SUPREME COURT OF INDIA

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

CRIMINAL APPEAL NO. 1265 OF 2017
[ARISING OUT OF SPECIAL LEVE PETITION (CRL) NO. 2013 OF 2017]

RAJESH SHARMA & ORS. …….Appellants

.Vrs.

STATE OF U.P. & ANR. ……..Respondents

PENAL CODE, 1860 – S.498A

Misuse of section 498A I.P.C. – It is not only judicially acknowledged but also from certain studies – Section 498 A was inserted in the statute with the laudable object to check unconscionable demands by greedy husbands and families which at times result in cruelty to women and also suicides – However, the provision is abused in order to rope in the relatives of the husband including Parents, Grand parents and Children on the strength of vague and exaggerated allegations without any verifitable evidence of physical or mental harm or injury, resulting harassment or even arrest of innocent family members – Directions issued to curb such menace.

District Legal Services Authorities to constitute one or more Family Welfare Committees, comprising three members, in each District – Every complaint U/s. 498A IPC received by the Police or Magistrate be referred to such Committee who, after interaction with the parties, personally or over telephone or by any other mode submit a report to the above authority within one month and till then no arrest should normally be effected – However, committee members will not be called as witnesses – The complaints U/s. 498A IPC and other connected offences may be investigated only by a designated Investigating Officer of the area – In cases where a settlement is reached it is open for the District and Sessions Judge or any other Senior Judicial Officer nominated by him, to club all connected cases between the parties arising out of matrimonial disputes and to dispose of the proceedings including closing of the criminal case – Personal appearance of all family members, particularly outstation members may not be required and the trial Court ought to grant exemption from personal appearance or permit appearance by video conferencing without adversely affecting progress of the trial – Moreover, persons ordinarily residing out of India, impounding of Passports or issuance of Red Corner Notice should not be a routine – If a bail application is filed with at least one clear day's notice to the Public

Prosecutor/Complainant, the same may be decided as far as possible on the same day and recovery of disputed dowry items may not by itself be a ground for denial of bail, if maintenance or other rights of wife/minor children can otherwise be protected – However, these directions will not apply to the offences involving tangible physical injuries or death. (Paras 14 to 19)

Case Law Referred to :-

1. (2005) 6 SCC 281 : Sushil Kumar Sharma versus Union of India.[1]
2. (2010) 7 SCC 667 : Preeti Gupta versus State of Jharkhand.[2]
3. (2010) 13 SCC 540 : Ramgopal versus State of Madhya Pradesh.[3]
4. ILR (2003) I Delhi 484 : Savitri Devi versus Ramesh Chand.[4]
5. (2008) 151 DLT 691 : Chander Bhan versus State.[5]
6. (2014) 8 SCC 273 : Arnesh Kumar versus State of Bihar.[6]
7. (2014) 2 SCC 1 : Lalita Kumari versus Government of Uttar Pradesh.[7]
10. (2012) 10 SCC 603 : Sahara India Real Estate Corporation Limited v. Securities and Exchange Board of India.[10]
    SCBA v. Union of India (1998) 4 SCC 409
    Union of India vs. Raghubir Singh (d) by Lrs. (1989) 2 SCC 754
    Dayaram vs. Sudhir Batham (2012) 1 SCC 333
11. (2012) 3 SCC : State of Punjab vs. Dalbir Singh.[11]
12. (2012) 10 SCC12 : Gian Singh vs. State of Punjab. [12]

For Appellants : M/s. P. N. Puri, Shri A.S. Nadkarni (ASG), Shri V.V. Giri, Sr. Adv., Vaibhav Manu Srivastava [P-2] Ms. Uttara Babbar, Ms. Pragya Baghel & Ms. Svadha Shanker.

For Respondents :

Date of judgment : 27.07. 2017

JUDGMENT

ADARSH KUMAR GOEL, J.

1. Leave granted.

2. The question which has arisen in this appeal is whether any directions are called for to prevent the misuse of Section 498A, as acknowledged in certain studies and decisions. The Court requested Shri A.S. Nadkarni, learned ASG and Shri V.V. Giri, learned senior counsel to assist the Court as *amicus.* We place on record our gratitude for the assistance rendered by learned ASG Shri Nadkarni and learned senior counsel Shri Giri who in turn was ably assisted by advocates Ms. Uttara Babbar, Ms. Pragya Baghel and Ms. Svadha Shanker.

3. Proceedings have arisen from complaint dated 2nd December, 2013 filed by respondent No.2 wife of appellant No.1. Appellants 2 to 5 are the parents and siblings of appellant No.1. The complainant alleged that she was

married to appellant No.1 on 28th November, 2012. Her father gave dowry as per his capacity but the appellants were not happy with the extent of the dowry. They started abusing the complainant. They made a demand of dowry of Rs.3,00,000/- and a car which the family could not arrange. On 10th November, 2013, appellant No.1 dropped the complainant at her matrimonial home. She was pregnant and suffered pain in the process and her pregnancy was terminated. On the said version, and further version that her *Stri dhan* was retained, appellant No.1 was summoned under Section 498A and Section 323 IPC. Appellants 2 to 5 were not summoned. Order dated 14th July, 2014 read as follows:

> *"After perusal of the file and the document brought on record. It is clear that the husband Shri Rajesh Sharma demanded car and three lacs rupees and in not meeting the demand. It appears that he has tortured the complainant. So far as torture and retaining of the stri dhan and demanding 50,000 and a gold chain and in not meeting the demand the torture is attributable against Shri Rajesh Sharma. Rajesh Sharma appears to be main accused. In the circumstances, rest of the accused Vijay Sharma, Jaywati Sharma, Praveen Sharma and Priyanka Sharma have not committed any crime and they have not participated in commission of the crime. Whereas, it appears that Rajesh Sharma has committed an offence under Section 498A, 323 IPC and read with section 3 / 4 DP act appears to have prima facie made out. Therefore, a summon be issued against him."*

4. Against the above order, respondent No.2 preferred a revision petition and submitted that appellants 2 to 5 should also have been summoned. The said petition was accepted by the Additional Sessions Judge, Jaunpur *vide* order dated 3rd July, 2015. The trial court was directed to take a fresh decision in the matter. Thereafter, the trial court *vide* order dated 18th August, 2015 summoned appellants 2 to 5 also. The appellants approached the High Court under Section 482 CrPC against the order of summoning. Though the matter was referred to the mediation centre, the mediation failed. Thereafter, the High Court found no ground to interfere with the order of summoning and dismissed the petition. Hence this appeal.

5. Main contention raised in support of this appeal is that there is need to check the tendency to rope in all family members to settle a matrimonial dispute. Omnibus allegations against all relatives of the husband cannot be taken at face value when in normal course it may only be the husband or at

best his parents who may be accused of demanding dowry or causing cruelty. To check abuse of over implication, clear supporting material is needed to proceed against other relatives of a husband. It is stated that respondent No.2 herself left the matrimonial home. Appellant No.2, father of appellant No.1, is a retired government employee. Appellant No.3 is a house wife. Appellant No.4 is unmarried brother and appellant No.5 is unmarried sister who is a government employee. Appellants 2 to 5 had no interest in making any demand of dowry.

6. Learned counsel for respondent No.2 supported the impugned order and the averments in the complaint.

7. Learned ASG submitted that Section 498A was enacted to check unconscionable demands by greedy husbands and their families which at times result in cruelty to women and also suicides. He, however, accepted that there is a growing tendency to abuse the said provision to rope in all the relatives including parents of advanced age, minor children, siblings, grand-parents and uncles on the strength of vague and exaggerated allegations without there being any verifiable evidence of physical or mental harm or injury. At times, this results in harassment and even arrest of innocent family members, including women and senior citizens. This may hamper any possible reconciliation and reunion of a couple. Reference has been made to the statistics from the Crime Records Bureau (CRB) as follows:

> *"9. That according to Reports of National Crime Record Bureau in 2005, for a total 58,319 cases reported under Section 498A IPC, a total of 1,27,560 people were arrested, and 6,141 cases were declared false on account of mistake of fact or law. While in 2009 for a total 89,546 cases reported, a total of 1,74,395 people were arrested and 8,352 cases were declared false on account of mistake of fact or law.*
>
> *10. That according to Report of Crime in India, 2012 Statistics, National Crime Records Bureau, Ministry of Home Affairs showed that for the year of 2012, a total of 197,762 people all across India were arrested under Section 498A, Indian Penal Code. The Report further shows that approximately a quarter of those arrested were women that is 47,951 of the total were perhaps mother or sisters of the husband. However most surprisingly the rate of charge-sheet filing for the year 2012, under Section 498A IPC was at an exponential height of 93.6% while the conviction rate was at a staggering low at 14.4% only. The Report stated that as many as*

3,72,706 cases were pending trial of which 3,17,000 were projected to be acquitted.

11. That according to Report of Crime in India, 2013, the National Crime Records Bureau further pointed out that of 4,66,079 cases that were pending in the start of 2013, only 7,258 were convicted while 38,165 were acquitted and 8,218 were withdrawn. The conviction rate of cases registered under Section 498A IPC was also a staggering low at 15.6%."

8. Referring to ***Sushil Kumar Sharma versus Union of India***[1]***, Preeti Gupta versus State of Jharkhand***[2]***, Ramgopal versus State of Madhya Pradesh***[3]***, Savitri Devi versus Ramesh Chand***[4]***,*** it was submitted that misuse of the provision is judicially acknowledged and there is need to adopt measures to prevent such misuse. The Madras High Court in M.P. No.1 of 2008 in Cr. O.P. No.1089 of 2008 dated 4th August, 2008 directed issuance of following guidelines:

"It must also be borne in mind that the object behind the enactment of Section 498-A IPC and the Dowry Prohibition Act is to check and curb the menace of dowry and at the same time, to save the matrimonial homes from destruction. Our experience shows that, apart from the husband, all family members are implicated and dragged to the police stations. Though arrest of those persons is not at all necessary, in a number of cases, such harassment is made simply to satisfy the ego and anger of the complainant. By suitably dealing with such matters, the injury to innocents could be avoided to a considerable extent by the Magistrates, but, if the Magistrates themselves accede to the bare requests of the police without examining the actual state of affairs, it would create negative effects thereby, the very purpose of the legislation would be defeated and the doors of conciliation would be closed forever. The husband and his family members may have difference of opinion in the dispute, for which, arrest and judicial remand are not the answers. The ultimate object of every legal system is to punish the guilty and protect the innocents."

9. Delhi High Court *vide* order dated 4th August, 2008 in ***Chander Bhan versus State***[5] in Bail Application No.1627/2008 directed issuance of following guidelines :

1 (2005) 6 SCC 281, 2 (2010) 7 SCC 667, 3 (2010) 13 SCC 540, 4 ILR (2003) I Delhi 484, 5 (2008) 151 DLT 691

"2. Police Authorities:

(a) Pursuant to directions given by the Apex Court, the Commissioner of Police, Delhi vide Standing Order No.330/2007 had already I ssuedguidelines for arrest in the dowry cases registered under Sections 498-A/406 IPC and the said guidelines should be followed by the Delhi Police strictly and scrupulously.

(i) No case under Section 498-A/406 IPC should be registered without the prior approval of DCP/Addl.DCP.

(ii) Arrest of main accused should be made only after thorough investigation has been conducted and with the prior approval of the ACP/DCP.

(iii) Arrest of the collateral accused such as father-in-law, mother-in-law, brother-in-law or sister-in-law etc. should only be made after prior approval of DCP on file.

(b) Police should also depute a well trained and a well behaved staff in all the crime against women cells especially the lady officers, all well equipped with the abilities of perseverance, persuasion, patience and forbearance.

(c) FIR in such cases should not be registered in a routine manner.

(d) The endavour of the Police should be to scrutinize complaints very carefully and then register FIR.

(e) The FIR should be registered only against those persons against whom there are strong allegations of causing any kind of physical or mental cruelty as well as breach of trust.

(f) All possible efforts should be made, before recommending registration of any FIR, for reconciliation and in case it is found that there is no possibility of settlement, then necessary steps in the first instance be taken to ensure return of stridhan and dowry articles etc. by the accused party to the complainant."

10. In ***Arnesh Kumar versus State of Bihar***[6], this Court directed as follows :

"11.1All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest

6 (2014) 8 SCC 273

under the parameters laid down above flowing from Section 41, Cr.PC;

11.2 All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

11.3 The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4 The Magistrate while authorizing detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorize detention;

11.5 The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

11.6 Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

11.7 Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

11.8 Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court."

11. Learned ASG suggested that there must be some preliminary inquiry on the lines of observations in ***Lalita Kumari versus Government of Uttar Pradesh***[7]. Arrest of a relative other than husband could only be after permission from the concerned Magistrate. There should be no arrest of relatives aged above 70 years. Power of the police to straight away arrest must be prohibited. While granting permission, the court must ascertain that there is prima facie material of the accused having done some overt and

7(2014) 2 SCC 1

covert act. The offence should be made compoundable and bailable. The role of each accused must be specified in the complaint and the complaint must be accompanied by a signed affidavit. The copy of the preliminary enquiry report should be furnished to the accused.

12. Shri V. Giri, learned senior counsel assisted by advocates Ms. Uttara Babbar, Ms. Pragya Baghel and Ms. Svadha Shanker submitted that arrest in an offence under Section 498A should be only after recording reasons and express approval from the Superintendent of Police. In respect of relatives who are ordinarily residing outside India, the matter should proceed only if the IO is convinced that arrest is necessary for fair investigation.

In such cases impounding of passport or issuance of red corner notice should be avoided. Procedure under Section 14 of the Protection of Women from Domestic Violence Act, 2005, of counseling should be made mandatory before registration of a case under Section 498A.

13. We have given serious consideration to the rival submissions as well as suggestions made by learned ASG and Shri V. Giri, Senior Advocate assisted by Advocates Ms. Uttara Babbar, Ms. Pragya Baghel and Ms. Svadha Shanker. We have also perused 243rd Law Commission Report (August, 2012), 140th Report of the Rajya Sabha Committee on Petition (September, 2011) as well as several decisions to which our attention has been invited.

14. Section 498A was inserted in the statute with the laudable object of punishing cruelty at the hands of husband or his relatives against a wife particularly when such cruelty had potential to result in suicide or murder of a woman as mentioned in the Statement of Objects and Reasons of the Act 46 of 1983. The expression 'cruelty' in Section 498A covers conduct which may drive the women to commit suicide or cause grave injury (mental or physical) or danger to life or harassment with a view to coerce her to meet unlawful demand.8 It is a matter of serious concern that large number of cases continue to be filed under Section 498A alleging harassment of married women. We have already referred to some of the statistics from the Crime Records Bureau. This Court had earlier noticed the fact that most of such complaints are filed in the heat of the moment over trivial issues. Many of such complaints are not bona fide. At the time of filing of the complaint, implications and consequences are not visualized. At times such complaints lead to uncalled for harassment not only to the accused but also to the complainant. Uncalled for arrest may ruin the chances of settlement. This

Court had earlier observed that a serious review of the provision was warranted. The matter also appears to have been considered by the Law Commission, the Malimath Committee, the Committee on Petitions in the Rajya Sabha, the Home Ministry, which have been referred to in the earlier part of the Judgment. The abuse of the provision was also noted in the judgments of this Court referred to earlier. Some High Courts have issued directions to check such abuse. In **Arnesh Kumar (supra)** this Court gave directions to safeguard uncalled for arrests. Recommendation has also been made by the Law Commission to make the offence compoundable.

15. Following areas appear to require remedial steps :-

i) Uncalled for implication of husband and his relatives and arrest.

ii) Continuation of proceedings in spite of settlement between the parties since the offence is non-compoundable and uncalled for hardship to parties on that account.

16. Function of this Court is not to legislate but only to interpret the law. No doubt in doing so laying down of norms is sometimes unavoidable.[10] Just and fair procedure being part of fundamental right to life,[11] interpretation is required to be placed on a penal provision so that its working is not unjust, unfair or unreasonable.The court has incidental power to quash even a non-compoundable case of private nature, if continuing the proceedings is found to be oppressive.[12] While stifling a legitimate prosecution is against public policy, if the proceedings in an offence of private nature are found to be oppressive, power of quashing is exercised.

17. We have considered the background of the issue and also taken into account the 243rd Report of the Law Commission dated 30th August, 2012, 140th Report of the Rajya Sabha Committee on Petitions (September, 2011) and earlier decisions of this Court.We are conscious of the object for which the provision was brought into the statute. At the same time, violation of human rights of innocent cannot be brushed aside. Certain safeguards against uncalled for arrest or insensitive investigation have been addressed by this Court. Still, the problem continues to a great extent.

18. To remedy the situation, we are of the view that involvement of civil society in the aid of administration of justice can be one of the steps, apart from the investigating officers and the concerned trial courts being sensitized. It is also necessary to facilitate closure of proceedings where a genuine

[10] (2012) 10 SCC 603, [11] (2012) 3 SCC & [12] (2012) 10 SCC

settlement has been reached instead of parties being required to move High Court only for that purpose.

19. Thus, after careful consideration of the whole issue, we consider it fit to give following directions :-

i) (a) In every district one or more Family Welfare Committees be constituted by the District Legal Services Authorities preferably comprising of three members. The constitution and working of such committees may be reviewed from time to time and at least once in a year by the District and Sessions Judge of the district who is also the Chairman of the District Legal Services Authority.

(b) The Committees may be constituted out of para legal volunteers/social workers/retired persons/wives of working officers/other citizens who may be found suitable and willing.

(c) The Committee members will not be called as witnesses.

(d) Every complaint under Section 498A received by the police or the Magistrate be referred to and looked into by such committee. Such committee may have interaction with the parties personally or by means of telephone or any other mode of communication including electronic communication.

(e) Report of such committee be given to the Authority by whom the complaint is referred to it latest within one month from the date of receipt of complaint.

(f) The committee may give its brief report about the factual aspects and its opinion in the matter.

(g) Till report of the committee is received, no arrest should normally be effected.

(h) The report may be then considered by the Investigating Officer or the Magistrate on its own merit.

(i) Members of the committee may be given such basic minimum training as may be considered necessary by the Legal Services Authority from time to time.

(j) The Members of the committee may be given such honorarium as may be considered viable.

(k) It will be open to the District and Sessions Judge to utilize the cost fund wherever considered necessary and proper.

ii) Complaints under Section 498A and other connected offences may be investigated only by a designated Investigating Officer of the area. Such designations may be made within one month from today. Such designated officer may be required to undergo training for such duration (not less than one week) as may be considered appropriate. The training may be completed within four months from today;

iii) In cases where a settlement is reached, it will be open to the District and Sessions Judge or any other senior Judicial Officer nominated by him in the district to dispose of the proceedings including closing of the criminal case if dispute primarily relates to matrimonial discord;

iv) If a bail application is filed with at least one clear day's notice to the Public Prosecutor/complainant, the same may be decided as far as possible on the same day. Recovery of disputed dowry items may not by itself be a ground for denial of bail if maintenance or other rights of wife/minor children can otherwise be protected. Needless to say that in dealing with bail matters, individual roles, prima facie truth of the allegations, requirement of further arrest/ custody and interest of justice must be carefully weighed;

v) In respect of persons ordinarily residing out of India impounding of passports or issuance of Red Corner Notice should not be a routine;

vi) It will be open to the District Judge or a designated senior judicial officer nominated by the District Judge to club all connected cases between the parties arising out of matrimonial disputes so that a holistic view is taken by the Court to whom all such cases are entrusted; and

vii) Personal appearance of all family members and particularly outstation members may not be required and the trial court ought to grant exemption from personal appearance or permit appearance by video conferencing without adversely affecting progress of the trial.

viii) These directions will not apply to the offences involving tangible physical injuries or death.

20. After seeing the working of the above arrangement for six months but latest by March 31, 2018, National Legal Services Authority may give a

report about need for any change in above directions or for any further directions. The matter may be listed for consideration by the Court in April, 2018.

21. Copies of this order be sent to National Legal Services Authority, Director General of Police of all the States and the Registrars of all the High Courts for further appropriate action.

22. It will be open to the parties in the present case to approach the concerned trial or other court for further orders in the light of the above directions.

2017 (II) ILR - CUT- 508 (S.C.)

SUPREME COURT OF INDIA

R.K. AGRAWAL, J. & ABHAYA MANOHAR SAPRE, J.

CRIMINAL APPEAL NO. 1448 OF 2017

[ARISING OUT OF SPECIAL LEVE PETITION (CRL) NO. 3716 OF 2017]

LT. COL. PRASAD SHRIKANT PUROHIT ……..Appellant(s)

.Vrs.

STATE OF MAHARASHTRA ……Respondent(s)

(A) CRIMINAL PROCEDURE CODE, 1973 – S.439

Bail – Offence U/ss. 302, 307, 326, 324, 327, 153-A & 120-B I.P.C. with sections 3, 4, 5 & 6 of the Explosive Substances Act and sections 3, 5 & 25 of the Arms Act, 1959 – Appellant has refused the claim of conspiracy as he was an intelligence officer of the Indian Army at the relevant time – Submission of supplementary chargesheet by N.I.A. is at variance with the chargesheet filed by A.T.S. Mumbai – Trial is likely to take a long time and the appellant is in custody for a period of 8 years and 8 months – High Court has also erred in ignoring the doctrine of parity while granting bail to a co-accused on the changed circumstances after filing of charge sheet by the N.I.A. – The appellant has made out a prima facie case for release on bail – Held, bail granted to the appellant subject to certain conditions imposed by the Court.

(Para 24)

(B) CRIMINAL PROCEDURE CODE, 1973 – S.439

Bail – Court granting bail should exercise its discretion in a judicious manner but not as a matter of course – Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence – Any order devoid of such reasons would suffer from non-application of mind – It is also necessary for the Court granting bail to consider, among other circumstances, the following factors before granting bail

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence,
(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant,
(c) Prima facie satisfaction of the Court in support of the charge.

(Para 20)

(C) CRIMINAL PROCEDURE CODE, 1973 – S.439

Bail – Though an accused has a right to make successive applications for grant of bail, the Court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected – In such cases, the Court also has a duty to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications.

(Para 22)

Case Law Referred to :-

1. (2015) 7 SCC 440 : Prasad Shrikant Purohit -V- State of Maharashtra & Anr.

For Appellant(s) : Mr. Harish salve (Sr.Adv.) M/s. Kamakshi S. Mehlwal

For Respondent(s) : M/s. B. Krishna Prasad, Addl. Solicitor General

Date of judgment : 21.08.2017

JUDGMENT

R.K. AGRAWAL, J.

1) Leave granted.

2) This appeal is directed against the judgment and order dated 25.04.2017 passed by the High Court of Judicature at Bombay in Criminal Appeal No. 664 of 2016 whereby the Division Bench of the High Court dismissed the bail application filed by the appellant herein.

3) **Brief facts:**

(a) On 29.09.2008, at around 9:35 p.m., a bomb explosion took place at Malegaon, District Nasik, opposite Shakil Goods Transport Company between Anjuman Chowk and Bhiku Chowk. The said blast was caused by explosive device fitted in LML Freedom Motor Cycle bearing Registration No. MH-15-P-4572. As a result of the said explosion, six persons were killed and about 100 persons had received injuries of various nature. Damage to the property was also caused.

(b) The offence came to be registered under CR No. 130/2008 in Azad Nagar Police Station, Malegaon under Sections 302, 307, 326, 324, 427, 153-A and 120-B of the Indian Penal Code, 1860 (in short 'the IPC') read with Sections 3, 4, 5 and 6 of the Explosive Substances Act read with Sections 3, 5 and 25 of the Arms Act, 1959.

(c) During the course of investigation, the samples collected from the place of offence were sent to the Forensic Science Laboratory at Nasik and the same were found to be containing Cyclonite (RDX) and Ammonium Nitrate. On 18.10.2008, the provisions of Sections 15, 16, 17, 18, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967 (Amended) 2004, (in short 'the UAP Act') were invoked and the case was entrusted to Deputy Superintendent of Police, (HQ), Nasik Rural. On 26.10.2008, the Anti-Terrorist Squad (ATS), Mumbai took charge of the investigation and on 29.11.2008, the provisions of Maharashtra Control of Organized Crime Act, 1999 (in short 'the MCOC Act) were added.

(d) During investigation, it was found that the appellant herein, along with other co-accused in the case, entered into a criminal conspiracy between January, 2008 to October, 2008 with a common object and intention to strike terror in the minds of people caused bomb blast at Malegaon by using explosive substances to cause damage to life and property and to create communal rift. According to ATS, the appellant herein had brought RDX with him from Kashmir for the purpose of Bomb Blast at Malegaon.

(e) During investigation, it has been further revealed by the ATS that the appellant herein was a serving Army Officer and was associated with Military Intelligence and Interior Terrorism (Insurgency Activities). The appellant herein floated 'Abhinav Bharat' organization in the year 2007 inspite of being serving as a Commissioned Officer in Armed Forces. The other co-accused in the case were also the members of the said organization. The object of the Organization was to turn India into a Hindu Rashtra called

as 'Aryavrat'. They had planned to train persons for guerrilla war and had also decided to kill the persons opposing their object of formation of a Hindu Rashtra. As per the investigation, it has also come out that the appellant herein along with other persons had participated in various meetings of the said Organization to discuss various aspects for achieving their goals. Further, it is the case of the ATS that the organization, viz., 'Abhinav Bharat' is an Organized Crime Syndicate and its members including the appellant herein were active since 2003. In one of the meetings at Bhopal, on 11/12 April, 2008, the criminal conspiracy to cause bomb blast at Malegaon was hatched. In the said meeting, the appellant herein took the responsibility of providing explosives for the common object in order to take revenge of 'Jihadi' activities by Muslim community.

(f) After completion of the investigation, on 20.01.2009, the ATS, Mumbai, filed charge sheet under Sections 302, 307, 326, 324, 427, 153A read with Section 120B of the IPC and Sections 3, 5 and 25 of the Arms Act and Sections 15, 16, 17, 18, 20 and 23 of the UAP Act, Sections 3(1)(i), 3(1)(ii), 3(2), 3(3), 3(5) of the MCOC Act, Sections 3, 4, 5 and 6 of the Explosive Substances Act.

(g) The appellant came to be arrested on 05.11.2008 in connection to the said offence. he appellant herein preferred a Bail Application being No. 42 of 2008 before the SpecialJudge under MCOCA for Greater Mumbai. By order dated 31.07.2009, the Special Judge discharged the appellant and other co-accused from the offences under MCOC Act and directed to transfer the case to the regular court at Nasik. The State Government, being aggrieved by the order dated 31.07.2009, filed an appeal being 866 of 2009 before the High Court. A Division Bench of the High Court, vide order dated 19.07.2010, set aside the order dated 31.07.2009 and restored the bail application filed by the appellant herein for hearing on merits. The appellant herein went in appeal before this Court and filed Criminal Appeal Nos. 1969-1970 of 2010. It would be appropriate to mention here that after filing of the charge sheet by ATS, Mumbai, the investigation of the same was started by the National Investigation Agency, (NIA), New Delhi as per the order of the Government of India dated 01.04.2011 and on 13.04.2011, the NIA re-registered the offence in respect of the said incident as CR No. 5/11.

(h) This Court, in ***Prasad Shrikant Purohit*** vs. ***State of Maharashtra and Another*** (2015) 7 SCC 440, dismissed the criminal appeals filed by the appellant herein while restoring the Bail Application No. 42 of 2008 to the

file of the Special Judge for passing orders on merits. On the question of applicability of the MCOC Act, this Court has observed as under:-

> **"95.** In the light of our above conclusions on the various submissions, we are convinced that in respect of the appellant in Criminal Appeal No. 1971 of 2010, namely, A-7, there is no scope even for the limited purpose of Section 21(4)(*b*) to hold that application of MCOCA is doubtful. We have held that the said appellant A-7 had every nexus with all the three crimes, namely, Parbhani, Jalna and Malegaon and, therefore, the bar for grant of bail under Section 21 would clearly operate against him and there is no scope for granting any bail. Insofar as the rest of the appellants are concerned, for the purpose of invoking Section 21(4)(*b*), namely, to consider their claim for bail, it can be held that for the present juncture with the available materials on record, it is not possible to show any nexus of the appellants who have been proceeded against for their involvement in Malegaon blast with the two earlier cases, namely, Parbhani and Jalna. There is considerable doubt about their involvement in Parbhani and Jalna and, therefore, they are entitled for their bail applications to be considered on merits."

Vide order dated 12.10.2015, the Special Judge, rejected the bail application of the appellant herein. Aggrieved by the decision dated 12.10.2015, the appellant herein preferred a Criminal Appeal being No. 138 of 2016 before the High Court. During the pendency of the aforesaid appeal before the High Court, the NIA submitted supplementary charge sheet dropping the charges under MCOCA against all the accused persons including the appellant herein. In view of the supplementary charge sheet by the NIA, the High Court permitted the appellant herein to file fresh bail application.

(i) The appellant herein filed a fresh bail application before the Court of Special Judge under MCOC Act, 1999 and NIA Act, 2008 for Greater Mumbai. The Special Judge, vide order dated 26.09.2016, denied the bail to the appellant herein. Being aggrieved by the order dated 26.09.2016, the appellant herein went in appeal before the High Court and filed Criminal Appeal No. 664 of 2016. The NIA resisted the bail application of the appellant herein on various grounds before the High Court. On 25.04.2017, a Division Bench of the High Court, dismissed the bail application of the appellant herein. Aggrieved by the order dated 25.04.2017, the appellant has filed this appeal before this Court by way of special leave.

