite her cheeks and ravished her. After satisfying his sexual lust, appellant – Akshya Pradhan caught hold the victim by her arms to facilitate the appellant – Dolagobinda Pradhan to commit such bestial act. Being satisfied with their sexual appetite, the appellants left the place leaving the victim at high and dry. The crestfallen victim in paroxysm of despair and frustration rushed to her house at village- Nuadihi and immediately on reaching home narrated the entire horrendous episode before her husband. She also shown her torn inner garments worn at the time of occurrence and the injuries she sustained on her cheeks to her husband. The Police Station being at a considerable distance and that being night hours, on the following day at around 11 a.m. the victim and her husband reached Police Station and lodged F.I.R. (Ext.1). P.W.7 took up investigation of the case, seized the wearing apparels of the victim worn at the time of incident and her broken glass bungles as per seizure list (Exts.5 and 6 respectively). The victim was referred for medical examination at C.H.C., Lahunipada, the appellants were arrested and after completion of due investigation, charge-sheet was submitted. The case was committed to the Court of Sessions in accordance with law where they pleaded not guilty to the charge. As such, in order to prove its case, the prosecution examined 8 witnesses, exhibited 14 documents including the medical reports, Chemical examination report and also produced Material Objects viz. M.Os.I to V. No evidence, however, adduced on behalf of the appellants who have taken a plea of false implication on account of animosity with the husband of the victim.

3. The learned counsel for the appellants contended that the husband of the victim having not supported the case of the prosecution and the appellants and the husband of the victim being in loggerheads on some issue or others and admittedly, on the morning of that alleged date of occurrence, the appellants and the husband of the victim having fought with each other, no implicit reliance can be placed on the uncorroborated testimony of the victim who had a strong motive to implicate the appellants in serious crime.

4. On the contrary, the learned Addl. Government Advocate submitted that the evidence of the victim cannot be tested with suspicion. She having deposed a factum of rape affecting her own chastity, that does not render testimony of the victim unreliable. Hence, this criminal appeal is devoid of merit, submitted by the learned Addl. Government Advocate.

5. To appreciate the rival contentions raised at the Bar, I have carefully scrutinized the evidence of the victim and other witnesses examined on behalf of the prosecution as well as documentary evidence brought on record keeping in view the settled law on the subject as held in the case of ***Bharwada Bhoginbhai Hirjibhai vrs. State of Gujarat*, AIR 1983 S.C. 753,** wherein the Apex Court in paragraphs-10 & 11 have held as follows;

> "**10.** By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :- (1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred, (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would

be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husbands' family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, act as a deterrent.

11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hang-over). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, as a general rule,

> there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities factor' is found to be out of tune."

Here, the victim is a married lady having two children, the elder being around 7 years old. She has given a detail narration of the events. She in this regard stands corroborated by the version indicated by her in the F.I.R. lodged at her earliest opportunity. She has stated as to how she was obstructed at a lonely place at that hour of the night in a rural area and how she was forcibly taken behind a road side date palm clump where she was subjected to rape by the appellants. Her evidence also revealed that the appellants inserted their male organs inside her female genitalia and how despite her visible reaction and struggle she could not extricate herself from the two able bodied rapists. Her evidence also disclosed that while committing sexual assault, the appellant – Akshya Pradhan bit her cheeks and how her wearing glass bungles got broken when she attempted to avoid sexual assault on her. It is also stated that her 'Saya', M.O.II got stained with semen. Her evidence also revealed that immediately on arrival home she narrated before her husband how she was sexually ravished. The Police Station at Lahunipada being at a distance of 20 K.ms. from her village she could not proceed to the Police Station in that hour of night and on the following morning she proceeded to Police Station accompanied with her husband and lodged report (Ext.1). She has identified her wearing apparels and broken glass bungles (M.Os.I to IV). The victim was subjected to some searching and incisive cross-examination where she almost remained firm and the defence failed to demolish her testimony on oath so far sexual ravishment is concerned. The defence has elicited the topography of the area where she was sexually assaulted. However, presence of person, if any, at the relevant time not brought on record despite such searching cross-examination. That apart, she made struggle to get rid from the clutches of the appellants also brought in course of such examination of the victim where broken glass bungles lend assurance to her version. Turning to the evidence of the husband of the victim, who is examined as P.W.3, I find he has deposed as to why he left the eating house at 6 p.m., with his children leaving

his wife (victim) to handle the business in that evening. His evidence also revealed that around 8 p.m. his wife reached home weeping and being asked she disclosed an occurrence committed against her. However, this witness as reflected in his deposition could not narrate what he heard from his wife because he felt ashamed to speak what he heard from his wife. He has also stated to have accompanied his wife to the Police Station on the following morning when she lodged F.I.R.. With the permission of the Court, this witness was cross-examined by the prosecution where he has stated that on the date of occurrence during morning hour the appellants along with a group of persons had assembled in his hotel and assaulted him when he denied to shift his hotel from that place. Admittedly, this witness had sustained injury in his left eye as evident from the evidence of the doctor (P.W.2) who had the occasion to examine this P.W.3 on 24.03.1990 at Lahunipada PHC and proved his report, Ext.2. P.W.4 is the Medical Officer of C.H.C., Lahunipada. He had examined the victim on police requisition on 25.03.1990 where he noticed 4 numbers of bruises of size ½ cm on the left cheek and another 4 numbers of bruises of such size on the right cheek of the victim. He has opined that the injuries were caused within 24 hours and could have been caused by teeth bite. Ext.4 is the said report. Nothing substantial elicited in the cross-examination to discard the opinion of the Medical Officer. It is consistent with the oral evidence of the victim that while committing rape, appellant – Akshya Pradhan bit her cheeks. The husband of the victim having not supported the oral testimony of the victim in material particulars and she having not sustained any injury on her vagina, the learned counsel for the appellants strenuously contended to discard the testimony of the victim in this peculiar facts and circumstances of the case where she apparently having a motive to seek revenge against the appellants, particularly when the evidence of the victim is not free from blemish. In this regard, he has drawn the notice of this Court to the evidence of the victim indicating the fact that the victim's evidence with regard to the identification of the appellants was unworthy of credence as she stated that she could not identify their faces, coupled with the fact that no spermatozoa was found evidencing the recent sexual intercourse and also there was no injury on her person. It has been further submitted that no doubt, solely relying on the version of the victim, a conviction can be recorded, but the same must be reliable. When the evidence of the victim in this case is not reliable, coupled with the fact that she had a motive to implicate the appellants, the trial court committed gross error in appreciation of the evidence on record to record a conviction believing the version of the victim. In this regard, the learned counsel for the appellants has placed

reliance on a decision of this Court in the case of ***Manas Ranjan Thakur vrs. State,*** (2001) 20 OCR 176, wherein this Court has held that "It is also well settled in law that absence of injury on the private part of the victim or stains of semen or spermatozoa is of no consequence and cannot negative the offence of rape, but where the medical evidence is to the effect that there was no sign of recent intercourse or injury on the girl's private part and where it is clear that the prosecutrix is not a reliable witness or is a willing party to sexual intercourse, it would not be safe to convict the accused, on her uncorroborated testimony.

6. So far as the contention with regard to the identification is concerned, no doubt in that particular event she could not have clearly identified the faces of the appellants, but she actually having acquaintance with them inasmuch as in her evidence she stated that both the appellants having their "eating house" near the "eating house" of the victim and about the incident preceding the aforesaid, it cannot be said that she had not identified the appellants. Her saying that she had no prior acquaintance cannot be interpreted to understand that she did not know them at all as in her evidence earlier she has clearly stated about the role of the appellants in the incident and the incident that has occurred. So, the contention advanced with regard to identification of the appellants is of no consequence, more so when the absence of acquaintance must have been answered by the victim with regard to closeness of her with the appellants. When the appellants are known and the occurrence had taken place in the darkness of the night, there is no manner of doubt that the victim's identification with regard to the appellants is acceptable one.

7. Coming to the next contention that absence of non-corroboration from the injuries on the private part or person of the victim is concerned, it cannot be lost sight that the victim was having two children acquainted with sexual life. So, absence of injury on the female organs of the victim does not affect her testimony with regard to the sexual assault. In this regard, a reliance can be placed on a decision of this Court in the case of ***Lakhia @ Laxmidhar Sahu vrs. State,*** **(1997) 12 OCR 259,** wherein it has been held as follows :-

> "…….It must also be remembered that the reaction of the vaginal mucosa to a penetrating foreign body is to lubricate, and therefore even in non-consenting intercourse there will be a certain amount of lubrication produced during the act, even if lubrication was lacking on initial penetration. The frequently repeated myth that the vagina

will remain dry in non-consenting intercourse with the resulting production of serious abrasion and bruising is entirely untrue.

In the case of sexually experienced women, and those who have born children, signs of even the most minor vaginal injury may well be absent.

This Court in the case of *Dinabandhu Behera vrs. State of Orissa,* reported in (1995) 8 OCR 123**,** has held as follows :-

"Absent of injuries on the person of the victim may not be fatal to the prosecution and corroborative evidence may not be an imperative component of judicial credence in rape cases."

Thus absence of injury cannot be a factor to rule out the allegation of rape."

8. It is also well settled law that if the version of the prosecutrix in her evidence is believable, the basic truth in her evidence is ascertainable and it is found to be credible and consistent, there is no law that itself cannot form the basis of conviction. Corroboration, as has been often held by the Apex Court and this Court, is not a sine-qua-non for a conviction in a rape case. It has been repeatedly pointed out by the Apex Court that the evidence of the victim of a sexual assault stands at par with the evidence of an injured witness and is entitled to a great weight, absence of corroboration notwithstanding. If the evidence of the victim does not suffer from any basic infirmity, and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. When a grown-up and married woman gives evidence on oath in Court that she was raped, it is not proper judicial approach to disbelieve her outright, if only because of absence of corroboration from the oral testimony of her husband and because of absence of medical evidence in the facts and circumstances like the present one where it is brought on record that the appellants having also a hotel near Weekly market and they having threatened the victim's husband to shift his hotel from that place but he having not succumbing to their pressure did not pull down the shutter, he was assaulted on that very morning. It is probable as well as reasonable that either out of fear of the appellants of further retaliation if he deposed against them in support of his wife, or he is an emotional and sentimental person who does not like to further stake the

reputation of his wife, he having a second wife who is no other than the sister of the victim living under the same roof, he might not have deposed in support of his wife's version. This probability factor is not totally inconsistent with the version of the victim and does not render it unworthy of credence. No doubt abstract or hypothetical question like why a prosecutrix would implicate innocent person is not conclusive to guilt of the accused. I have given my anxious consideration to the probability factors in this peculiar circumstances, but do not find any motive of falsely implicating the appellants which is not apparent on record. The totality of the circumstances do not disclose any strong motive to falsely involve the persons charged. A woman will not ordinarily stake her reputation by leveling a false charge of rape which tends to spoil her own chastity. In such circumstances, when a woman comes forward and says that she was raped and when nothing substantial elicited to doubt her testimony, her evidence should carry the same weighed as is attached to the evidence of an injured witness who is victim of violence. A woman in rural surroundings like the victim would attach maximum importance to her chastity and would not easily be a party to facilitate her husband to continue business at that place which otherwise would jeopardize her reputation and lower her in the esteem of others when the record reveals that she managed business in their eating house throughout the day. Though her evidence appears seemingly incredible on the surface, but it is inherently probable and is not studded with any falsehood. There is sufficient corroboration to her testimony from the medical evidence. The victim having sustained injuries on her cheek and when her glass bungles broken while she was struggling, those are intrinsic corroboration and symbol of struggle. She has also identified her wearing apparels and her broken glass bungles. Probability factors do not render her evidence unworthy of credit on any count. The learned trial court has discussed all such issues thread are in its long judgment and I find the conclusion reached is in accordance with law and proved fact and does not call for any second opinion.

9. Consequently, I find the victim being a trustworthy and when her evidence inspires confidence and particularly when there is no basic infirmity and probabilities factor do not render it unworthy of credence, there is no reason to discard her testimony only because her husband for some reason or others expressed his reservation to describe in details as to what the victim had narrated before her in that fateful evening. The immediate conduct of the victim in disclosing about the incident before her husband is also admissible under Section 6 of the Indian Evidence Act as *res gestae.* It is a spontaneous

statement connected with the fact in issue and there was no time interval for fabrication and concoction which has been considered at length by the learned trial court. The plea of the appellants was a plea of despair not worthy of credence. After all, it is appellants and not the victim of sex crime who is on trial. 'Rape' is not only a crime against the person of a woman it is a crime against the entire society. It despairs the entire psychology of a woman and pushed her into a deep emotional crisis. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape looks down upon her in duration and contend. In such a situation when a woman like the victim comes forward and depose, there is built-in-assurance that the charge is genuine rather than fabricated. Testimony of the victim inspires confidence, on the basis of which alone, conviction can be safely sustained.

10. Consequently, for the foregoing reasons, I find no merit in this criminal appeal and, accordingly, it stands dismissed. The impugned judgment of conviction and order of sentence recorded by the learned Asst. Sessions Judge, Bonai are hereby confirmed. L.C.R. received be sent back forthwith along with a copy of the Judgment.