4) Heard Mr. Harish Salve, learned senior counsel for the appellant herein and Mr. Maninder Singh, learned Additional Solicitor General for the respondent-State and Mr. Amarendra Sharan, learned senior counsel for the intervenor-Nisar Ahmed Haji Sayed Bilal, who is the father of one of the deceased.

Point(s) for consideration:-

5) The only point for consideration before this Court is whether in the present facts and circumstances of the case, the appellant has made out a case for grant of bail or not?

Rival contentions:-

6) Mr. Harish Salve, learned senior counsel for the appellant herein contended before this Court that in view of the supplementary report filed by the NIA, dropping the charges in respect of the offences under the MCOC Act, it has to be held that there is no *prima facie* case against the appellant herein. Learned senior counsel further contended that earlier, the bail applications were rejected mainly on the basis of the confessional statements of the co-accused under the MCOC Act and now, as the charges under the MCOC Act have been dropped, the confessional statements of the co-accused are required to be excluded from consideration and in their absence thereof, there is no incriminating material against the appellant herein so as to deny him the benefit of bail. Learned senior counsel further contended that during investigation by NIA, PW-79, PW-112 and PW-55 have retracted their previous statements made before the ATS. The fact that the material witnesses have retracted from their statements while complaining about the harassment and torture meted out by the officers of the ATS, clearly indicate that the investigation carried out by the ATS was not fair but it was tainted. The statements and confessions have been extracted subjecting the witness and co-accused to the torture and duress, under the threats of implicating them falsely. Learned senior counsel contended that in view of the withdrawal of those statements and confessions, there remains nothing on record to implicate the appellant herein with the alleged offence.

7) Learned senior counsel further contended that the appellant was a Military Intelligence Officer at the relevant time and had participated in the meetings held at various places like Faridabad, Bhopal etc. in discharge of his duties as such for collecting intelligence and creating new sources and the said fact has also been revealed in the Report of Court of Inquiry (CoI) conducted by the Army Officers against him as well as in the reply filed by

the Ministry of Defence and the documents filed by the said Ministry in the Special Court. Learned senior counsel further contended that there was no sufficient material to show that in the said meetings, any conspiracy was hatched to commit the bomb blast at Malegaon.

8) Learned senior counsel vehemently contended the statement of PW-21 that immediately after the alleged conspiracy meeting, he found the appellant herein disclosing the details of the said meeting to his superior officers in Military Intelligence in order to suggest that no conspirator will ever divulge the details of the conspiracy to the superior officers in Military Intelligence. Even the appellant herein also informed that it was a 'covert operation' of Military Intelligence.

9) Learned senior counsel further contended that the Report of Inquiry (RoI) also reveals that the RDX was planted by the ATS officer in the house of Sudhakarn Chaturvedi (A-11). The statements of PW-180 and PW-183 also indicate the same but the courts below disbelieved the version of NIA in this regard.

10) Further, learned senior counsel strenuously contended that whether the amended provision of Section 43(D)(5) of the UAP Act be applied retrospectively to the appellant herein. The said provision had been amended on 31.12.2008 while the incident had taken place on 29.09.2008. He further contended that the High Court was not right in holding that the right of bail of the accused is a procedural right and cannot be considered as a substantive right for retrospective applicability of the provision. Further, the sanction granted for prosecution of the appellant under Section 45(1) of the UAP Act was not valid. He further stressed upon the point that the High Court erred in ignoring the Doctrine of Parity while granting bail to Pragya Singh Thakur (A-1) wherein the court has taken into account the changed circumstances in the charge sheet filed by the NIA but the very same facts have been ignored in the case of the appellant herein. Learned senior counsel finally submitted that the appellant is in jail since last about eight years and eight months and the delay is on account of the prolonged time taken by the investigation agencies and the appellant herein has a good *prima facie* case to succeed for grant of bail before this Court.

11) Learned Additional Solicitor General (ASG) for the respondent-State strongly controverted the contentions raised by learned senior counsel for the appellant herein by submitting that he was the main conspirator and *prima facie* there is sufficient material on record to prove his involvement in the alleged offence. Merely because the charges have been dropped under the

MCOC Act, it does not mean that there is no material against the appellant herein in respect of other charges. The NIA has given clean chit to Pragya Singh Thakur (A-1) and some other accused person but it has not exonerated the appellant herein from the charges leveled against him which clearly proves that the NIA has also found sufficient material to implicate the appellant.

12) Learned ASG finally submitted that the conclusions about involvement of the appellant herein in the offences alleged against him as drawn by the ATS are supplemented and supported by the NIA officers in their detailed investigation. Having regard to the gravity and seriousness of the offence, which were in the nature of waging war against the unity and integrity of the Nation, and, that too, by violent means, the bail application of the appellant could not have been allowed and it has rightly been rejected by the courts below and no interference is sought for by this Court.

13) Mr. Amarendra Saran, learned senior counsel for the intervenor submitted that there are sufficient material and evidence on record to establish a *prima facie* case of the involvement of the appellant herein in the criminal offence and the report of the Court of Inquiry (CoI) submitted by the Military authorities cannot be taken into consideration for deciding the question of grant of bail.

Discussion:-

14) In order to prove the *prima facie* case against the appellant, the prosecution has relied upon the transcription of the conversations of the meetings obtained from the laptop of Swami Amrutanand (A-10), statement of prosecution witnesses recorded under Sections 161 and 164(5) of the Code of Criminal Procedure, 1973 (in short 'the Code'), intercepted telephonic conversations between the appellant herein and co-accused persons and lastly the finding of traces of RDX in the house of co-accused Sudhakar Chaturvedi (A-11). With regard to the transcription of the conversations of the meetings, it was urged from the side of the appellant that there was no such conspiracy hatched between the persons present in the meeting to commit bomb blasts at Malegaon and the persons present have expressed their general opinion about the then prevailing political and social situation. In this backdrop, it is relevant to note that the appellant herein was a serving Army Officer and was associated with Military Intelligence and Interior Terrorism (Insurgency Activities). In the statement of PW-21, it has been revealed that immediately after the alleged conspiracy meeting, he found the appellant herein disclosing

the details of the said meeting to his superior officers in Military Intelligence. Even the appellant herein also informed that it was a 'covert operation' of Military Intelligence and he attended the said meetings to create the counter intelligence and no conspirator will ever divulge the details of the conspiracy to the superior officers in Military Intelligence. Besides this, the documents filed by the Ministry of Defence and the papers of the Court of Inquiry also substantiate the claim of the appellant herein. Similarly, intercepted telephonic conversations between the co-accused and the appellant herein were supported as part of duty.

15) The NIA started the investigation on the basis of the facts stated in the FIR and the evidence collected by the ATS, Mumbai. During investigation, it was found that there were contradictions with regard to the evidence led in the charge sheet by the ATS. On the basis of the specific points covered during the investigation conducted by the NIA, it was concluded that no offence under the MCOC Act was attracted and the confessional statements recorded under the provisions of the said Act by ATS Mumbai were not being relied upon by the NIA in the charge sheet against the accused persons. In fact, on evaluation of the evidence against Pragya Singh Thakur (A-1), the evidence on record were not found sufficient by the NIA to prosecute her as all the witnesses had retracted from their statements and thus no case was made out against her.

16) As regards the other parameters to be considered while deciding the application of bail, like, reasonable apprehension of the witnesses being tampered with and danger, of-course, of justice being thwarted by grant of bail, needless to state that already some of the witnesses have retracted their statements made before the ATS. A perusal of the statements of various prosecution witness recorded under Section 164 of the Code by the NIA, it was revealed that the ATS, Mumbai forced them to make the statements under the aforesaid Section by threatening them to falsely implicate them in the case. In other words, witnesses retracted from their statements recorded by the ATS, Mumbai at Mumbai. Even during re-examination of PW-79 recorded under Section 164 of the Code, he deposed that he did not attend any meeting of 'Abhinav Bharat' held at Bhopal and he had never visited Bhopal until ATS took him to Ram Mandir, Bhopal in the month of May, 2009. The very same statement was again recorded at Delhi by learned Metropolitan Magistrate, where he confirmed the same.

17) In view of the above, it would be relevant to quote the retracted statement of PW-55, mentioned in the charge sheet filed by the NIA, wherein

he stated that he did not retract in front of the Magistrate while his statement was being recorded under Section 164 of the Code due to threat and pressure of the ATS. However, he sent one complaint to Maharashtra State Human Rights Commission, Mumbai on 05.10.2009 stating that he was forced to give the confessional statement as dictated to him by the ATS Mumbai that too before transfer of the investigation of the case to the NIA. He further alleged that the following lies were dictated to him to depose before the Magistrate by the ATS which he also incorporated in the complaint sent to State Human Rights Commission which are as under:-

> (1) That Lt. Col. Prasad Purohit gave him 3 weapons and ammunition to be kept in his house for a month sometime in 2006. The description of the weapons was also dictated to him.
>
> (2) That he saw RDX in the house of Lt. Col. Prasad Purohit in a green sack at Devlali.
>
> (3) That Lt. Col. Purohit confessed to him about having supplied RDX for Samjhauta Express Blast.
>
> (4) That Lt. Col. Purohit told him in the early 2008 that something was planned to be done soon. He further told him that an action was planned in Nashik District in Oct/Nov. 2008.
>
> (5) That he was asked to say that Lt. Col. Purohit had confessed to him about planning and executing the Malegaon blast along with his accomplices.

18) Apart from the above, during the investigation by the NIA, it was revealed that the Army authorities had conducted a Court of Inquiry (CoI) against the appellant herein. During scrutiny of the proceedings of the CoI, a different story of assembling of IED in the House of Sudhakar Chaturvedi (A-11) came to light. During re-examination of the witnesses by the NIA who deposed before the Court of Inquiry (CoI), it was revealed that they suspiciously found API Bagde of ATS in the house of A-11 when A-11 was not present in the house. On considering the facts narrated by the witnesses, the question arises here as to why API Bagde visited the house of A-11 in his absence. It is also pertinent to mention her that the ATS conducted the search of the house of A-11 on 25.11.2008 wherefrom they had taken the swab of RDX which creates a doubt on the recovery of RDX keeping in view the examination of the witnesses. Even in the charge sheet filed by the ATS, it has been very specifically mentioned that the recovery itself becomes suspect

on the ground that the ATS Mumbai may have planted the RDX traces to implicate him and the other accused persons in the case.

19) Further, with regard to the contention of learned senior counsel as to the non-applicability of Section 43-D(5) of the UAP Act or want of valid sanction for the prosecution, it was rightly suggested by the learned ASG that it can be considered at the time of trial and not at this stage.

Conclusion:-

20) In our considered opinion, there are material contradictions in the charge sheets filed by the ATS Mumbai and the NIA which are required to be tested at the time of trial and this Court cannot pick or choose one version over the other. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational rights of the agency. It must result in minimum interference with the personal liberty of the accused and the right of the agency to investigate the case.

21) The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for *prima facie* concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider, among other circumstances, the following factors also before granting bail; they are:

(*a*) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(*b*) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(*c*) *Prima facie* satisfaction of the court in support of the charge.

22) Before concluding, we must note that though an accused has a right to make successive applications for grant of bail, the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications.

23) At the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused.

24) In view of the foregoing discussion, we are of the considered opinion that there are variations in the charge sheets filed by ATS Mumbai and NIA. Further, the appellant herein, who was at the relevant time was an Intelligence officer of the Indian Army has refuted the claim of conspiracy on the ground of Intelligence inputs which he informed to his superior officers as well and the alleged role of ATS officials in the planting of RDX at the residence of A-11 clearly indicate the fresh grounds which persuade the appellant herein to take a view different from the one taken in the earlier applications. As mentioned earlier, at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken. However, keeping in view the fact that NIA has submitted the supplementary charge-sheet which is at variance with the charge-sheet filed by the ATS and that the trial is likely to take a long time and the appellant has been in prison for about 8 years and 8 months, we are of the considered view that the appellant has made out a *prima facie* case for release on bail and we deem it appropriate to enlarge the appellant herein on bail, subject to the following conditions:

(*i*) On his furnishing personal security in the sum of Rs 1 (one) lakh with two solvent sureties, each of the like amount, to the satisfaction of the trial court.

(*ii*) The appellant herein shall appear in court as and when directed by the court.

(*iii*) The appellant herein shall make himself available for any further investigation/interrogation by NIA as and when required.

(*iv*) The appellant herein shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade that person from disclosing such facts to the court or to the investigating agency or to any police officer.

(*v*) The appellant herein shall not leave India without the previous permission of the trial court.

(*vi*) In case the appellant herein is in possession of a passport, the same shall be deposited with the trial court before being released on bail.

(*vii*) We reserve liberty to the respondents to make an appropriate application for modification/recalling the order passed by us, if for any reason, the appellant herein violates any of the conditions imposed by this Court.

25) It is further made clear that the grant of bail to the appellant herein shall be no consideration for grant of bail to other accused persons in the case and the prayer for bail by other accused persons (not before us) shall be considered on its own merits. We also make it clear that the Special Court shall decide the bail applications, if filed by the other accused persons, uninfluenced by any observation made by this Court. Further, any observations made by us in this order shall not come in the way of deciding the trial on merits.

26) In view of the above, we set aside the judgment passed by the High Court dated 25.04.2017 and grant bail to the appellant herein on the conditions mentioned above. Intervention Application is allowed. The appeal is allowed.

Appeal allowed.

2017 (II) ILR - CUT-520

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

W.P.(C) NO. 7120 OF 2017

AJAY KUMAR JAIN .....Petitioner

.Vrs.

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

TENDER – Additional Performance Security (APS) at pre-bid stage – Such condition imposed vide office Mémorandum Dt.04.05.2016 amending para 3.5.5. (v) of Note – 11 of OPWD code vol-1 – Action challenged – No prejudice would be caused to the Goverment Departments if APS is provided at the time of execution of contract infavour of the successful bidder – Due to the above condition, potential bidders, who are otherwise eligible may not participate in the tender process and if there will be lesser particepants it would be

detrimental to the public interest – Moreover OPWD code provides sufficient secutity measures to avoid fake and irrelevant bids – Held, imposition of APS at the pre-bid stage is arbitrary, unreasonable and detrimental to public interest, which warrants a judicial review by this Court – The impugned office Memorandum Dt 04.05.2016 is quashed.

(Paras23,24)

Case Laws Referred to :-

1. (2003) 5 SCC 437 : Union of India Vs. International Trading Co.
2. (2005) 1 SCC 679 : Association of Registration Plates Vs. Union of India and Ors.
3. 1994 SCC (6) 651 : Tata Cellular –v- Union of India.
4. (2015) 2 SCC 796 : Census Commissioner and others Vs. R.Krishnamurthy.

For Petitioner : M/s Prabodha Ch. Nayak & S.K.Rout
For Opp. Parties : Mr.R.K.Mohapatra, GA

Decided on 25.07.2017

JUDGMENT

VINEET SARAN, CJ

This is a batch of writ petitions filed by some contractors challenging the condition, whereby, in response to tender call notice, they are required to furnish Additional Performance Security (APS) at the stage of submission of their bids in the form of bank draft or other specified modes as a pre-condition to their participation in the tender process, if their bids are for amounts below the estimated cost as provided in the notice inviting tender.

2. W.P.(C) No.7120 of 2017 is being treated as the leading petition, in which counter and rejoinder affidavits have been exchanged. The counter affidavit filed in this writ petition has been adopted by the State Government in all other connected writ petitions, and copies of the same have been served on the respective learned counsel for the petitioners in other connected writ petitions. Rejoinder affidavit in the leading writ petition has been filed. Some other writ petitioners have also filed their rejoinder affidavits. As such, pleadings between the parties (to the extent as desired by the respective petitioners) have been exchanged and with the consent of learned counsel for the parties, these writ petitions are being disposed of at the admission stage.

3. The brief facts of the leading writ petition are that on 30.03.2017, a tender call notice (e-procurement notice) was issued by the Water Resources Department of Government of Odisha inviting tenders for canal and road

works. The tenders were invited for total 13 items. The cost of the tender paper for each item was Rs.10,500/-. The estimated cost of the work for each item, as well as the EMD/security amounting to 1% of the estimated cost, was also specified. Besides other conditions, condition no.6 required that a bidder was to provide Additional Performance Security at the time of submitting its bid. The relevant clause 6 is reproduced below:

> *"Additional performance security shall be obtained from the bidder, when the bid amount is less than the estimated cost put to tender. In such an event, the bidder who have quoted less bid price than the estimated cost put to tender shall have to furnish the exact amount of differential cost i.e. estimated cost put to tender minus the quoted amount as additional performance security in shape of Demand Draft/Term Deposit Receipt pledged in favour of the Executive Engineer, Lower Indra Canal Division, Khariar from work serial no.01 to 09 and office of the Executive Engineer, Lower Indra Dam Division, Damsite, Tikhali from work serial no.10 to 13 in the sealed envelope along with the price bid at the time of submission of bids. The bids of the technically qualified bidders will be opened for evaluation of the price bid in case of the bidders quoted less bid price/rate than the estimated cost put to tender and have not furnished the exact amount of differential cost (i.e. estimated cost put to tender minus the quoted amount) as Additional Performance Security in shape of Demand Draft/Term Deposit Receipt, their price bid will not be taken into consideration for evaluation even if they have qualified in the technical bid evaluation."*
>
> *(emphasis supplied)*

4. The petitioner in this writ petition, being the 'B' Class licensed contractor duly registered under the Registration Rules, 1967, claims to be qualified to participate in the tender for each of the 13 works, but is aggrieved by the pre-condition imposed by Clause 6 of the tender call notice requiring him to provide APS for each of the items at the time of submission of the bid, which was in terms of the Office Memorandum dated 04.05.2016 issued by the Works Department of the Government of Odisha. The petitioner has thus prayed for quashing of the tender call notice dated 30.03.2017, as well as the Office Memorandum dated 04.05.2016. Besides this, the petitioner has also prayed for quashing of an earlier Office Memorandum dated 08.11.2013. In the leading writ petition bearing W.P.(C) No.7120 of 2017 as well as in certain other writ petitions, the prayer for

quashing of the Office Memorandum dated 08.11.2013, imposing the condition of not accepting the bid below 15% of the estimated cost has also been challenged, besides certain other prayers.

5. Learned counsel for all the petitioners have jointly stated that in this batch of writ petitions, the question to be considered may be limited only with regard to the legality of the Office Memorandum dated 04.05.2016. They further made a prayer that in case the petitioners, who are still aggrieved with the Office Memorandum dated 08.11.2013 or wish to press any other prayer in their writ petitions, they may be permitted to file separate writ petitions in that regard, which shall be considered irrespective of their filing these writ petitions in which such questions/prayers have not been considered.

6. Such prayer of the learned counsel for the petitioners is accepted, and thus, in this writ petition, we are only considering the validity of the Office Memorandum dated 04.05.2016, and the condition imposed in the tender call notices in pursuance thereof.

7. We have heard Shri Prabodh Chandra Nayak, Shri Sukanta Kumar Dalai, Shri Asim Amitabh Dash, Shri Abhijit Pattnaik, Shri Jatindra Kumar Mohapatra and Shri S. Padhy, learned counsel for the petitioners, and Shri R.K. Mohapatra, learned Government Advocate appearing for the State opposite parties and have perused the records.

8. The contention of the learned counsel for the petitioners is that the aforesaid pre-condition of furnishing the APS at the time of submission of bids is not provided for in the Odisha Public Works Department (OPWD) Code and, as such, the condition so imposed is contrary to law, which is restrictive in nature, and would be violative of Article 19(1)(g) of the Constitution of India. It is contended that because of the said condition as imposed, there would be lesser participants/bidders, which would mean lesser competition, meaning thereby the competitive price bids would not be available, and would thus cause financial loss to the State Exchequer. Such a system would favour those who are big and financially strong contractors/bidders, to the detriment of the smaller bidders, which would be violative of Article 14 of the Constitution of India. The contention is that by imposing such a pre-bid condition of providing APS, financial harassment would be caused to the bidders, because if the contractor is to participate in all the works for which tenders are invited, he would have to first furnish APS for the difference of the estimated cost and the bid amount, where the

same is less than the estimated cost, which otherwise the bidder would be required to furnish only if his bid is accepted and he is a successful bidder.

9. As an example, Sri P.C.Nayak, learned counsel for the petitioner in the leading writ petition has submitted, that if the petitioner wants to bid for all the 13 works for which the tender call notice has been issued on 30.3.2017, the petitioner would have to furnish APS for the differential amount in each of the 13 works, whereas earlier he would have to furnish APS only for the works for which his bid was successful. As a result of this, only financially very sound or moneyed contractor would be benefitted, even though the petitioner may be able to perform the work contract for lesser price, if he is allowed to participate in all the 13 works and required to furnish the APS at the time of entering into the contract for such items where he is declared to be successful bidder. The submission is that the purpose of furnishing APS is to ensure that the successful bidder entering into a contract/agreement with the Department, gives additional security for the performance of the contract for the differential price between the estimated cost and the bid price, where it is lesser than the estimated cost. The interest of the Government Department is to be secured only where the contract is awarded and not prior to it. The apprehension of the State that the contractor, after submitting his bid at a price below the estimated cost may not thereafter enter into the agreement, is misconceived, as the Government Department issuing the tender call notice can always forfeit the EMD/Security Deposit furnished by the bidder, and also further initiate proceedings for blacklisting the contractor, and a further provision is there that the concerned Government Department shall inform all other Government Departments for blacklisting of such contractor, so that he may not be awarded contracts by other Government Departments. Besides this, it is submitted that the bidders have to also deposit the tender cost for each work separately, which is not refundable.

10. Learned counsel for the petitioners have also submitted that there is a distinction between the bid security and performance security. Performance security is to be furnished at the stage of performance of work, which is only after the contract is to be awarded in favour of the successful bidder and not earlier; whereas bid security is to be furnished at the stage of submitting the bid. Thus, the submission is that the bid security of 1% of the estimated cost is rightly required to be deposited at the stage of submission of bid, and the performance security by way of APS can be asked to be furnished only when the successful bidder is required to perform the contract. The contention,

thus, is that no prejudice would be caused to the Government Departments if APS is provided at the time of execution of contract in favour of the successful bidder, as the interest of the Government Departments would be fully safeguarded. The apprehension that the successful bidder delays the execution of the agreement by not furnishing the APS is ill-founded, as terms of the tender call notice can always require the successful bidder to furnish APS within a stipulated time after acceptance of his bid, failing which his bid would be cancelled and security deposit forfeited and the contractor be blacklisted, plus provision can also be made for recovering liquidated damages. It is thus contended that there is no reasonable nexus between the object of furnishing APS at the stage of submitting the bid, and there is also no reason given for imposing such pre-condition.

11. The other contention of the learned counsel for the petitioner is that such restriction as has been imposed by Office Memorandum dated 4.5.2016, cannot be considered to be classified as a law within the meaning of Article 13(3)(a) of the Constitution of India. It also restricts the scope of level playing field, which is being deprecated by judicial pronouncements. In the end, it was submitted that the restriction so imposed is not derived from any law or backed by any Government Rules, and thus cannot be imposed.

12. *Per Contra*, Sri R.K.Mohapatra, learned Government Advocate appearing for the opposite parties has submitted that furnishing of APS is not an alien concept, as the same was already there in terms of the Office Memorandum dated 8.11.2013, and the provision of furnishing APS at the time of submission of bid was introduced as the Government had experienced that contractors were quoting unreasonably lesser price than the estimated cost, on which they could not work and thus, either they do not come forward to enter into agreement or leave the work unfinished in between. It is contended that because of the same, the Government suffered huge financial loss, as well as delay in completion of projects and as such, the condition was imposed in public interest, so that the public does not suffer, and money as well as time is also not wasted. It is contended that cancellation of the bids, where APS is not furnished, delays the entire process and at times, fresh tender call notice has to be issued, which is against public interest, which is paramount. He has thus contended that the condition so imposed by the Office Memorandum dated 4.5.2016 is fully justified in law and cannot be said to be contrary to the provisions of the OPWD Code or the Constitution, as the same is neither discriminatory nor does it impose any unreasonable restriction. Learned Government Advocate has thus prayed that the writ petition deserves to be dismissed.

13. In support of their submissions, learned counsel for the parties have relied on certain decisions, which shall be considered while dealing with their arguments.

14. We have carefully considered the submissions advanced by the learned counsel for the parties and perused the records.

15. The brief background of the case is that contractors, who are licensed and registered under the relevant Rules, are eligible to participate in the tender process in response to tender call notice issued by various Departments of the Government of Odisha for carrying out the work contracts for the respective Government Departments.

16. In Office Memorandum dated 08.11.2013, it was provided that where the bid amount offered by a bidder was more than 10% less than the estimated cost, the successful bidder was required to provide APS by way of bank draft or other specified modes. By Office Memorandum dated 04.05.2016, the earlier Office Memorandum dated 08.11.2013 has been modified to the effect that the APS should be obtained from the bidder at the stage of submission of his bids, when the bid amount is less than the estimated cost put to tender. It is such pre-condition of furnishing APS at the stage of submission of the bid (and not by the successful bidder alone after his bid is accepted as provided earlier) which is under challenge in these present writ petitions.

17. For record, it may be noted at this stage that just prior to issuance of Office Memorandum dated 08.11.2013, another decision was taken on 26.10.2013 to the effect that the estimated cost be calculated after taking into account 7.5% as profit of the contractor and another 7.5% as overhead charges, and thus the State Government had come to the conclusion that the minimum viable cost at which a contractor could successfully perform the contract, should not be less than 15% of the estimated cost. Thus, a provision was incorporated in the Office Memorandum dated 08.11.2013 that those tenders in which the price quoted was below 15% of the estimated cost would not be considered.

18. For proper appraisal of the relevant clauses relating to the APS in the Office Memorandums dated 08.11.2013 and 04.05.2016 are reproduced below:

"OFFICE MEMORANDUM DATED 08.11.2013

(2) Amendment to Para-3.5.14 of Note-I of OPWD Code, Vol-

I by inclusion:

Note-I – If L-1 bidder does not turn up for agreement after finalization of the tender, then he shall be debarred from participation in bidding for three years and action will be taken to blacklist the contractor. In that case, the L-2 bidder, if fulfils, other required criteria would be called for drawing agreement for execution of work subject to the condition that L-2 bidder negotiates at par with the rate quoted by the L-1 bidder otherwise the tender will be cancelled. In case a contractor is blacklisted, it will be widely publicised and intimated to all departments of Government and also to Government of India agencies working in the state.

(3) ***Amendment to Appendix-IX, Clause 36 of OPWD Code, Vol-II by inclusion:***

Clause No.36 – If the rate quoted by the bidder is less than 15% of the tendered amount, then such a bid shall be rejected and the tender shall be finalized basing on merits of rest bids. But if more than one bid is quoted at 14.99% (Decimals upto two numbers will be taken for all practical purposes) less than the estimated cost. The tender accepting authority will finalize the tender through a transparent lottery system, where all bidders/their authorized representatives the concerned Executive Engineer and DAO will remain present.

4.(A) Amendment to Para-3.5.5 (V) of Note-II of OPWD Code, Vol-I by substitution:

Note-(II) – When the bid amount is up to 10% less than the estimated cost, no additional performance security is required to be deposited. When the bid amount is less than the estimated cost by more than 10% and within 15%, in such an event, the successful bidder will deposit the additional performance security to the extent of 1.5 times of the differential cost of the bid amount and 90% of the estimated cost."

OFFICE MEMORANDUM DATED 04.05.2016

(1)(A) Amendment to Para-3.5.5 (V) of Note- II of OPWD Code, Vol-I by modification:

Note-(II) – Additional Performance Security shall be obtained from the bidder when the bid amount is less than the estimated cost put to tender. In such an event, the bidders who have quoted less bid

price/rates than the estimated cost put to tender shall have to furnish the exact amount of differential cost i.e. estimated cost put to tender minus the quoted amount as Additional Performance Security in shape of Demand Draft/Term Deposit Receipt pledged in favour of the Divisional Officer in the sealed envelope along with the price bid at the time of submission of bids.

The bid of the technically qualified bidders will be opened for evaluation of the price bid. In case of the bidders quoting less bid price/rate than the estimated cost put to tender and have not furnished the exact amount of differential cost (i.e. estimated cost put to tender minus the quoted amount) as Additional Performance Security in shape of Demand Draft/Term Deposit Receipt, their price bid will not be taken into consideration for evaluation even if they have qualified in the technical bid evaluation."

(emphasis supplied)

19. It is clear from a plain reading of Office Memorandum dated 08.11.2013 quoted supra, that when the bid amount offered by a bidder is more than 10% less than the estimated cost, the successful bidder is required to provide APS by way of bank draft or by other specified mode as a security for performance of the contract. Subsequently, vide Office Memorandum dated 04.05.2016, the earlier memorandum dated 08.11.2013 was modified to the effect that APS should be obtained from the bidder at the stage of submission of the bid, when the bid amount is less than the estimated cost put to tender. Taking into consideration the rival contentions of the parties, it appears that in order to secure the performance of the contract awarded in favour of the successful bidder, the APS is being imposed, which is in addition to the other mode of security measure, in order to ensure timely performance of the contract. Sufficient measures are being taken under the provisions of the OPWD Code to ensure fair play in the evaluation process as well as performance of contract. A bidder is required to submit bid security @1% of the estimated cost at the time of submission of the bid. Thus, the bidder would lose EMD if he backs out during the evaluation process. There are also other penal provisions in the OPWD Code to prevent any foul play by the bidder. Thus, there is no justification requiring the bidders to deposit APS at the time of bid, which in the nature of a performance security.

20. By the very nomenclature of "Additional Performance Security", it is clear that the same is meant as security for performance of the contract, and

unless the contract is entered into, there cannot be any occasion of furnishing Additional Performance Security. The performance security can thus be required to be deposited only by the successful bidder. It cannot be imposed upon the bidders for each of the items at the time of submission of their respective bid.

21. The submission of Mr.Nayak is that Article 19 (1)(g) of the Constitution provides all citizens a right to practise any profession, or to carry on any occupation, trade or business. Sub-clause (6) of Article-19 provides for restrictions on the right conferred under Article 19 (1)(g), to the effect that nothing in Article 19(1) shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred under sub-clause (g). Thus, the right conferred under Article 19(1) (g) is always subject to the restriction made under any law for the time being in force. No enactment having been brought in the relevant law to put a condition of APS at the pre-bid stage, which, in other words, would prevent potential bidders from participating in the tender process, cannot sustain in the eyes of law by way of an enactment by the State Legislature.

22. Mr.R.K.Mohapatra, learned Government Advocate vehemently objected to the submissions of learned counsel for the petitioners, and submitted that APS at the pre-bid stage is being imposed for the public interest. Individual interest should also always pave way for the public interest. Thus, the requirement of submission of APS at the pre-bid stage cannot be faulted with. It is his submission that if the lowest bidder does not turn up and second lowest bidder does not match with the price of the lowest bidder, then the authority has to invite fresh tender by making wide publication. In that process, it not only causes huge loss to the public exchequer, but also possibility of not completing the project within the stipulated period cannot be ruled out, which is definitely against the public interest. The submission of Mr.Mohapatra, learned GA cannot hold good for the reason, that the question of backing out from contract or leaving the job in the midway would arise in course of performance of a contract. It does not arise at the pre-bid stage. Submission of Mr.Mohapatra is essentially with regard to performance of contract awarded in favour of the successful bidder, so it does not stand to reason as to why APS should be imposed at the pre-bid stage. There is no reasonable nexus between the condition of imposition of APS at pre-bid stage and the object to be achieved by such imposition.

OPWD Code provides sufficient security measures to avoid fake/irrelevant bids. In the guise of imposing further security measures to achieve the object, performance security cannot be imposed at the pre-bid stage.

In the case of ***Union of India Vs. International Trading Co.***, reported in (2003) 5 SCC 437, Hon'ble Supreme Court at paragraph-23 has held as under:

> *"23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interest of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country……."*
>
> *(emphasis supplied)*

In the case at hand, by the restriction imposed at the pre-bid stage, the right of the potential bidders, who are otherwise eligible to participate in the tender process, is being arbitrarily infringed. It certainly curtails the reasonable expectation of the intending eligible bidders to participate in the bidding process.

In the case of ***Association of Registration Plates Vs. Union of India and others***, reported in (2005) 1 SCC 679, Hon'ble Supreme Court at paragraph-43 held as under:

> *"43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work, Article 14 of the Constitution prohibits the government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and*

> *in public interest in awarding contract. At the same time, no person can claim fundamental right to carry on business with the government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on government in its dealings with tenderers and contractors.*
>
> *(emphasis supplied)*

No purpose can certainly be served in nipping the contractors, who are otherwise eligible, at the threshold. There cannot be any fair competition, as there would be lesser participants, which is certainly detrimental to the public interest.

State Governments, State Government Undertakings, Corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, Corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution, and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

The aforesaid principle has been laid down in various judicial pronouncements starting from much celebrated decision of the Apex Court in the case of ***Tata Cellular –v- Union of India,*** reported in 1994 SCC (6) 651. Mr. Mohapatra, learned GA relied upon the case of ***Census Commissioner and others Vs. R.Krishnamurthy,*** reported in (2015) 2 SCC 796, where the Supreme Court, at paragraph-33, held as under:

> *"33. From the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an*

enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the court is not expected to sit as an appellate authority on an opinion."

Similar is not the situation in the case at hand. As discussed earlier, the imposition of APS at the pre-bid stage is arbitrary, unreasonable as well as detrimental to public interest. Thus, the same warrants a judicial review by this Court.

23. Taking into consideration the case laws discussed above, it can be safely concluded that by requiring the bidders to submit APS for each item of the tender at the time of submission of the bid is violative of Article 19 (1)(g) of the Constitution, being arbitrary and irrational. It does not sub-serve any public interest; rather it restricts the level playing field in the matter of award of contract.

24. In that view of the matter, the writ petition is allowed to the extent that the condition imposed by Office Memorandum dated 04.05.2016 by amending Para-3.5.5(v) of Note-II of OPWD Code Vol.1 by modifying the same and providing that Additional Performance Security (APS) of the amount of difference between the estimated cost and the cost of bid (if lower than the estimated cost) is to be provided at the time of submission of the bid, is quashed.

The said condition of providing Additional Performance Security of the amount of difference can be imposed only for a successful bidder, which can be required to be provided within such stipulated time as may be provided for, or else the bid of the successful bidder would be cancelled and the security deposit would be forfeited, if permissible in law, and further proceeding for blacklisting would be initiated as per law.

We make it clear that we are not expressing any opinion with regard to Office Memorandum dated 08.11.2013 or with regard to other prayers made in the writ petition, as the prayer for quashing Office Memorandum dated 04.05.2016 alone has been considered. The same may be agitated by filing separate writ petition, if so advised. No order as to costs.

Writ petition allowed.

2017 (II) ILR - CUT-533

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

W.P.(C) NO. 13899 OF 2017
WITH BATCH

SILICON INSTITUTE OF TECHNOLOGY, BHUBANESWAR ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp. Parties

ODISHA PROFESSIONAL EDUCATIONAL INSTITUTIONS REGULATIONS (REGULATION OF ADMISSION AND FIXATION OF FEE) ACT, 2007 – S.9(3)(5)

Filling up of unfilled NRI seats – Procedure – As per the provisions of the Act, 2007 as well as the Approval Process Handbook 2017-2018 of the AICTE and the Admission Rules framed by the OJEE, 2017, the seats which fall vacant from amongst the NRI quota would be transferred to the general seats and allotment would be done strictly as per the general merit – Further clause 13.3.b of the Handbook makes it clear that general fee shall be applicable to these candidates who are admitted to the vacant NRI seats – However there is no provision that the Management of the Institutions have a say in the selection of the students to fillup the unfilled NRI quota seats – Held, vacant NRI seats of the respective Colleges have to be filled up from amongst the general candidates as per the provisions of section 9(3) and (5) of the Act, 2007 and para 13 of the Approval Process Handbook 2017-2018 issued by the AICTE. (Paras 8 to 11)

For Petitioner : M/s. Soubhagya S.Das, R.Sahoo,
K.C.Mohapatra & S.Dash
M/s. Aswini Patnaik & B.Baisakh
M/s. Devi Prasad Dash, B.K.Mishra
& K.C.Lenka
M/s. Bhagaban Mohanty, D.Chhotray,
S.Mohanty & B.Moharana

For Opp. Parties : Addl. Government Advocate
M/s.S.Palit, A.K.Mahana, A.Mishra & A.Parija
M/s. Aditya Ku. Mohapatra & S.J.Mohanty
Mr. S.S.Mohapatra

Decided on 19.07.2017

JUDGMENT

VINEET SARAN, CJ.

The prayers in these writ petitions are many, but learned counsel for the petitioners have limited their prayer only with regard to filling up of un-filled Non-Resident Indian (NRI) seats in their respective Colleges.

2. We have heard Sri Soubhagya Sundar Das, learned counsel for the petitioner in W.P.(C) No.13899 of 2017, Sri Aswini Patnaik, learned counsel for the petitioner in W.P.(C) No.13990 of 2017, Sri Devi Prasad Dash, learned counsel for the petitioner in W.P.(C) No.14016 of 2017, learned Additional Government Advocate for opposite party No.1, Mr.S.Palit, learned counsel for the Chairman, Orissa Joint Entrance Examination (OJEE) and Policy Planning Body (PPB), Sri Aditya N.Mohapatra, learned counsel for Biju Pattnaik University of Technology (BPUT) and Sri S.S.Mohapatra, learned counsel for All India Council for Technical Education (AICTE).

On consent of learned counsel for the parties, these writ petitions are being disposed of at admission stage.

3. Submission of learned counsel for the petitioners is that the respective Colleges would themselves be entitled to fill up the unfilled NRI quota seats from amongst the candidates enlisted by the OJEE and strictly on the basis of merit. It is contended that since such right would be available to them for filling up of NRI seats from amongst the NRI quota candidates, hence petitioners' institutions have right to choose the candidates from the enlisted candidates, as the same principle would apply for filling up the vacant unfilled seats of NRI quota candidates.

4. Sri Palit, learned counsel for OJEE has submitted that admissions are to be granted in terms of the AICTE Act 1987 (for short, 'the Act 1987') and the Regulations framed thereunder in 2016, as well as the Approved Process Handbook 2017-2018 (for short, 'Handbook') published under the aforesaid Regulations. It is not disputed that the Regulations of AICTE, framed under the Act 1987, have statutory force. Mr. Palit, learned counsel has submitted that once the NRI seats remain unfilled, the seats are to be given to the general candidates as per the general merit list. Such position has not been denied by learned counsel for the parties. It is the submission of Mr. Palit that the petitioners-institutions have made endeavour to cherry pick the students from the merit list, which is dehors the law and should not be encouraged. It has been submitted that Clause-13 of the Handbook deals with 'Admission for Sons and Daughters of Non Resident Indian(s)'. Mr.Palit relied on this provision in support of his submission.

5. Sri A.K.Mohapatra, learned counsel for BPUT and Mr.S.S.Mohapatra, learned counsel for the AICTE have adopted the submissions made by Mr.Palit.

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

6. The procedure for admission for Sons and Daughters of Non Resident Indian parents has been very clearly laid down in Clause-13 of the Handbook, which is reproduced below:

> *"13. Admission for Sons and Daughters of Non Resident Indian(s)*
>
> *13.1 Requirements and Eligibility*
>
> *a. For seeking grant of approval for admitting Sons and Daughters of Non Resident Indian(s), Institutions shall apply on the Portal.*
>
> *b.Five percent (5%) of seats within "Approved Intake" shall be allowed for admission under NRI category.*
>
> *c.The Institution shall have "Zero Deficiency" as per the Report generated.*
>
> *13.2 Applicants shall submit relevant documents as per Appendix 17 to Regional office (RO) along with the application.*
>
> *13.3 Procedure*
>
> *a. Grant of Approval for admission under NRI is based on self-disclosure of required facilities and infrastructure availability as submitted online on AICTE Web-Portal.*
>
> ***b. In the event of non-availability of students in NRI category, the seats shall be given to general candidates as per general merit. However, general fee shall be applicable to these candidates thus admitted against vacant NRI seats.***
>
> *13.4 Fee and Admission*
> *a. Competent Authority for admission shall be the same as for regular admission and shall fetch list of Technical Institutions who have sought approval from the Council.*
>
> *b. The Competent Authority for admission shall display availability of NRI seats, branch wise, in various Institutions, for information of candidates during all stages of admission so that the students can freely exercise their informed choice. The Institutions shall publish in*

their brochure and web site the number of NRI seats available in Course/division.

c. Competent Authority for admission shall prepare merit list of applicants by inviting applications from eligible NRI students and effect admission strictly on merit basis.

xx xx xx"

7. Along with the writ petitions, the petitioners have filed Admission Rules of OJEE-2017 Odisha. Clause 2 of the aforesaid Rules deals with the '*Seat Allotment Procedure'*. Learned counsel for the petitioners have relied on the relevant portion of Clause-2 of the said Admission Rules dealing with NRI quota which is reproduced below:

- *"5% seats are reserved for NRI and another 15% is reserved for JEE (MAIN)-2017.*
- *If candidates are less than 5% in NRI, the balance seat will be transferred to the general seat and allotment will be done as per general merit."*

Section-9 under the Orissa Professional Educational Institutions Regulations (Regulation of Admission and Fixation of Fee) Act 2007 (for short, 'Act 2007') which is relevant, is reproduced below:

"9.Reservation of seats – (a) In every professional educational institution admissions shall be in accordance with the reservation policy of the Government notified for the purpose of this Act;

Provided that nothing in this Sub-section shall be applicable to the minority institutions.

(2) In a private professional educational institution other than minority institution not exceeding fifteen per centum of the approved intake may be filled up by NRI from the merit list prepared on the basis of JEE.

(3) Where any shortfall in filling of seats from NRI occurs, such vacant seats may be filled up from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, conducted by Central Board of Secondary Education:

Provided that while filling up such vacant seats NRI shall be preferred.

(4) In a private professional educational institution fifteen per centum of the approved intake may be filled up strictly from the merit lsit of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, conducted by Central Board of Secondary Education.

(5) where the seats remain unfilled due to non-availability of candidates in the list specified in Sub-sections (3) and (4) or where student out of such lists leaves after selection to such seats, the same shall be filled up by the candidates belonging to the general category from the merit list of the JEE.

6(a) Where seats for reserved category are left unfilled due to non-availability of candidates from a particular category in the list of JEE, such seats shall be filled up by candidates of same category from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, failing which such vacant seats shall be filled up by candidates not belonging to any reserved category in accordance with the merit list of JEE.

(b) If still seats remain vacant, a second JEE may be conducted.

7(a) In a Minority institution, not less than fifty per centum of the approved in take shall be filled up by minority students from within the State belonging to the minority community to which the institution belongs on the basis of inter se merit in the merit list of the JEE.

(b) The remaining seats shall be for the general category out of which up to fifteen per centum may be filled up by NRI."

8. A conjoint reading of the aforesaid provisions of the Act 2007 as well as the Approval Process Handbook 2017-2018 of the AICTE and the Admission Rules framed by the OJEE 2017 for admission, would make it clear that the seats which fall vacant from amongst the NRI quota, would be transferred to the general seats and allotment would be done strictly as per the general merit. Clause 13.3.b of the Handbook further makes it clear that general fee shall be applicable to these candidates who are admitted to these vacant NRI seats.

9. The procedure for Admission reveals that OJEE, after counseling, recommends the students for admission in particular colleges on the basis of their merit and choice, i.e., the procedure which is to be followed in all cases

for admission of general candidates. The cases at hand are clear cases where, after the NRI seats fall vacant, the same are to be treated as general seats to be filled up from amongst the general candidates. Thus, the procedure to fill up the general candidates seats has to be followed while filling up of such seats. On being questioned repeatedly, none of the counsel appearing for the petitioners could point out any provision of the Act, 1987 and Regulations framed thereunder or the Handbook or the Act 2007, whereby they would be entitled to have their say in the matter of picking up students of their choice from amongst the merit list of OJEE.

10. Section-9 of Act 2007 also clearly provides for filling up of the unfilled NRI quota seats by candidates belonging to general category from the merit list of the JEE, which in the present case is OJEE, as OJEE has adopted the merit list of JEE Main. Although much has been argued that in the previous years, the benefit of the institutions having a say in the filling up of the vacant NRI seats was granted by this Court, but none of the learned counsel appearing for the petitioners has placed before us a single decision wherein ratio has been laid down to this effect, after giving reasons as to how and under which provision the Management of such institutions would have a say in the selection of the students to fill up the unfilled NRI quota seats. As such, since no such decision has been cited before us and only mention has been made that there are certain judgments, which have not been cited, we are unable to appreciate such proposition of law as canvassed by learned counsel for the petitioners.

11. In view of the aforesaid, we are of the clear opinion that the vacant NRI seats of the respective Colleges have to be filled up from amongst the general candidates as per the provisions of Section 9(3) and (5) of Act 2007 and para-13 of the Approval Process Handbook 2017-2018, issued by the AICTE. The process may be completed by the OJEE at the earliest.

12. With the aforesaid observation, the writ petitions stand disposed of. Free copy of this judgment be supplied to Sri Palit for necessary compliance.

Writ petitions disposed of.

2017 (II) ILR - CUT-539

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

W.P.(C) NO. 15903 OF 2017

PRIYANKA SENAPATY .....Petitioner

.Vrs.

VICE-CHANCELLOR, OUAT, BHUBANESWAR & ORS. .....Opp. Parties

EDUCATION – Petitioner is a student of 4 years degree course (B.Sc. Forestry) 2015 in OUAT – She was debarred to appear in the 2nd semester examination due to shortage of attendance – Hence the writ petition – Petitioner had only attended 12 classes out of 22 scheduled and unscheduled classes – Petitioner being a sports person had to attend practice session and events representing the college for which she could not secure adequate attendance during the 2nd semester period – Moreover due to absence of the concerned teacher scheduled classes could not be held and some scheduled classes were held informing the students by WhatsApp and all such were not intimated to the petitioner – Held, in view of the peculiar facts and circumstances of the case which involves the career of the petitioner, this court directs the OUAT authorities to conduct special 2nd semester examination for the petitioner and also to take consequential steps in the matter – However this may not be treated as precedence as this order passed considering the peculiar circumstances of the case.

(Paras 9)

For Petitioners : M/s. Shashi Bhusan Jena, S.Behera, A.Mishra & S.Soren.

For Opp. Parties : M/s. Pabitra Mohan Pattajoshi, S.N.Rath & N.C.Das.

Decided on 15.07.2017

JUDGMENT

K.R. MOHAPATRA, J.

The petitioner, a student of four years degree Course (B.Sc. Forestry), 2015 in the Orissa University of Agriculture and Technology, Bhubaneswar (for short, 'OUAT'), has approached this Court for a direction to allow her to sit in the 2nd semester examination through a special examination condoning her shortage of attendance during the 2nd semester period.

2. Petitioner, being duly selected, took admission in B.Sc. (Forestry) in the constituent College of Forestry under OUAT in August 2015, her

admission number being 44Fo/15, OUAT. She had cleared her 1st semester examination and mid-semester examination conducted by the OUAT in November, 2015 and March, 2016 respectively.

3. As per Clause-21 of the Semester Regulation for Under Graduate (UG) courses, a student is required to secure at least 70% attendance to appear in the semester examination. Due to shortage of her attendance during the 2nd semester period, i.e., from 21.01.2016 to 30.06.2016, she was not allowed to appear in the 2nd semester examination for which she has approached this Court for the aforesaid relief.

4. Mr. Abhijit Mishra, learned counsel for the petitioner, submitted that the petitioner being a sports person, had to attend practice sessions and events representing the College for which she could not secure adequate attendance during the 2nd semester period. Further, scheduled classes were not held due to absence of teaching faculty. However, some un-scheduled classes were held intimating the students by WhatsApp, some of which could not be communicated to the petitioner. Out of 32 (thirty-two) scheduled classes, the concerned teacher had taken only 12 (7 theory +5 practical) classes and had taken 10 (ten) numbers of un-scheduled classes (5 theory + 5 practical). Thus, out of thirty-two scheduled classes, only twenty-two classes could be held, out of which the petitioner had attended only twelve classes. Several other students also suffered shortage of attendance during the 2nd semester period for which the Academic Council in its meeting dated 21.09.2016 passed the following resolution (resolution no.7172):

> "3. **Considered regarding the shortage of attendance of 1st year B.Sc. (Forestry), 2015 Batch students.**
>
> *Proceeding of the enquiry committee regarding the shortage of attendance of 1st year B.Sc. (Forestry) students was discussed in detail. The concerned teacher did not take the required number of classes and took classes outside the approved time table without approval of authority, and made the new timings circulated through Whatsapp. The House resolved that the classes should be taken in scheduled time. The teachers should not be allowed to take classes as per their own will. The classes can be taken on holidays for achieving the NIDs. Adjustment classes will be taken in lieu of 2nd Saturday. Classes can never be suspended on the occasion of functions. Action as deem fit may be taken against erroneous teachers."*

> Accordingly, a formula was worked out in which the petitioner secured only 63.63% of attendance. Thus, there was shortage of around 6% of attendance, for which she was not permitted to sit in the 2nd semester examination. The petitioner had also represented the Dean, Students' Welfare, OUAT to condone the shortage of attendance, but to no effect. It is further contended by learned counsel for the petitioner that the petitioner being a sports person ought to be given some extra weightage and her shortage of attendance may be condoned. During pendency of the writ petition, 2nd semester examination for B.Sc. (Forestry), 2015 course was conducted. Hence, learned counsel prays for a direction to conduct a special 2nd semester examination for the petitioner and to grant her consequential benefits.

5. Mr. Pabitra Mohan Pattjoshi, learned counsel appearing for the OUAT, relying upon the counter affidavit and additional affidavits, filed during course of hearing, submitted that as the concerned teacher was engaged in seminars and had gone on study tour representing the College, she could not conduct the regular classes, for which un-scheduled classes, taking consent of the students, were conducted to complete the course. The petitioner was duly intimated about the un-scheduled classes, but she along with some others did not attend, both scheduled as well as un-scheduled classes for which they suffered shortage of attendance. Although Physical Education Officer (PEO) had recommended the case of the petitioner for condonation of shortage of her attendance, the same was not taken into consideration as he was not the competent authority to make such recommendation. The teaching faculties are also warned to take regular classes as per the schedule and not to take un-scheduled classes in future. In order to make good the shortage of attendance of the students, a liberal view was taken by the Academic Council and a formula was worked out in which the petitioner had secured only 63.63% which falls short by 6.37%, to appear in the 2nd semester examination. Hence, learned counsel for the OUAT contended that the writ petition merits no consideration and, the same is liable to be dismissed.

6. In course of hearing, it came to the notice of this Court that out of thirty-two scheduled classes for the 2nd semester, only 12 (twelve) could be taken by the concerned teacher, besides 10 (ten) un-scheduled classes were also taken. Thus, aggregating the scheduled and unscheduled classes taken, it came to 22 (twenty-two) classes out of 32 (thirty-two) scheduled classes to be taken for completion of course.

7. As learned counsel for the OUAT could not explain the position, this Court taking a serious note of the matter, vide its order dated 11.05.2017, directed the Registrar, OUAT to be present in person with relevant records on 22.06.2017 to explain the matter. In compliance of the said direction, the Registrar, OUAT and Dean, Students' Welfare, OUAT as well as Dean, College of Forestry, OUAT were present in person on 22.06.2017. On that date, they were directed to file an affidavit explaining as to why there was shortfall in taking scheduled classes. Accordingly, an additional affidavit was also filed by the Dean, College of Forestry-opposite party no.3 on 27.06.2017 explaining as to under what circumstances, only 12 (twelve) scheduled classes could be taken out of 32 (thirty-two) and 10 (ten) un-scheduled classes were taken to make good the loss.

8. We have heard learned counsel for the parties at length; perused the record and on consent of learned counsel for the parties, took up the matter for final disposal at admission stage.

9. The facts narrated are not disputed. Admittedly, the petitioner had only attended 12 (twelve) classes out of 22 (twenty-two) scheduled and un-scheduled classes. Thus, applying the formula, she was given a grace of two classes and accordingly, she could only secure 63.63% of attendance out of 70%, which falls short of approximately 2 classes. As there was a shortage of her attendance, she was not allowed to appear in the 2nd semester examination. Learned counsel for the petitioner, though challenged the formula adopted by the OUAT to calculate the attendance of the students to be defective, but could not place any material in support of the same. Be that as it may, the fact that the petitioner is a sports person and that she has represented the College, is not disputed by the OUAT. Further, considering the grievance of the petitioner, the PEO had also recommended her case for condonation of shortage in attendance during the 2nd semester period. The said fact is also not disputed by the OUAT. OUAT has only challenged the authority of PEO to make such recommendation. The fact that only twelve scheduled classes out of thirty-two could be taken by the concerned teacher cannot also be denied. The conduct of the concerned teacher in not taking scheduled classes and instead conducting un-scheduled classes after intimating the students through WhatsApp has been deprecated by the Academic Council. The teachers have also been warned to take classes, as per the time table. The petitioner had also attended most of the un-scheduled classes. Although several allegations and counter allegations have been made by learned counsel for the parties and submissions are being made to justify

their respective actions/steps taken, this Court, keeping in view the career of the petitioner as well as considering the fact that the petitioner is interested in completing her course and that she being a sports person could not attend few classes, for her sports activities, is of the view that a liberal view should be taken in the peculiar facts of this case.

Accordingly, this Court without entering into the intricacies and correctness of allegations and counter-allegations made by learned counsel for the parties and taking a lenient view, directs the OUAT authorities to conduct special 2nd semester examination for the petitioner, Miss Priyanka Senapaty (Admission No.44Fo/15, OUAT) and also take consequential steps in the matter.

This may not be treated as precedence, as this order is being passed taking into consideration the peculiar facts and circumstances of this case.

10. With the aforesaid observation and direction, the writ petition is allowed.

Writ petition allowed.

2017 (II) ILR - CUT-543

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

W.P.(C) NO. 22044 OF 2016

M/S. SRIRAM INTELLIGENCE SECURITIES PVT. LTD., BHUBANESWAR .....Petitioner

.Vrs.

COLLECTOR-CUM-CHAIRMAN, RMSA NUAPADA & ANR. .....Opp. Parties

TENDER – Sealed tender invited by O.P.No.2 vide tender call notice Dt. 24.02.2016 – Petitioner qualified in the bid and became L-1 – Tender call notice was cancelled, vide tender cancellation notice Dt. 28.10.2016 – Action challenged – No specific denial that the petitioner was the successful bidder – No reason has been assigned while cancelling the tender call notice – Petitioner has suffered due to the arbitrary action of the opposite parties – Held, impugned tender cancellation notice is quashed – Since the period for which the tender was invited had already been over since March, 2017, this Court is not

in a position to direct the Opp. Parties to award the tender in favour of the petitioner – However, since the petitioner suffered due to illegal action of the Opp. Parties, the Opp. Parties are directed to pay a sum of Rs. 50,000/- to the petitioner as compensation towards the loss he has suffered. (Para 7)

Case Laws Referred to :-

1. AIR 1978 SC 851 : Mohinder Singh Gill & Anr. -V- Chief Election
2. 2016 (II) OLR 237 : M/s. Shree Ganesh Construction -V- State Orissa & Ors.
3. AIR 2016 SC 5566: State of Jharkhand & Ors. -V- M/s. CWE-Soma Consortium.

For Petitioner : M/s. Dhananjay Mund, R.K.Acharya, S.N.Padhee & P.K.Behera

For Opp.Parties : Addl. Standing Counsel (S. & M.E.)

Date of Hearing : 26.04.2017
Date of judgment : 26.04.2017

JUDGMENT

K.R. MOHAPATRA, J.

This writ petition has been filed assailing the Tender Cancellation Notice dated 28.10.2016 (Annexure-3) and also for a direction to opposite parties to award the tender in favour of the petitioner pursuant to tender call notice dated 24.02.2016 (Annexure-1) for selection of Manpower Services Providers for engagement of 15 numbers of Class-IV post in Odisha Adarsha Vidyalaya (Model Schools) under Nuapada district.

2. The case of the petitioner is that the District Project Coordinator-cum-District Education Officer, Nuapada-opposite party No.2 had invited sealed tender vide tender call notice dated 24.02.2016 for selection of Manpower Services Provider for engagement of 15 numbers of Class–IV posts in Odisha Adarsha Vidyalaya (Model Schools) under Nuapada district for the year 2016-17. Pursuant to the said tender call notice dated 24.02.2016 (Annexure-1), petitioner had submitted its tender papers within the stipulated period, last date being dated 11.03.2016. The technical bid was opened on 11.03.2016. Petitioner along with ten others were found eligible in the technical bid. Out of them, nine bidders were qualified for the financial bid, including the present petitioner. Subsequently, on 22.03.2016 the financial bid was opened. On scrutiny, it was ascertained that the petitioner was the L-

1 and M/s Sumeet Security Services was L-2. Other bidders were not qualified as they had quoted less than 2% of the gross amount quoted by them as service charges. It is worth-mentioning here that as per Clause-4 of the financial bid, the service charges quoted should not be less than 2% of the gross amount. The petitioner-agency had quoted the gross amount of Rs.6248.99/- paisa per person, which included Rs.124.98 paisa as service charges, which was Rs.0.01 paisa more than the 2% gross amount quoted by the petitioner. Similarly, M/s. Sumeet Security Agency had quoted a gross amount of Rs.6245.00 paisa per person and Rs.125/- as service charges, which was also more than 2% towards service charges. As such, the petitioner was hopeful of being awarded with the contract. But to his utter surprise, the tender call notice was cancelled vide tender cancellation notice dated 28.10.2016 (Annexure-3) without assailing any reason thereto. Hence, the petitioner being deeply aggrieved by such tender cancellation notice, has filed the writ petition seeking aforesaid relief.