Appeal dismissed.

2017 (II) ILR - CUT- 949

S. PUJAHARI, J.

CRA NO. 244 OF 1992

JAIRAM BHOI ……..Appellant.

.Vrs.

STATE OF ORISSA ……..Respondent

PENAL CODE, 1860 – S.366

Victim, who was on the verge of attaining majority, was in deep love with the accused – She voluntarily moved from one place to another and sworn an affidavit as the wife of the accused – She also did not depose about any illicit intercourse – No evidence that the accused kidnapped/abducted or deceitfully induced the victim girl to leave her parental home – Charge U/s 366 can not be said to have been established as possibility of the victim going away on her own accord with the accused from her lawful guardianship can not be ruled out – Held, the impugned judgment of conviction and sentence is setaside.

(Paras 7,8,9)

Case Law Referred to :-
1. (1997) 12 OCR 275 : Laxman Mishal vrs. The State.

For Appellant : M/s. G.N. Rout, P.K. Kundu & S.K. Bihari
For Respondent : Mr. S.B. Mohanty (AGA)

Date of Hearing : 21.02.2017
Date of Judgment: 21.02.2017

JUDGMENT

S.PUJAHARI, J.

This appeal is directed against the judgment of conviction and order of sentence passed by the learned 1st Addl. Sessions Judge, Cuttack in S.T. No.50 of 1992 convicting the appellant (hereinafter referred to as "the accused") for commission of offence under Section 366 of the Indian Penal Code, 1860 (for short "the IPC") and sentencing him to undergo R.I. for a period of 3 years and to pay a fine of Rs.500/-, in default, to undergo R.I. for a further period of two months. 2. Adumbrating the fact as unfolded before the trial court is that on 21.01.1991 the accused, a co-villager (P.W.4) aged about 16 years old had induced the victim girl to leave her lawful guardianship, being swayed by the version of the accused, the victim left her lawful guardianship and eloped with the accused, spent a night with him in a nearby betel vine. They shuttle from one place to other and ultimately they reached Cuttack where they sworn an affidavit showing their status as 'husband' and 'wife'. When the victim was found missing, on the report of her father, investigation taken up, the victim was rescued and restored to her lawful guardianship, police took up investigation of the case touching all aspects and on completion thereof placed charge-sheet against the accused for commission of offence under Sections 363 and 366 of IPC. The learned J.M.F.C.(R), Cuttack committed the case to the Court of Sessions. The Court of the learned First Addl. Sessions Judge, Cuttack, however, framed charge under Section 366 of IPC alone against the accused who abjured his guilt and claimed to be tried. Prosecution, therefore, examined 8 witnesses and exhibited similar number of documents. The accused who had taken the plea of denial and false implication, however, did not choose to adduce any defence in his support.

3. On conclusion of the trial, placing reliance on the evidence adduced by the prosecution, particularly the evidence of the victim girl (P.W.4) and the Investigating Officer (P.W.8), the learned trial court returned the judgment of conviction and order of sentence as stated aforesaid.

4. Assailing the aforesaid judgment of conviction and order of sentence, this criminal appeal has been filed by the accused, inter-alia, on the ground that there was lopsided appreciation of evidence on record as nothing incriminating the fact that the accused had taken the victim girl from her lawful guardianship or induced her to elope with him proved by the prosecution.

5. The learned counsel for the accused submits that since in this case the victim girl had stated that she voluntarily joined the company of the accused and there being nothing on record suggesting the fact that she was induced by the accused to leave her home and no convincing material being there indicating the fact that the victim girl could not have left the company of her lawful guardianship save and except the inducement, conviction under Section 366 of IPC was inept and not legally sustainable. To buttress his stand, the learned counsel places reliance on a decision of this Court in the case of ***Laxman Mishal vrs. The State,*** **(1997) 12 OCR 275**, wherein His Lordships have held that "possibility of the victim going away on her own accord with the accused from her lawful guardianship cannot be ruled out." It is further submitted that there was also no convincing and acceptable evidence that the accused had taken away or induced the victim to leave her parental home and she being in deep love with the accused, the possibility of the victim leaving the lawful guardianship on her own volition cannot be ruled out. Placing reliance on such law laid down in the referred case, it is also submitted that since the ingredients of Section 366 of IPC is conspicuous by its absence in this case, the trial court should not have recorded the judgment of conviction. In such premises, the learned counsel submits to set-aside the impugned judgment of conviction and set the accused at liberty. 6. Per contra, the learned counsel for the State drawing attention of this Court to the evidence of the victim girl who has deposed that she being in love with the accused he persuaded her to leave her lawful guardianship, submits that the evidence writ large that there being inducement given by the accused, for which the victim eloped with him, it cannot be said that the conviction of the accused was unsustainable.

7. I have given my anxious consideration to all such contentions raised, which need careful sifting of the evidence to reach at a just and reasonable conclusion as to whether the victim eloped with the accused without any inducement whatsoever. Tell tale ingredients brought on record reveals that the victim was below 18 years of age and apparently minor who, however, at

the relevant period was on the verge of attaining majority. She has developed her sense of discretion to distinguish what is 'right' or 'wrong'. In the aforesaid circumstances, when the victim has fairly admitted that she was in deep love with the accused and on the night of occurrence when she came in their backyard accused persuaded her to elope with him and being swayed she joined with the accused and spent substantial period in his company till she was rescued. Such statement of the victim girl leads to a reasonable and irresistible conclusion that she was in love with the accused and when at that hour of the night she was in her 'Bari', her version that she was persuaded by the accused and induced, appears to be a bundle of falsehood created to protect her chastity in the family and before the friends. As the victim girl for a quite long period remained in the company of the accused and made no attempt to escape from his company, moved with him from place to place, sworn an affidavit showing her status as 'wife' of the accused till she was rescued by the police, this Court is of the considered opinion that the victim girl who was on the verge of attaining majority voluntarily joined the company of the accused leaving lawful guardianship on her own volition cannot be ruled out altogether. In such premises, when there is no convincing and consistent evidence on record indicating the fact that the accused took active part in inducing his paramour and when tell tale circumstances supports the fact that the victim being on the verge of attaining majority, the charge under Section 366 of IPC cannot be said to have been established beyond all sets of doubt. There is no evidence brought on record that the accused kidnapped / abducted the victim by force of taking out of the lawful guardianship was by any deceitful means. The accused, as record reveals, never intended to misled the victim girl. He has not induced the victim girl to leave her parental home on pretext. The victim moved from one place to another voluntarily and had sworn an affidavit that tool the victim also not deposed about any illicit intercourse. The intention of the accused is the basis and gravamen of offence under Section 366 of IPC. When the victim voluntarily spent several days with the accused and no evidence that she was abducted deceitfully and when such alleged abduction was not with the intent to have sex with the victim, the accused could not be roped by Section 366 of IPC. Where the victim though a minor on the verge of attaining majority voluntarily left her home out of her own free will and also voluntarily stayed with him for several days without any force on her, the accused was neither guilt of kidnapping or abduction. Moreover, when a girl at the time of kidnapping from lawful guardianship possibly intends to cohabit of her own free will, mischief of Section 366 of IPC is not applicable. Concludingly,

when the victim left her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party when the latter cannot be considered to have committed the offence as defined in Section 361 of IPC as well. The accused having never laid a foundation by inducement, allurement or threat and when he has not influenced the minor and weighed with her in leaving her guardian's custody, the conclusion of guilty recorded by the learned trial court is unsustainable in law as well as in fact. This cul-de-sac conclusion emanating from the proved fact is also fortified by the ratio laid down in the case of *Laxman Mishal (supra).*

8. In the premises aforesaid, on reappraisal of the evidence on record in the background of settled law, this Court is of the considered opinion that when there is no convincing and consistent evidence indicating the fact that the accused had intentionally induced the victim on false pretext or forcibly coerced her, the possibility of the victim accompanied the accused on her own volition / accord appears to be highly reasonable and probable. Hence, the conviction of the accused under Section 366 of IPC is unsustainable in fact as well as in law.

9. Therefore, the appeal is allowed. The impugned judgment of conviction and order of sentence dated 12.05.1992 passed by the learned 1st Additional Sessions Judge, Cuttack in Sessions Trial No.50 of 1992 convicting the appellant for commission of offence under Section 366 of IPC and sentencing him to undergo R.I. for a period of three years and to pay a fine of Rs.500/-, in default, to undergo R.I. for a further period of two months, are set-aside. The appellant is acquitted of the said charge. Since the appellant, namely, Jairam Bhoi is in jail custody, he be set at liberty forthwith, if he is not otherwise required to be incarcerated in any other case. L.C.R. received be sent back forthwith along with a copy of this Judgment.

Appeal allowed.

2017 (II) ILR - CUT-954

BISWANATH RATH, J.

W.P.(C) NO. 9721 OF 2003

MANAGING DIRECTOR, ORISSA STATE COOPERATIVE AGRICULTURAL & RURAL DEVELOPMENT BANK LTD. ……..Petitioner

.Vrs.

GOURAHARI SAHU & ORS. ……..Opp. Parties

(A) ODISHA LOKPAL AND LOKAYUKTAS ACT, 1995 – S.8 (b)

Claim for retiral dues before Lokpal – Lokpal allowed claim made by O.P.NO 1 against the petitioner – Hence the writ petition.

Since O.P.No1 can avail remedy for the above claim before any Tribunal or court of law, Hon'ble Lokpal has no authority U/s S.8 (b) of the Act. to decide the same and as such he has exercised jurisdiction not vested in him – Held, the impugned order passed by the Hon'ble Lokpal is setaside. (Para 7)

(B) ODISHA CO-OPERATIVE SOCIETIES ACT, 1962 – S.68

Claim made by O.P.No.1 for retiral dues – He was an employee of Odisha State CARD Bank – He wrongly approached the Lokapal, who has no jurisdiction to decide such claim – Held, the petitioner has remedy U/s 68 of the Act, 1962 – Even if the impugned order passed by the Lokpal is setaside it shall not preclude O.P.No1 from approaching the appropriate authority under any other law. (Para 7)

Case Law Referred to :-

1. 2011 (II) ILR-CUT-93: Raghunath Mishra vrs. Principal Accountant General (A&E) & Ors.

For Petitioner : M/s. A.K.Mishra, AK.Sharma,M.K.Dash, P.K.Dash & S.Mishra

For O.P. 1 : M/s. S.K.Purohit, A.K. Nayak, P.K. Swain & A.K.Das

For O.P. 2 : M/s. B.Mohanty, B.Tripathy

Date of hearing :18.07.2017

Date of Judgment :18.07.2017

JUDGMENT

BISWANATH RATH, J.

Filing the writ petition, the petitioner-Orissa State Cooperative Agricultural & Rural Development Bank Ltd. has assailed the order passed

by the Hon'ble Lokpal, Orissa involving Case No.331-LP(G) of 2011 appearing at Annexure-3.

2. Undisputed fact remains is O.P.1, an ex-cadre Secretary of CARD Bank, Bargarh superannuated from his service on 31.7.2009 filing the complaint before the Hon'ble Lokpal, Orissa, vide Case No.331-LP(G) of 2011 made claim over his retiral dues, gratuity, encashment of unutilized leave from his employer and the above proceeding has been concluded by passing of the impugned order, Annexure-3 challenged herein.

3. Challenging the impugned order, Sri Mishra, learned counsel for the petitioner raising the authority of Hon'ble Lokpal in the involved matter submitted that the Hon'ble Lokpal has no authority to take up the issue involved therein, and therefore, the direction impugned herein is without jurisdiction. Referring to the provisions contained in Sections 7 & 8 of the Orissa Lokpal and Lakayuktas Act, 1995, Sri Mishra attempted to justify his submission that the Hon'ble Lokpal has exercised jurisdiction not vested in him. Referring to a decision of this Court in ***Raghunath Mishra vrs. Principal Accountant General (A & E) & Others*** reported in 2011 (II) ILR-CUT-93, Sri Mishra, learned counsel for the petitioner submitted that for the direction therein, the decision has a direct application to the case at hand. Further for the private O.P. having a clear remedy under Section 68 of the Orissa State Cooperative Societies Act, proceeding before the Hon'ble Lokpal was not maintainable and in the above circumstance, Sri Mishra prayed this Court for interference in the impugned order and setting aside the same.

4. Sri Purohit, learned counsel for O.P.1, the beneficiary by virtue of the impugned order, on the other hand, submitted that there is no dispute that the petitioner was an employee of the CARD Bank and there are number of decisions of this Court entitling such employees their benefits through OSCARD Bank. Referring to the decisions of this Court in ***Laxmi Kanata Mohanta vrs. Orissa Cooperative Agricultural & Rural Development Bank Ltd. & others*** (W.P.(C) No.7970/2017 disposed of on 5.5.2017) and ***Orissa Cooperative Agricultural & Rural Development Bank Ltd. vrs. Sri Sachindra Harpal*** (W.A. No.364/2011 disposed of on 9.9.2014) and the direction of the Hon'ble apex Court involving SLP No.3259/2015, Sri Purohit claimed that there being no dispute regarding entitlement of the petitioner, there is no infirmity in the impugned order by directing the authority to make payment.