3. Counter affidavit has been filed by the opposite party No.2 contending that at Clause-4 of the application for financial bid, it was categorically mentioned that, as District Office is to deduct TDS (IT) @ 2% of the gross billed amount, the service charges quoted should not be less than 2% of the gross amount. Bid of the bidder quoting less than 2% of the gross amount as service charges will be rejected. The tender committee meeting was held on 19.03.2016 in the official chambers of Additional District Magistrate. Out of eleven numbers of bidders participated in the process, nine were qualified for financial bid and after opening of the financial bid, it was found that six numbers of bidders had quoted the service charges of Rs.124.97 paisa. One M/s. Quantum Global Infratech Ltd. quoted lowest service charges of Rs.105/-. The petitioner-agency had quoted the service charges at Rs.124.98 paisa and M/s.Sumeet Security Service had quoted Rs.125/-. Since the service charges quoted by the petitioner along with seven others being less than 2% of the gross amount, they were not found eligible in the financial bid. However, the service charges quoted by M/s. Sumeet Security Service was exactly 2% of the gross amount. Thus, it was unanimously decided to put up the matter before the Collector, Nuapada for final decision. It is further contended in the counter affidavit that the Odisha Adarsha Vidyalaya Sangathana, vide letter dated 07.02.2016 (Annexure-E/2), communicated to the Collector and District Magistrate, Kandhamal, copy of which was communicated to different Collectors and District Education Officers including the Collector, Nuapada as well as DEO, Nuapada,

indicating the breakup of consolidated remuneration of Rs.6,250/- of Class-IV staff (Science Attendant, Office Peon and Night Watcher-cum-Sweeper) to be outsourced for Odisha Adarsha Vidylya (Model Schools). It was indicated therein that the base remuneration is Rs.4,515/-, employer's contribution to EPF is Rs.603/-, employer's contribution to ESI is Rs.215/- services charges @ 2% of 'gross remuneration' is Rs.125/-, Service Tax (@ 14.5%) of column (1+2+3+4) is Rs.792/-, which comes to 'gross remuneration' per manpower per month to be Rs.6,250/-. Taking into consideration letter under Annexure-E/2, the Collector, Nuapada opined that some of the bidders had quoted less than 2% of services charges keeping the remuneration intact, which was incongruous. Further, the condition of service charges notified by the DEO, Nuapada (opposite party No.2) in the tender call notice was in contradiction of the Government guidelines for which he recommended for cancellation of tender call notice. Accordingly, Annexure-3 was issued. As such, there is no illegality in issuing Annexure-3. Further, it was specifically mentioned in the tender call notice that the Collector and Chairman, RMSA reserves the right to annul any of the bids without assigning any reason thereof. Thus, no fault can be attributed to the opposite parties for issuance of Annexure-3. Hence, the writ petition is liable to be dismissed.

4. Heard Mr. Dhananjaya Mund, learned counsel for the petitioner and Mr.S.K. Samal, learned Standing Counsel for the School and Mass Education Department.

5. Mr. Mund, learned counsel for the petitioner, referring to paragraph-6 of the writ petition, submitted that as per Claus–4 of the financial bid application, he had quoted the gross amount as Rs.6,248.99 paisa per person, which included Rs.124.98 paisa as service charges. As such, the service charges quoted by him was Rs.0.01 paisa more than 2% of the gross amount he had quoted. The tender call notice never indicated that the service charges should be more than 2% of the 'gross remuneration'. The opposite parties, in order to justify their action, have resorted to Annexure E/2, which is not permitted in law in view of the ratio decided in ***Mohinder Singh Gill & Anr. Vs. The Chief Election***, reported in AIR1978 SC 851. The law is well-settled that the order canceling tender should be reasoned one. Due to the arbitrary action of the opposite parties, the petitioner had suffered a lot. In that view of the matter, he prayed for setting aside the tender cancellation notice issued under Anneuxre-3 and prayed for awarding the contract in his favour.

Mr.Mund also placed reliance on a decision of this Court in the case of ***M/s Shree Ganesh Construction Vs. State Orissa and others***, reported in 2016 (II) OLR 237.

6. Mr. Samal, learned Standing Counsel for the School and Mass Education Department reiterated the plea taken in the courter affidavit and prayed for dismissal of the writ petition. He relied upon the case of ***State of Jharkhand and others Vs. M/s. CWE-Soma Consortium***, reported in AIR 2016 SC 5566 and submitted that in case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. He further submitted that so long as the bid is not accepted the lowest bidder acquires no vested right to have an auction concluded in his favour. Hence, he prayed for dismissal of the writ petition.

7. Having heard learned counsel for the parties and on perusal of the record, it appears that the tender call notice under Annexure-1 does not whisper a single word about quoting service charges more than 2% of the 'gross remuneration'. Clause-4 of the financial bid application clearly stipulates that the service charges quoted should not be less than 2% of the 'gross amount'. The opposite parties have tried their level best to justify their action resorting to the letter dated 17.02.2016 (Annexure-E/2) issued by the State Project Director to the Collector and District Magistrate, Kandhamal, copy of which was communicated was also communicated to the Collector and District Magistrate, Nuapada as well as DEO, Nuapada. In the said letter, it is indicated that the service charges should be calculated @ 2% of the 'gross remuneration', which was not there in the tender call notice. There is no quarrel to the ratio decided in the case of *M/s. CWE-Soma Consortium (supra)* relied upon by Mr.Samal. But, the same has no application to the present case in view of the fact that the impugned tender cancellation notice under Annexure-3 has been issued without assigning any reason thereto. Mr.Samal referring to the counter affidavit has made an endeavour to justify the action of the authorities in cancelling the tender call notice which is not permissible in law. In the case of *Mohinder Singh Gill (supra)*, Hon'ble Apex Court at para-8 held as follows:

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons 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. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16

"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 effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Similar view is taken by this Court in *M/s Shree Ganesh Construction (supra).* As such, the opposite parties cannot justify their action in cancelling the tender call notice by supplementing reasons, which was not available in the impugned notice under Annexure-3 itself. As such, the cancelation of tender resorting to a reason, which was not there in the tender call notice, cannot be held to be justified being *de hors* the law.

The petitioner at paragraph-6 of the writ petition, has specifically stated that he had quoted gross amount Rs.6,248.99 paisa per person which included Rs. 124.98 paisa as service charges quoted by him. The service charges quoted by him is more than 2% of the gross amount of Rs.6248.99 paisa. There is no specific denial to the same in the counter affidavit. There being no specific denial to the averment that the petitioner was L-1 bidder, in all probability, the petitioner would have been the successful bidder. Thus, due to the arbitrary action of the opposite parties, the petitioner being the L-1 bidder had to suffer.

8. In that view of the matter, tender cancellation notice dated 28.10.2016 (Annexure-3) is not sustainable in the eyes of law and is quashed. Since the period for which the tender was invited has already been over since March, 2017, we are not in a position to direct the opposite parties to award the tender in favour of the petitioner. However, due to the illegal and arbitrary action of the opposite parties, the petitioner is made to suffer and should be duly compensated for the same. Accordingly, we direct that a sum of Rs.50,000/- (rupees fifty thousand) shall be paid by the opposite parties to the petitioner towards loss he has suffered, which according to us is just and adequate in the facts and circumstances of the case.

9. The writ petition is accordingly allowed.

Writ petition allowed.

2017 (II) ILR - CUT- 549

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

W.P.(C) NO. 8516 OF 2015

STATE OF ODISHA & ANR. .....Petitioners

.Vrs.

SUDIPTA KU. MOHANTY & ORS. .....Opp. Parties

SERVICE LAW – Recruitment by Government – Post which is lying vacant is to be filled up on the basis of the prevalent rule at the time of vacancies of the said post – In case of amendment of the said rule, post which fell vacant prior to amendment of rules would be governed by the original rules and not by the amended rules.

In this case, advertisement published on 06.10.2012 to fill-up 800 posts of Jr. Assistants/Assistant Section Officers – Earlier the above post was governed by Odisha Ministerial Service (Method of Recruitment and Conditions of Service of Jr. Assistants in the Offices of the Departments of Secretariat) Rules, 1951 which was superseded by new rule in the year 2010 wherein the upper age limit has been prescribed from 18 years to 32 years – As per the 1951 Rules, the authority has to ascertain the vacancies once in every year in order to fill-up the vacancies – Since there was no recruitment from the year 1998 till 2012, petitioners who were eligible during those period became overaged and prayed before the Tribunal to allow them to participate in the recruitment relaxing the upper age limit – Tribunal allowed their prayer – Hence the writ petition – The petitioners who were eligible under the 1951 Rules, which was amended in the year 2010, will be governed under the 1951 Rules as the Government has failed to advertise the vacancies year wise – In view of Rule 2 of the Odisha Civil Service (Fixation of Upper Age Limit) Rules, 1989, if for any reason applications have not been invited by the authority to conduct examination during any particular year to fill-up the vacancies of the year, applicants who would have been eligible if applications were invited during that year, shall be eligible to complete at the examination in subsequent year, meaning there by the Government is supposed to advertise the vacancies year-wise subject to availability of vacancies and if it would not be advertised, the candidates who intend to participate in the selection process would not be deprived of due to latches on the part of the authorities – Held, there is no infirmity in the impugned order passed by the Tribunal, calling for interference by this Court.. (Paras 7, 8, 9)

Case Laws Referred to :-

1. (1983) 3 SCC 284 : Y.V. Rangaiah Vrs. J. Sreenivasa Rao.
2. (1997) 10 SCC 419 : State of Rajasthan Vrs. R. Dayal and Others.
3. AIR 2007 SC 2840 : P. Mohanan Pillai Vrs. State of Kerala and Others.
4. 2013 (II) OLR 760 : State of Odisha and Others Vrs. Manoj Kumar Panda and Others.

For Petitioners : Mr. M.S. Sahoo, Addl. Govt. Adv.

For Opp. Parties : M/s. S.Das, S.Jena, K.Mohanty, S.D.Routray & S.K.Samal,
M/s. Dr. J.K.Lenka & P.K.Behera,
M/s. Arjun Ch. Behera,
B.K.Barik, S.K.Parida, R.K.Dash & K.K.Mohant,
Mr. Pradipta Ku. Mohanty (Sr. Adv.),
M/s.D.N.Mohapatra,
Smt.J.Mohanty, P.K.Nayak, S.N.Dash & A.Das,
M/s. Pramod Ku. Mishra, N.Behera & A.B.Mallick,
M/s. N.R.Rout, J.P.Behera & Pami Rath,
Mr. Shiba Sankar Pradhan,
M/s. Alok Ku. Mohapatra, Mrs. B.Panda, J.Mohanty, S.Mohanty, S.P.Mangaraj, T.Dash, S.Samal, S.K.Barik & S.Nath,
M/s. Biswabihari Mohanty, M.R.Harichandan, B.Tripathy & B.Samantaray.

Date of hearing : 19.07.2017
Date of judgment: 19.07.2017

JUDGMENT

S. N. PRASAD, J.

This writ petition is by the State of Odisha, through its Principal Secretary to Government, Home Department under Articles 226 and 227 of the Constitution of India wherein the order dtd.19.12.2014 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.4048(C) of 2012 and batch cases are under challenge whereby and where under the Tribunal, while disposing of the original applications, held that the candidates who were eligible for year 1998 to 2010 in respect of vacancies of Jr. Assistants / Assistant Section Officers, which were caused in these years are eligible to take the examination pursuance to advertisement dtd.06.10.2010,

participate in the selection process and their results, if kept in sealed cover, be declared along with result of the others.

2. The brief fact of the case of the applicants is that their applications may be accepted by relaxing the upper age limit for recruitment to the post which was not held from 1998-2012 and also prayed for a declaration that the Rule 8 of Orissa Secretariat Service (Method of Recruitment and Conditions of Service of Assistant Section Officers) Rules, 2010 (herein after referred to as the Rules, 2010) be declared as ultra-virus to Article 14 and 16 of the Constitution of India and in consequence thereof to quash the said rule and clause 4 of the advertisement under Annexure-2 and 3.

It has also been prayed for a direction to the respondents to accept the candidature of the applicants for the post of Assistant Section Officers in terms of the advertisement dtd.06.10.2012 by considering the age of the applicants with effect from the date of resolution dtd.30.09.2008 or by relaxing the age of the petitioners in terms of pre-amended Sub-Rule (2) of the Orissa Civil Service (Fixation of Upper Age Limit) Rules, 1989, (herein after referred to as the Rules, 1989) and allow the applicants to participate in the process of selection in terms of the Rules, 1989.

It is the case of the applicants that the entry level in the ministerial service cadre in the Secretariat was designated as Asst. Section Officer in the scale of pay of Rs.5000-150-8000/- and the existing cadres of Jr. Assistants and Sr. Assistants were merged in this cadre of Asst. Section Officer vide Home Department resolution dtd.30th September 2008. The Government of Odisha thereafter has come out with a Rule in exercise of power conferred under Article 309 of the Constitution of India known as the Orissa Secretariat Service (Method of Recruitment and Conditions of Service of Assistant Section Officers) Rules, 2010, came into force w.e.f. 06.04.2010.

So far as the age limit to apply for the post of Asst. Section Officer is concerned, Rule 8(2) of the Rules, 2010 provides that a candidate must have attained the age of 21 years and must not above the age of 32 years on first day of January of the year of recruitment.

Provided that the upper age limit in respect of reserved categories of candidates referred in Rule 6 shall be relaxed in accordance with the provisions of the Act, Rules, orders or instructions, for the time being in force, for the respective categories.

The resolution was issued in 2008 and the Rules, 2010 came into force w.e.f.06.04.2010 but no step was taken to fill up the post of Assistant Section Officers till the year 2012. In the meantime an advertisement bearing No.8 of the 2012-13 was issued by the Odisha Public Service Commission on 6.10.2012 inviting applications to fill up 811 posts of Assistant Sections Officers, lying vacant in the Governor's Secretariat as well as in the State Secretariat wherein it was stipulated that online application forms would be available till 30th November 2012 by 11.59 P.M. and last date for receipt of application was 3.12.2012.

The grievance of the applicants is that earlier the post of Assistant Section Officers was governed by a set of Rules, namely The Odisha Ministerial Service (Method Of Recruitment and Conditions of Service of Jr. Assistants in the Offices of the Departments of Secretariat) Rules, 1951 and as per Rule 3 of the said Rules, 1951 it was required for the respondents to conduct competitive examination to fill up such posts once in every year and it was mandatory on the part of the respondents to determine the vacancies and then advertise the same inviting applications from the eligible candidates. So far as the relaxation of the eligibility criteria is concerned, it was governed by the Orissa Civil Service (Fixation of Upper Age Limit) Rules, 1989 and Rule 2 of the said Rules provides that the upper age limit for entry into Government service shall be 32 years except where a higher upper age limit has been prescribed for any such service or post.

Provided that the upper age limit in case of Scheduled Castes/Scheduled Tribes shall be relaxed by 5 years as provided under the Orissa Reservation of Posts and Services, Act, 1975, as amended from time to time.

Provided further that if for any reason applications have not been invited by the authority, competent to conduct examination during any particular year to fill up the vacancies of the year, applicants, who would have been eligible if applications were invited during that period, shall be eligible to compete at the examination held in the subsequent years.

On the basis of the above proviso in the last advertisement for the post of Jr. Assistants, the candidates were otherwise eligible to appear at the examination for the vacancies caused pre 1997 recruitment years but could not appear in the examination due to advertisement having not been notified. In that view of the matter the grievance of the applicants is that since the vacancy is prior to the Rule 2010 came into effect, as such they are entitled to

be given the relaxation in age in view of the second proviso to Rules 1989 because for no fault of the candidates like the applicants they have been deprived from appearing in the competitive examination due to notification to fill up the vacancies having not been notified by the government.

The applicants have approached to the Tribunal after the advertisement having been notified on 06.10.2012 fixing age range for applicants to be in between 21 years to 32 years as on 01.01.2012 since they were not coming under the consideration zone being age barred.

3. The applicants had approached to the Tribunal for redressal of their grievance, the Tribunal, after noticing the opposite party – State, who is petitioner herein, has passed an order taking into consideration the relevant date of vacancies of the post of Jr. Assistants which ultimately been merged to the post of Asst. Section Officer on 30th September, 2008.

The stand of the State before the Tribunal was that since the Government has come out with new Rule effective w.e.f. 06.04.2010 and the advertisement has come on 06.10.2012, as such the vacancies are to be filled up in pursuance to the new Rule having came into effect wherein there is no provision like that of the second proviso of the Rule 2 of the Rules, 1989, the Tribunal, after negating the plea of the State and taking into consideration the definition of 'year' as defined under the recruitment rule and second proviso to Rules, 1989 and also considering the fact that in between 1997 to 2010 there was no vacancy having been advertised by the state authorities for fulfilling the post of Jr. Assistants / Sr. Assistants which subsequently been merged to the post of Asst. Section Officers, passed an order directing the authorities to allow the applicants to participate in the examination pursuance to the advertisement dtd.06.10.2012.

4. The said order is under challenge before this court by way of the instant writ petition having been questioned by the State of Odisha through the Secretary to Government, Home Department inter alia on the ground that when new Rule has came into force w.e.f. 06.10.2010, there is no dispute in the settled proposition that the vacancies advertised after the implementation of the new Rule, the post is to be filled up on the basis of the criteria laid down in the new Rule and the provision of the old Rule which has been substituted by the new Rule will not govern the recruitment process.

5. While on the other hand, the plea of the applicants who are opposite parties herein is that although the Rule has come on 06.04.2010 but it is

settled proposition of law that the Rule which was prevalent at the time of the occurrence of the vacancies will be applicable for filling up of the vacancies of that particular year. According to them, the vacancies are of the year 1997 to 2010, as such the provision of recruitment rule prevalent during that period will be applicable and admittedly during that period the Rules 1989 was prevalent, as such they are entitled to be given chance to appear in the examination in view of the provision of second proviso to Rule 2 of the Rules, 1989.

In the light of these submissions the order passed by the tribunal is before us for its judicial scrutiny.

6. We have heard the learned counsels for the parties and perused the documents available on record.

We thought it proper to refer the relevant rules before scrutinizing the legality and propriety of the order passed by the Tribunal.

The State of Odisha has come out with a Rule in exercise of power conferred under Article 309 of Constitution of India on 27th October, 1989, known as the Odisha Civil Service (Fixation of Upper Age Limit) Rules, 1989 wherein the provision has been made under Rule 2 which is being reflected hereunder as:-

> *"2. Notwithstanding anything contained in any recruitment rule regulating the method of recruitment in Civil Services and / or Civil Posts in Pensionable establishment under the State Government, the upper age limit for entry into Government Service shall be Thirty-two year except where a higher upper age limit has been prescribed for any such service or post:*
>
> *Provided further that if for any reason applications have not been invited by the authority competent to conduct examination during any particular year to fill up the vacancies of the year, applicants, who would have been eligible if applications, were invited during that year, shall be eligible to complete at the examination held in the subsequent year. This proviso will also apply to cases where advertisements have already been issued for recruitment to services and posts under Government but the process of recruitment has not commenced."*

It is evident from the said provision that the Government has taken a conscious decision by making a statute in exercise of power conferred under

Article 309 of the Constitution of India providing therein that if for any reason applications have not been invited by the authority to conduct examination during any particular year to fill up the vacancies of the year, applicants who would have been eligible if applications were invited during that year, shall be eligible to compete at the examination held in the subsequent year, meaning thereby the Government is supposed to advertise the vacancies year-wise subject to availability of vacancies and if it would not be advertised, the candidates who intend to participate in the selection process would not be deprived due to latches on the part of the authorities.

The issue pertains to the instant writ petition is regarding recruitment to the post of Assistant Section Officer. The state of Odisha has come out with a Rule known as Odisha Ministerial Service (Method of Recruitment and Conditions of Service of Jr. Assistants in the Offices of the Departments of Secretariat) Rules, 1951 wherein the provision has been made to make recruitment every year.

This Rule has came into effect with effect from 12.12.1951 wherein under Rule 5 the provision has been laid down for determination of number of vacancies which provides as under:-

> *"**5. Determination of number of vacancies** – On the first day of September, each year the Departments of Secretariat shall communicate to the Home Department in the form as prescribed in Appendix III, the total number of vacancies including the number of vacancies to be specifically kept reserved for Scheduled Castes and Scheduled Tribes candidates in the service found at the time or likely to occur during the twelve months commencing from the ensuing months of April."*

Rule 6 provides the provision for advertisement of vacancies which reads as follows:-

> *"**6. Advertisement of Vacancies** – The Government in Home Department, on receipt of the requisite information from all Departments shall report, not latter than the 15th day of September the number of vacancies to the Secretary to Commission who shall thereafter issue advertisement in the Orissa Gazette and in such newspapers as may be considered necessary inviting application in the prescribed form for the general competitive examination.*

In case required number of Scheduled Castes and Scheduled Tribes candidates are not available in the general recruitment examination for filling up the vacancies kept reserved for Scheduled Caste and Scheduled Tribe candidates, the Commission at the request of Home Department may issue a fresh advertisement in the Orissa Gazette and in such news papers as may be considered necessary inviting fresh application from Scheduled Castes and Scheduled Tribes candidates only in the prescribed form for conducting a special competitive examination."

It is evident from conjoint reading of the provisions of Rule 5 and 6 that the vacancies are to be ascertained on the first day of September of each year and thereafter the same shall be reported to the Secretary to Commission, not latter than the 15th day of September, who shall issue advertisement in the Odisha Gazette and in such newspapers as may be considered necessary inviting application in the prescribed form for the general competitive examination.

The Rules, 1951 has been superseded by Odisha Secretariat Service (Method of Recruitment and Conditions of Service of Assistant Section Officers) Rules, 2010 notified w.e.f. 6th April, 2010 wherein the definition of 'year' has been made as the "Calendar Year". Under the heading 'Eligibility Condition' the provision of minimum or maximum age has been made under provision of Rule 8(2) which reads as under:-

*"**8. Eligibility conditions** – (1) Nationality: A candidate must be a citizen of India.*

(2) Age Limits: A candidate must have attained the age of 21 years and must not be above the age of 32 years on 1st day of January of the year of recruitment.

Provided that the upper age limit in respect of reserved categories of candidates referred to in rule 6 shall be relaxed in accordance with the provisions of the Act, rules, orders or instructions, for the time being in force, for the respective categories."

In the light of these statutory provisions the grievance of the applicants and the grounds taken by the applicants vis-à-vis the finding of the Tribunal have been scrutinized by us.

7. The fact in the instant case, which is not in dispute, is that the vacancies for the post of Assistant Section Officers have been advertised by

virtue of advertisement No.8 of the year 2012-13 inviting applications to fill up the said posts to the extent of 800 from different categories, published on 6.10.2012, wherein the age limit has been prescribed under clause No.4 of the advertisement published by the Odisha Staff Selection Commission, Bhubaneswar prescribing the age limit as not less than 18 years and more than 32 years of age as on 01.01.1997, however a candidate completing 18 years of age as on 01.01.2010 shall also be eligible to apply.

The grievance of the petitioners is that the day when the advertisement was published they have become over age, as such they were not in a position to participate in the selection process for consideration of their candidature to the post advertised in terms of the said advertisement. The main grievance of the applicants was that in view of the provision of Rules, 1951 the vacancy was to be filled up by calculating the vacancies in the month of September of each year and the authorities kept mum from the year 1997 to 2010 by not publishing the advertisement for the vacancies which has occurred during the intervening period from 1997 to 2010, as such they cannot be deprived from participating in the selection process in the light of the provision of Rules, 2010 regarding the upper age limit as provided under column no.4 of the advertisement.

There is no dispute about the settled proposition of law that the post which is lying vacant is to be filled up on the basis of the prevalent rule at the time of the vacancies of the said post, reference in this regard may be made to the judgment rendered by Hon'ble Apex Court in the case of **Y.V. Rangaiah Vrs. J. Sreenivasa Rao**, reported in (1983) 3 SCC 284 wherein the Hon'ble Apex Court dealing with the case of promotion and the consideration on the basis of the rule as to whether on the day of vacancy to fill up the post, which rule will be applicable if the rule has been amended in the meanwhile. While answering the issue it has been held that the rule which will be in vogue at the time of the vacancies would be taken into consideration for fulfilling the post.

In the Case of **State of Rajasthan Vrs. R. Dayal and Others**, reported in (1997) 10 SCC 419 the Hon'ble Apex Court dealing with the similar situation and putting reliance upon the judgment rendered in the case of **Y.V. Rangaiah** (supra) has been pleased to hold that the post which fell vacant prior to the amendment of rules would be governed by the original rule and not by the amended rules. The vacancies that arose subsequent to the amendment of rules are required to be filled up in accordance with the law existing as on date when the vacancies arose.

In the case of **P. Mohanan Pillai Vrs. State of Kerala and Others**, reported in AIR 2007 SC 2840 the Hon'ble Apex Court has been pleased to hold that the eligibility criteria as also the procedure as they are prevailing on the date of vacancies should ordinarily be followed.

We, in the light of the proposition laid down by the Hon'ble Apex Court and after going through the factual aspect of the case wherein the fact is not in dispute regarding availability of vacancies and no initiative has been taken by the state authorities to fill up the post from 1997 to 2010 and in the meanwhile the 1951 rule has been superseded by new rule of the year 2010 wherein the upper age limit has been prescribed from 18 years to 32 years.

We after going through the rule 1951, have not found the prescription of age minimum or maximum which does suggest that the provision of Rules, 1989 regarding the upper age limit with the relaxation will be applicable as per second proviso to Rules, 1989.

It is also admitted position that the advertisement has been issued on 6.10.2012, i.e. after coming into effect the Rules, 2010 and on this ground the State authorities are opposing the claim of the petitioners on the ground that since the advertisement has come after promulgation of the Rules, 2010 wherein the minimum and maximum age has been prescribed without any relaxation as has been reflected in the second proviso to Rules, 1989 which was the prevalent rule prior to promulgation of Rules, 2010 so far as it relates to the age, reason being that in the Rules, 1951 there is no stipulation of either minimum or maximum age, we are not in agreement with the ground of the State authorities for the reason of the settled proposition of law that the rule which is prevalent on the date of occurrence of vacancies will be applicable for the purpose of fulfilling the post and admitted position in this case is that no advertisement was issued in between the year 1997 to 2010 while the vacancy occurred during this intervening period which ought to have been notified each year in the month of September as per the provision made under Rules, 1951, but reason best known to the State authorities, they have not come out with any advertisement providing opportunity to such candidates who are anticipating for issuance of notification for fulfilling the said post so that their candidature may be considered and the advertisement has come only when they have become more than 32 years, being age barred, as per the provision of Rules, 2010.

The tribunal, after taking into consideration the provisions of Rules, 1951 read with Rules 1989, occurrence of vacancies during the subsistence

period of the Rules 1951 read with Rules 1989 and also considering the fact that the petitioners cannot be deprived from the right to be considered for engagement in the light of advertisement dtd.06.04.2012 merely on the ground of being age barred, has came to conclusion regarding the right of consideration of the applicant in the competitive examination in pursuance to the advertisement No.8 / 2012-13.

8. Learned Sr. Counsel appearing for the applicants has relied upon the judgment rendered by a coordinate bench of this court in the case of **State of Odisha and Others Vrs. Manoj Kumar Panda and Others**, reported in 2013 (II) OLR 760 wherein the subject matter was for fulfilling the post under different Class-II services under the State and the same issue has been involved in the said case, the coordinate bench of this court, after taking into consideration the relevancy of the rule as on the date of occurrence of vacancy, has allowed the candidature of such candidates who have become age barred due to non-advertisement of the post and according to him the order passed by this court in the said writ petition has been implemented by the State authorities without challenging the same, as such the state authority now cannot take different stand.

Learned Additional Government Advocate has fairly submitted that the issue involved in the instant case is covered with the issue raised in the case of **State of Odisha and Others Vrs. Manoj Kumar Panda and Others** (supra) and the direction passed by this court in the said writ petition has been given effect to.

9. In view of the discussion made by us herein above, taking into consideration the reasoning given by the Tribunal in the order impugned as also the fact that the State in similar situation has implemented the order passed by this court in the case of Manoj Kumar Panda, we are in agreement with the finding and direction passed by the Tribunal and accordingly found no error apparent on the face of record, rather we are of the view that the Tribunal has taken into consideration the factual aspect, the proposition of law as has been discussed by us herein above and the applicability of the rule and has passed the order. In view thereof we find no reason to interfere with the same, accordingly the writ petition fails. In the result the writ petition stands dismissed.

Writ petition dismissed.

2017 (II) ILR - CUT-560

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

W.P.(C) NO(s). 16565 OF 2016
WITH BATCH

UNION OF INDIA & ORS. ……..Petitioners

.Vrs.

BHAGABAN MISHRA ……Opp. Party

SERVICE LAW – Grant of first and second upgradation in pay scale under Assured Career Progression Scheme on completion of regular service of 12 years and 24 years respectively – Whether in service training period is to be considered for counting the length of regular service ? – Held, Yes. (Paras 11,12,13)

For Petitioners : Mr. Ashok Mohanty, Sr. Advocate,
M/s.Kalpana Pattanaik & D.Rath
M/s.Anindya Ku. Mishra, N.N.Mohapatra & A.K.Sahoo
M/s. Avijit Pal & A.Das
Mr. Paresh Kumar Sahoo
M/s.Piyush Ku. Mishra, A.K.Panda, A.K.Choudhury, A.K.Sahoo & G.N.Das

For Opp.Parties : M/s. N.R.Routray, Surendra Sarkar, Smt.J.Pradhan, T.K.Choudhury & S.K.Mohanty

Date of hearing : 01.05.2017
Date of judgment : 01.05.2017

JUDGMENT

S. N. PRASAD, J.

In all these writ petitions since common issue involved, the same are being disposed of by this common order.

These writ petitions are under Articles 226 and 227 of the Constitution of India preferred by Union of India through its General Manager, East Coast Railway, Bhubaneswar whereby and where under the orders passed by Central Administrative Tribunal, Cuttack Bench, Cuttack on different dates in different original applications has been assailed wherein the learned Tribunal has granted the benefit of upgradation in pay scale under Assured Career Progression Scheme by counting the period of training undergone by the applicants.

2. The brief facts of the case of the opposite parties – applicants in all the cases before the Tribunal was that they have joined the training after following all the formalities and on successful completion they have been taken into the cadre with effect from different dates and thereafter they have been regularized on different dates as Technical Grade-III (Welder).

The applicants have raised their grievance that they be given the benefit of upgradation in pay scale under the scheme formulated by the authorities by counting the period of 12 years from the date of their initial appointment, but when the same has not been considered by the authorities, they have approached the Tribunal and the Tribunal, after taking note of the entire aspect of the matter, has passed an order holding therein that they are entitled to be given upgradation of pay scale under the Assured Career Progression Scheme by counting 12 years of service from the date of their initial appointment, the said orders are under challenge before this court by way of these writ petitions inter alia on the ground that the training period ought not to have been counted for the purpose of counting the 12 years of continuous service.

3. Mr. Ashok Mohanty, learned Sr. Counsel representing the Union of India has tried to strengthen his argument by submitting that so many circulars have been issued by the East Coast Railway which provides condition that the period undergone on training cannot be counted for the purpose of counting the 12 years of service, rather the 12 years was to be counted from the date when the period of training has been completed.

He submits that the petitioners since have got pre training, i.e. before entering into service, as such the pre training period should not have been directed to be counted by the Tribunal for the purpose of counting the continuous service to extend the benefit of Assured Career Progression Scheme.

Learned Sr. Counsel, however, has submitted that if the training period is in service then the 12 years can be counted from the date of initial appointment.

4. Learned counsel appearing for the opposite parties - applicants has vehemently opposed the submission advanced on behalf of learned Sr. Counsel representing the East Coast Railway.

While arguing, he has submitted that the same issue fell for consideration before this court and this court in series of writ petitions have

approved the order of the Tribunal, the matter went before the Hon'ble Apex Court, and the Apex Court has affirmed the same by dismissing the Special Leave Petition, hence nothing remains to be decided in this case.

He submits that the opposite parties - applicants have been appointed pursuant to an advertisement notified by the authorities being Employment Notice No.M8/476/MCS/ R&S whereby and where under the applications have been invited for recruitment of trainees for being eventually absorbed as Skilled Artisan in the Revised Scale of pay of Rs.260-400 in carriage repair work-shop with the condition that the candidates must have passed from any I.T.I. in the appropriate trade or completed Apprenticeship training in the appropriate trade and possess National Apprenticeship Certificate and the candidates should be in between the age group of 18 to 25 years of age as on 1.1.1985, the other stipulation therein was that the selected persons will have to undergo training up to maximum period of one year at the suitable technical establishment on the railway as the administration may decide, stipend as per rule in force from time to time will be paid to such trainees.

On the strength of this advertisement, submission has been advanced by the learned counsel that since the opposite parties - applicants have been appointed pursuant to Employment Notice No.M8/476/MCS/R&S after having the I.T.I. or the Apprenticeship Certificate, they have got their appointments and thereafter they have been directed to go for training which itself suggests that same was in-service training and in no stretch of imagination the in-service training undergone by them can be taken away from the length of service.

He countered the argument of learned Sr. Counsel representing the East Coast Railway by submitting that the opposite parties – applicants have not got their appointments on the basis of pre training rather the pre training was one of the eligibility criteria for their participation in the selection process and they having pre-training, Apprenticeship certificate or I.T.I., have participated and thereafter when entered into service they have undergone training in terms of offer of appointment and on completion of successful training they have been taken under regular establishment, hence the submission advanced by the learned Sr. Counsel in this regard is not acceptable and not factually correct.

He submits that if the appointment would have been made on the basis of Apprenticeship certificate and without any direction to go for in-service training, in that situation, the period undergone training under

Apprenticeship certainly would not have been counted for the purpose of counting the length of service, but that is not the fact in all the cases and that is not the prayer of the petitioners which has been adjudicated upon by the Tribunal, rather before the tribunal, the factual aspect was as to whether the training undergone by one or the other applicants in service can be counted for the purpose of counting the length of service period or not and that has been answered.

5. While countering this submission, learned Sr. Counsel representing the East Coast Railway, has submitted that the question involved in this case is pre training period and the Tribunal has misconstrued this aspect of the matter while adjudicating the issue.

He further submits that in other matter, the order of tribunal has been challenged before the Hon'ble Supreme Court and the Supreme Court is now in seission of the matter by issuing notice in the Special Leave Petition which is now pending before the Hon'ble Supreme Court.

6. We have heard learned counsels for the parties and perused the documents available on the record and on the basis of that their argument has been appreciated.

On the basis of the factual aspect which has been canvassed before us by the learned counsels for the parties, the question which is to be looked into by this court is as to whether the period of training would be counted if the training is by one or the other employees in course of service or the pre service.

In order to examine this issue, we have gone into the pleading of the respective parties. It is evident from the notice inviting application being Employment Notice No.M8/476/MCS/R&S which has been notified inviting application for recruitment of trainees for being absorbed as skilled artisan in revised scale of pay of Rs.260-400 in carriage repair workshop in Mancheswar near Bhubaneswar. The minimum qualification for recruitment as skilled artisan, as stipulated that the candidate must have passed from any I.T.I. in appropriate trade or completed apprenticeship training in appropriate trade and possess national apprenticeship certificate.

The other condition stipulated in the said advertisement is that the selected persons will have to undergo training up to maximum period of one year at a suitable technical training establishment on the Railways as the administration may decide, stipend as per rules in force from time to time

will be paid to such trainees. In all other respects the appointment will be governed by the Railway Rules in force from time to time, the trainees are required to find their own residential accommodation at the place of training.

The opposite parties – applicants, in pursuance to the said employment notice, have made their applications being eligible as per the minimum qualification prescribed, they have been appointed on different dates, on successful completion of training since they are found suitable in the test conducted for absorption, have been regularized and posted against existing vacant post of Mechanical Department in Skilled Grade-III in scale 950-1500 plus allowances, as would be evident from the office order dtd.4.9.1997.

While they were working, the South Eastern Railways has come out with a scheme known as Assured Career Progression scheme to grant upgradation in pay scale wherein the provision has been made that first upgradation of pay would be granted after 12 years of regular service and second upgradation after 12 years of regular service from the date of first financial upgradation, subject to fulfillment of prescribed condition, as would be evident from the circular dtd.25.11.2013 appended to the writ petition.

The opposite parties – applicants raised their demand that they be given the first upgradation in pay scale after completion of 12 years of service from the date of their initial appointment, the same having been rejected by the authorities on the ground that their 12 years would be counted from the date when they have been taken into regular establishment i.e. with effect from 04.09.1997, the opposite parties – applicants, being aggrieved with the same, have approached the Tribunal and the tribunal after taking into consideration the fact that similar issue has been decided by it, which has been affirmed by this court in series of writ petitions which ultimately been affirmed by Hon'ble Supreme Court in Special Leave Petitions, has passed an order directing the authorities to count the period of service from the date of their initial training and directed them to grant the 1st upgradation from the date of their initial appointment, that order is under challenge in these writ petitions.

7. Learned Sr. Counsel representing the East Coast Railway has relied upon one communication dtd.14.3.1998 which stipulates that the service of the trainees would be taken under the regular establishment subject to their successful completion of training against the available vacancy, after completion of the training they will have to serve the railway administration

for a minimum period of 5 years if required by the administration and the trainee will not been allowed to withdraw from training except for any reasons beyond his / her control.

We have also come across the scheme of upgradation in pay scale dtd.25.11.2013 which stipulates a condition that the benefit of first upgradation in pay scale would be granted after completion of 12 years of regular service and second upgradation on completion of 12 years from the date when the first upgradation has been granted.

We have also come across the office order dtd.4.9.1997 by which the services of the opposite parties - applicants have been regularized on successful completion of their training with effect from 4.9.1997 while they have joined their services in training in different dates in the year 1988.

8. Learned Sr. Counsel has put emphasis on the circular dtd.1.12.1998 which contains a provision that the benefit of upgradation in pay scale would be granted on the basis of completion of regular service of 12 years and 24 years for first and second upgradation respectively.

Learned Sr. counsel has also relied upon the Indian Railway Establishment Manual which has been notified in pursuance to the provisions of Apprenticeship Act, 1961, placing reliance up the same it has been submitted that if a person is directed to undergo training under the Apprenticeship Act, 1961 or the Indian Railway Establishment Manual as contained in Annexure-6 to the addl. affidavit filed by them, the period rendered by the employee under the apprenticeship cannot be counted for the purpose of counting the length of regular service.

He has also relied upon the Indian Railway Establishment Code which also is under the Apprenticeship Act stipulating the meaning of the apprenticeship. He further relied upon one clarification as contained in Annexure-8 contained in order no.257/ 2004 wherein it has been stated that the period of training would be counted for the purpose of pensionary benefit and for no other purpose that period would be counted.

He has also relied upon the Master Circular No.37 wherein under the eligibility condition head, it has been provided that the service for this purpose shall be the service rendered on regular basis, service rendered on ad hoc basis shall, however, be taken into account for this purpose if it is followed by regularization without break.

While on the other hand learned counsel for opposite parties - applicants has relied upon the employment notice No.M8/476/MCS/R&S which is the advertisement, in pursuance of which they have been appointed under the post with the condition that they have to go for training. They have also relied upon Annexure-C dtd.22.6.1992 wherein it has been stipulated that the period rendered on training would be counted for the purpose of increment.

They have relied upon the order passed by this court in W.P.(C) No.12425 of 2012 wherein similar issue has been decided by this court by approving the order passed by the Tribunal wherein the same view has been taken by the Tribunal which has been challenged before the Hon'ble Apex Court in Special Leave Petition No.110404 of 2013 wherein the order passed by this court has been affirmed, on the strength of these documents it has been submitted that the issue has already been decided by this court having been affirmed by Hon'ble Apex Court, as such nothing remains to be decided in this case, hence they have prayed to dismiss the writ petition.

They have also relied upon another order passed by this Bench in W.P.(C) No. 19250 of 2016 wherein taking into consideration the fact that the same issue has already been decided by this court having been affirmed by the Hon'ble Supreme Court, this court has declined to interfere, as such the writ petition has been dismissed approving the order passed by the tribunal.

Learned counsel for opposite parties – applications, on the strength of these documents, have submitted that the writ petitions may be dismissed.

10. Learned Sr. Counsel representing the East Coast Railways submitted that other matters also went before Hon'ble Apex Court wherein notice has been issued and now the matter is pending but no document to that effect has been produced before this court.

11. We, in the light of these documents and submissions, have examined the issue in detail.

It is not in dispute that the authority has come with a scheme for grant of upgradation in pay scale and to that effect the decision has been taken to grant first upgradation after completion of 12 years of continuous regular service.

It is also not in dispute that the training undergone in-service by an employee cannot be excluded from counting the entire length of service.

It is also not in dispute that the apprenticeship period under the Apprenticeship Act, 1961 cannot be counted for the purpose of counting the length of service.

In the light of these settled propositions we have examined the factual aspect of the instant cases.

We have taken into consideration the notice inviting application which contains a condition by inviting application for the post of trainees for being eventually absorbed as skilled artisan having minimum qualification of having passed from any I.T.I. in appropriate trade or completed Apprenticeship training with possessing a national apprenticeship certificate.

Learned counsel representing the opposite parties are not disputing the fact that on the basis of the advertisement as contained in employment notice No.M8/476/MCS/R&S (Annexure-8) to the reply filed by the opposite parties – applicant, they have been engaged as trainees after having possessed I.T.I. or the apprenticeship certificate. They have been appointed as trainees with a condition to undergo training up to maximum period of one year at a suitable technical training establishment of the railways. After completion of the period of training they have been absorbed under the regular establishment vide order dtd.4.9.1997 after passing the test conducted for absorption.

On the basis of the admitted position that the opposite parties – applicants have been appointed in pursuance to the advertisement No.M8/476/MCS/R&S, as such there is no dispute about the fact that they have been appointed after getting either I.T.I. certificate or apprenticeship certificate under the Apprenticeship Act, 1961 and got their engagement in pursuance to the said advertisement as trainees and on successful training they have been taken under regular establishment on different dates, as such we are not in hesitation to hold on the basis of this factual aspect which has been placed before us that the said training period is **in service training.**

It is not *res integra* that in-service training period would not be counted for counting the length of service, learned Sr. counsel for the East Coast Railway has submitted that it is the pre service training as has been obtained by them under the Apprenticeship Act, 1961, this argument is not acceptable to us in view of the admitted position in the case that the applicants have been appointed in pursuance to the advertisement No.M8/476/MCS/R&S which requires minimum qualification to have I.T.I.

or the certificate of apprenticeship, hence we are of the considered view that the training obtained by them is during service period and as such the said period would not in any stretch of imagination not be counted for the purpose of counting the length of period of service.

12. So far as the contention of learned Sr. Counsel representing the East Coast Railways by putting reliance upon the manual / code issued by the Railways, but that is not applicable in the facts and circumstances of the present case since we have reached to the conclusion that the said training period has been obtained by them while they were in service having been appointed in pursuance to the advertisement No.M8/476/MCS/R&S.

The same issue fell for consideration before the tribunal and the tribunal has passed an order directing the authorities to count the period of in-service training period for the purpose of counting the length of service, the same matter fell for consideration before this court in series of writ petitions, one of them have been annexed by the applicants in their reply, i.e. W.P.(C) No.12425 of 2012 which has even been affirmed by Hon'ble Apex Court in Special Leave Petition No.11040 of 2013 and subsequently thereafter following the order passed by this court having been confirmed by Hon'ble Apex Court, the other writ petition have been disposed of being W.P.(C) Nos.18880 of 2015, 19680 of 2015, 19678 of 2015 and 19250 of 2016.

13. So far as the contention raised by the learned Sr. Counsel that in another Special Leave Petition having the same issue, the Hon'ble Apex Court has issued notice and the same is pending, but no such document to that effect has been placed, hence we are bound by the order passed by this court having been confirmed by Hon'ble Apex Court as has been reflected herein above and accordingly we are of the view that the order passed by the Tribunal in original applications need no interference by this court. Accordingly all the writ petitions stand dismissed.

Writ petitions dismissed.

2017 (II) ILR - CUT-569

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

O.J.C. NO. 7072 OF 1999

SUPERINTENDENT OF POLICE, KEONJHAR & ORS. .....Petitioners

.Vrs.

JUDHISTIRA NAIK & ORS. .....Opp. Parties

SERVICE LAW – Dismissal from service for taking illegal gratification from three persons to provide their children Government job – Tribunal reversed the order of dismissal and imposed three black marks and directed reinstatement in service on the ground that the delinquent belongs to scheduled caste and has only put five years of service – Hence the writ petition – A grave misconduct should not go unpunished inorder to maintain discipline of an institution – When the charge for moral turpitude was proved, the order of dismissal should not have been altered by the learned Tribunal merely on sympathy – Held, the impugned order passed by the learned Tribunal is setaside.

(Paras 4,5,6)

Case Laws Referred to :-

1. (2013) 10 SCC 10 : Deputy Commissioner, Kendriya Vidyalaya Sangthan and Others vrs. J. Hussain
2. 2006 5 SCC 673 : State of U.P and Others Vrs. Raj Kishore Yadav and Another
3. 2008 15 SCC 657 : State Bank of Hyderabad and Another Vrs. P.Kata Rao.
4. AIR 2015 SC 545 : Union of India and Others Vrs. P. Gunasekaran.

For Petitioners : Mr. M.S. Sahoo, (Addl. Govt. Adv.)
For Opp.Parties : M/s. Satyanarayan Mohapatra & S.Ghos.

Date of hearing : 27.04.2017
Date of judgment : 27.04.2017

JUDGMENT

S. N. PRASAD, J.

This writ petition is under Articles 226 and 227 of the Constitution of India whereby and where under the order passed by the Odisha Administrative Tribunal, Bhubaneswar dtd.5.11.1998 passed in O.A. No.584 of 1991 has been assailed by the State of Odisha wherein the Tribunal, while reversing the order of punishment by substituting the order of dismissal to the

effect of awarding 3 black marks with a direction to treat the period of suspension as such and directed the applicant to be reinstated in service against any available vacancy.

2. The brief fact of the case is that the opposite party no.1 – applicant was appointed as a Jr. Clerk in the office of Superintendent of Police, Keonjhar with effect from 25.8.1984. After a short span of his service career there was an allegation against him of accepting illegal gratification of Rs.700/-, Rs.1000/- and Rs.900/- from three persons for providing jobs for their children. He was charged with misconduct and moral turpitude and a proceeding was drawn which was entrusted to Addl. Superintendent of Police, Keonjhar for enquiry. The Addl. Superintendent of Police, during enquiry, taking into consideration the evidence of the witnesses and the statement of the investigating officer, has came to finding that the charge of acceptance of money from one Achyute Dhangudia, Chitaranjan Naik and Kailash Jena is proved beyond any doubt. Accordingly, the report was sent before the Superintendent of Police, who while agreeing with the finding, has awarded punishment of 3 black marks with a direction to treat the period of suspension from 10.12.1985 as such.

The Deputy Inspector General of Police, Western Range, in terms of Police Manual Rule 853 reviewed the proceeding and passed orders after observing due formality, i.e. after considering the show cause explanation of opposite party no.1 and being satisfied that the punishment was inadequate in view of the gravity of the charge, imposed the punishment of dismissal.

The opposite party no.1, against the order of dismissal, filed an appeal before the Director General and Inspector General of Police, who on careful consideration of the evidence on record, has upheld the orders passed by the Deputy Inspector General of Police against which original application being O.A. No.584 of 1991 has been filed for quashing the orders of punishment, the Tribunal while interfering with the decision of the authorities, have revived the order passed by the original authority with a direction to reinstate him in service, which is under challenge in this writ petition.

3. The grounds which has been taken by the State of Orissa while assailing the order is that the Tribunal has exceeded its jurisdiction by assuming the power of disciplinary authority by reversing the order of punishment of dismissal which can only be exercised in rarest of rare cases if the situation so warrants i.e. if there is no consideration of the evidence relied

upon by the delinquent employee by the enquiry officer or miscarriage of justice or there is violation of principle of natural justice, but no such ground has been made out by the delinquent employee before the tribunal and without appreciating this aspect of the matter, the order of punishment has been interfered with.

He submits that since the charge is of moral turpitude regarding taking bribe, hence proceeding has been drawn up, the charge having been proved, the delinquent authority has imposed punishment but by imposing three black marks only while the Deputy Inspector General of Police, exercising the power conferred upon him under Rule 853 of Police Manual Rules, has differed the order of punishment seeing the gravity of the charge, hence reversed the order of punishment after following the procedure laid down in the rule and passed order of dismissal by reversing the order of punishment of imposition of three black marks which has been concurred by the revisional authority, hence there is two concurrent findings passed by competent authorities and the same is within the jurisdiction of the authorities hence the same should not have been interfered by the tribunal considering the gravity of allegation which pertains to moral turpitude.

4. We have heard the learned counsels for the parties and perused the documents available on record.

The admitted position in this case is that the petitioner got his appointment as Jr. Clerk in the office of Superintendent of Police, while he was serving a departmental proceeding was initiated against him for an allegation of taking gratification of Rs.700/-, Rs.1000/- and Rs.900/- from three persons. Accordingly, the enquiry committee has been constituted in which the petitioner has participated and the enquiry officer, on the basis of the deposition led and the documents placed before him, has found the charge proved. Enquiry Officer has forwarded the enquiry report before the disciplinary authority who, after following the principle of natural justice, has imposed the punishment of imposition of three black marks.

The petitioner has been provided with all opportunity of hearing before the enquiry officer since nothing has been complained either before the tribunal or before this court with respect to not following the principle of natural justice.

The Deputy General of Police, in exercise of power conferred under Rule 853 of the Police Manual Rules, has reviewed the order of punishment passed by the disciplinary authority by following the principle of natural

justice, considering the gravity of the nature of allegation, has imposed the punishment of dismissal since the same relates to moral turpitude i.e. taking illegal gratification from three persons to provide their children with Government jobs. A revision has been preferred before the Director General of Police – cum Inspector General of Police who has confirmed the order of punishment passed by the Appellate Authority.

The tribunal while interfering with the order of punishment has gone into the point purely on sympathetic consideration by considering that the applicant has put only five years of service at the relevant point of time and he belongs to Scheduled Caste and as such awarding black mark itself is a major penalty, has reversed the order of dismissal to that of imposing three black marks, but according to us the sympathy shown by the tribunal is not at all warranted considering the gravity of the allegation which pertains to moral turpitude that is of taking illegal gratification.

It is also not in dispute that merely on sympathy the punishment of dismissal cannot be altered, reference in this regard may be made to the judgment rendered by Hon'ble Apex Court in the case of **Deputy Commissioner, Kendriya Vidyalaya Sangthan and Others vrs. J. Hussain**, reported in (2013) 10 SCC 106 wherein, at paragraph 15, their Lordships have been pleased to hold as follows:-

> *"15. The High Court has also mentioned in the impugned order that the respondent is a married man with family consisting of number of dependants and is suffering hardship because of the said "economic capital punishment". However, such mitigating circumstances are to be looked into by the departmental authorities. It was not even pleaded before them and is an after-effect of the penalty. In all cases dealing with the penalty of removal, dismissal or compulsory retirements, hardship would result. That would not mean that in a given case punishment of removal can be discarded by the Court. That cannot be a ground for the Court to interdict the penalty. This is specifically held by this Court in* ***Hombe Gouda Educational Trust – vs- State of Karnataka****, (2006) 1 SCC 430 in the following words:*
>
> *"20.A person, when dismissed from service, is put to a great hardship but that would not mean that a grave misconduct should go unpunished. Although the doctrine of proportionality may be applicable in such matters, but a punishment of dismissal from service for such a misconduct cannot be said to be unheard of. Maintenance*

of discipline of an institution is equally important. Keeping the aforementioned principles in view, we may hereinafter notice a few recent decisions of this Court."

5. Moreover, the interference by a court of law regarding quantum of punishment or legality or propriety of the order of punishment is very limited under its judicial review, which can only be exercised in certain conditions as has been laid down by Hon'ble Apex Court in the case of **State of U.P and Others Vrs. Raj Kishore Yadav and Another, 2006 5 SCC 673** wherein their Lordships have been pleased to hold that (it is settled law that the High Court has limited scope of interference in the administrative action of the State in exercise of extraordinary jurisdiction under Art.226 of the Constitution of India and, therefore, the findings recorded by the enquiry officer and the consequent order of punishment of dismissal from service should not be disturbed.)

In another judgment rendered by Hon'ble Apex Court in case of **State Bank of Hyderabad and Another Vrs. P.Kata Rao, 2008 15 SCC 657** wherein at para 18 and 19 it has been held as follows:-

"18. There cannot be any doubt whatsoever that the jurisdiction of superior courts in interfering with a finding of fact arrived at by the enquiry officer is limited. The High Court, it is trite, would also ordinarily not interfere with the quantum of punishment. There cannot, furthermore, be any doubt or dispute that only because the delinquent employee who was also facing a criminal charge stands acquitted, the same, by itself, would not debar the disciplinary authority in initiating a fresh departmental proceeding and / or where the departmental proceedings had already been initiated, to continue therewith.

19. We are not unmindful of different principles laid down by this Court from time to time. The approach that the Court's jurisdiction is unlimited although had not found favour with some Benches, the applicability of the doctrine of proportionality, however, had not been deviated from."

In the judgment rendered by Hon'ble Apex Court in case of **Union of India and Others Vrs. P. Gunasekaran,** reported in AIR 2015 SC 545 the Hon'ble Apex Court has been pleased to laid down a guideline in order to make interference with the order of punishment which is being quoted herein below:-

"13. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge No.1 was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Art.226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:

a. The enquiry is held by a competent authority;
b. The enquiry is held according to the procedure prescribed in that behalf;
c. There is violation of the principles of natural justice in conducting the proceedings;
d. The authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;
e. The authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;
f. The conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;
g. The disciplinary authority had erroneously failed to admit the admissible and material evidence;
h. The disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;
i. The finding of fact is based on no evidence.
Under Article 226 / 227 of the Constitution of India, the High Court shall not:
(i) Re-appreciate the evidence;
(ii) Interfere with the conclusions in the enquiry, in case the same has been conducted in a accordance with law;
(iii) Go into the adequacy of the evidence;
(iv) Go into the reliability of the evidence;
(v) Interfere, if there be some legal evidence on which findings can be based.
(vi) Correct the error of fact however grave it may appear to be;

(vii) *Go into the proportionality of punishment unless it shocks its conscience."*

Thus the settled legal proposition is that the scope of judicial review under Article 226 of the Constitution of India is very limited and the High Court cannot sit as an appellate court and in the recent judgment rendered in case of **Union of India Vrs. P. Gunasekaran** (supra) it has been held that the High Court can interfere under Article 226 but cannot interfere under Art.226 to re-appreciate the evidence, to interfere with the conclusion in the enquiry, in case the same has been conducted in accordance with law, go into the adequacy of the evidence, go into the reliability of the evidence, interfere, if there be some legal evidence on which findings can be based, correct the errors of fact however grave it may appear to be, go into the proportionality of punishment unless it shocks its conscience and the High Court can only see whether the enquiry held by competent authority or the enquiry is held according to the procedure prescribed or there is violation of principle of natural justice in conducting the proceeding, the authorities have disabled themselves from reaching a fair conclusion by some consideration extraneous to the evidence and merits of the case, the authorities have allowed themselves to be influenced by irrelevant or extraneous consideration, the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion, the disciplinary authority had erroneously failed to admit the admissible and material evidence, the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding and the finding of fact based on no evidence.

6. We have examined the case in hand on the basis of the principles laid down by the Hon'ble Apex Court in the cases referred herein above and have found that no such situation was in existence before the tribunal considering the nature of allegation which pertains to moral turpitude and integrity which led it to interfere with the order of punishment purely on sympathetic ground, hence we are not in agreement with the finding of the tribunal, as such order is not sustainable in the eye of law, accordingly the same is set aside. In the result the writ petition stands allowed.

Writ petition allowed.

2017 (II) ILR - CUT-576

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

W.P.(C) NO. 8180 of 2015

ISWAR CHANDRA PRADHAN .....Petitioner

.Vrs.

STATE OF ORISSA (LAW DEPT.) & ORS. .....Opp. parties

SERVICE LAW – Petitioner entered into service as Jr. Clerk on 15.12.1987 – He was promoted to the post of Grade-III Bench Clerk on 12.01.1012 – One adverse entry in the CCR of the petitioner during 03.08.2012 to 29.042013 – DPC did not consider the case of the petitioner for promotion to the post of Grade- II Bench Clerk – Hence the writ petition – Since the adverse remark has not been communicated to the petitioner there is failure of principles of natural justice and he has been denied promotion illegally on 2013 which is violative of Art. 14 of the constitution of India – Held, the adverse entry in the CCR of the petitioner for the above period is liable to be expunged or quashed and the petitioner is entitled to be promoted to the post of Grade- II Bench Clerk when his juniors got promoted by restoring his seniority. (Paras 22 to 24)

For Petitioner : M/s. M.K. Pati, D.P. Nanda,
H.S. Dalai & R. Mohapatra

For Opp.Parties : Mr. Bibhu Prasad Tripathy, (A.G.A)

Date of hearing :19.04. 2017
Date of Judgment:16.05.2017

JUDGMENT

DR. D.P.CHOUDHURY, J.

The petitioner, in this writ petition, assails the action of the opposite parties in not giving promotion to him.

FACTS

2. The factual matrix leading to the case of the petitioner is that the petitioner entered into service in the judgeship of Cuttack on 15.12.1987 as a Junior Clerk and subsequently, he was promoted to the post of Grade-III Bench Clerk on 12.1.2012 by the order of the District Judge, Cuttack. While the petitioner was working satisfactorily, one adverse remark in the Confidential Character Roll (CCR) for the period from 03.08.2012 to

29.04.2013 was communicated to him on 06.06.2013. The said period relates to his incumbency in the Court of the learned J.M.F.C. (P), Kujanga. The petitioner submitted his representation (Annexure-2) to expunge the adverse remark made in his CCR on the ground stated therein. It is alleged inter alia that the Departmental Promotion Committee (hereinafter called as "the DPC") did not consider the case of the petitioner for promotion on the ground of adverse entry in his CCR. There was no preliminary enquiry as to the allegations made and no prima facie case was made out justifying denial of promotion to the petitioner. However, the batch-mates of the petitioner got promoted after superseding him. The criteria for promotion is normally made on the basis of merit-cum-suitability in all respect with due regard to the seniority. Moreover, while giving promotion, the DPC is to scrutinize the available preceding five years CCRs. It is stated that the petitioner was promoted to Grade-II Bench Clerk on 30.04.2014, which is only ten months after being superseded on 17.05.2013. It is alleged inter alia that the relevant rules have not been followed in this case while superseding him. Resultantly petitioner made representation on 19.8.2014 (Annexure-3) to restore his seniority with consequential relief, but that was rejected illegally on 23.2.2015.

3. Be it stated that the CCR of the petitioner has been made throughout good except the aforesaid period. So, the writ petition is filed to expunge the adverse entry made in the CCR of the petitioner for the period from 03.08.2012 to 29.04.2013 and to allow all service benefits including financial benefits with effect from 24.6.2013. The petitioner has also sought for the intervention of this Court for directing the opposite party no.2 to regularize the service of the petitioner.