5. Sri B.Mohanty, learned counsel for O.P.2, while not disputing the proposition raised by Sri Mishra but objecting the submission of Sri Purohit, learned counsel for O.P.1, submitted that the claim of the petitioner not being adjudicated by the appropriate authority, there should not be any observation with regard to entitlement of the petitioner at this stage and it should be left open to be adjudicated and directed by the competent authority.

6. Considering the rival contentions of the parties and taking into consideration the question of jurisdiction of the Hon'ble Lokpal, Orissa over such matters, this Court finds, Sections 7(1) & (2), 8(1) and 17(3) of the Orissa Lokpal and Lakayuktas Act, 1995 read as under :-

> "7.Matters which may be investigated by Lokpal or Lokayukta :- (1) Subject to the provisions of this Act, the Lokpal may investigate any action which is taken by or with the general or specific approval of –
>
> (i) a Minister or the Chief Secretary or a Secretary; or
> (ii) any other public servant being a public servant of a class or sub-class of public servant notified by the State Government in consultation with the Lokpal in this behalf ;
>
> in any case where a complaint involving a grievance or an allegation is made in respect of such action or such action can be or could have been, in the opinion of the Lokpal, the subject of a grievance or an allegation.
>
> (2) Subject to the provisions of this Act, a Lokayukta may investigate any action which is taken by or with the general or specific approval of, any public servant not being a Minister, the Chief Secretary or a Secretary or other public servant referred to in Sub-section (1) in any case where a complaint involving a grievance or an allegation is made in respect of such action or such action can be or could have been, in the opinion of the Lokayukta, the subject of a grievance or any allegation.
>
> 8. Matters not subject to investigation :- (1) Except as hereinafter provided, the Lokpal or a Lokayukta shall not conduct any investigation under this Act in the case of a complaint involving a grievance in respect of any action –
>
> (a) if such action relates to any matter specified in the Third Schedule ; or

(b) if the complainant has or had any remedy by way of proceeding before any Tribunal or Court of Law :

Provided that the Lokpal or a Lokayukta may conduct an investigation notwithstanding that the complainant had or has such a remedy, if the Lokpal or, as the case may be, the Lokayukta is satisfied that such person could not or cannot, for sufficient cause, have recourse to such remedy.

"17.Protection- (3) Except on the ground of jurisdiction, no proceedings or decision of the Lokpal or the Lokayuktas shall be liable to be challenged, reviewed, quashed or called in question in any Court or Tribunal."

It is also relevant to take note of the provision at Section 68 of the Orissa State Cooperative Societies Act, which reads as hereunder :-

"68. Disputes which may be referred to arbitration- (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, management or the business of a Society, other than a dispute required to be referred to the Tribunal and a dispute required to be adjudicated under the Industrial Disputes Act, 1947, shall be referred to the Registrar if the parties thereto are among the following, namely "

a) the Society, its Committee, past Committee, any part or present Officer or office-bearer, any past or present agent, any past or present servant or the nominee, legal heir or representative of any deceased Officer, office-bearer, deceased agent or deceased servant of the Society ; or

b) a member, past member, or a person claiming through a member, past member or deceased member of the Society, or of a Society which is a member of the Society ; or

c) a surety of a member, past member or a deceased member, whether such surety is or is not a member of the Society; or

d) any other Society."

7. Considering the legal aspect involving the jurisdiction of the Ho'ble Lokpal under the Orissa Lokpal and Lakayuktas Act, 1995 and taking into consideration the rival contentions of the parties, this Court finds, in the dispute involved in the proceeding taken up by the Hon'ble Lokpal for the clear statutory provision available to the petitioner by initiation of a

proceeding under Section 68 of the Orissa State Cooperative Societies Act, the jurisdiction of the Hon'ble Lokpal is completely ousted. Further looking to the decisions cited by the learned counsel for the petitioner, this Court finds, taking a case of objection to the jurisdiction of the Hon'ble Lokpal involved in the Indian Administrative Service, this Court taking into consideration of a decision of the Hon'ble apex Court has categorically held that such disputes cannot come within the domain of the Hon'ble Lokpal. The decision referred to herein above and as relied on by the petitioner has a direct bearing on the case at hand. Provisions contained in Sections 7 & 8 of the Act 1995 also completely exclude such disputes from the provision of the Lokpal Act.

Considering the legal position indicated herein above and the decisions referred to herein above and further finding that the petitioner has a clear remedy under the provision of the Orissa State Cooperative Societies Act, this Court finds, the impugned order passed by the Hon'ble Lokpal is without jurisdiction and as a result, this Court while interfering with the impugned order, sets aside the order passed by the Hon'ble Lokpal at Annexure-3. While parting with the case at hand, this Court makes an observation that dismissal of the writ petition shall not preclude the petitioner from approaching the appropriate authority provided under any other law.

8. The writ petition thus stands allowed but however with the observation made herein above. No cost.

Writ petition allowed.

2017 (II) ILR – CUT- 958

BISWANATH RATH, J.

W.P.(C) NO. 14653 OF 2017

RANJUTA DALA BEHERA .....Petitioner

.Vrs.

STATE ELECTION COMMISSIONER, ODISHA & ORS. .....Opp. Parties

ODISHA ZILLA PARISHAD ACT, 1991 – S.32

Election dispute – For filing of Election Case period of limitation is 15 days from the date of declaration of the result – In this case

election result declared on 25.02.2017 and election petition filed on 03.03.2017 – However security amount deposited on 07.03.2017 – Present petitioner being O.P.No.1 filed petition under Order 7, Rule 11 C.P.C. for dismissal of the election petition as the security amount not deposited alongwith the election petition – Application rejected – Hence the writ petition – Presentation of election petition as well as deposit of security amount has to be made within the period of limitation of 15 days from the date of declaration of the result – Held, since the security amount was deposited on 07.03.2017 it is held to be within the period of limitation – There being no infirmity in the impugned order the same is confirmed.

(Paras 7, 8, 9)

Case Laws Referred to :-

1. AIR 2002 SC 3105 : M.Y. Ghorpada v. Shivaji Rao M. Paol and Ors.
2. 2013(I) OLR-205 : Kiranbala Rout v. Smt. Rasnamayee Roy.
3. AIR 1978 SC 1583 : Shiv Chand v. Ujagar Singh & another

For Petitioner : M/s.K.K.Mishra, R.K.Mahanta
For Opp. Parties : Mr. P.Acharya, Sr. Adv.
M/s.G.Mishra, D.K.Patra, A.Dash,
B.R.Tripathy, J.R.Deo

Date of hearing :09.08. 2017
Date of Judgment :30.08.2017

JUDGMENT

BISWANATH RATH, J.

This writ petition involves a challenge to the order dated 14.07.2017 passed in Election Petition No.2 of 2017 rejecting an application under Order 7 Rule 11 read with Section 151 of the C.P.C.

2. Short background involved in the case is that the petitioner and the opposite party No.2 were the contestants for the post of Member of the Zilla Parisad Zone No.49 in the District of Ganjam. The opposite party No.2 being the unsuccessful candidate in the Zilla Parisad Election raised an election dispute against the present petitioner registered as Election Petition No.2 of 2017 on the file of learned District Judge, Ganjam-Berhampur. The election of the opposite party No.1 therein-the present petitioner was challenged on the ground that the elected candidate for her having more than two children was disqualified under Section 33(W) of the Orissa Zilla Parishad Act, 1991 hereinafter called as the Act, 1991. Thus, while praying for declaring the opposite party No.1 was disqualified for the election of t he Zilla

Parishad and being the next nearest contestant prayed for issuing a direction to the opposite party Nos.3 to 5 therein to notify the name of the petitioner as the elected member of the Zilla Parisad Zone No.49. Upon service of copy of the election petition, the successful candidate i.e. the present petitioner-opposite party No.1 therein in the election dispute filed an application under Order 7 Rule 11 read with Section 151 of the C.P.C seeking dismissal of the election petition on two counts, firstly, the elected candidate had no cause of action in absence of material particulars about the exact date of birth, secondly, the election petition was not accompanied with the security deposits which amounts failure of statutory compliances. The present petitioner filing her objection contended that the petition under Order 7 Rule 11 read with Section 151 of C.P.C was not maintainable for having a clear cause of action involving the election dispute. Further, for tendering the security deposits within the time limitation for filing the election petition the election petition was very much valid. Entering into contest, the Election Tribunal i.e. learned District Judge giving finding on both the counts against the present petitioner held not only the election petition had cause of action but for the deposit of the security amount by 7.03.2017 the election petitioner complied all the formalities required therein.

3. Assailing the impugned order, learned counsel for the petitioner referring to the provisions contained in Section 32 of the Orissa Zila Parisad Act and also the provision contained in Order 7 Rule 11 of C.P.C contended that for the provisions contained in Section 32 of the Act and since the security amount has not been deposited on the date of filing of the election petition, the election petition was invalid. Sri K.K. Mishra, learned counsel for the petitioner alleged that the learned District Judge has failed to appreciate this aspect of the matter and further, also failed in appreciating the issues involved regarding the election dispute having no cause of action. Sri K.K. Mishra, learned counsel thus, claimed that the impugned order becomes bad in law and should be interfered with.

4. Sri Gautam Mishra, learned counsel for the opposite party No.2 referring to the objection filed in the Court below in reiterating the grounds taken therein submitted that not only there is appropriate deposit of security involved but the petitioner has also a definite cause of action pleaded therein and thus claimed that the petition under Order 7 Rule 11 of C.P.C. has failed on both the counts, the Court below has definite findings on both the counts and thus, claimed that there is no infirmity in the impugned order.

5. Sri P. Acharya, leaned Senior Advocate though appears in the matter on behalf of the State Election Commissioner but for the limited role of the State Election Commissioner in the matter requested the Court for passing an order in accordance with law.

6. Undisputed fact remains here that the petitioner and the opposite party No.2 were the contestants for the post of Member of the Zilla Parishad Zone No.49 in the District of Ganjam. There also remain no dispute regarding voting in the election

taken place on 17.02.2017. In the first counting though the petitioner was declared elected but in the recounting on 25.02.2017 the opposite party No.2 was declared to have been elected as a Member of the Zilla Parisad Zone No.49 in the District of Ganjam. Thus looking to the provision contained in Section 32 of the Orissa Zilla Parishad Act read with provisions contained in the Chapter VI-A in the Orissa Panchayat Samiti Act, 1959 particularly the provisions at Section 44-B of the Act, 1959, it appears, the petitioner therein i.e. the present opposite party No.2 was required to file the election petition within fifteen days after the day on which the result in the election was announced. For better appreciation of the mater this Court before proceeding to decide on the merit of the case would like to take note of the provisions at Section 32(I)(2) & (3) of the Orissa Zilla Parishad Act, 1991 and also the provision at Section 44-B of the Orissa Panchayat Samiti Act, 1959, which reads as follows:

> "**[32. Election disputes-**(1) No election of a person either as a member or as the President or Vice-President of a Parishad held under this Act shall be called in question except by an election petition presented before the District Judge having jurisdiction over the place at which office of the Parishad is situated.
>
> (2) For the purpose of Sub-section (1), the provisions contained in Chapter-VI-A (hereinafter referred to in this sections as the said Chapter) of the Orissa Panchayat Samiti Act, 1959 shall *mutatis mutandis* apply except as hereunder provided.
>
> In the said Chapter-
>
> (i) The reference to the expression "Samiti" and "Election Commissioner" wherever they occur, shall be construed as reference to "Parishad" and "District Judge" respectively;
>
> (ii) an election petition presented before a District Judge may, either *suo motu* or on application, be transferred to any Additional District Judge;
>
> (iii) for Sub-section (3) of Section 44-J the following Sub-section shall be substituted, namely;
>
> "(3) In the event of the District Judge declaring a casual vacancy to have been created, it shall direct the appropriate authority to take steps for filling the vacancy" and
>
> (iv) for Section 44-Q the following section shall be substituted, namely:"
>
> "**44-B. Presentation of petitions –**(1) The petition shall be presented on one or more of the grounds specified in Section 44-L before the [Civil

Judge (Senior Division)] having jurisdiction over the place at which the office of the Samiti is situated] together with a deposit of [two hundred rupees] as security for costs within fifteen days after the day on which the result of the election was announced:

Provided that if the office of the [Civil Judge (Senior Division) is closed on the last day of the period of limitation as aforesaid the petition may be presented on the next day on which such office is open:

Provided further that if the petitioner satisfies the [Civil Judge (Senior Division)] that sufficient cause existed for the failure to present the petition within the period aforesaid the {Civil Judge (Senior Division)] may in his discretion condone such failure:

Provided also that in cases where the result of the election was announced prior to the 26th day of January 1961, the aforesaid period of limitation shall be computed from the said date.