4. Per contra, a counter affidavit has been filed by the opposite party no.2 refuting the allegations made in the writ petition. It is the case of the opposite party no.2 that the petitioner, while working for the period from 18.01.2012 to 28.07.2012 and 03.08.2012 to 29.04.2013 as Bench Clerk to the learned J.M.F.C., Kujanga, he was awarded two adverse entries in his CCR by two successive Presiding Officers vide Annexure-A/2. Be it stated that the name of the petitioner was brought under zone of consideration for promotion to the next higher post in accordance with Rule 11 of Orissa District & Sub-ordinate Courts Non-Judicial Staff Services (Method of Recruitment and Conditions of Service) Rules, 2008 (hereinafter called as "the Rules, 2008") and Orissa Civil Service (Zone of Consideration for Promotion) Rules, 1998 and other notifications of the State Government, but

the DPC, in its meeting held on 17.5.2013, did not recommend the petitioner for promotion to the next higher post due to the adverse entries made in his CCR for the above two successive spell.

5. It is stated that the adverse entries made in the CCR of the petitioner is mainly related to the unbecoming conduct on the part of a Government servant being quarrelsome and mischief monger and instigate bar members against the P.O. As the DPC did not promote the petitioner for the reasons best recorded, he was not promoted to the next higher post. The Rule provides for promotion to the officers who are not only have merit but also have got seniority, but the petitioner could not fulfil the criteria to occupy the next higher post. Not only this, but also the Ex-J.M.F.C., Kujanga, in his confidential report, stand by the remark given in the CCR of the petitioner. The CCR of the petitioner has been duly communicated to him and his representation has been rightly rejected after being considered in view of the General Administration Department Memo No.741 dated 5.2.1982. In the year 2014, the petitioner was promoted to the post of Grade-II Bench Clerk. Be it stated that on 19.8.2014, the petitioner had made representation to restore his seniority with effect from 24.06.2013 in the gradation list but the same has also been rejected in view of Rule-9(2) of the Rules, 2008. On the whole, it is stated that the petitioner was rightly not promoted due to the adverse entries in his CCR which are serious in nature.

6. The petitioner filed rejoinder to the counter of the opposite party no.2 reiterating the facts narrated in the writ petition and some fresh facts. It is revealed from the same that at no point of time, the petitioner was asked to explain about the adverse remark as mentioned in the counter affidavit for the period from 18.01.2012 to 28.07.2012. According to him on 12.01.2012, the petitioner has been promoted to the post of Grade-III, Bench Clerk vide Annexure-7. If at all the petitioner could be found suitable for promotion on 12.01.2012, it is not correct to say about the change of conduct, attitude and behaviour of the petitioner subsequently as the CCR from 18.01.2012 to 28.07.2012 is allegedly not good. When the CCR for the above period is not communicated to the petitioner, the benefit of same should be accorded to him. When there is no enquiry or any explanation called for from the petitioner as to the entry in the communicated adverse remark, the authority should not have taken the same into consideration to deny him promotion. The petitioner has also submitted in the rejoinder to go through the service record and the CCR to justify his claim.

7. SUBMISSIONS

Mr.Nanda, learned counsel for the petitioner submitted that the petitioner, right from the date of his joining, till date, has got an unblemished character roll except for the period from 03.08.2012 to 29.04.2013. He further submitted that the communication of adverse entries in the CCR is only for a period of less than nine months and since the preceding five years CCR has to be gone through and the CCR for the rest of the period of preceding five years are favourable, the petitioner should have been promoted. Even if the petitioner has made representation to expunge the adverse entries in his CCR, it was rejected after the consideration of promotion to the next higher post. According to him, in such circumstance, it may be well assumed that the petitioner was not given adequate opportunity to ventilate his grievance for considering his case for promotion to the next higher post.

8. Mr.Nanda, learned counsel for the petitioner further contended that the opposite parties, while considering the petitioner's case for promotion, should have also considered the seniority as the employees below him in the gradation list, got promoted. The criteria for preceding five years should be understood in accordance with Orissa Civil Service (Criteria for Promotion) Rules, 1992 (hereinafter called "the Rules, 1992"), but the same has not been followed in the case of the petitioner. The entire service career, as would be appearing from the CCR of the petitioner, would go to show that the petitioner has got absolute integrity and has no adverse entries except the alleged one which is false and concocted one. When an employee has maintained his competency and character through-out, it is improbable on his part to behave in unbecoming manner for a very short span. So, the adverse entries in the CCR of the petitioner should have been expunged and the petitioner could have been promoted to the next higher post basing on the CCRs already available on record. He further submitted that the learned District Judge has committed an error by rejecting the representation of the petitioner on extraneous consideration, but not with reference to the Rules. When admittedly, there is no Departmental Proceeding or any other criminal proceeding against the present petitioner and he has no any adverse entries through-out his service career except the alleged one, debarring him from further promotion is not only discriminatory but also has damaged his service career. So, there is serious discrimination which is violative Articles 14 and 16 of the Constitution of India and as such, the writ petition be allowed and the petitioner be promoted to the next higher post by restoring his seniority with effect from 24.06.2013.

9. Mr.Tripathy, learned Additional Government Advocate submitted that the opposite party-appointing authority has considered the representation of the petitioner to expunge the adverse entries made in his CCR, but due to seriousness allegations, it was rejected. He further submitted that the adverse entries in his CCR by successive Judicial Officers being in the same manner, there is no doubt that the petitioner has no regard to the discipline in the Judicial Department and as such rightly he was not promoted to the next higher post. According to him, the adverse entries in the CCR of the petitioner within the preceding five years of the promotion have been taken into consideration by the DPC and thus, his demerit has superseded his seniority. On the other hand, the petitioner's case although went under the zone of consideration for promotion, but considering his CCR vis-a-vis the CCRs of others, he was not promoted due to such adverse entries in his CCR. He also stated that seniority is not the sole criteria always to consider the case for promotion but also merit is the main criteria for promotion as per Rules, 2008 and Rules, 1992. So, the writ petition is sans merit.

10. POINTS FOR CONSIDERATION

The main points for consideration are:
(i) whether the petitioner is entitled to be promoted to the next higher post?
(ii) Whether the adverse entry made in the CCR of the petitioner for the period from 03.08.2012 to 29.04.2013 can be expunged?

11. DISCUSSIONS

It is admitted that the petitioner joined in the judgeship of Cuttack as a Junior Clerk on 15.12.1987 and he was promoted to the rank of Grade-III, Bench Clerk on 12.01.2012 vide Annexure-7. His promotion to the rank of Grade-II, Bench Clerk was not made due the adverse remarks against him in his CCR. It is not in dispute that the petitioner made representation against the adverse entry in his CCR and the same was rejected by the opposite party no.2.

12. According to the General Administration Department Memo No.741/P.R.O.11/81(SE) dated 05.02.1982 with regard to the CCRs of non-Gazetted employees of the Government, the CCRs shall be maintained always financial year-wise and the report period will be from 1st April to 31st March. It is also made clear from the said circular that confidential remarks should be based on the assessing authority's personal knowledge of the

employee's work and conduct and minimum observations period of four months would be required for an officer to form a reliable opinion about the work of a subordinate. The CCRs, on receipt, will be scrutinized in the office of the appointing authority and all adverse remarks will be communicated to the employee by the officer entrusted with maintenance of CCRs because the purpose of communication is to ensure that the employee rectifies the defect at the earliest. The employee has right to make representation against the adverse remarks in his CCR for getting them expunged the representation should be examined and disposed of ordinarily within three months from the date of receipt of the same.

13. Now adverting to the facts of the present case, on 06.06.2016 vide Annexure-1, the petitioner was served with the adverse remarks in his CCR made for the period from 03.08.2012 to 29.04.2013, which is produced as under:

"OFFICE OF THE REGISTRAR, CIVIL COURTS,
CUTTACK
Confidential Letter No.22/Dt

To

Sri Iswar Chandar Pradhan
Bench, Clerk
Court of the J.M.F.C.(P), Kujanga

I am directed to inform that while going through your CCR by the learned District Judge, Cuttack, the following adverse remarks has been made by the then J.M.F.C.(P), Kujanga during your incumbency as Bench Clerk of the said Court for the period from 03.08.2012 to 29.04.2013:

"His behaviour is very rude. He instigates other staff and Advocates of the local Bar to move against the P.O. His work is not satisfactory and he does not hesitate to argue with the P.O. in each occasion."

Therefore, you are directed to submit your view, if any, in the matter within three days of receipt of this communication positively.

Registrar,
Civil Courts, Cuttack"

Except the above communication of adverse remarks, no other communication was made to the petitioner. Annexure-2 shows that the petitioner had made representation challenging the said adverse entry in his CCR on the ground that he has performed his duty as Bench Clerk to J.M.F.C. (P), Kujanga during the relevant period, i.e, 03.08.2012 to 29.04.2013 sincerely, honestly and efficiently. Annexure-3 shows that the petitioner made representation to restore his seniority because he was promoted to the post of Grade-II Bench Clerk later with effect from 30.04.2014 but not on 24.06.2013 when his juniors got promoted. But the said representation was also rejected by the appointing authority as per the provisions of Rule-9(2) of the Rules, 2008.

14. Mr.B.P.Tripathy, learned Additional Government Advocate relies upon Annexure-A/2 to counter the case of the petitioner. The said CCR relates to the period from 18.01.2012 to 28.07.2012 and 03.08.2012 to 29.04.2013 which read as follows:

1	2	3	4
18.1.12 to 28.7.12	Sr.Clerk JMFC(P), Kujanga	During this period there was major change in him. He quarrels with P.O. & other staffs. Rude behaviour towards everyone. However his work is O.K Sd/-28.7.12	Sd/-D.J 18.5.13
3.8.12 to 29.4.13	Bench Clerk, Court of J.M.F.C. (P), Kujanga	His behaviour is very rude. He instigates other staffs and Advocates of the local Bar to move against P.O. His work is not satisfactory and he does not hesitate to argue with the P.O. in each occasion Sd/-29.4.13	Communicate Sd/-18.5.13 The representation of Iswar Pradhan has no merit. The observation of the immediate superior officer is accepted. Sd/-21.2.2015

15. The copy of entries shows that the reviewing appointing authority has verified the remarks of the reporting officer on one day, i.e., on 18.05.2013, but directed to communicate the adverse remarks with regard to the period from 03.08.2012 to 29.04.2013. On the other hand, the adverse entries with

regard to the period from 18.01.2012 to 28.07.2012 was not communicated to the petitioner.

16. Annexure-B/2 is the resolution of the DPC held on 17.05.2013. The relevant discussion in regard to the petitioner, which is at paragraph-8 of the same, is placed below for reference:

> "xx xx xx xx
>
> 8.So far as Sri Iswar Chandra Pradhan placed at Serial No.8 is concerned although no D.P. has been initiated against him, the two successive entries made in his CCR covering the period from 18.1.2012 to 29.4.2013 speak adverse on his behaviour and official conduct. Two successive presiding officers have reported him to be quarrelsome and mischief monger. As noticed from his latest CCR entry, he goes to the extent of instigating the bar members to move against the Presiding Officer. His work is also reportedly not satisfactorily. Such a conduct is unbecoming on the part of a Government Servant, particularly an employee of our disciplined Department. In our considered view, he does not deserve to promotion until he mends his conduct and behaviour.
>
> xx xx xx xx"

17. The above discussion of the DPC shows that the DPC has taken into consideration the adverse entries made in the CCR of the petitioner for the period from 18.01.2012 to 28.07.2012 and 03.08.2012 to 29.04.2013. When the entry for the period from 18.01.2012 to 28.07.2012 has not been communicated to the petitioner at all, the same cannot be utilized against him.

18. The Hon'ble Supreme Court, in the case of **Dev Dutt –V- Union of India and others; (2008) 8 SCC 725,** at paragraph-41, have observed as follows:

> "41. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution."

With due respect to the above decision, it is clear that non-communication of adverse entry cannot be considered by the DPC to utilize

the same to deny promotion, which is violative of Article 14 of the Constitution of India and the same principle is applicable to the case at hand.

19. On further scrutiny of the records, it appears that the DPC was convened on 17.05.2013 whereas Annexure-A/2 shows that on 18.05.2013, the learned District Judge, Cuttack, opposite party no.2, directed to communicate the CCR for the period of 03.08.2012 to 29.04.2013, which is after the DPC convened its meeting and the said communication was made on 06.06.2013. On the other hand, there was no communication of the adverse entries for the relevant period to the petitioner prior to DPC convened its meeting. Thus, on the date of sitting of the DPC, there was no adverse entry for any period communicated to the petitioner giving rise to his representation to be made to expunge the said remarks. Since it is settled law that non-communicative adverse entry cannot stand as a bar to obstruct the promotion of an employee, the conclusion arrived at by the DPC taking such adverse remarks into consideration for not giving promotion to the petitioner, is not supported by any law.

20. As per Rule-3(c) of Odisha Civil Services (Criteria for Promotion) Rules, 1992, the DPC or Selection Committee shall scrutinize preceding five available annual CCRs and other documents, if any and this five years means the five years preceding the year in which the officer's performance is, in accordance with the relevant Recruitment Rules, first evaluated. For better appreciation, Rule-3(c) of the Rules, 1992 is placed below:

> "3.xx xx xx
>
> (C) In order to judge the suitability of an officer for promotion, the Orissa Public Service Commission, the Departmental Promotion Committee, the Selection Committee or Selection Board, as the case may be, shall scrutinize preceding five available annual Confidential Character Rolls and other documents, if any, having a bearing on the performance and conduct of all eligible officers, unless for reasons to be recorded, it is considered necessary to refer to any earlier record to adjudge an officer's suitability:
>
> Provided the available Confidential Character Rolls (C.C.Rs) taken into consideration for promotion as above shall include C.C.Rs covering at least a period of three years in preceding five years."
>
> Note I – The expression other documents means papers of whatsoever nature having bearing on the performance and conduct of

eligible officers like C. B. I. or Vigilance reports, papers relating to departmental action and other confidential reports having nexus with an officer's performances which might have been prepared after giving an opportunity to an officer of being heard and not reflected in his C. C. R's. or service records.

Note II – The expression "Preceding five Years" means the Five years preceding the year in which the Selection Committee, Departmental Promotion Committee or Selection Board as the case may be, sits, but where the said committee sits for more than once such five years shall be reckoned from the date of its first meeting."

21. The DPC has not considered the case of the petitioner in the light of the provisions of law as enshrined in Rules, 1992. For that we have called for the CCR of the petitioner. The available CCRs of the petitioner are as follows:

"21.6.2004 to 9.6.2006	Jr. Clerk in the office of the SDJM, (S), Cuttack	Sincere, hard working and methodical in his work. Well mannered. Nothing is heard against him.
15.7.2009 to 02.07.2010	Junior Clerk, Court of S.D.J.M., Cuttack	Obedient, sincere and dependable
15.12.2010 to 17.01.2012	Junior Clerk	Good"

Besides the above CCRs, the CCR for the years previous to 2004 from the date of his entry into service, there is no adverse remarks. Rather, he has been rated as a good employee. Similarly, after the relevant entry till 2016, he bears no adverse remarks and has got satisfactory CCRs. Be that as it may, had the DPC taken into consideration the available five years CCR preceding the year of selection without taking non-communicative adverse CCR only for the relevant period, the case of the petitioner could have been favourably considered. Hence, we are of the view that the DPC, instead of taking into consideration the relevant entries for preceding five years in the CCR as per rule, has taken into consideration the non-communicated adverse remarks illegally and as such has improperly rejected the case of the petitioner for promotion to the post of Grade-II Bench Clerk.

22. It is also found that the opposite party no.2 gave promotion to the petitioner on 30.4.2014 to the rank of Grade-II Bench Clerk. But, it does not appeal to conscience as to how the petitioner being unsuitable for promotion in 2013, was found suitable for promotion in 2014 having the same CCR on the record. Thus, we are of the view that the petitioner has been denied promotion in 2013 illegally and the same is violative of Article 14 of the Constitution of India. On the other hand, he is entitled to be promoted in 2013 under the DPC held on 17.05.2013. Point No.(i) is answered accordingly.

23. **Point No.(ii)**

It has been already discussed, as above, that the adverse entry communicated after the due date of DPC convened cannot be considered to obstruct the promotion of the petitioner on 17.05.2013 to the next higher post, i.e, Grade-II Bench Clerk. Also it is revealed from the material that the representation has been made by the petitioner to expunge such adverse remark made in his CCR and by Annexure-4, the Registrar, Civil Courts, Cuttack simply informed that the District Judge, Cuttack has been pleased to reject the representation as it was not found satisfactory. The representation vide Annexure-2 shows that the same has been made by the petitioner on 07.06.2013 in detail but consideration of the same was made only in 2015 being communicated vide Annexure-4. The opposite party no.2 is required to pass a speaking order while rejecting the representation of the petitioner. The same being not made, we are of the view that the same has not been considered in proper manner. Hence, the rejection of the same cannot be considered as legal. When not only the CCRs of the five years preceding the year of selection and subsequent year do not have any adverse remark but has satisfactory remark, the said adverse remark for the period from 03.08.2012 to 29.04.2013 is liable to be quashed. Considering all such materials, we are of the opinion that the adverse entry made in the CCR of the petitioner for the relevant period, i.e, from 03.08.2012 and 29.04.2013 is liable to be expunged. Point No.(ii) is answered accordingly.

24. **CONCLUSION**

In view of the aforesaid analysis, the adverse entry in the CCR of the petitioner for the period from 03.08.2012 to 29.04.2013 being liable to be expunged or quashed, the Court do order so. We, therefore, are of the considered view that the petitioner is entitled to be promoted to the post of Grade-II Bench Clerk with effect from 24.06.2013 instead of 30.6.2014 to the said post for which we direct that the petitioner be promoted to the post

of Grade-II Bench Clerk when his juniors got promoted by restoring his seniority. However, service benefits including financial benefits be accorded to him notionally. Order for such promotion be passed within one month from the date of communication of this order. The writ petition is disposed of accordingly. Requisites for communication of the order be filed within a week.

Writ petition disposed of.

2017 (II) ILR - CUT-587

S.K. MISHRA, J.

W.P.(C) NO. 6417 OF 2016

SURENDRA PRADHAN ……..Petitioners

.Vrs.

STATE TRANSPORT AUTHORITY, ODISHA & ANR. ……Opp. Parties

MOTOR VEHICLES ACT, 1988 – S. 71

Advertisement for stage carriage permit – Petitioner made an application with required affidavit – Transport commissioner granted permit infavour of the petitioner – However, secretary STA directed to place the matter in the next STA meeting on the ground that two number of VCRs were pending against his vehicles – Hence the writ petition – Grant of permit and issuance of permit are different – Once the permit is granted it is simply left to communicate the order to the granter, which is only a ministerial act and it can not be equated to the grant of permit – Moreover, it is proved that VCRs initiated against the petitioner were disposed of on different dates and no such VCR was initiated against the stage carriage for which application has been made – So it cannot be said that the petitioner has made any mis representation – Held, action of O.P. No.2 is illegal – Impugned order is quashed – Direction issued to issue the stage carriage permit infavour of the petitioner immediately. (Paras 17 to 21)

Case Law Relied on :-

1. AIR 1998 SC. 2621 : A.P.S.R.T.C. Vrs. State Transport Appellate Tribunal & Ors.

For Petitioner : M/s. Pravakar Behera & A.K.Behera
For opposite parties : Addl. Standing Counsel
For the Interveners : M/s. M. Balakrishna Rao & R.K.Pattnaik.

Date of judgment: 07.7.2017

JUDGMENT

S.K.MISHRA,J.

In this writ petition, the petitioner, who happens to be the owner of a stage carriage vehicle bearing Regn. No.0D-02-Z-5699, who had applied for route permit from Kakatpur to Bhubaneswar (2 R.T.) and was selected for the same, assails the order dated 21.3.2016 passed by the Secretary, State Transport Authority, Odisha, opposite party no.2, directing to place for grant of permit in favour of the petitioner in the next meeting of the State Transport Authority (hereinafter referred to as the "S.T.A." for brevity) to be held on 24.4.2016.

2. The brief facts of the case is that the petitioner is a transport operator and he owns several vehicles. He purchased a new vehicle and get the same registered on 4.12.2015 bearing Regn. No.0D-02-Z-5699. The Transport Commissioner-cum-Chairman, State Transport Authority, Odisha, Cuttack has published an advertisement in The New Indian Express on 27.11.2015 inviting applications from intending stage carriage operators for grant of permanent permit against the various vacant lots/routes. In that advertisement, it was mentioned that applications must reach the Office of the Chairman within fifteen days during the office hours and not later than 5 P.M. on 11.12.2015. In the said advertisement it was stipulated that the applications must be made in prescribed form duly filled in and signed by the registered owner accompanied with money receipts towards applications fees together with all M.V. documents. It was further stipulated that the applicant shall also file an affidavit along with application stating therein that no tax dues and penalty are outstanding against the operator, no VCR pending against the vehicle, no court cases pending against any of his vehicle and the present vehicle.

3. Pursuant to the aforesaid advertisement the petitioner had applied for grant of permanent permit in his favour for operating his stage carriage vehicle in the aforesaid route. The vacant route was mentioned at Sl. No.18 of the said advertisement. The application was undisputedly filed on the last date before closure of the Office. On 18.12.2015 the 280th meeting of the

S.T.A. was held. On the basis of merits and evaluation criteria evolved by the S.T.A. the petitioner was found more meritorious and accordingly the S.T.A. in it proceeding mentioned above resolved to grant permanent permit in favour of the petitioner in respect of his stage carriage vehicle registration number of which has been mentioned in the preceding paragraph. Though the S.T.A. took a decision to grant permanent permit to the petitioner with a stipulation that the petitioner should lift the permit within a period of ten days from the date of grant of the order, the same has not been communicated to him.

4. However, it is the case of the petitioner that he has not been intimated by the opposite parties about the grant order. After the petitioner came to know about the decision of the S.T.A., he deposited the permit fees in the office of the Transport Commissioner on 10.2.2016 for issuance of permanent permit in his favour. Though the petitioner has deposited the permit fees and submitted all the M.V. documents before the office of the Transport Commissioner, as yet no permit has been issued in favour of the petitioner. The petitioner personally approached opposite party no.2 in respect of his vehicle. However, opposite party no.2 informed him that his case will be reconsidered in the next meeting. The petitioner further learnt that opposite party no.2 by virtue of its order dated 21.3.2016 has directed that the matter be placed before the next S.T.A. meeting to be held on 21.4.2016. The petitioner is, therefore, aggrieved by the order passed by opposite party no.2 to place his case in the next meeting of the S.T.A., seeks a direction to quash the said order, i.e. Annexure-5 and issue mandamus against opposite parties to issue permanent permit in respect of his vehicle in the aforesaid route.

5. The opposite parties, i.e. the S.T.A. represented through its Asst. Secretary, have filed its counter affidavit. The opposite parties in this case, inter alia, plead that the petitioner's claim is based on the proceeding held in 280th meeting of the S.T.A. held on 18.12.2015 under Annexure-3. It contains a stipulation that the grantee shall lift the permit within a period of 10 days from the date of communication of the grant order. The opposite parties further plead that there is no communication of grant order from the opposite parties to the petitioner. Therefore the question of seeking a direction for issuance of permanent permit does not arise.

6. The opposite parties further plead that one Anam Charan Swain who was also an applicant for the said route vide his communication dated

18.2.2016 brought to the notice of the Commissioner STA regarding pendency of V.C.R. against the petitioner. It is brought to the notice of the Court that the S.T.A. in its 279th meeting, held on 17.6.2015, decided that plying of vehicle by the applicant, violating permit condition, plying any vehicle without permit or any unauthorized route, making unauthorized trip, vehicle check report drawn/report submitted to that effect will be considered, irrespective of the fact that VCR was closed in compounding of the offence. It was further pleaded that five marks of each violation will be deducted for the aforesaid violation. Further case of the opposite parties is that at the time of consideration of permanent permit, the petitioner on 6.12.2015 has shown an affidavit that that there is no tax penalty outstanding pending against his vehicle, no VCR case is pending against his vehicle and also route. The opposite parties plead that on verification subsequently, it was found that there were two VCRs pending against the petitioner on the date of consideration of the application. In this connection two letters have been issued by the RTO, Bhubaneswarand RTO, Cuttack on 15.3.2016 and 14.3.2016 respectively. Therefore, it is stated that the petitioner has given false affidavit indicating therein that non-pendency of the VCR against his other vehicles and on the basis of such misrepresentation it was decided to grant permit in his favour.

7. The opposite parties further plead that it is the settled principle of law that unless and until the order is communicated to the person concerned, it does not create nor confer any right on him, whose enforcement can be sought for. Therefore when in due inquiry it was found that two number of VCRs were pending against the petitioners, the opposite parties thought it prudent to place the matter before the next meeting of S.T.A. for the purpose of taking just and appropriate decision in accordance with 279th meeting of S.T.A. held on 17.6.2015. The opposite parties pray that the writ petition is without merit and the same should be dismissed.

8. One Anam Charan Swain, intervener, has filed a Misc. Case to implead himself as a party to the proceeding. Though no order has been passed on the Misc. Case and he was not granted permission to file counter affidavit, learned counsel appearing for the intervener namely M. Balkrishna Rao was also heard along with the counsel for the petitioner and leaned Addl. Standing Counsel for the State.

9. In the above background of the facts, the following questions arise for determination.

Firstly, whether the petitioner has deliberately perpetuated fraud or made a fraudulent representation regarding non-pendency of any VCR against any of his concerned vehicle which he is required to give as per the advertisement as per Annexure-1.

Secondly, whether opposite party no.2 can stop issuance of permit though there is order to that effect by the S.T.A.

Thirdly, it is to be seen whether the writ of mandamus should be issued quashing Annexure-5 upholding the contention of the learned counsel for the petitioner that once STA takes a decision to grant physical issuance of permit is only a ministerial act and the Secretary, S.T.A. is bound to obey the order passed by the S.T.A.

10. The most important aspect of the case is that in the years 2014 as per the 279th meeting of the S.T.A., held on 17.6.2015, it has been decided that while considering grant of permit in favour of the different applicants minus marking should be adopted for each latches in payment of tax, pendency of cases and issuance of V.C.R. It is apparent from Annexure-A/2 that the S.T.A. in its 279th meeting resolved that that no mark should be awarded for experience as stage carriage operator. The most important resolution appeared at page 32 (internal page-7 of the counter affidavit filed by the opposite parties). It is profitable to take note of the exact words used by the State.

> "(b) Plying of vehicle by the applicant violating permit conditions, plying any vehicle without permit on any unauthorized route, making unauthorized trip, Vehicle Check Reports drawn/reports submitted to that effect will be considered irrespective of the fact that the VCR was closed on composition of offences. Five marks for each violation will be deducted for above offences."

11. Now in view of the resolution of the S.T.A. in its 279th meeting it was the bounden duty of the S.T.A. to incorporate the same in the advertisement, which was issued on 27.11.2015 as at Annnexure-1 asking the applicant to file affidavit in the line of the resolution.

12. A careful examination of Annexure-1, i.e. the advertisement reveals that the following condition has been imposed regarding criminal cases, VCR etc.

" xxx xxx xxx xxx xxx

The applicant shall also file an affidavit along with application stating therein that no tax dues and penalty are outstanding against the operator, no VCR pending against the vehicle, no Court cases pending against any of his vehicle and the present vehicle, number of year of operation/experience of the applicant in providing passenger transport.

xxx xxx xxx xxx xxx."

13. In pursuance of the aforesaid advertisement the petitioner, as it appears from the Annexure-B/2 filed by opposite party no.2, has filed an affidavit to the effect that there is no tax penalty outstanding pending against his vehicle, no V.C.R. court case is pending against any of his vehicle and also route. He has also stated that he has 25 years of experience in operating the stage carriage.

14. The specific case of the opposite parties is that after the decision was taken they have sought for clarification and it was brought to the notice of the S.T.A., as per the letters issued by the R.T.Os., Bhubaneswar and Cuttack on 15.3.2016 and 14.3.2016 that V.C.Rs. were initiated against the petitioner, but the same were disposed of on different dates. However, no such VCR was initiated against the stage carriage for which an application has been made. It is also borne out from the record that on the next year another advertisement was brought out by the STA in daily Odia Newspaper "Dharitiri" on 22.3.2016 which had also a stipulation similar to the stipulation made in the previous years advertisement which the subject matter of the writ petition.

15. It is further borne out from the record that on 5.4.2016 Annexure-11 has been issued by the STA, which is a corrigendum. In the said corrigendum, the opposite parties referring to the earlier advertisement published on 22.3.2016 in Odia Daily "Dharitri" clarified that no VCR pending against the vehicle may be read as no VCR pending against the operator.

16. From the aforesaid facts , which are amply established in this case, it is clear that the STA in its 279th meeting took a decision that negative mark should be awarded to those applicants against whom cases are pending for violation of traffic rules and regulations or against whom VCR are issued etc. However, while carrying out of the resolution of the STA in its 279th meeting the STA itself committed a mistake by not publishing the exact resolution taken by the STA in the 279th meeting, rather it sought for an affidavit from the intending operators to the following effect:-

> "…….The applicant shall also file an affidavit along with application stating therein that no tax dues and penalty are outstanding against the operator, no VCR pending against the vehicle, no Court cases pending against any of his vehicle and the present vehicle ….."

17. Thus, it is apparent that the opposite parties are themselves to be blamed. They have taken a decision and while carrying out the same they have made a mistake. This mistake was not detected in the year 2015. Another advertisement was issued again by the STA in the year 2016 committing the same mistake and later on corrigendum was issued. However, the corrigendum issued in the year 2016 will not be applicable to the present petitioner as his application was in pursuant to advertisement dtd.27.11.2015 wherein no stipulation has been made that no VCR should have been initiated against the petitioner, rather the stipulation was that no VCR could be initiated against the vehicle in question.

18. Thus, the contentions raised by the learned counsel for the State and learned counsel for the intervener that the petitioner has filed an affidavit to comply the stipulations made in the advertisement under Annexure-1 and there are cases, which were initiated and disposed of against his other vehicles, the act of the petitioner is tainted with fraud and the order of opposite party no.2 in stalling issuance of permanent permit in favour of the petitioner is correct.

19. However, this court is of the opinion that the corrigendum issued on 5.4.2016 has no application to the processes for selection in the year 2015 in pursuant to the advertisement dtd.27.11.2015. If the S.T.A. has taken a decision, it should implement the same. The petitioner should not suffer with any orders or liabilities if order is not implemented due to the fault of the S.T.A. The decision taken by the S.T.A. in its meeting is a confidential matter and the same is not published in the news paper. While publishing advertisement for consideration of application of issuance of route permit, it is the duty of the S.T.A. to implement its own decision and, therefore, it cannot be said that the petitioner has made any fraudulent representation or mis-representation of facts before the S.T.A. His affidavit is in the line of the advertisement issued under Annexure-1. So the first question that arises in this case is answered in favour of the petitioner and it is held that the petitioner has been treated discriminately by the S.T.A. and appropriate permit should be granted in his favour. It is also contended by the learned

Standing Counsel in course of hearing that the decision to grant stage carriage permit in favour of the petitioner is that the S.T.A. has jurisdiction, to recall its own order, under sub-clauses (a) and (b) of clause (xxii) of sub-section (2) of Section 72 of the Motor Vehicles Act, 1988. The S.T.A. can not recall the permit issued in his favour. However, careful examination of the aforesaid provision reveals that the Regional Transport Authority may after giving notice of not less than one month vary the conditions of the permit or attach to the permit further conditions. The aforesaid provision clearly provides for variation of the conditions of the permit and not recalling of the permit itself. So the contentions raised by the learned Addl. Standing Counsel for the State and learned counsel for the intervener are not tenable.

20. The second question is that the opposite parties plea that though decision has been taken for grant of permit in favour of the petitioner as per the 279th meeting as yet no permit has been issued against him so he cannot claim a matter of right to be issued a permanent permit. In this score, this Court takes note of the reported case of ***A.P.S.R.T.C. Vrs. State Transport Appellate Tribunal and others***; AIR 1998 SUPREME COURT 2621, wherein the Hon'ble Supreme Court at paragraph-11 has held that the grant of permit and the issue of permit are different.The Tribunal or the Commissioner grants permission to the Secretary of the R.T.A. after receipt of record evidencing Transport Commissioner's permission. The actual issue of permit was only a ministerial act and it cannot be equated to the grant of permit. Thus, it is clear that once it was decided in 280th meeting the only course available to opposite party no.2 is to issue permit in favour of the petitioner and his action in not granting permit or intimating him to lift the permit, the petitioner having already deposited the permit fees is illegal.

21. In that view of the matter, this Court is of the opinion that writ petition is meritorious and it deserves to be allowed. Accordingly, the writ petition is allowed. Annexure-5 issued by opposite party no.2 referring the application of the petitioner for grant of permanent permit in favour of his vehicle bearing Regn. No.0D-02-Z-5699 to the next meeting is hereby quashed. Opposite party nos.1 and 2 are directed to issue the stage carriage permit immediately in favour of the petitioner preferably within a period of seven days from the date of notice of this order.

22. Keeping in view the aforesaid consideration, there shall be no order as to costs.

23. Urgent certified copy of this judgment be given to the learned counsel for the petitioner as per rules.

24. Requisites to communicate the order to the opposite parties be filed within seven days.

Writ petition allowed.

2017 (II) ILR - CUT-595

DR. A.K. RATH, J.

C.M.P. NO. 266 OF 2014

TRILOCHAN PARIDA .....Petitioner

.Vrs.

PURNA CHANDRA NANDA & ANR. .....Opp. parties

EVIDENCE ACT, 1872 – S.65(a)

Secondary evidence – Learned trial court allowed application of the plaintiff to accept Photostat copy of Panchayat Bantan Patra as secondary evidence – Order challenged – Application was filed after closure of evidence of the plaintiff – On a conspectus of the plaint, it is evident that there is no pleading with regard to previous partition nor the said document has been relied upon – The plaintiff failed to explain as to under what circumstances the Photostat copy was prepared – No foundation was laid by the plaintiff to lead the secondary evidence – Since the conditions enumerated in clause (a) of Section 65 of the Act had not been satisfied, the learned trial court is not correct in accepting the Photostat copy of the document as secondary evidence – Held, the impugned order passed by the learned trial court is quashed. (Paras 6, 7)

Case Laws Referred to :-

1. AIR 2007 SC 1721 : Smt.J.Yashoda v. Smt. K.Shobha Rani.

For Petitioner : Mr. S.K.Mishra
For Opp. Parties : Mr. S.Samantray

Date of Hearing :19.4.2017
Date of Judgment: 1.05.2017

JUDGMENT

DR.A.K.RATH, J.

This petition challenges the order dated 21.2.2014 passed by the learned Civil Judge (Senior Division), Udala, Mayurbhanj in Civil Suit No.63 of 2012. By the said order, the learned trial court allowed the application of the plaintiff to accept the photostat copy of Panchayat Bantan Patra as secondary evidence.

2. Opposite party no.1 as the plaintiff instituted Civil Suit No.63 of 2012 in the court of the learned Civil Judge (Senior Division), Udala, Mayurbhanj for declaration of easementary right, mandatory and permanent injunction impleading the petitioner and proforma opposite party no.2 as defendants. The case of the plaintiff is that Late Raj Kishore Parida, the father of defendant no.1 and proforma defendant no.2 and two others were the joint recorded owners of homestead appertaining to Sabik Khata No.28 and Jantrida under Sabik Khata No.26 of Mouza-Nagabani. The property was amicably partitioned between the parties. Raj Kishore got land measuring 11 gunths towards South in East-West direction. After death of Raj Kishore, his two sons i.e., both the defendants, amicably partitioned the property keeping the provisions of road for their joint use towards north with width-18. In the said partition, Jaykrushna got western side. It was decided that the road towards north will be used by both of them for ingress and egress to public road. It is further pleaded that he purchased the share of Jay Krushna proforma defendant no.2 by means of two sale deeds dated 24.11.1981. He constructed a dwelling house and used the suit passage for ingress and egress. The land purchased by the plaintiff has been recorded in his name.

3. Pursuant to issuance of summons, defendant no.1 entered appearance and filed the written statement denying the assertion made in the plaint. It is stated that there is no passage. The land of defendant no.2 is adjacent to public road and thus the plea of existence of no passage to public road is not correct. The defendant no.2 also filed a written statement contending inter alia that there is a passage in between the land of defendant nos.1 and 2. While the matter stood thus, the plaintiff filed an application to accept the photostat copy of Panchayat Bantan Patra as secondary evidence on the ground that he has procured the same from defendant no.2. It is stated that defendant no.2 has filed objection to the petition of the plaintiff for production of original document on the ground that he is an old man of 90 years and has lost his memory. He could not remember where the original was kept. Earlier, the Court has directed defendant no.2 not to produce the

original Bantan Patra without leave of this Court. In course of cross-examination of defendant no.1, since document was not filed, the court had to accept the photostat copy of the same as secondary evidence. It is further stated that defendant no.1 was a party to the said document. The defendant no.1 filed objection to the same. It is stated that there is no whisper in the plaint with regard to the said document. After closure of the evidence from the side of the plaintiff, the petition has been filed. There is no material on record that the document sought to be produced as secondary evidence was made from the original. The photostat copy of the document is not admissible unless it is proved to be genuine. Defendant no.2 supported the case of the plaintiff. The learned trial court assigned the following reasons and allowed the application.

> "Previously, this Court has given observation with a direction to Defendant No.2 not to produce the said 'Bantan Patra' before the Court any stage during trial without leave of the Court. The said order was not challenged by defendant No.2. In other word, he has accepted the fact of existence of such 'Bantan Patra'. Admittedly, the plaintiff has not relied upon such document during filing of the plaint. But it is a subsequent development came through the cross-examination of Defendant No.2 himself. The defendant No.2 had brought the fact from the mouth of the plaintiff for which the plaintiff compelled to adduce evidence on such fact. The plaintiff has issued notice as per Sec.66 of Indian Evidence Act. Thereafter, he produced the said photo copy of original. As such, he is authorized to give secondary evidence relating to said 'Bantan Patra'. It is needless to say that document shall go through proper examination and cross-examination."

4. Heard Mr. Mishra, learned Advocate for the petitioner and Mr.Samantray, learned Advocate for opposite party no.1.

5. On an interpretation of Sections 63 and 65(a) of the Evidence Act, the apex Court in the case of Smt.J.Yashoda v. Smt. K.Shobha Rani, AIR 2007 SC 1721 held :

> "**7.** Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.
>
> 8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be

given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section. In Ashok Dulichand v. Madahavlal Dube and Another [1975(4) SCC 664], it was inter alia held as follows:

"After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the Court of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973,

> before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy. Prayer was also made by the appellant that in case respondent no. 1 denied that the said manuscript had been written by him, the Photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession of respondent no.1. The appellant further failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No.1 in his affidavit denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

6. The present case may be examined on the anvil of the decision cited (supra). On a conspectus of the plaint, it is evident that there is no pleading with regard to previous partition nor the said document has been relied upon. The plaintiff failed to explain as to under what circumstances the photostat copy was prepared. After closure of evidence of the plaintiff, the application was filed. No foundation was laid by the plaintiff to lead the secondary evidence. Since the conditions enumerated in Clause (a) of Section 65 of the Indian Evidence Act had not been satisfied, the learned trial court fell into patent error of law in accepting the photostat copy of the document as secondary evidence.

7. In the wake of the aforesaid, the order dated 21.2.2014 passed by the learned Civil Judge (Senior Division), Udala, Mayurbhanj in Civil Suit No.63 of 2012 is quashed. The petition is allowed. There shall be no order as to costs.

Petition allowed.

2017 (II) ILR - CUT- 600

DR. A.K. RATH, J.

CMP NO. 389 OF 2016

RAJENDRA KUMAR ROUTRAY & ORS. .....Petitioners

.Vrs.

GOURAHARI PATTNAYAK & ANR. .....Opp. Parties

ODISHA CONSOLIDATION OF HOLDINGS & PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – S. 51

Bar of suit – Consolidation ROR published in the year 2003 – Suit filed challenging such ROR – Held, Civil Court has the jurisdiction to entertain the suit in spite of the bar contained in section 51 of the Act. (Para 8)

For Petitioner : M/s Ranghadhar Behera
For Opp. Parties : Mr. A.C. Mohapatra

Date of hearing : 19.07.2017
Date of judgment: 26.07.2017

JUDGMENT

DR. A.K.RATH, J

This petition challenges the order dated 11.2.2016 passed by the learned 2nd Addl. District Judge, Khurda in Civil Revision No.2 of 2015. By the said order, learned 2nd Addl. District Judge dismissed the revision and confirmed the order dated 10.9.2015 passed by the learned Civil Judge (Senior Division), Khurda in C.S. No.91 of 2005, whereby and whereunder the learned trial court rejected the application of the defendants under Order 7 Rule 11 CPC to reject the plaint on the ground that the suit is barred as per the provision of Sec. 51 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as "the OCH & PFL Act").

2. Opposite parties as plaintiffs instituted the suit for declaration of right, title and interest, declaration that the mutation ROR issued by the consolidation authority is wrong, illegal and not binding on them, correction of the same and permanent injunction impleading the petitioners as defendants. Pursuant to issuance of summons, defendants entered appearance and filed a petition under Order 7 Rule 11 CPC to reject the plaint on the ground that the suit is not maintainable in view of Sec. 51 of the OCH & PFL Act. It is stated that the ROR issued by the consolidation authority can be

challenged before the Consolidation Commissioner under the provisions of the OCH & PFL Act. The consolidation authority is empowered to decide the right, title and interest of the parties and correctness of the ROR. Learned trial court rejected the same. Assailing the said order, the defendants filed Civil Revision No.2 of 2015 in the court of the learned 2nd Addl. District Judge, Khurda, which was eventually dismissed.

3. Heard Mr. Ranghadhar Behera, learned counsel for the petitioners and Mr. A.C. Mohapatra, learned counsel for the opposite parties.

4. Mr. Behera, learned counsel for the petitioners, submitted that the consolidation ROR was published in the year 2003. It was open to the plaintiffs to file revision before the Consolidation Commissioner under the provision of the OCH & PFL Act. After lapse of 12 years, they instituted the suit. The suit is not maintainable in view of the embargo under Section 51 of the OCH & PFL Act.

5. Per contra Mr. Mohapatra, learned counsel for the opposite parties, submitted that after publication of the record of right, the suit has been filed for declaration of right, title and interest and for a declaration that the publication of record of right is illegal and not binding and permanent injunction. The prayer being composite, the civil court has jurisdiction to decide the lis.

6. Secretary of State v. Mask & Co., AIR 1940 Privy Council 105 is a locus classicus on the subject. It was held –

> "….It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

7. In Gulzar Khan v. Commissioner of Consolidation and others, 76 (1993) CLT 161, the question arose whether the power conferred by Sec. 37 of the OCH & PFL Act would be available for exercise after a notification has been issued as contemplated by Sec. 41(1) of the Act on the subject that consolidation operations have been closed in the unit, the result of which is that the village or villages forming part of the unit cease to be under consolidation operations. The Full Bench of this Court summarised the following principles.

"36. We may conclude our views relating to Civil Court's jurisdiction by stating that the same would be available after closure of consolidation operations only in any one of the following circumstances;

(i) The cause of action accruing after the closure of the consolidation operations. (ii) If the consolidation authorities had taken the decision without complying with the provisions of the Act or had not acted in conformity with the fundamental principle of judicial procedure (which would take within its fold the case of violation of natural justice).

(iii) Obtaining of order from the hand(s) of consolidation authorities by playing fraud on the party who seeks to approach the Civil Court."

8. In view of the authoritative pronouncement of the decisions cited supra, the irresistible conclusion is that the civil court has the jurisdiction to entertain the suit in spite of the bar contained in Section 51 of the OCH & PFL Act.

9. In the wake of the aforesaid, the petition sans merit, is dismissed. No costs.

Petitiion dismissed.

2017 (II) ILR - CUT-602

DR. A.K. RATH, J.

C.M.P. NO. 446 OF 2014

G. BASAVAIAH .....Petitioner

.Vrs.

SAMIR KUMAR PATTNAIK .....Opp. Party

CIVIL PROCEDURE CODE, 1908 – O-22, R-10

Suit for specific performance of contract – During the pendency of the suit, defendant alienated the suit property in favour of the present petitioner – Suit decreed – Defendant preferred appeal, who expired subsequently – No steps by his legal heirs to prosecute the appeal – Petitioner filed petition under Order 22, Rule 10 C.P.C. for substitution as there was devolution of interest in his favour during the pendency of the suit – Application rejected – Hence this Petition –

A transferee pendente lite of an interest in immovable property is a representative in interest of the party from whom he has acquired that interest – So the petitioner being an alienee is ordinarily entitled to join as a party under Order 22, Rule 10 C.P.C. to enable him to protect his interest – Held, the impugned order passed by the appellate court is quashed – The application filed by the petitioner under Order 22, Rule 10 C.P.C. is allowed. (Paras 5,6,7)

Case Laws Referred to :-

1. AIR 2001 SC 2552 : Dhurandhar Prasad Singh vs. Jai Prakash University & Ors.
2. AIR 2005 SC 2209 : Amit Kumar Shaw and another vs. Farida Khatoon & Anr.

For Petitioner : Mrs. Padmaja Pattanaik

For Opp. Party : Mr. Pradipta Kishore Nanda

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 26.02.2014 passed by the learned District Judge, Cuttack in R.F.A. No.17 of 2011, whereby and whereunder, learned appellate court rejected the application of the petitioner under Order XXII Rule 10 C.P.C. to substitute him in place of the deceased-appellant.

02. Since the dispute lies in a narrow compass, it is not necessary to recount in detail the cases of the parties. Suffice it to say that the opposite party as plaintiff instituted C.S. No.467 of 2006 in the court of the learned Civil Judge (Sr. Div.), 1st Court, Cuttack for specific performance of contract impleading one Lokanath Das as defendant. The defendant entered appearance and filed written statement denying the assertions made in the plaint. The suit was decreed. Assailing the judgment and decree, the defendant filed R.F.A. No.17 of 2011 before the learned District Judge, Cuttack. Since there was delay in filing the appeal, an application under Sec.5 of the Limitation Act was filed to condone delay. While the matter stood thus, the appellant died on 29.06.2013 leaving behind his widow, son and daughter. It is apt to state here that during pendency of the suit, the petitioner had purchased the suit land from the defendant-appellant by means of a

registered sale deed dated 19.04.2010 and mutated the same in his name. After death of the defendant-appellant, he filed an application under Order XXII Rule 10 C.P.C. to allow him to substitute in place of the deceased-appellant and continue the appeal. According to him, since the legal representatives of the deceased-appellant have not taken steps for substitution, he is seriously affected. His interest has devolved after him. The respondent filed objection to the same stating therein that the learned trial court had passed the order of status quo. Violating the same, the defendant-appellant alienated the property to deprive the plaintiff from the fruits of litigation. The transaction is void. Learned appellate court held that the alleged sale deed executed in favour of the petitioner by the defendant can be treated as non-existant. The petitioner has no right to be substituted in place of the deceased-appellant and rejected the petition.

03. Mrs. Padmaja Pattanaik, learned counsel for the petitioner submitted that during pendency of the suit, the defendant alienated the land in favour of the petitioner by means of a registered sale deed for a valid consideration. Thereafter, the petitioner mutated the land in his favour. Since the legal heirs of the defendant-appellant have not taken steps to prosecute the appeal, the petitioner filed an application for substitution. She further submitted that there was devolution of interest. She relied on the decision of the apex Court in the case of ***Dhurandhar Prasad Singh vs. Jai Prakash University and others,*** **AIR 2001 SC 2552.**

04. Per contra, Mr. Pradipta Kishore Nanda, learned counsel for the opposite party submitted that learned trial court directed the parties to maintain status quo over the suit property. The defendant executed the sale deed in favour of the petitioner in contravention of the order of status quo. The alleged sale deed is void. Thus, there is no devolution of interest upon the petitioner.

05. The apex Court in the case of *Dhurandhar Prasad Singh* (supra) held that Order XXII Rule 10 C.P.C. provides for cases of assignment, creation and devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of suit is devolved upon another during its pendency but such a suit may be continued with the leave of the Court by or against the person upon whom such interest has devolved. But, if no such a step is taken, the suit may be continued with the original party and the person upon whom

the interest has devolved will be bound by and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original party being no longer interested in the proceeding did not vigorously prosecute or collouded with the adversary resulting in decision adverse to the party upon whom interest had devolved. The legislature while enacting Rules 3, 4 and 10 has made clear-cut distinction. In cases covered by Rules 3 and 4, if right to sue survives and no application for bringing legal representatives of a deceased party is filed within the time prescribed, there is automatic abatement of the suit and procedure has been prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. In cases covered by Rule 10, the legislature has not prescribed any such procedure in the event of failure to apply for leave of the Court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceeding would continue by or against the original party although he ceased to have any interest in the subject of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on the record. Under Rule 10, Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this entitles, the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the Court for leave to continue the suit.

06. In ***Amit Kumar Shaw and another vs. Farida Khatoon and another,*** **AIR 2005 SC 2209**, the apex Court held that the application under Order XXII Rule 10 can be made to the appellate Court even though the devolution of interest occurred when the case was pending in the trial court. It further held that under Order XXII, Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. An alienee pendente lite is bound by the final decree that may be passed in the suit. Such an alienee can be brought on record both under this rule as also

under O 1 Rule 10. Since under the doctrine of lis pendens a decree passed in the suit during the pendency of which a transfer is made binds the transferee, his application to be brought on record should ordinarily be allowed. The doctrine of lis pendens applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Though the plaintiff is under no obligation to make a lis pendens transferee a party; under Order XXII Rule 10 an alienee pendente lite may be joined as party. The Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. A transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

07. In the wake of aforesaid, the order dated 26.02.2014 passed by the learned District Judge, Cuttack in R.F.A. No.17 of 2011 is quashed. The application filed by the petitioner under Order XXII Rule 10 C.P.C. is allowed. Learned appellate court shall proceed with the appeal. The petition is allowed. No costs.

Petition allowed.

2017 (II) ILR - CUT- 607

DR. A.K. RATH, J.

C.M.P. NO. 1561 OF 2014

GODABA MADHU .....Petitioner

.Vrs.

RAI ANANDAM .....Opp. Party

REGISTRATION ACT, 1908 – Ss. 17, 49

Whether unregistered partition deed filed by the defendant is admissible in evidence for Collateral purpose ? Held, in the event the defendant wants to mark the document for collateral purpose, it is open for him to pay the stamp duty with penalty, get the document impounded and the learned trial court is at liberty to mark the said document as exhibit for collateral purpose, subject to proof and relevance. (Paras 6,7)

Case Law Referred to :-

1. AIR 1969 AP 242 : Chinnappareddigari Peda Mutyala Reddy -V- Chinnappareddigari Venkata Reddy

For Petitioner : Mr. R.K. Sahoo

For Opp. Party : Mr. Biraja Pr. Das

Date of Hearing : 22.02.2017

Date of Judgment:03.03.2017

JUDGMENT

DR. A.K.RATH, J.

The seminal question that hinges for consideration is as to whether an unregistered partition deed is admissible in evidence for collateral purpose ?

2. The opposite party as plaintiff instituted C.S.No.44 of 2013 in the Court of the learned Civil Judge (Senior Division), Parlakhemundi, Gajapati for declaration of right, title, interest over the suit property, permanent injunction and recovery of possession impleading the petitioner as defendant. Pursuant to issuance of summons, the defendant entered contest and filed written statement denying the assertions made in the plaint. In course of hearing, the defendant filed an application and sought to mark an unregistered partition deed as exhibit. The same was objected to by the plaintiff. The learned trial court came to hold that the document is required compulsorily registrable under Section 17 of the Registration Act and as such the same is not acceptable in evidence.

3. Heard Mr.Sahoo, learned Advocate for the petitioner and Mr.Das, learned Advocate for the opposite party.

4. The subject of matter of dispute is no more res integra. This Court in Abani Kumar Meher and others Vrs. District Collector, Bargarh and others (C.M.P.No.1444 of 2016 disposed of on 15.2.2017) held thus:-

> "6. Section 17 (1) (b) of the Registration Act, 1908 mandates that any document which has the effect of creating and taking away rights in respect of an immovable property must be registered. Section 49 of the Act imposes bar on the admissibility of an unregistered document and deals that documents that are required to be registered under Section 17 of the Act.
>
> 7. Section 35 of the Stamp Act, 1899 mandates that instrument not duly stamped inadmissible in evidence. The same is quoted below:-
>
> "35. Instruments not duly stamped inadmissible in evidence, etc.-No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:
>
> Provided that-
>
> (a) any such instrument [shall] be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;
>
> xxx xxx xxx
>
> 8. On a bare perusal of the said provision, it is pellucid that an authority to receive evidence shall not admit any instrument unless it is duly stamped.
>
> 9. The apex Court in the case of Omprakash Vrs. Laxminarayan and others (2014) 1 SCC 618 held that an instrument not duly stamped shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with

penalty. In the case of Avinash Kumar Chauhan Vrs. Vijay Krishna Mishra, (2009) 2 SCC 532, the apex Court held that Section 33 of the Act casts a statutory obligation on all the authorities to impound a document. The court being an authority to receive a document in evidence is bound to give effect thereto. The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Since adequate stamp duty was not paid, it was held that the court, therefore, was empowered to pass an order in terms of Section 35 of the Act.

10. Thus, an unstamped instrument is not admissible in evidence even for collateral purpose, until the same is impounded. In the event the petitioners want to mark those documents, it is open for them to pay the stamp duty together with penalty and get the document impounded and the learned trial court is at liberty to mark the said documents subject to proof and relevance."

5. Where a partition takes place, the terms of which are incorporated in an unregistered document, the said document is inadmissible in evidence and cannot be looked for the terms of the partition. It is in fact the source of title to the property held by each of the erstwhile coparceners.

6. A five Judge Bench of Andhra Pradesh High Court in Chinnappareddigari Peda Mutyala Reddy v. Chinnappareddigari Venkata Reddy, AIR 1969 AP 242 held that the whole process of partition contemplates three phases i.e. severancy of status, division of joint property by metes and bounds and nature of possession of various shares. In a suit for partition, an unregistered documents can be relied upon for collateral purpose i.e., severancy of title, nature of possession of various shares but not for the primary purpose i.e., division of joint properties by metes and bounds.

7. In view of the discussions made above, the petition is disposed of with an observation that in the event the defendant wants to mark the document for collateral purpose, it is open for him to pay the stamp duty with penalty, get the document impounded and the learned trial court is at liberty to mark the said document as exhibit for collateral purpose subject to proof and relevance.

Petition disposed of.

2017 (II) ILR - CUT- 610

DR. B.R. SARANGI, J.

W.P.(C) NO. 3717 OF 2017

SASWAT BEJ .....Petitioner

.Vrs.

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

EDUCATION – When a syllabus has been prescribed to conduct a particular examination, the same can not be unilaterally modified, altered or classified by filing counter affidavit subsequently.

In this case the petitioner was selected to appear in the National Rural Talent Search Examination 2016 conducted by the Board of Secondary Education, Odisha (O.P.No.2) – Being dissatisfied with the marks awarded, he sought for the answer sheet under the RTI Act and found that, though he answered question No. 12 correctly by shading option "D" as per the text book prescribed by the Board, no mark was awarded against the said question relying upon certain description made in the dictionary which is not the prescribed book as per syllabus published by O.P.No.2 – Held, this court issued direction to O.P.2 to make necessary correction in consonance with the syllabus for NRTC Examination, 2016 and re-compute the marks as admissible to the petitioner. (Paras 6, 8)

Case Laws Referred to :-

1. AIR 1978 SC 851 : Mohinder Singh Gill v. The Chief Election Commissioner.
2. (2008) 3 SCC 172 : Vishnu Dev Sharma v. State of Uttar Pradesh.
3. (2008) 9 SCC 407 : Steel Authority of India Ltd. v. Sales Tax Officer, Rourkela I Circle
4. AIR 2010 SC 1285: Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity.
5. AIR 2004 SC 1794 :State of Orissa v. Dhaniram Luhar.

For Petitioner : M/s. D.Mohanty, A.Mishra, B.P.Panda & D.Behera
For Opp. Parties : M/s. A.Nath & R.P.Pattanaik

Decided on : 05.07.2017

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner, who is a candidate for National Rural Talent Search Examination, 2016 (for short "NRTC Examination, 2016"), files this application seeking for direction to opposite party no.2 to award one mark in respect of question no.12.

2. The epitome of fact leading to filing of this writ application, in a nutshell, is that the petitioner, after passing Class-VII from Mahamanab U.P. Vidyapitha, Kathiapada under Pattamundai Block, is now prosecuting his study in Class-VIII in M.N. High School, Pattamundai in the district of Kendrapara. The Board of Secondary Education, Odisha like every year conducted NRTC Examination, 2016 and syllabus for the examination according to the syllabus of Class-VII was designed by it. The petitioner, being selected to appear at the said examination, filled up the form under OBC/SEBC category. On consideration of his application, admit card was issued allotting roll number 04AC051. The petitioner appeared at the examination held on 24.09.2016 at (04AC) M.N. High School, Pattamundai. After the result was published, the petitioner was found to have secured 76 marks. After going through the marks secured by the petitioner, his father sought for the answer sheet under the Right to Information Act, which was supplied to him. On verification of such answer sheet, it was appeared that though the petitioner had answered question no.12 correctly by shading option "D" with black colour, no mark was awarded against said question, as according to model answer prepared by Board of Secondary Education, Odisha option "C" was the correct answer. As such, the petitioner has approached this Court by filing the present writ application.

3. Mr. A.Mishra, learned counsel for the petitioner strenuously urged before this Court that as per the text book prescribed for Class-VII by the Board of Secondary Education, Odisha, i.e., "SAHITYA SOURAVA", option "D" is the correct answer to question no.12. If the authority has prescribed the syllabus for NRTC Examination, 2016 as per syllabus of Class-VII, it should not have subsequently denied the claim of the petitioner relying upon certain description made in the dictionary, which is contrary to the provisions of law.

4. Mr. A.K. Nath, learned counsel appearing for opposite party no.2, referring to the counter affidavit, states that according to the model answer prepared by the Board of Secondary Education, Odisha option "C" is the correct answer to question no.12 because of the reason that the same has been prescribed in the Odia dictionary "TARUNA SABDAKOSA". Therefore, no illegality or irregularity has been committed by the authority in not awarding mark against question no.12, as the answer of the petitioner does not tally with the model answer prepared by opposite party no.2.