2[***]

[(3) An election petition presented before a [Civil Judge (Senior Division)] may either *suo motu* or on an application, be transferred by the District Judge to any other [Civil Judge (Senior Division)] subordinate to him.]

(4) [***]

(5) No candidate who has been elected to be a Member, Chairman or Vice-Chairman of a [***] Samiti shall be debarred from holding office as such Member, Chairman or Vice-Chairman merely by reason of any lection petition having been filed against him unless his election has been declared void by the [Civil Judge (Senior Division)].

(6) [***]"

7. From Annexure-1 it appears, the election petition was filed on 3.03.2017 and from the submission made by the respective parties and discussions made in the impugned order, it appears, though the election petition does not accompany the security deposit but on 3.03.2017 itself a petition was filed alongwith four challans praying the Court for taking up the matter and allowing the petitioner therein to deposit the security amount of Rs.200/- with the Nazir of the District Court, Ganjam at Berhampur. The above petition was posted to 6.03.2017 and on this date itself an order was passed for accepting the security amount and as a consequence thereof, the security amount was deposited on 7.03.2017. Undisputedly, the result in the election was declared on 25.02.2017 based on a recounting process and the security involved was deposited on 7.03.2017.

8. Reading of the above provisions quoted in paragraph No.6 hereinabove, it appears, the time stipulation for filing of the election dispute is 15 days after the day

result was announced. Looking to the factual aspect available from the pleadings as well as the discussions available in the impugned order, it appears the Election petition did accompany a chalan for deposit of the security amount and with a request therein for directing the Nazir to accept the security amount on 3.03.2017 itself. District Court taking up the request passed the order directing for acceptance of the Security amount on 6.03.2017 and the deposit of the amount was made on 7.03.2017. Thus, it becomes clear that the security deposit was made within ten days of the prescribed period of limitation of 15 days for filing of the election petition. The Hon'ble Apex Court in deciding a matter on similar situation in the case of ***M.Y. Ghorpada v. Shivaji Rao M. Paol and others*** as reported in **AIR 2002 SC 3105** though held that the requirement of making security deposit is mandatory but considering that the deposit was not made while presenting the election petition, but looking to the mode of deposit, the person who could make a deposit, has to be complied with the rules of the High Court, held the deposit of security to be directory. In another case between ***Yashwant Singh Yadav v. Prescribed Authority/Sub-Divisional Officer and another*** as dealing with a case of election dispute under the U.P. Panchayat Raj Rules as reported in **1991 RD 439** it has been held that in the case of deposit of security, the amount before expiry of the period on limitation prescribed for filing of the election petition, it would amount to substantial compliance of the related provisions. Similarly, in another case in between ***Smt. Kiranbala Rout v. Smt. Rasnamayee Roy*** as reported in **2013(I) OLR-205** considering that the security amount was deposited within the period of limitation a Single Bench of this Court has held that there has been substantial compliance of the security deposit aspect. In another case in the case in between ***Shiv Chand v. Ujagar Singh and another*** as reported in **AIR 1978 SC 1583** the Hon'ble Apex Court considering a matter involving Representation of Peoples Act came to hold that the substance of the matter must govern because hyper-technicality, when the public policy of the Statute is fulfilled, cannot be permitted to play procedural tyrant to defeat a vital judicial process namely investigation into the merits of the election petition.

9. Under the circumstance, considering the judicial pronouncements indicated hereinabove, the provision contained in Section 32 of the Orissa Zilla Parishad Act, 1991 read with the provisions in Chapter VI-A of the Orissa Panchayat Samiti Act, 1959, the event taken note hereinabove, for either the Act, 1991 or the Act, 1959 having not contained a provision for dismissal of the Election Petition on the ground of non-deposit of security amount together with the Election Petition, and also for the observations made hereinabove, this Court finds, there has been substantial compliance of the requirement of deposit of the security amount within the limitation period. Accordingly, this Court finds no infirmity in the impugned order, which is accordingly, confirmed.

10. The writ petition stands dismissed. However, there is no order as to cost.

Writ petition dismissed.

2017 (II) ILR - CUT-964

S. K. SAHOO, J.

CRLMC NO. 1473 OF 2007

BENJAMIN ROUL …….Petitioner

.Vrs.

SAJAL DAS ……..Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.205

Dispensing with personal attendance of the accused – Magistrate should not be too technical and reject the prayer merely because the plea taken in the petition is not satisfactorily established – The Magistrate should concentrate more on the question whether personal attendance of the accused is necessary for the purpose of the case – Further the discretion must be liberally and reasonably exercised by considering the social status of the petitioner, his age, custom and nature of the offence.

In this case, the learned Magistrate has neither taken into consideration the social status of the petitioner, his age nor the necessity of his personal attendance but mechanically rejected the application – Held, the impugned order is set aside – The learned Magistrate shall dispense with the personal appearance of the petitioner on such terms and conditions fixed by the Court.

Case Laws Referred to :-

1. Vol.85(1998) C.L.T.372 : Kamaljeet Singh Ahluwalia -V- State of Orissa
2. 1992(1) O.L.R.437 : Tilotama -V- Ranjitarani

For Petitioner : None
For Opp.Parties : None

Date of Hearing : 02.05.2017
Date of Judgment: 02.05.2017

JUDGMENT

S. K. SAHOO, J.

None appears on behalf of the petitioner as well as opposite party.

The petitioner Sri Benjamin Roul has filed this application under section 482 of the Criminal Procedure Code challenging the impugned order dated 19.06.2007 passed by the learned Sub-divisional Judicial Magistrate (Sadar), Cuttack in I.C.C. Case No.1065 of 2006 in rejecting the petition

under section 205 Cr.P.C. filed by the petitioner to dispense with his personal attendance.

On the basis of the complaint petition filed by the opposite party Sajal Das, cognizance of offence under section 406 of the Indian Penal Code was taken and process was issued against the petitioner by the learned S.D.J.M. (Sadar), Cuttack. The allegation against the petitioner is that while discharging his duty as treasurer, secretary and auditor of Oriya Baptist Church, Cuttack situated at Mission Road, Cuttack in between 1991 to 2000, he had misappropriated a sum of Rs.3,37,358.75 (rupees three lakhs thirty seven thousand three hundred fifty eight and seventy five paisa).

On being summoned, the petitioner filed an application under section 205 of Cr.P.C. before the learned S.D.J.M. (Sadar), Cuttack through his advocate with a prayer to dispense with his personal appearance mainly on the ground that he was aged about 68 years and he is a respectable senior citizen of the Christian Community and he was the retired Oath Commissioner -cum- Stamp Reporter in the Board of Revenue and he was the elected General Secretary of the highest body of the Baptist Church of the State and he was also the elected Deacon of the Cuttack Oriya Baptist Church for last fifteen years.

The opposite party filed his objection to the said application and the learned S.D.J.M. (Sadar), Cuttack vide impugned order dated 19.06.2007 has been pleased to hold that the petitioner is residing at Sutahat in Cuttack which is hardly five kilometers away from the Court and he can taken resort to section 317 of Cr.P.C. after his first appearance before the Court. Considering the nature and gravity of the accusation and the manner and circumstances under which the petitioner committed the offence, the petition under section 205 of Cr.P.C. was rejected.

On the basis of the affidavit which was sworn at the time of filing of this application under section 482 Cr.P.C. in the year 2007, the age of the petitioner was indicated to be 68 years and therefore, at present he is 78 years. There is also no dispute that the offence under section 406 of the Indian Penal Code is triable by Magistrate and carrying maximum punishment upto three years or with fine or with both.

Section 205 Cr.P.C. deals with the power of a Magistrate to dispense with personal attendance of accused. Sub-section (1) states that at the time of issuance of summons under section 204 Cr.P.C., if the Magistrate thinks that

the personal attendance of the accused is not necessary, he may dispense with such personal attendance and permit him to appear by his pleader. In the case of **Kamaljeet Singh Ahluwalia -Vrs.- State of Orissa reported in Vol. 85 (1998) Cuttack Law Times 372**, this Court after considering the scope and object of section 205 of Cr.P.C. summarized as follows:-

> "(i) personal appearance of the accused in a criminal trial is the normal rule and exempting from personal appearance is an exception which can be resorted to in suitable cases by due exercise of judicial discretion;
>
> (ii) when the alleged offence(s) involves moral turpitude, relates to grievous offences or prescribes considerable length of substantive sentences, the Court exercising the discretion shall take the total fact and circumstances into consideration and through a speaking and reasonable order exercise the discretion judiciously;
>
> (iii) no hard and fast rule or a strait-jacket formula can be prescribed as to where exemption shall be granted and when it is to be refused. It all depends upon the facts and attendant circumstances and the wisdom of the Court;
>
> (iv) when there is no prospect of quick disposal of the case, no question involves identity of the accused, direction for personal appearance may cause harassment as in the case of Paradanasini ladies, old, ailing or infirm persons or Government servants or business man, Court should consider their case keeping in view to the totality of all circumstances; and
>
> (v) a liberal construction of the provisions of law be made unless the converse is necessary in the interest of justice."

In case of **Tilotama -Vrs.- Ranjitarani reported in 1992 (1) Orissa Law Reviews 437**, it was held that the Magistrate while exercising his judicial discretion under section 205 of Cr.P.C. should not take too technical a view and reject the prayer for dispensing with personal attendance merely because the plea taken by the accused in the petition is not satisfactorily established. The Magistrate should concentrate more on the question whether personal attendance of the accused is necessary for the purpose of the case. It is further held that in case of Pardanashin women, Courts have consistently taken the view that although there is no exception in law merely because the accused is a Pardanashin woman, discretion must be reasonably exercised by

consideration of social status and custom and also the nature of the offence; ordinarily exemption should be granted unless a strong prima facie case is made out against it. The discretion should be liberally exercised in view of general feeling which exists against public appearance of women and the fact that procedural law is frequently abused to gratify personal malice.

The learned Magistrate has neither taken the social status of the petitioner, his age nor the necessity of personal attendance of the petitioner. Apart from the fact that the offence is triable by Magistrate, considering the nature of accusation in the case and the age of the petitioner, I am of the view that the learned Magistrate has not exercised the judicial discretion properly and he should not have mechanically rejected the application under section 205 Cr.P.C. filed by the petitioner.

Therefore, I am of the view that the grounds of rejection of the application under section 205 Cr.P.C. filed by the petitioner vide impugned order dated 19.06.2007 is not sustainable in the eye of law and accordingly, the same is hereby set aside.

The learned Magistrate shall dispense with the personal appearance of the petitioner on giving an undertaking by him to the satisfaction of the Magistrate that the counsel on his behalf would be present in Court throughout the proceeding and that the petitioner shall have no objection in taking evidence in his absence and further that he would attend the Court as and when his personal attendance is required by the Court. Accordingly, the CRLMC is disposed of.

Petition disposed of.

2017 (II) ILR - CUT-967

S.K. SAHOO, J.

CRIMINAL REVISION NO. 82 OF 2001

RAJA @ RAJENDRA NAIK ……..Petitioner

.Vrs.

STATE OF ORISSA ……..Opp. Party

PENAL CODE, 1860 – S. 376(1)

Rape – Conviction challenged – Victim is major and married – P.W.1, the husband of the victim stated to have seen the sexual intercourse of the victim and the petitioner inside a room and instead

of any kind of protest he locked the door of that room and went to call others – Even the victim (P.W.1) inspite of noticing the arrival of her husband has not sought for his help to rescue her from the petitioner – No evidence that at the time of rape the victim was threatened or her mouth was gagged – Though houses of other persons are close to his house nobody has stated to have heard any shout of the victim – Evidence of witnesses as well as surrounding circumstances coupled with the medical examination reports of the victim goes against the prosecution case for commission of forcible sexual intercourse on the victim – Both the courts below have proceeded pedantically without an in depth analysis of the evidence and circumstances in its proper perspective – Held, case against the petitioner has not been established by the prosecution beyond all reasonable doubt – Impugned judgment and order of conviction and sentence passed by the learned Courts below are set aside. (Paras10,11)

For Petitioner : Mr. Sarbeswar Behera

For Opp. Party : Mr. Deepak Ku. Pani, Addl. Standing Counsel

Date of Hearing : 09.03.2017
Date of Judgment : 09.03.2017

JUDGMENT

S. K. SAHOO, J.

The petitioner Raja @ Rajendra Naik faced trial in the Court of learned C.J.M. –cum- Asst. Sessions Judge, Boudh in S.T. No.03 of 1995 for offences punishable under sections 450 and 376(1) of the Indian Penal Code on the accusation that on 13.05.1994 at about 12.00 noon, he committed house trespass by entering into the house of Kalandi Behera (P.W.1) in order to commit an offence of rape and also committed rape on the victim "KB" (P.W.2), the wife of P.W.1.

The learned Trial Court vide impugned judgment and order dated 28.10.1995 found the petitioner guilty under sections 450 and 376(1) of the Indian Penal Code and sentenced him to undergo R.I. for a period of seven years and to pay a fine of Rs.1,000/- (rupees one thousand), in default, to undergo S.I. for a period of six months for the offence under section 450 of the Indian Penal Code and R.I. for a period of seven years and to pay a fine of Rs.2000/- (rupees two thousand), in default, to undergo S.I. for a period of six months under section 376(1) of the Indian Penal Code. Both the substantive sentences were directed to run concurrently.

The petitioner preferred an appeal in the Court of Session which was heard by the learned Additional Sessions Judge, Boudh in Criminal Appeal No.10 of 2000 (Criminal Appeal No. 38 of 1995-D.C.) and the learned Appellate Court vide impugned judgment and order dated 18.11.2000 though acquitted the petitioner of the charge under section 450 of the Indian Penal Code but upheld the order of conviction under section 376 of the Indian Penal Code and the sentence imposed by the learned Trial Court for such offence, hence the revision.

2. The prosecution case, as per the first information report lodged by Kalandi Behera (P.W.1) before the officer in charge of Purunakatak police station is that on 13.05.1994 he had been to the house of one Keshaba Naik who is his caste man on account of daughter's marriage of the later. On that day at about 12.00 noon when P.W.1 returned home, he found that his wife (P.W.2) and the petitioner were engaged in sexual intercourse inside the house. P.W.1 suddenly locked the door (tatti) of the house and went to call the co-villagers including the father of the petitioner. By the time P.W.1 returned back, the petitioner fled away from the house cutting the door which was seen by others. The co-villagers told P.W.1 that they cannot settle the matter in the village and accordingly P.W.1 lodged the first information report.

On receipt of the first information report, Purunakatak P.S. Case No.25 of 1994 was registered on 13.05.1994 under section 376 of the Indian Penal Code by P.W.16 Santanu Kumar Padhi, officer in charge of Purunakatak police station and he himself took up investigation.

3. During course of investigation, the I.O. examined the informant, recorded his statement, visited the spot, examined the victim and other witnesses, prepared the spot map Ext.13, seized the wearing apparels of the victim and prepared seizure list (Ext.1). He also seized the saree (M.O.I) and blouse (M.O.II) of the victim on being produced by her. The petitioner was arrested and his wearing apparels were seized. Both the petitioner and the victim were sent for medical examination to Medical Officer, Purunakatak Government Hospital and then to District Headquarters Hospital, Phulbani where blood and saliva samples of both the petitioner and the victim were collected in sealed packets and requisition was made for collection of the vaginal swab of the victim as well as the semen of the petitioner. The wearing apparels of the victim as well as the petitioner were forwarded to S.F.S.L., Rasulgarh, Bhubaneswar for chemical analysis and after completion of

investigation, charge sheet was submitted against the petitioner on 10.08.1994 under sections 450 and 376 of the Indian Penal Code.

4. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned Trial Court framed charge on 17.04.1995 for offences punishable under sections 450 and 376(1) of the Indian Penal Code and since the petitioner refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

5. The defence plea of the petitioner was one of denial and it was pleaded that due to party faction in the village, the case has been foisted against him.

6. In order to establish its case, the prosecution examined sixteen witnesses.

P.W.1 Kalindi Behera is the informant of the case and he stated to have seen the petitioner having sexual intercourse with the victim.

P.W.2 Kumudini Behera is the victim who narrated the incident in detail.

P.W.3 Lalu Naik stated about the disclosure made by P.W.1 before him relating to commission of rape by the petitioner and further stated that the petitioner ran away from the house of P.W.1. He is also witness to the wearing apparels of the victim as well as the petitioner.

P.W.4 Mangulu Chaulia also stated in similar manner like P.W.3 and he is also witness to the seizure of wearing apparels of the victim as well as the petitioner.

P.W.5 Kartik Bisi is the scribe of the first information report.

P.W.6 Keshab Naik did not support the prosecution case for which he was declared hostile by the prosecution.

P.W.7 Kunja Digal was the constable attached to Purunakatak police station who took the victim and the petitioner first to Purunakatak P.H.C. and then to District Headquarters Hospital, Phulbani for medical examination.

P.W.8 Narada Sahani was the Havildar working at Purunakatak police station who also accompanied the petitioner and the victim to the hospital for their medical examination.

P.W.9 Bansidhar Das was the constable attached to Purunakatak police station who stated about the seizure of one sealed packet containing

blood and saliva of the petitioner as well as the victim and also about the preparation of seizure list Ext.6.

P.W.10 Kabiraj Pradhan was another constable who stated similarly like P.W.9.

P.W.11 Dr. Shantilata Dash was the Gynecology Specialist at District Headquarters Hospital, Phulbani who on police requisition examined the victim on 15.05.1994 and prepared her report Ext.7.

P.W.12 Amiya Kumar Samantaray was the Scientific Officer attached to D.F.S.L., Phulbani who examined the wearing apparels of the victim and the petitioner and suspected presence of semen stains and accordingly advised the Investigating Officer to send the exhibits to State S.F.S.L., Rasulgarh, Bhubaneswar for further confirmation test and opinion.

P.W.13 Patitapaban Panigrahi was the Pathology Specialist at District Headquarters Hospital, Phulbani who examined the sample of vaginal fluid collected from the victim and opined that it did not reveal any spermatozoa. He proved his report Ext.10/1.

P.W.14 Dr. S. Gangadharan was the Radiology Specialist at District Headquarters Hospital, Phulbani who on examination of the x-ray plates of the victim, opined the age of the victim to be more than twenty one years at the time of examination and accordingly proved his report Ext.11.

P.W.15 Dr. Gyanaranjan Biswal was the Assistant Surgeon attached to District Headquarters Hospital, Phulbani who on police requisition examined the petitioner on 15.05.1994 and proved his report Ext.12.

P.W.16 Santanu Kumar Padhi was the officer in charge of Purunakatak Police Station who is the Investigating Officer in this case.

The prosecution exhibited fifteen documents. Exts.1, 2 and 6 are the seizure lists, Ext.3 is the F.I.R., Exts.4 and 5 are the command certificates, Ext.7 is the medical examination report of the victim prepared by P.W.11, Ext.8 is the consent of victim for medical examination, Ext.9 is the report of the scientific officer (P.W.12), Ext.10/1 is the report of P.W.13, Ext.11 is the report of P.W.14, Ext.12 is the report of P.W.15, Ext.13 is the spot map, Ext.14 is the police requisition for examination of the petitioner and Ext.15 is the police requisition for examination of the victim.

The prosecution also proved four material objects. M.O.I is the saree and M.O.II is the blouse of the victim, M.O.III is the dhoti and M.O.IV is the gamucha (napkin) of the petitioner.

7. The learned Trial Court after analyzing the evidence of the witnesses came to hold that the evidence of P.W.2, the victim is creditworthy and the prosecution case of rape by the petitioner as was disclosed from the evidence was believed by him. The learned Trial Court further held that the finding of the doctor that there was no evidence of recent sexual intercourse is not conclusive evidence that the rape was not committed by the petitioner on P.W.2 because the medical evidence cannot displace the evidence of victim woman. The learned Trial Court disbelieved the evidence of D.W.1 and found the petitioner guilty of the offences under sections 450/376 of the Indian Penal Code.

The learned Appellate Court has been pleased to hold that although witnesses are cross examined at length, nothing material has been brought out to discard the evidence of the witnesses and further held that the learned Trial Court has rightly believed the evidence of the witnesses. The learned Appellate Court further held that the victim has categorically stated that she had no consent for the sexual intercourse. However, the learned Appellate Court held that the conviction of the petitioner under section 450 of the Indian Penal Code is illegal and cannot be sustained.

8. Mr. Sarbeswar Behera, learned counsel appearing for the petitioner contended that the victim is a major lady and the materials available on record indicate that she was a consenting party and while both the petitioner and the victim were in a compromising position, they were seen by the husband of the victim for which in order to save her own skin, the victim has foisted the case. Learned counsel for the petitioner further contended that medical examination report of the victim as well as the petitioner falsify that there was any kind of forcible sexual intercourse on the victim. The learned counsel further submitted that though the wearing apparels of the victim as well as the petitioner were seized and sent for chemical analysis but the chemical examination report has not been produced and therefore, keeping in view the surrounding circumstances, benefit of doubt should be extended in favour of the petitioner.

Mr. Deepak Kumar Pani, learned Addl. Standing Counsel on the other hand submitted that presence of the petitioner at the time of occurrence in the house of the victim has been proved by the evidence of P.W.1 as well as P.W.2 and other witnesses have also stated that they had seen the petitioner running away from the house of the informant. The learned counsel for the State further contended that the victim is a married lady and therefore, she was habituated to sexual intercourse and in such circumstances, absence of

injury on her private part cannot be a factor to discard her testimony. It is further contended that when the victim has stated that she had no consent and she was raped forcibly by the petitioner and the petitioner has not taken any such plea of consent, the contention raised by the learned counsel for the petitioner that victim was a consenting party cannot be accepted. It is further stated that when there is concurrent finding by both the Courts below and there are no material discrepancies in the evidence of the victim or any illegality or infirmity in the impugned judgments, it would not be proper to interfere with the same in exercise of the revisional jurisdiction.

9. Adverting to the contentions raised at the Bar by the respective parties and coming first to the medical evidence, it appears that the victim was examined by P.W.11 Dr. Shantilata Das on 15.5.1994 at District Headquarters Hospital, Phulbani which is two days after the occurrence. The doctor did not find any external injury over the body of the victim. Secondary sex character was found well developed and no injury was found on the breast of the victim. On internal examination, no fresh injury was found present over the vulva. No foreign hair or matting of hair was present. The doctor opined that there is no evidence of recent sexual intercourse and there is no external injury present over the body and foreign hair and seminal stain were found absent over the private part and examination of vaginal smear indicated absence of spermatozoa. The medical examination report was marked as Ext.7. In the cross examination, the doctor has stated that vaginal spermatozoa alive will remain present for 72 hours and dead spermatozoa may be available beyond 72 hours. The doctor has further stated that in case force is used for sexual intercourse and the victim tries to resist, there would be external injury on the abdomen, chest, back, limbs etc. P.W.13 Patitapaban Panigrahi, the Pathology Specialist examined the vaginal fluid collected from the victim by P.W.11 and he opined that plain smear examination did not reveal either living or dead spermatozoa. P.W.14 Dr. S. Gangadharan conducted ossification test of the victim and after analyzing x-ray plates, he opined that the age of the victim was more than 21 years. His report has been marked as Ext.11.

The petitioner was medically examined by P.W.15 Dr. Gyanaranjan Biswal on 15.05.1994 who stated that there was no scratch mark, no injury and there was no discharge and smegma was found absent and he found that the petitioner was capable of performing sexual intercourse but there was no sign of recent sexual intercourse and there was no injury on the private parts of the body.

Therefore, the medical examination reports of the victim and the petitioner are totally silent regarding commission of forcible sexual intercourse. However, absence of corroboration from the medical evidence cannot be the sole factor to discard the evidence of the victim if it otherwise inspires confidence particularly when the victim is a married lady and there is delay of two days in her medical examination.

10. Coming to the oral evidence relating to commission of rape, in the First Information Report, the informant (P.W.1) has mentioned that when he returned home on 13.5.1994 at about 12.00 noon, he found that his wife (P.W.2) and the petitioner were indulged in sexual intercourse inside a room for which he locked the door of the house and went to call others. He has not mentioned to have heard any shout of the victim before seeing them indulged in sexual intercourse. In the evidence, P.W.1 has stated that on the date of occurrence at about noon, when he came back to his house and opened the Tatti (door) of the bed room, he saw the petitioner was having sexual intercourse with the victim (P.W.2). He further stated that P.W.2 was lying down and she was trying to escape from the clutches of P.W.1 who was forcibly lying upon her and having sexual intercourse with her. He further stated that he closed the door of the bed room and went to call the father of the petitioner.

The victim (P.W.2) has stated that on the date of occurrence when she was alone in her bed room, the petitioner came to her bed room and enquired from her as to where P.W.1 had gone and she told that P.W.1 had been to cook rice in a marriage ceremony and then the petitioner forcibly dragged her to the bed room and committed rape on her in spite of her protest. She further stated that when the petitioner was forcibly having sexual intercourse with her, P.W.1 came and saw the occurrence and closed the tatti (door) of the bed room and went to village to call Bhadraloks where after the petitioner ran away to his house by cutting tatti of her bed room.

It has come from the evidence of P.W.1 that the houses of other persons are close to his house and those persons were residing in their respective houses with their family. Nobody has stated to have heard any shout of the victim. P.W.1 has not stated either in the F.I.R. or in the chief examination to have heard any shout of the victim prior to seeing the petitioner committing sexual intercourse with the victim. Though the victim has stated that she was forcibly dragged and in spite of her vehement protest, the petitioner forcibly committed sexual intercourse with her but the medical evidence is completely silent in that respect. There is no evidence that at the

time of commission of the crime, the victim was either threatened with any weapon or her mouth was gagged or her hands and legs were tied and therefore, in such a situation a married lady like P.W.2 would have raised protest against the commission of rape by the petitioner and in that event there was chance of external injuries both on the victim as well as on the petitioner.

It is the prosecution case that P.W.1 saw the petitioner and the victim were having sexual intercourse inside the bed room. It is most peculiar that in spite of noticing the arrival of her husband, the victim has not sought for his help to rescue her from the petitioner. If the victim was protesting and shouting at the time of commission of rape as stated by her and P.W.1 came at that point of time, he would have first tried to rescue the victim and apprehend the petitioner but his peculiar conduct in closing the door of the bed room without any kind of protest and going away to the neighbourhood to call others including the father of the petitioner appears to be an unbelievable story which rather suggests that perhaps he saw both the victim and the petitioner in a compromising position and the victim also noticed the arrival of her husband and therefore, in order to save her skin, chance of false implication of the petitioner by the victim cannot be ruled out.

The evidence of the witnesses who have seen the petitioner running away from the house of the informant is not very much material for arriving at a conclusion that the petitioner raped the victim in as much as even in a case of consent for sexual intercourse inside the bed room, when it was detected, ordinarily it was expected from the petitioner to escape from the spot.

The wearing apparels of the victim as well as the accused were sent for chemical analysis but the prosecution has not made any attempt to prove the chemical analysis report.

The evidence of the witnesses as well as the surrounding circumstances coupled with the medical examination reports of the victim and the petitioner goes against the prosecution case relating to commission of forcible sexual intercourse on the victim by the petitioner. Both the Courts below have proceeded pedantically without making an in depth analysis of facts and circumstances and evidence led in the trial in its proper perspective.

11. In view of the facts and circumstances discussed above, I am not able to agree with the findings of the Courts below and accordingly hold that the

case against the petitioner has not been established by the prosecution beyond all reasonable doubt.

In the result, the revision petition is allowed and the impugned judgment and order of conviction and the sentence passed thereunder are hereby set aside and the petitioner is acquitted of the charge under section 376 of the Indian Penal Code.

Revision allowed.

2017 (II) ILR - CUT-976

S. K. SAHOO, J.

ABLAPL NO. 7962 OF 2017

BIKRAM CHHOTARAY .....Petitioner

.Vrs.

STATE OF ODISHA .....Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.438

Anticipatory bail – Offence U/s. 354, 506, 507 I.P.C. and section 66-A of the I.T. Act, 2000 – While considering such application, the court must carefully examine the entire available record, particularly the allegations which have been directly attributed to the accused and verify whether these allegations are corroborated by other materials and circumstances on record or not apart from examining the nature and gravity of the accusation, the exact role played by the accused, the possibility of the accused fleeing from justice or committing similar or other offences, impact of grant of anticipatory bail on society, any obstacle likely to be caused in the free, fair and full investigation as well as reasonable apprehension of the accused in tampering with the evidence or apprehension of threat to the informant or the victim.

In this case after examination of the materials against the petitioner, particularly the FIR and the statements of the victim that the petitioner is threatening the victim and other witnesses and there is necessity of custodial interrogation of the petitioner, this court is not inclined to grant pre-arrest bail to the petitioner.

(Paras 8,9)

Case Law referred to :-

1. (2015) 61 Orissa Criminal Reports 20 : Shreya Singhal -V- Union of India

For Petitioner : Mr. Devashis Panda, Shib Shankar Mohanty, S.R.Pati.

For Opp. Party : Mr. Arupananda Das, Addl. Govt. Adv. Mr. Sangram Ku. Das

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Date of hearing : 06.07.2017
Date of judgment: 18.07.2017

JUDGMENT

S. K. SAHOO, J.

The petitioner Bikram Chhotaray has knocked the doors of this Court by way of filing this application under section 438 Cr.P.C. seeking anticipatory bail in connection with Bonai P.S. Case No. 66 of 2017 corresponding to G.R. Case No. 269 of 2017 pending in the Court of learned J.M.F.C., Sundargarh.

The police machinery swung into motion when the victim presented a first information report on 09.05.2017 before the Inspector in Charge, Bonai Police Station stating therein that she belonged to a middle class family and she came in contact with the petitioner since last three years through facebook. Initially both of them were talking with each other over phone but subsequently they developed love affair. They used to talk more and more over phone and the victim had told her family members about her affairs. After some days, the petitioner came to Bonai and met the victim. The victim was prosecuting her studies in a Government college in Rourkela and doing post graduation. The petitioner also came to Rourkela, met the victim and took her to a hotel for having some discussion. The petitioner gave assurance to the victim that he was doing a Government job and there would be no difficulty if they marry to each other. The petitioner took some photographs with the victim in the hotel room. Four to five times the petitioner met the victim in the hotel and used to take intimate photographs with her and kept physical relationship with the victim against her will and even took some indecent photographs with her. Since the petitioner was giving assurance of marriage to her, she was not disclosing about their meetings at Rourkela to her family members. For last few days, the victim came to realise that the petitioner was not of good character and she started suspecting him and ultimately denied for marriage with the petitioner. The petitioner being aggrieved started threatening to the victim that he had kept different

photographs with him so also video and he would show it to others. The petitioner further threatened that in case the victim reports the matter to police, he would kill her. The victim tried to avoid talking with the petitioner by blocking his phone number and switching off her mobile phone but the petitioner tried to call the parents and brother of the victim for which they also put the phone number of the petitioner in the block list. The petitioner not only threatened the father of the victim by sending messages but also sent different threatening sms in whatsapp to the brother of the victim and his friends. The petitioner sent some obscene photographs of the victim in the mobile phone of the brother of the victim and his friends. He also sent such photographs of the victim to her friends. Two days prior to the lodging of the F.I.R., during the evening hours, the petitioner abused the father and brother of the victim in filthy language and also threatened to kill them. Over this issue, the health condition of the father of the victim became serious and the mental condition of the brother of the victim who was staying at Bangalore also got worsened. The victim gave different phone numbers which were used by the petitioner.

On the basis of such first information report, Bonai P.S. Case No.66 of 2017 was registered under section 354, 506 and 507 of the Indian Penal Code and section 66-A of the Information and Technology Act, 2000 (hereafter 'I.T. Act, 2000').

During course of investigation, the statement of the victim under section 161 Cr.P.C. was recorded and the copies of the sms forwarded by the petitioner to the mobile phones of the father and relatives of the victim were seized and other witnesses were also examined. The Investigating Officer submitted a letter to Superintendent of Police, Rourkela to move the telecom authority to provide the CDR, location and ownership of the mobile phones which were used by the petitioner from 01.02.2017 to 24.05.2017. After receiving the CDRs of the mobile phone numbers used by the petitioner, it was found that there were frequent calls from those phone numbers to the mobile phones of the victim. The Investigating Officer also verified the hotel register and seized a copy of the register. The statement of the victim under section 164 Cr.P.C. was also recorded in which the victim categorically stated as to how the petitioner sent her obscene photographs in the mobile phones of her family members and relatives.

Mr. Devashis Panda, learned counsel appearing for the petitioner contended that section 66-A of the I.T. Act, 2000 has been struck down by the Hon'ble Supreme Court and so far as the other offences under which the

case has been registered i.e. sections 354-A and 507 of the Indian Penal Code are bailable in nature and the offences are triable by Magistrate and the investigation has made substantial progress and material documents have also been seized and therefore, the anticipatory bail application of the petitioner may be favourably considered. Mr. Arupananda Das, learned Additional Government Advocate on the other hand produced the case diary and placed the statements of the victim as well as the copies of the sms and contended that the manner in which the petitioner has conducted himself, he is not entitled to be released on anticipatory bail particularly when the investigation is under progress and custodial interrogation of the petitioner is very much necessary.

Mr. Sangram Kumar Das, learned counsel appearing for the informant also opposed the prayer for bail and submitted a letter dated 27.05.2017 of the Commanding Officer of the petitioner which indicates that the petitioner was granted leave for thirty days from 20th January 2017 to 18th February 2017 to proceed to his home but he has not returned to the unit till date and Court of inquiry for desertion was held at unit location on 19th February 2017 and the petitioner was declared as deserter. It is further indicated that since the petitioner has deserted the Army and not present in the unit, no disciplinary action against him could be taken.

Section 66-A of the I.T. Act, 2000 has been struck down by the Hon'ble Supreme Court in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2) in **Shreya Singhal -Vrs.- Union of India reported in (2015) 61 Orissa Criminal Reports 20**. The judgment was pronounced on 24.03.2015. Therefore, the registration of F.I.R. under such offence on 09.05.2017 is quite unjustified. It shows that even more than two years after the pronouncement of the judgment, the Inspector in charge of Bonai police station was not aware about such judgment. It is the duty of the Home Department and other senior police officials to update the police department in respect of such affairs by regularly holding training programmes. If the investigating agency remains unaware of update laws of the land, the sufferers would be the innocent citizens.

Section 67 of the I.T. Act, 2000 deals with punishment for publishing or transmitting obscene material in electronic form and it prescribes punishment for three years and with fine which may extend to five lakh rupees and section 67-A of the I.T. Act, 2000 deals with punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form and it prescribes punishment upto five years and fine which

may extend to ten lakh rupees. 'Electronic form' as per section 2 (r) of the I.T. Act, 2000 with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. On going through the accusation made by the victim against the petitioner, prima facie materials for commission of offences under sections 67 and 67-A of the I.T. Act, 2000 are attracted. Mere registration of the F.I.R. under wrong offence or offence which has been struck down by the Hon'ble Supreme Court is not a ground for grant of bail. It is duty of the Court to verify the contents of the F.I.R. and materials on record to find out if any other offence/offences are made out or not otherwise if inadvertently or deliberately the F.I.R. is registered under lesser offences and the Court decides the bail application of the accused looking at such offences without looking at the contents of the F.I.R. then there is every likelihood of failure of justice. Instances are not wanting in this country where taking advantage of registration of the F.I.R. under lesser offences than what it really discloses, the accused persons have got the benefit of bail. If a Court decides the bail looking at the formal registration page of the F.I.R. and the offences mentioned therein without going into the details of occurrence as narrated in the body of the F.I.R., it may cause injustice not only to the victim but also to the accused.

The law is well settled that while considering the application for anticipatory bail, the Court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and verify whether these allegations are corroborated by other materials and circumstances on record or not apart from examining the nature and gravity of the accusation, the exact role played by the accused, the possibility of the accused fleeing away from justice, the possibility of the accused committing similar offences or other offences, impact of grant of anticipatory bail on society in such matters, any obstacle likely be caused in the free, fair and full investigation as well as reasonable apprehension of the accused in tampering with the evidence or apprehension of threat to the informant or the victim.

Considering the submissions made by the respective parties, the materials available on record and without entering into a detailed examination of the materials available against the petitioner at this stage but on a brief examination of such materials and after evaluating the same with utmost care and caution particularly the FIR and the statements of the victim

recorded by the police as well as by the Magistrate and the copies of the sms details, I am of the view that in view of the nature and gravity of the accusation and the conduct of the petitioner in threatening the victim and other witnesses, necessity of custodial interrogation of the petitioner and the fact that the investigation is under progress, I am not inclined to exercise the discretionary power under section 438 of the Code by granting pre-arrest bail to the petitioner. Accordingly, the ABLAPL application stands dismissed.

Application dismissed.

2017 (II) ILR - CUT- 981

J. P. DAS, J.

CRLMC NO. 1288 OF 2016

NAROTTAM BASTIA .....Petitioner

.Vrs.

STATE OF ORISSA & ANR. .....Opp. Parties

NEGOTIABLE INSTRUMENTS ACT, 1881 – Ss. 138, 142, 142-A

Complaint case for dishonour of cheque – Territorial jurisdiction – Held, Complaint U/s.138 N.I. Act. will be maintainable only in the court under whose jurisdiction the cheque was presented for encashment by the payee or holder in due course where the drawee maintains the account. (Paras 4,5,6)

Case Laws Referred to :-

1. (2014) 59 OCR (SC) 289 : Dasharath Rupsingh Rathod -V- State of Maharashtra & Anr.
2. (2015) 61 OCR (SC) 413 : Ultra Tech Cement Ltd. -V- Rakesh Ku. Singh & Anr.
3. 2015 AIR SCW 6556 : M/s. Bridgestone India Pvt. Ltd. -V- Inderpal Singh

For Petitioner : M/s. A.R.Dash, D.R.Rath, S.K.Nanda-1 & G.Nial

For Opp. Parties : Addl. Standing Counsel M/s. S.R.Mohapatra, B.R.Mohanty, S.Harichandan,M.K.Swain & S.Mohanty

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Date of hearing : 11.08.2017
Date of judgment: 18.08.2017

JUDGMENT

J.P. DAS, J.

This is an application under Section 482, Cr.P.C. assailing the order dated 19.02.2016 passed by the learned Sessions Judge, Cuttack in Criminal Revision No.25 of 2015 setting aside the order dated 04.05.2015 passed by the learned J.M.F.C., Cuttack in I.C.C. Case No.916 of 2013 solely on the point of jurisdiction of the court to try a case initiated under Section 138 of the Negotiable Instrument Act (for short "the Act").

2. The present opposite party no.2 filed the private complaint against the present petitioner on 26.08.2013 alleging an offence under Section 138 of the Act with the submission that the present petitioner as accused therein had issued a cheque in his favour dated 17.07.2013 drawn on HDFC Bank, Bhubaneswar to discharge some previous liability. But the said cheque was dishonoured by the bank due to insufficiency of funds and despite statutory notice the accused did not make payment of the cheque amount. Learned S.D.J.M., Cuttack took cognizance of the offence and issued notice to the accused who appeared through his counsel on 17.01.2014. On 29.01.2014 the charge was read over to the representing lawyer and it having been denied, the case was posted for hearing. On 16.07.2014 the complainant filed an affidavit evidence and the matter was adjourned to 29.10.2014 for hearing. Thereafter the matter was further adjourned and on 28.11.2014 the counsel for the accused filed a petition for supply of copies of documents and the case was adjourned to 20.12.2014 for filing of objection. The matter was heard on 27.01.2015 and on 04.05.2015, the learned J.M.F.C., Cuttack to which court the case was transferred from the court of S.D.J.M., Cuttack passed the order holding that his court had no jurisdiction to try the case since the cheque in this case was presented in the Bank at Bhubaneswar and taking of evidence had not started in the case, in view of the judgment passed by the Hon'ble Supreme Court in ***Dasharath Rupsingh Rathod –vrs,- State of Maharashtra and another*** (2014) 59 OCR (SC) 289, wherein it was held that :-

> "To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the Complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of Complaint cases where proceedings have gone to the stage of Section 145 (2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing

> territorial jurisdiction, as now clarified, to the Court where it is presently pending. All other Complaints (obviously including those where the accused/respondent has not been properly served) shall be returned to the Complainant for filing in the proper Court, in consonance with our exposition of the law. If such Complaints are filed/refiled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred."

3. The said order was challenged before the learned Sessions Judge, Cuttack in Criminal Revision No.25 of 2015. Learned Sessions Judge analyzing the position of law held in ***Rupsingh Rathod's case*** (supra) and relying upon another decision of the Hon'ble Apex Court in ***Ultra Tech Cement Ltd. –vrs.- Rakesh Kumar Singh and another,*** (2015) 61 OCR (SC) 413 held that the evidence had already commenced in course of the trial before the learned trial court and hence the trial court at Cuttack had jurisdiction in view of the specific observation in ***Rupsingh Rathod's case.***

4. The aforesaid order of the learned Sessions Judge is assailed in this present revision with the submission that the dictum of the Hon'ble Apex Court in ***Rupsingh Rathod's case*** has been overruled by a subsequent decision of the Hon'ble Apex Court in ***M/s.Bridgestone India Pvt. Ltd. –vrs.- Inderpal Singh,*** reported in 2015 AIR SCW 6556. In the said case taking into consideration the amendment to the act by way of adding Section 142-A, their Lordships have held that the direction issued in ***Rupsingh Rathod's case*** no more holds good since by way of amendment it has been held that the trial of a case under Section 138 of the Act shall only by a court within whose local jurisdiction the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in the due course, as the case may be, maintains the account is situated. It would be profitable to court the relevant amendment for the purpose of clarity.

> "3. In the principal Act, section 142 shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely :-
>
> (2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,-
>
> (a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation- For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."

4.In the principal Act, after section 142, the following section shall be inserted, namely :-

142A. (1)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or directions of any court, all cases transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Ordinance, as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1), and such complaint is pending that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of this Ordinance, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times."

5. It was observed by their Lordships that the amended Section 142 (2) as quoted above, leaves no room for any doubt that with reference to an offence under Section 138 of the Act the place the cheque was delivered for collection would be determinative of the place of territorial jurisdiction. It was further observed by their Lordship as follows :-

> "It is, however,, imperative for the present controversy, that the appellant overcomes the legal position declared by this Court, as well as, the provisions of the Code of Criminal Procedure. Insofar as the instant aspect of the matter is concerned, a reference may be made to Section 4 of the Negotiable Instruments (Amendment) Second Ordinance, 2015, whereby Section 142A was inserted into the Negotiable Instruments Act. A perusal of Sub-section (1) thereof leaves no room for any doubt, that insofar as the offence under Section 138 of the Negotiable Instruments Act is concerned, on the issue of jurisdiction, the provisions of the Code of Criminal Procedure, 1973, would have to give way to the provisions of the instant enactment on account of the non-obstante clause in sub-section (1) of Section 142A. Likewise, any judgment, decree, order or direction issued by a Court would have no effect insofar as the territorial jurisdiction for initiating proceedings under Section 138 of the Negotiable Instruments Act is concerned. In the above view of the matter, we are satisfied, that the judgment rendered by this Court in Dashrath Rupsingh Rathod's (AIR 2014 SC 3519) case would also not non-suit the appellant for the relief claimed."

6. In view of the aforesaid settled position of law, it has become clear that a proceeding under Section 138 of the Act shall be only in the court under whose jurisdiction the cheque was presented for encashment by the payee or holder in due course where the drawee maintains the account. This is irrespective of the fact as to whether the taking of evidence has commenced in course of trial or not as was observed in the case of ***Rupsingh Rathod.***

7. In view of the aforesaid settled position of law, the findings of the learned Sessions Judge is not sustainable in law and is accordingly set aside confirming the order passed by the learned trial court dated 04.05.2015 passed in I.C.C. Case No.916 of 2013.

8. In view of the aforesaid findings, the complaint shall be returned by the learned trial court to the complainant within a week of presentation of a

certified copy of this order before the said court by the present petitioner and the complainant shall be at liberty to file the same in the court having competent jurisdiction according to law and it shall be accepted to have been filed within time if filed before the competent court within thirty days from the date of return of the complaint to the complainant unless the initial or prior filing was itself time barred. The CRLMC is accordingly allowed.

Petition allowed.

2017 (II) ILR - CUT- 986

DR. D.P. CHOUDHURY, J.

W.P.(C) NO. 5895 OF 2017

SANJEEB KUMAR BEHERA .....Petitioner

.Vrs.

STATE OF ODISHA
(CO-OPERATION DEPT.) & ORS. .....Opp. Parties

ODISHA AGRICULTURAL PRODUCE ACT, 1956 – S.5

Government notification Dt. 30.03.2017 to abolish all RMC Check Gates w.e.f. Dt. 01.04.2017 – Action challenged on the ground that the notification is not in consonance with Rule 48-A of the Rules, 1958 – Introduction of Goods and Services Tax by Government to collect tax or fee at one point so as to save the small agriculturists, farmers and other stake holders in the society – Moreover the notification does not alter any provisions of law – Held, the impugned notification cannot be said to have been issued contravening the provisions of the Act, 1956 and Rules, 1958 and the Court is reluctant to quash the same.

(Paras 22, 23, 24)

Case Laws Referred to :-

1. AIR 2003 SC 1742 : Agriculture Market Committee, Rajam and another –V- Rajam Jute and Oil Millers Association, Rajam.
2. AIR 2012 SC 3149 : Vinod Kumar Koul –V- State of Jammu and Kashmir and others.
3. 2009 (Supp.I) OLR 682 : Radhashyam Panigrahi –V- Registrar (Administration), Orissa High Court and another.
4. 2016 (I) ILR-CUT-631 : Amit Kumar Saa -V- State of Odisha and others.
5. (2011) 11 SCC 334 : Grid Corporation of Orissa Limited and Others -V- Eastern Metals and Ferro Alloys and Others.

6. AIR 2012 SC 3791 : Union of India and others -V- S. Srinivasan with Union of India and others –V- Saroj Kumar Shukla and others.

For Petitioner :Dr. Ashok Mohapatra, Sr. Adv. & Md. G.Madani

For Opp. Parties :Mr. Amit Ku. Pattnaik, Addl. Govt. Adv.
Mr. Pravash Ch. Panda
M/s. S.Mishra & A.Kejirwal

Date of hearing :18.07.2017
Date of Judgment:06.09.2017

JUDGMENT

DR. D.P.CHOUDHURY, J.

Challenge has been made to the order dated 30.03.2017 passed by the Principal Secretary to Government, Cooperation Department, Government of Odisha vide Annexure-1 abolishing all the Check Gates of Regulated Market Committee (hereinafter called as "RMC") with effect from 01.04.2017.

2. FACTS

The adumbrated facts leading to the writ petition is that the petitioner is a farmer and a member of Regulated Market Committee, Panposh. It is stated that the State Government in its Cooperation Department issued notification on 30.03.2017 abolishing all the RMC Check Gates of the State with effect from 01.04.2017 purportedly under Section 5 of the Orissa Agricultural Produce Act, 1956 (hereinafter called as "the Act, 1956") in every market area. The duty of Market Committee is to collect market fee in accordance with Section 11 of the Act for the development of the said market area and agriculturist.

3. Orissa Agricultural Produce Markets Rules, 1958 (hereinafter called as "the Rules, 1958") was framed by the State Legislature under the Act, 1956. Rule-48 of the Rules, 1958 specifically states about the manner of levy of fee and their collection. Similarly, Rule 48-A of the Rules, 1958 was enacted for the establishment of Check Gates by the Market Committee. The provisions in the Act, 1956 and the Rules, 1958 entrust the power to the officials of the Market Committee to search, seize and inspect any person carrying on business in the market area under the RMC. If Rules are not obeyed the very purpose of collection of market fee by establishing such Check Gates that the market fee collected from the purchaser/traders are used

for the interest of the farmers and agricultural producers would be frustrated. So, Rule 48-A was inserted with bona fide intention of the Legislature to promotethe interest of the farmers or agriculturists and there should not be any middleman to collect the fees unauthorizedly.

4. When the RMC Check Gates were established with a very purpose of the interest of the farmers/agricultural producers, the opposite party no.1 suddenly made order vide Annexure-1 abolishing all the RMC Check Gates with effect from 01.04.2017 without affording any reasonably opportunity of being heard to the RMC and without collecting any data thereon. It is mentioned in the impugned order that for the interest of the farmers and public of the State, the RMC Check Gates are removed, but the real interest of the farmers and public of the State are not protected by such abolition of the RMC Check Gates.

5. Under the provision of the Act, 1956, any Rule or Regulation to regulate the RMC without Rules being amended in accordance with the provisions of law, said order vide Annexure-1 is bad in law. So, the issuance of the impugned order vide Annexure-1 is otherwise illegal and does not convey any meaningful intention or object to promote the interest of the agriculturists and farmers. So, it is prayed to quash the impugned order dated 30.03.2017 vide Annexure-1.

6. SUBMISSIONS

Dr. Ashok Mohapatra, learned Senior Advocate for the petitioner submitted that the opposite party no.1 has shattered the hope of the agriculturists as well as farmers by issuing impugned order vide Annexure-1 inasmuch as by abolishing all the RMC Check Gates of the State, the interest of the farmers is more affected. According to him, the Act, 1956 and the Rules, 1958 are framed for promoting the interest of the farmers and the agriculturists and to abolish the entry of middleman for persuading others to purchase agricultural produce.

7. Dr.Mohapatra, learned Senior Advocate for the petitioner further submitted that as per the provisions of the Act, 1956, any amendment in the Rules, 1958 must be placed before the State Assembly and after due legislative process, the amendment is to be brought into the textbooks. Since in the instant case, Rule 48-A was inserted by the provisions of the Act, 1956, any abolition whether for the interest of the farmers or not must be made by undergoing the legislative process. On the other hand, Annexure-1 being not

put up before the State Assembly is against the provisions of the Act, 1956 and as such, the amended provisions are not available to the opposite parties.

8. Dr.Mohapatra, learned counsel for the petitioner, referring to the impugned order dated 30.03.2017 vide Annexure-1, submitted that the plea of the opposite party no.1 to the effect that the impugned order has been issued for the interest of the farmers and agriculturists is not correct as the very purpose of establishing the RMC Check Gates was for the interest of the farmers and development of market yard. So, he submitted that Annexure-1 is illegal and improper. In support of his submissions, he cited the decision of the Hon'ble Supreme Court in the case of ***Agriculture Market Committee, Rajam and another –V- Rajam Jute and Oil Millers Association, Rajam; AIR 2003 SC 1742*** and relying on the said decision, he submitted that it is for the Market Committee to decide the manner of levying market fee. He also cited the decision of the Hon'ble Supreme Court in the case of ***Vinod Kumar Koul –V- State of Jammu and Kashmir and others; AIR 2012 SC 3149*** where Their Lordships have observed that administrative decision cannot override the statute. He also relied upon the decision of this Court rendered in the case of ***Radhashyam Panigrahi –V- Registrar (Administration), Orissa High Court and another; 2009 (Supp.I) OLR 682*** where this Court have held that when statutory rules govern the field, prior executive instructions cease to apply. So, he submitted that the impugned order dated 30.03.2017 vide Annexure-1 is illegal and should be set aside.

9. Mr.Amit Kumar Patnaik, learned Additional Government Advocate for the State submits that Rule 48-A of the Rules, 1958 was inserted for the interest of the agriculturists and the farmers, but it is not a fact that Rule 48-A has been violated by issuing such notification vide Annexure-1. He drew the attention of the Court to the language used in the Rule and submitted that according to Rules, the RMC is to establish the RMC Check Gates with approval of Government, but not otherwise. As the Goods and Services Tax has been introduced recently, there is no necessity of RMC Check Gates. He also cited the decision of this Court reported in the case of ***Amit Kumar Saa –V- State of Odisha and others; 2016 (I) ILR-CUT-631*** where Their Lordships have refused to strike down the decision of the State Government in abolishing the Check Gates with effect from 01.04.2017 under the Commercial Tax and the Transport Organization. By relying upon the said decision, he submitted that in view of the said decision, the present writ petition has no merit and the same should be rejected.

10. Mr.P.C.Panda, learned counsel for the opposite parties 2 to 4 submitted that the petitioner has not come to the Court with clean hand. According to him, the purpose of establishing of RMC Check Gates has been frustrated by not being used properly. He also cited that the RMC Check Gates have been opened illegally by RMC without previous approval of the Government in accordance with Rule 48-A of the Rules, 1958. He also relied upon the judgment of this Court dated 19.06.2017 passed in W.P.(C) Nos.12330, 12391 and 12392 of 2003 wherein at paragraph-28 of the said judgment, it is observed that collection of the market fee at Check Gate is not necessary as Rule 51 of the Rules, 1958 is clear that it is the trader or buyer, who can collect the market fee and deposit the same with the RMC. On the other hand, he submitted that the petitioner has got ulterior motive to allege about keeping open of the Check Gates not for the interest of the farmers but for their interest. So, he submitted to dismiss the writ petition.

11. POINTS FOR CONSIDERATION

The main point for consideration is as to whether the impugned order dated 30.03.2017 vide Annexure-1 is not in consonance with Rule 48-A of the Rules, 1958 and the same is liable to be set aside?

12. DISCUSSIONS

The main object of the Act, 1956 is to protect the agricultural producers from the unfair practice and undue exactions of a host of middlemen on whom he has to depend for marketing his surplus produce. So, the twin object of the Act, 1956 in one hand is to protect the agricultural producers from any unholy business transactions and secondly to have his direct contact with the consumer to sell his agricultural produce. The unfair practices that are commonly practised by the wholesale traders in the course of their transactions with the agricultural producers are unfair deductions, non-use of standard weights and measures, unfair manipulation of weighing and measurement, taking very large quantities of free samples, levy of excessive market charges etc. So, the Act, 1956 and the Rules framed thereunder in 1958 are to avoid the unfair practice practised upon the agricultural producers or farmers. The middleman earlier was engaged between the agricultural producers and the consumer, but by this Act, 1956, the agricultural producer himself comes to the market area or market yard and directly used to sell to the buyers all the agricultural produce. The small amount of market fee is collected for facilitating buying and selling agricultural produce by the farmers or agriculturists for the development of

the market area and to give more breathing space to the agriculturists for the transactions. The Act, 1956 and the Rules made thereunder also amended from time to time.

13. Section-11 of the Act, 1956, which has been amended on 24.11.1984 is quoted hereunder for reference:

> **"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 rupee from every purchaser for every hundred rupees 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.

From the aforesaid Section, it appears that the provisions have allowed the Market Committee to levy and collect fees at the rate not being less than one rupee from each purchaser for every hundred rupees worth of agricultural produce marketed in the market area, in the manner as may be 'prescribed' and specified in the Bye-Laws.

14. Under Chapter-VI, Rule 48 of the Rules, 1958 has been amended on 3.8.1996, which is reproduced as under:

> "48. (1) The Market Committee shall levy and collect market fees from:
>
> (a) a purchaser of 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.

48-A.Establishment of Check Points by the Market Committee- The Market Committee may, for the purpose of due discharge of its

responsibilities, under the Act, Rules and Bye-laws, establish check points at such locations as may be notified by it from time to time, with the previous approval of the Government."

15. Rule 48-A was thus inserted facilitating the Market Committee to place check points so that the market fee can be collected smoothly. The collection of market fee is not only organized at check point but also market fee is collected at the market area or market yard of the RMC. This provision was not there before 1996 and when the markets were multiplied, the agriculturists are more motivated and the traders started trading at the market area, such provision is made to give more hands to the RMC to enhance the buying and selling of the agricultural produce and at the same time, to collect the market fee for the interest of the farmers and agriculturists and for enhancing the market activities so that no unscrupulous person can enter the market area to exploit the agricultural producer and take away the agricultural produce by evading payment of the market fee.

16. Dr.Mohapatra, learned Senior Advocate for the petitioner submitted that when Rule 48-A was inserted in the Rules by placing the same in the sessions of State Assembly, the impugned order vide Annexure-1 issued by the opposite party no.1 was unlawful being without the knowledge of the State Legislatures and as thus beyond the jurisdiction of the State Government to issue same. On going through the provisions of the Act, 1956 and Rule 48-A, it is clear that the Market Committee, for the purpose of duty of discharge of collection of market fee and to discharge the responsibility for such purpose may establish check points or check posts with the previous approval of the Government. So, the facility of establishing all check points or check posts is provided under Rule 48-A but it is not absolute right of RMC but an option given to him, which can be exercised with the previous approval of the Government.

17. The impugned order dated 30.03.2017 vide Annexurs-1 reads as under:

"GOVERNMENT OF ODISHA
COOPERATION DEPARTMENT
No.Agm-S-03/2017/2944/Coop. Date:30.03.2017

From:
Shri Manoj Ahuja, IAS
Principal Secretary to Government

To
All Collectors
The Director, Agriculture Marketing, Odisha
The Member Secretary, OSAM Board
All Chairman, Regulated Market Committee in the State

Sub: Abolition of all RMC check gates with effect from 1st April, 2017

Sir,

I am to say that Government have decided at the level of Hon'ble Chief Minister to abolish RMC check gates with effect from 1st April, 2017 in the interest of farmers as well as the public of the State.

It is, therefore, requested to take immediate follow up action for abolition of all RMC check gates with effect from 1st April, 2017.

Yours faithfully
Sd/-Principal Secretary to Government

Xx xx xx xx"

The aforesaid impugned order dated 30.03.2017 vide Annexure-1 states that for the interest of the farmers and public, the Government have decided to abolish the RMC Check Gates with effect from 01.04.2017 and accordingly directed the RMCs to abolish such Check Gates. On the other hand, the Government has withdrawn the approval, which the Government has extended to the RMCs. So, it is not an act of any amendment to Rule 48-A. The contention of petitioner that Rule 48-A of Rules, 1958 was amended by abolishing the RMC Check Gates is untenable. At the same time, the submission of Mr.Patnaik, learned Additional Government Advocate that the check points have been directed to be abolished for the interest of the farmers and agriculturists as in the meantime Goods and Services Tax has been made to operate by the Central Government as well as by the State Government is acceptable.

18. Every statute/rule/regulation/office order should have purposive interpretation. The question arises if at all the RMC Check Gates are established for the interest of the farmers, how can it be abolished again for the farmers? The submission of the learned counsel for the opposite parties 2 to 4 cannot be lost sight of because the purpose of establishing the RMC Check Gates if at all not properly implemented and the RMCs started to open

the Check Gates without any approval of the State Government, such illegal activities can be well checked if no Check Gate exists. When the very purpose of the Check Gates to facilitate agricultural producers to have more buying and selling and enhancement of the market fee but if the RMC Check Gates have been misutilized, such RMC Check Gates should hardly remain to meet the very purpose for which it is created. The abolition of the RMC Check Gates would do more welfare to the agriculturists or farmers than to establish the same. So, rightly Mr.Patnaik, learned Additional Government Advocate supporting the amendment, has submitted that for the interest of the farmers and public, the RMC Check Gates should be abolished.

19. By relying on the decision of the Hon'ble Supreme Court reported in the case of ***Vinod Kumar Koul –V- State of Jammu and Kashmir and others (Supra),*** Dr.Mohapatra, learned Senior Advocate for the petitioner submitted that issuance of the impugned order dated 30.03.2017 vide Annexure-1 being not consistent with Rule 48-A of the Rules, 1958 should be scrapped. On going through the said decision, it appears that the fact of said decision is not applicable to the facts of the case in hand because in that case, the Board has taken a decision contrary to the statutory rule and such Office Order having been issued, contravening the provisions of the Constitution was struck down. Similarly, in the decision reported in the case of ***Union of India and others –V- S. Srinivasan with Union of India and others –V- Saroj Kumar Shukla and others; AIR 2012 SC 3791*** Their Lordships have observed that if a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power, which is relatable to the rule.

20. With due regards to the aforesaid decisions, it appears that in the instant case, Rule 48-A of the Rules, 1958 has not been taken out from the statute. The Hon'ble Supreme Court, in the case of ***Grid Corporation of Orissa Limited and Others –V- Eastern Metals and Ferro Alloys and Others; (2011) 11 SCC 334*** at paragraph-25, have observed in the following manner:

> "25.xx xx xx
>
> .....The golden rule of interpretation is that the words of a statute have to be read and understood in their natural, ordinary and popular sense. Where however the words used are capable of bearing two or more constructions, it is necessary to adopt purposive construction, to identify the construction to be preferred.....

xx xx xx"

With due regard to the aforesaid decision, it appears that Rule 48-A of the Rules, 1958 has got natural interpretation. Even if the Rule is diagnosized, it is clear that the RMC has been facilitated to open the check points but subject to approval of the State Government for the larger interest of the farmers and agriculturists. So, the purpose of construction of such legislation is for the welfare of the farmers and agriculturists. All said to have been done under the power of the State Government.

21. Since issuance of Annexure-1 does not question the legislative process and also it does not add or alter any provisions of law but has performed its sovereign duty by directing abolition of the RMC Check Gates promoting the object of the Act, Annexure-1 cannot said to be illegal and improper. It is reiterated that the decision of the State Government for issuing Annexure-1 being act of withdrawal of approval to establish Check Gates for the interest of the farmers and agriculturists within the meaning of Rule 48-A of the Rules, 1958 having purposive interpretation, contention of the learned Senior Advocate of the petitioner is unacceptable.

22. It is the domain of State Government to exercise control over the RMC even if the RMC is created under the Act. In the meantime, the Goods and Services Tax has been introduced with the aim to collect the tax or fee at one point so as to save the small agriculturists or farmers and other stake holders in society. In a similar situation, the State Government in Finance Department has considered the proposal of abolition of the Check Gates of the Commercial Tax and Transport Department purportedly issued under Section 74 of the Odisha VAT Act, 2004 and this Court, in the case of ***Amit Kumar Saa –V- State of Odisha and others;(Supra),*** at paragraph-8 of the said judgment, has observed as follows:

"6.xx xx xx

> The officials dealing with the matter would the appropriate authority to take a decision, and merely because there is a provision for establishment of such check posts or barriers, it would not mean that the Act mandates establishment of such check posts. The appropriate authority has taken a conscious decision in the matter after considering all the relevant aspects, which, in our considered view, does not call for any interference. The writ petition is dismissed accordingly."

With due respect to the aforesaid decision, it is be observed that in this case also, establishment of RMC Check Gates is the discretion of the

RMC of course subject to approval of the State Government. It is the inherent power of such authority subject to reasonable grounds, may withdraw such approval at any point of time. There is no hard and fast rule that the State Government would continue to extend the approval from time to time. In the instant case, the State Government has simply vide Annexure-1 has directed for abolition of the Check Points/Check Gates, that means had withdrawn the earlier approval extended to install Check Gates by the RMC. When many commuters of goods vehicles enter the market area and Goods and Services Tax (GST) has already been implemented in the meantime, the concerned decision of the State Government to abolish Check Points by RMC cannot be taken as a surprise but has been taken for the benefit of the farmers or agriculturists. As the RMC has still power to collect market fee from the traders and Agriculture producers at market area and market yard, abolition of Check Points do not create any hurdle either for RMC or for agricultural producers.

23. When there is no infraction of the Rules or no departure from the legislative process and it is open for the State Government to revoke the approval for the benefit of the farmers, as discussed above, the submission Dr.Mohapatra, learned Senior Advocate for the petitioner that the impugned order dated 30.03.2017 (Annexure-10) is smack of travesty of justice is indefensible. At the same time, the submission of Mr.Patnaik, learned Additional Government Advocate and Mr.Panda, leaned counsel for the opposite parties 2 to 4 gained momentum. In the result, the impugned order dated 30.03.2017 vide Annexure-1 cannot be said to have been issued contravening the provisions of the Act, 1956 and the Rules, 1958. The point for consideration is answered accordingly.

24. <u>CONCLUSION</u>

In the writ petition, the petitioner has prayed to quash the impugned order dated 30.03.2017 vide Annexure-1 under which all the RMC Check Gates of the State have been abolished. It has been already held above that issuance of Annexure-1 does neither violate the provisions of the Act, 1956 and the Rules, 1958 nor it is against the interest of agriculturists or farmers. Therefore, as the impugned order dated 30.03.2017 vide Anneuxre-1 passed by the opposite party no.1 stands good being legal and proper, the Court is reluctant to quash the same. Hence, the writ petition being devoid of merit stands dismissed.

Writ Petition dismissed.