5. Having heard learned counsel for the parties and after perusing the records, since pleadings between the parties have been exchanged, with the

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

6. Admittedly, the petitioner was selected to appear at NRTC Examination, 2016. He filled up the form and pursuant to the admit card issued by the authority, he appeared at the examination. The syllabus for the examination was designed by Board of Secondary Education, Odisha-opposite party no.2 according to the syllabus of Class-VII. "SAHITYA SOURAVA" was one of the books prescribed for Class-VII students, from which question no.12 had been set. The extract of the said book annexed as Annexure-6 reveals that it was published and printed by the School and Mass Education Department of the Government of Odisha. Option "D" has been specifically mentioned under chapter "*Satyara Pujari Acharaya Harihara*" at page 39 of the writ application, but the model answer prescribed by opposite party no.2 indicates different answer, i.e., option "C" relying upon the Odia dictionary "TARUNA SABDAKOSA", which is not the prescribed book as per syllabus published by opposite party no.2 for the NRTC Examination, 2016.When a syllabus has been prescribed to conduct a particular examination, the same cannot be unilaterally modified, altered or clarified by opposite party no.2 subsequently by filing counter affidavit. It is well settled principle of law laid down by the apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner***, AIR 1978 SC 851 that if a specific matter has been prescribed, by filing a subsequent counter affidavit the same cannot be clarified by the authority concerned what had transpired in their mind while filing the counter affidavit. If the syllabus is fixed and the petitioner appeared at the examination in consonance with the syllabus prescribed by subsequent filing of affidavit, the position cannot be clarified saying that the dictionary meaning of the answer to question no.12 is option "C", according to which the model answer has been prepared. That cannot sustain in the eye of law. Therefore, this Court is of the considered view that answer given by the petitioner being in consonance with the syllabus of the NRTC Examination, 2016 and as per book prescribed, the subsequent clarification given in the counter affidavit justifying the correct answer as option "C" as per the model answer cannot hold good. Thereby, the counter so filed on behalf of opposite party no.2, being contrary to its own syllabus, cannot sustain.

7. In ***State of Orissa v. Dhaniram Luhar***, AIR 2004 SC 1794, the apex Court held that:

> *"Not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is*

bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice – delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. "The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind." The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless.Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."

Similar view has also been taken by the apex Court in ***Vishnu Dev Sharma v. State of Uttar Pradesh***, (2008) 3 SCC 172; ***Steel Authority of India Ltd. v. Sales Tax Officer, Rourkela I Circle***, (2008) 9 SCC 407; and ***Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity***, AIR 2010 SC 1285.

8. Applying the above principle, as laid down by the apex Court, to the present context and also reasons assigned therein, opposite party no.2 is directed to make necessary correction in consonance with the syllabus prescribed for NRTC Examination, 2016 and re-compute the marks as due and admissible to the petitioner, as expeditiously as possible, preferably within four weeks from the date of communication of this order. With the above observation and direction, the writ application stands allowed. No order to cost.

Writ application allowed**.**

2017 (II) ILR - CUT-614

DR. B.R. SARANGI, J.

W.P.(C) NO. 19092 OF 2015

UDAYANATH AUTONOMOUS COLLEGE OF SCIENCE & TECHNOLOGY, ADASPUR, CUTTACK ……..Petitioner

.Vrs.

REGIONAL PROVIDENT FUND COMMISSIONER, ORISSA & ORS. …….Opp. Parties

LIMITATION ACT, 1963 – S.14

Exemption of certain period of delay covered by bonafide litigious activity, due to selection of a wrong forum – So while considering the provisions of selection 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings.

In this case the delay caused in filing the appeal before the appellate tribunal is due to pendency of the writ petition before this court so the petitioner is entitled to avail the benefit of section 14 of the Act for exemption of the period covered by bonafide litigious activity – Held, the impugned order passed by the learned appellate tribunal for not considering the provisions of Section 14 of the Act is not sustainable in the eye of law, hence liable to be quashed – The matter is remitted back to the appellate tribunal for fresh adjudication in accordance with law. (Paras 12, 13)

Case Laws Referred to :-

1. AIR 2007 SC 276 : Regional Provident Fund Commissioner -V- Sanatan Dharam Girls Secondary School
2. AIR 2012 SC 683 : Kartik K. Parekh -V- Special Director, Directorate of Enforcement

For Petitioner : Mr. S.Kanungo

For Opp. Parties : Mr. S.K.Pattanaik, Senior Advocate
M/s. P.K.Pattnaik, S.P.Das & S.Das

Decided on : 04.07.2017

JUDGMENT

DR. B.R. SARANGI, J.

Udayanath Autonomous College of Science & Technology situated at Adaspur in the district of Cuttack files this application challenging the order

dated 06.10.2015 passed by the Employees Provident Fund Appellate Tribunal, New Delhi in ATA No. 1138(10) of 2015 in dismissing the appeal filed against order dated 15.06.2012 passed by the Assistant Provident Fund Commissioner, Odisha, Bhubaneswar under Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short "EPF & MP Act, 1952").

2. The factual matrix of the case is that the petitioner-Udayanath Autonomous College of Science & Technology is an aided educational institution within the meaning of Section 3(b) of the Orissa Education Act, 1969, which has been assessed by the Assistant Provident Fund Commissioner, on an enquiry being caused, and directed to pay a sum of Rs.13,96,260/- for the period 4/10 to 2/12 and a sum of Rs.1,88,987/- towards interest @ 12% per annum as per the provision of Section 7Q of the EPF & MP Act, 1952. Such assessment has been made for payment of dues under Section 7A of the EPF & MP Act, 1952. The said order of assessment was challenged by the petitioner before this Court in WP(C) No.12088 of 2012, which was disposed of finally on 23.07.2015 stating that the order being appealable one the petitioner may prefer an appeal before the appellate tribunal ventilating its grievance. Pursuant to such order, since there was availability of an alternative remedy, the petitioner preferred appeal before the Employees Provident Funds Appellate Tribunal, New Delhi, which was registered as ATA No. 1138(10) of 2015. The appellate tribunal came to hold that the appeal has to be filed before the tribunal within the statutory period and not according to wishes of the petitioner and considering the long delay in filing the appeal dismissed the same without going into its merits on account of barred by limitation.

3. Mr. S.Kanungo, learned counsel appearing for the petitioner strenuously urged that when the appeal was preferred before the appellate tribunal, it should have taken into consideration the fact that the delay in filing the appeal was due to pendency of the writ application before this Court and, as such, Section 14 of the Limitation Act will apply for the purpose. The appellate tribunal also failed to appreciate the fact on merit that without considering the applicability of Section 7A of the EPF & MP Act, 1952 the determination has been made by the Provident Fund Commission. He thus submitted that the appellate tribunal could have decided the appeal on merits instead of dismissing the same on the ground of limitation.

4. Mr. S.K. Pattnaik, learned Senior Counsel appearing along with Mr. P.K. Pattnaik, learned counsel for opposite parties no.1 and 2 states that once

the assessment has been made under Section 7A of the EPF & MP Act, 1952, the order itself is appellable and, as such, the petitioner should have preferred appeal before the appellate tribunal instead of filing the writ application. Since the petitioner availed the remedy before this Court by filing the writ application, which was ultimately disposed of by permitting the petitioner to prefer appeal, the appeal should have been considered in accordance with law.

5. This Court heard Mr. S. Kanungo, learned counsel for the petitioner and Mr. S.K. Pattnaik, learned Senior Counsel appearing along with Mr. P.K. Pattnaik, learned counsel for opposite parties no.1 and 2. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The petitioner being an aided educational institution within the meaning of Section 3(b) of Orissa Education Act, 1969, most of its employees are receiving grant-in-aid/block grant from the State Government. The College does not bear burden of disbursing the salary to its staff. Consequentially, the College is not liable to make EPF contribution under the provisions of the EPF & MP Act, 1952. Once the College is notified as an aided institution, the services of its employees are controlled by the State Government under the Orissa Education Act, 1969 and Rules framed thereunder. The Assistant Provident Fund Commissioner issued a notice to the petitioner on 20.03.2012 for inspection. In response to the same, the petitioner submitted its reply on 27.03.2012, 17.04.2012, 16.05.2012, 05.06.2012 and 14.06.2012 stating inter alia that the College in question is not covered under the EPF & MP Act, 1952 and is exempted from the purview of Section 17 read with Section 16(1)(b) of the said Act as per the decision of the apex Court in ***Regional Provident Fund Commissioner v. Sanatan Dharam Girls Secondary School***, AIR 2007 SC 276. But the Assistant Provident Fund Commissioner vide order dated 15.06.2012 held that the College is liable to pay a sum of Rs.13,96,260/- for the period from 4/10 to 2/12 and Rs.1,88,987/- towards interest @ 12% per annum as per the provisions of Section 7Q of the EPF & MP Act, 1952 without determining the liability under Section 7A of the EPF & MP Act, 1952. Against the said order, the petitioner approached this Court by filing WP(C) No.12088 of 2012, but the same was disposed of on 23.07.2012 with liberty to approach the appellate tribunal. In compliance of the same, the petitioner preferred appeal before the appellate tribunal which was registered

as ATA No.1138 (10) of 2015. The appellate tribunal, without considering the appeal on merit with regard to applicability of the provisions of Section 7A of the EPF & MP Act, 1952, dismissed the same on the ground of limitation by order dated 06.10.2015, the relevant part of which is quoted below:

> *".....It is pertinent to mention here that during course of argument, reason for filing WP before Hon'ble High Court was asked, against which counsel for appellant submitted that it was the choice and Sweet Will of appellant whether to challenge impugned order before this Tribunal or before Hon'ble High Court.*
>
> *Such kind of averments on behalf of appellant can not bypass the Provisions of the Act and Rules. Appeal is to be filed before this Tribunal within the statutory period not according to the wishes of appellant. Keeping in view all the circumstances of the case this Tribunal reached at a considered opinion that there is long delay in filing of appeal so present appeal is dismissed on account of barred by limitation. Copy of the order be sent to the parties as per law. File be consigned to the record room after due compliance."*

7. While preferring the appeal, in paragraph 5 of the appeal memo the petitioner had taken the following plea for condonation of delay:

> *"5. <u>Limitation</u>*
>
> *The appellant preferred writ petition bearing W.P.(C) No. 12088 of 2012 against the order dated 15.06.2012 passed by the Respondent No.2 on 09.07.2012 and the same was disposed of on 23.07.2015 with a directions that "after making some argument, learned counsel for the petitioner seeks permission to withdraw this writ petition with liberty to raise question on limitation before the appellate forum. Prayer is allowed. Accordingly, the writ petition is dismissed as withdrawn with liberty aforesaid". A true certified copy of the said order dated 23.07.2015 as well as the proof of the filing the writ petition is annexed hereto as ANNEXURE A8 for identification. The said certified copy was supplied on 03.08.2015. The present appeal is being filed under section 7-I of the Act, 1952 on 29/09/2015. If the period which was taken during high court proceeding, then present appeal is within the limitation period of 60+60 prescribed as per Rule 7(2) of the Employees Provident Appellate Tribunal (Procedure)*

Rules, 1997". The Hon'ble Tribunal is having legislative power to condone the delay of further 32 days. However, in the interest of justice, the application for condonation for delay is annexed hereto for kind consideration."

8. On perusal of the grounds taken in the appeal memo vis-à-vis the reasons assigned by the appellate tribunal, it appears that Section 14 of the Limitation Act has not been taken into consideration.

9. Rule 7(2) of the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997 reads as follows:

"7. FEE, TIME FOR FILING APPEAL, DEPOSIT OF AMOUNT DUE ON FILING APPEAL-

(2) Any person aggrieved by a notification issued by the Central Government or an Order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order, prefer an appeal to the Tribunal;

Provided that the Tribunal may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days:

Provided further no appeal by the employer shall be entertained by a Tribunal unless he has deposited with the Tribunal 75 percent of the amount due from him as determined under Sec. 7-A:

Provided also that the Tribunal may for reasons to be recorded in writing, waive or reduce the amount to be deposited under Sec. 7-O."

The above mentioned rule clearly specifies that the appeal has to be preferred within the period of 60 days from the date of issuance of the notification/order. Provided if the Tribunal is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, it can extend the said period by a further period of 60 days.

10. In view of the above provision and applying the same to the present context, since the petitioner had preferred a writ application before this Court challenging the order passed under Section 7A of the EPF & MP Act, 1952 and ultimately the said writ application was disposed of permitting the petitioner to prefer appeal, the delay which had been caused in preferring

appeal was because of pendency of the writ application before this Court and therefore that period of delay should have been excluded in view of the provisions contained in Section 14 of the Limitation Act, which reads thus:

> *"**14. Exclusion of time of proceeding bona fide in court without jurisdiction**. —*
>
> *(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*
>
> *(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*
>
> *(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. Explanation.— For the purposes of this section,—*
>
> *(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;*
>
> *(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;*
>
> *(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."*

11. Similar question had come up for consideration in ***Kartik K. Parekh v. Special Director, Directorate of Enforcement***, AIR 2012 SC 683 and the apex Court in paragraphs 26 and 27 of the judgment came to hold as follows:

*"**26**. The question whether Section 14 of the Limitation Act can be relied upon for excluding the time spent in prosecuting remedy before a wrong forum was considered by a two-Judge Bench in State of Goa v. Western Builders (AIR 2006 SC 2525 : 2006 AIR SCW 3436) (supra) in the context of the provisions contained in Arbitration and Conciliation Act, 1996. The Bench referred to the provisions of the two Acts and observed:*

"19. There is no provision in the whole of the Act which prohibits discretion of the court. Under Section 14 of the Limitation Act if the party has been bonafidely prosecuting his remedy before the court which has no jurisdiction whether the period spent in that proceedings shall be excluded or not. Learned counsel for the respondent has taken us to the provisions of the Act of 1996: like Section 5, Section 8(1), Section 9, Section 11, sub-sections (4), (6), (9) and sub-section (3) of Section 14, Section 27, Sections 34, 36, 37, 39(2) and (4), Section 41, sub-section (2), Sections 42 and 43 and tried to emphasise with reference to the aforesaid sections that wherever the legislature wanted to give power to the court that has been incorporated in the provisions, therefore, no further power should lie in the hands of the court so as to enable to exclude the period spent in prosecuting the remedy before other forum. It is true but at the same time there is no prohibition incorporated in the Statute for curtailing the power of the court under Section 14 of the Limitation Act. Much depends upon the words used in the Statute and not general principles applicable. By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act, 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act (sic not) be read in the Act of 1996, which will advance the cause of justice. If the Statute is silent and there is no specific prohibition then the Statute should be interpreted which advances the cause of justice."

***27**. The same issue was again considered by the three-Judge Bench in Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department (AIR 2009 SC (Supp) 396 : 2008 AIR SCW 4182) (supra) to which reference has been made*

hereinabove. After holding that Section 5 of the Limitation Act cannot be invoked for condonation of delay, Panchal, J. (speaking for himself and Balakrishnan, C.J.) observed:

"21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court.

22. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his

application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.

23. At this stage it would be relevant to ascertain whether there is any express provision in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act. On review of the provisions of the Act of 1996 this Court finds that there is no provision in the said Act which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act. On the contrary, this Court finds that Section 43 makes the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. The proceedings under Section 34 are for the purpose of challenging the award whereas the proceeding referred to under Section 43 are the original proceedings which can be equated with a suit in a court. Hence, Section 43 incorporating the Limitation Act will apply to the proceedings in the arbitration as it applies to the proceedings of a suit in the court. Sub-section (4) of Section 43, inter alia, provides that where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings with respect to the dispute so submitted. If the period between the commencement of the arbitration proceedings till the award is set aside by the court, has to be excluded in computing the period of limitation provided for any proceedings with respect to the dispute, there is no good reason as to why it should not be held that the provisions of Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act of 1996, more particularly where no provision is to be found in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act, to an application made under Section 34 of the Act. It is to be noticed that the powers under Section 34 of the Act can be exercised by the court only if the aggrieved party makes an application. The

jurisdiction under Section 34 of the Act, cannot be exercised suo motu. The total period of four months within which an application, for setting aside an arbitral award, has to be made is not unusually long. Section 34 of the Act of 1996 would be unduly oppressive, if it is held that the provisions of Section 14 of the Limitation Act are not applicable to it, because cases are no doubt conceivable where an aggrieved party, despite exercise of due diligence and good faith, is unable to make an application within a period of four months. From the scheme and language of Section 34 of the Act of 1996, the intention of the legislature to exclude the applicability of Section 14 of the Limitation Act is not manifest. It is well to remember that Section 14 of the Limitation Act does not provide for a fresh period of limitation but only provides for the exclusion of a certain period. Having regard to the legislative intent, it will have to be held that the provisions of Section 14 of the Limitation Act, 1963 would be applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award."

12. From the above, it is evident that the apex Court has also taken note of the judgment of the apex Court in ***State of Goa v. Western Builders***, JT 2001 (8) SC 271 and also in ***Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department***, JT 2008 (6) SC 22 and has come to a conclusion that the policy of Section 14 is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which, by reason of some technical defect, cannot be decided on merits and is dismissed. Therefore, while considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. The section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading of Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Needless to say that in the present context Section 5 of the Limitation Act may not have any application, but while applying such provisions condonation of delay has to be made on showing the "sufficient case". But the said provision is not applicable to the case of this nature, as because due to pendency of the writ application before this Court the petitioner approached the appellate tribunal at a belated stage. Reason for approaching the appellate tribunal is because of the pendency of

the writ application before this Court. Therefore, the petitioner is entitled to avail the benefit of Section 14 of the Limitation Act to exempt the period covered by bona fide litigious activity.

13. In view of the above settled position of law, the appellate tribunal, by applying the provisions contained in Section 14 of the Limitation Act, should have construed that the delay in approaching the appellate forum was bona fide. For non-consideration of the provisions of Section 14 of the Limitation Act, the order dated 06.10.2015 passed in ATA No.1138 (10) of 2015 in Annexure-2, being unsustainable in the eye of law, is liable to be quashed and is accordingly quashed. The matter is remitted back to the appellate tribunal for fresh adjudication in accordance with law.

14. The writ application stands allowed. No order to cost.

Writ application allowed.

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DR. B.R. SARANGI, J.

W.P.(C) NO. 18506 OF 2012

KANHU CHARAN MUNDA @ SARDAR ……..Petitioner

.Vrs.

GRID CORPORATION OF ORISSA LTD. (GRIDCO) & ORS. ……..Opp. Parties

SERVICE LAW – Petitioner was appointed as Junior Engineer (Electrical) on 15.03.1993 as a S.T. category candidate – He completed 5 years in 1998 and became eligible for promotion from E-2 grade to E-3 grade – He made representation to the authority to allow him E-3 grade w.e.f. 08.11.2004, from the date his juniors got promotion by applying the provisions of the ORV Act, 1975 but there was no fruitful result – Hence the writ petition – Pendency of vigilance case can not be a ground to disentitle the petitioner to be considered for promotion as he has been acquitted subsequently by the Special Judge (vigilance) vide judgment Dt. 25.02.2009 – So by applying the provisions of the ORV Act, the petitioner's case for promotion be considered in terms of the extant promotion policy of O.P. No.3 or he may be extended with the benefit of promotion from the date his junior has been promoted by granting all consequential service benefits as due and admissible

to him in accordance with law – However, in the meantime since the petitioner has already been promoted to E-3 grade he is only entitled to get the consequential financial benefits for the differential period and continuity in promotional post so as to entitle him to be considered for next promotion. (Paras15 to19)

Case Laws Referred to :-

1. (1999) 7 SCC 209 : Ajit Singh v. State of Punjab
2. AIR 1993 SC 477 : Indra Sawhney v. Union of India.

For Petitioner : M/s. Gautam Mishra & D.K. Patra,

For opp. parties : M/s. A.K. Mishra, A.K. Sahoo & S. Bhanja
Mr. P.K. Mohanty, Sr. Advocate.
M/s. D.N. Mohapatra, (Smt) J. Mohanty, P.K. Nayak, S.N. Dash & A. Das,

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Date of hearing : 24.04.2017
Date of judgment: 02.05.2017

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner, being a member of Scheduled Tribe community, was appointed as Junior Engineer (Electrical) in the Electrical Circle of Dhenkanal, pursuant to Annexure-1 dated 15.03.1993 in which his name finds place at serial no. 18, and his services were regularized on 25.04.1996. On the allegation of demand of bribe of Rs.600/-, Sambalpur Vigilance G.R. Case No. 17 of 1997 was registered against the petitioner. In that backdrop, by office order dated 27.05.1997 at annexure-2 the petitioner was placed under suspension with immediate effect, pending drawal of the disciplinary proceeding. Subsequently, pursuant to office order dated 19.01.1998 at annexure-3, the petitioner was reinstated in service with immediate effect and was posted as Junior Engineer (Electrical) under the Superintending Engineer, Electrical Circle, Jajpur Road. The petitioner continued to discharge his duties at different places under E-2 grade. When he came to know that similarly situated persons had been given E-3 grade, he made a representation vide Annexure-7 dated 26.12.2006 to the Chief Executive Officer, NESCO, Balasore to give him E-3 grade w.e.f. 08.11.2004. Pending consideration of representation, he was allowed to discharge the duties of Sub-Divisional Officer (Electrical) at different places.

2. When the matter thus stood, the Special Judge (Vigilance), Cuttack acquitted the petitioner of the charges framed against him vide judgment

dated 25.02.2009 passed in T.R. Case No. 295 of 2007. On acquittal of the petitioner, the opposite parties vide order dated 20.11.2009 dropped the departmental proceedings and exonerated him from all charges and the period of suspension was treated as duty. After the departmental proceeding was dropped, on 23.11.2009, the petitioner was given promotion to E-3 grade w.e.f. 30.08.2008, even though the petitioner had been discharging his duties as Sub-Divisional Officer (SDO) from 08.11.2004. Although in the gradation list-Annexure-13 dated 07.12.2006, the petitioner was placed at serial no. 32, one Ashok Kumar Nayak, who was about 8 years junior to the petitioner and was placed at serial no. 58, was given promotion to E-3 grade much prior to the petitioner, i.e., w.e.f. 08.11.2004. Similarly, one Manas Ranjan Mohanty, even though was allowed to discharge the duty of SDO (unlike the present petitioner), w.e.f. 18.10.2003, was regularized in the said post of E-3 grade, w.e.f. 30.01.2004, but the petitioner has been discriminated. Therefore, the petitioner claims that he should be allowed to continue in E-3 grade w.e.f. 08.11.2004 instead of 30.08.2008, hence this application.

3. Mr. G. Mishra, learned counsel for the petitioner strenuously urged that, while considering the promotion from E-2 to E-3 grade, the Orissa Reservation of Vacancies in Post and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 (for short "ORV Act"), which is applicable to the opposite party-organization, has been completely given a goby. More so, when one Ashok Kumar Nayak, who is 8 years junior to the petitioner, has been given promotion w.e.f. 06.11.2004, there is no valid and justifiable reason to give promotion to the petitioner to E-3 grade w.e.f. 30.08.2008. It is further contended that since the petitioner has already got promotion to E-3 grade vide order dated 23.11.2009, giving effect from 30.08.2008, he only claims that such benefit be extended from the date his junior has been promoted to E-3 grade, i.e., from 08.11.2004, or by applying the provisions contained in the ORV Act.

4. Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. S.N. Das, learned counsel for opposite party no.3 argued with vehemence that the claim made by the petitioner is not admissible in view of the fact that mere functioning as in-charge shall not entitle anyone to claim benefit attached to the assigned post. To support such contention, he relied upon the order dated 23.07.2008 of this Court passed in W.P.(C) No. 8192 of 2008, wherein it was held that if an employee being Lineman-A remained in charge of the Section, he could not claim the benefits of the Jr. Engineer and after joining of the Jr. Engineer in that Section, his return to the post of Lineman-A

could not be construed to be reversion, and hence there was no cause of action to maintain the writ petition. Applying the said principle to the present case, even though the petitioner was allowed to discharge the duties of E-3 grade, as SDO in-charge, that ipso facto cannot entitle him to get the benefit of promotion from grade E-2 to E-3. The petitioner's grievance by way of representation to give promotion to E-3 grade w.e.f. 08.11.2004 was not considered, since vigilance case was subjudice before the appropriate forum. So far as promotion of Ashok Kumar Nayak is concerned, it is contended that, even though he was junior to the petitioner and was continuing as SDO in-charge, Dhamnagar, as because he had completed AMIE since 01.05.2005, as per promotion policy his case was put up on 01.08.2006 before the Departmental Promotion Committee (DPC), which found him suitable for promotion to E-3 grade because of acquisition of higher qualification and, consequentially, such benefit was extended to him. In respect of Manas Ranajn Mohanty, who was S.D.O. in-charge on 18.10.2003 and whose services were regularized in the said post w.e.f. 30.01.2004, it stated that he was much senior to the petitioner, since he joined the service in the year 1989 whereas petitioner joined in the year 1993. Therefore, it is contended that the petitioner is not entitled to the benefit as claimed in the writ application.

5. Mr. A.K. Mishra, learned counsel for opposite party no.1 supported the contention raised by Mr. P.K. Mohanty, learned Senior Counsel for opposite party no.3.

6. Heard Mr. G. Mishra, learned counsel for the petitioner, Mr. A.K. Mishra, learned counsel for opposite party no.1 and Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. S.N. Das, learned counsel for opposite party no.3 and perused the record. Since pleadings between the parties have been exchanged, this writ petition is disposed of finally at the stage of admission with the consent of learned counsel for the parties.

7. In order to regulate the service conditions of the employees of the GRIDCO, "GRIDCO Officer's Promotion Policy" was framed under Clause-8 and 11 of the GRIDCO Officers Service Regulations. The objectives of such promotion policy were to provide opportunity in growth and career prospects by ensuring fairness, consistency and uniformity in the matters of promotion, to recognize and reward officers for their contribution to the growth of the Company, and to sustain the high morale of the Officers by informing them of the career opportunities existing in the Company. Clause-3 deals with coverage and clause-4 deals with guiding principles. Clause-5

deals with criteria for promotion, wherein it has been specifically stated in clause-5.1 that merit-cum-suitability with due regard to seniority shall be the criteria for promotion. As per clause-5.2, all promotions are subject to availability of vacancies and needs of the Company in respect of grades/disciplines. Clause-6 deals with eligibility and clause-6.1 provides that the years of service in a grade shall be called as the eligibility period for consideration of promotion to the next higher grade.

Clause-6.3 envisages minimum eligibility period for consideration of promotion to different grades. Promotion from grade E-2 to E-3, being the subject-matter of consideration in the case at hand, the relevant part of Claue-6.3 is quoted hereunder:

Grade		*The minimum years of service in the grade*
From	To	6 Years
E2	E3	
xx	xx	xx

Under Clause-6.4 it has been clarified that the officers not possessing the prescribed qualification under the GRIDCO Officers Recruitment Policy for entry into E-3 level shall not be considered for promotion beyond E3 level.

Clause-7.3 deals with "Engineering", and clause 7.3.4, which is relevant for the purpose of this case, is extracted hereunder:

> *"7.3.4 The number of vacancies to be filled up by promotion of Jr. Manager (EI) in E-2 to the post of Asst. Manager (EI) in E-3 shall be so fixed that the promoted Jr. Engineers do not exceed 33% the total no of posts of Asst. Managers (EI).*
>
> *Provided further that 5% of the total no. of posts of Asst. Manager 9EI) shall be filled up by Manager (EI) with degree in engineering in case such candidates are available in E-2.*
>
> *Provided further that the Jr. Engineers who are diploma holders in engineering but have completed at least 10 years of services shall not be considered for promotion.*
>
> *Notwithstanding the above, the candidates possessing qualification prescribed for direct recruitment shall also be eligible to offer themselves for Departmental Recruitment in accordance with GRIDCO Officers Recruitment Policy."*

Clause-8 of GRIDCO Officers Promotion Policy, which deals with zone of consideration, reads thus:

"8. ZONE OF CONSIDERATION:

8.1. Based upon the vacancies to be filled up in a Cadre/Discipline, a maximum of three Officers the basis of Seniority against a vacancy shall be considered for promotion.

8.2. However, the ratio of consideration as mentioned at 8.1 above shall be raised to a maximum or such other ratio as may be prescribed in order to consider the eligible SC/ST officers under provisions of ORV Act. In such consideration only the SC/ST officers shall be included in the consideration list. Officers belonging to other castes beyond the ratio of 1.3 are to be excluded.

8.3 Promotion of SC/ST officers shall be made as per the Roster Position. In the process if any SC/ST officer being junior to other categories of officers is promoted against the Roster Point this shall not be treated as violation of these rules."

(Emphasis supplied)

In Clause-8.2, as quoted above, it has been specifically mentioned that the ratio of consideration as mentioned at Clause-8.1 shall be raised to a maximum or such other ratio as may be prescribed in order to consider the eligible Scheduled Caste (SC)/Scheduled Tribe (ST) officers under provisions of ORV Act. Therefore, it leaves no room for doubt that the provisions of ORV Act are applicable to the SC and ST Officers, while considering for promotion, for determination of zone of consideration.

8. The aforementioned GRIDCO Officers Promotion Policy has been adopted by the Board of Directors of the NESCO in its 5th meeting dated 24.10.1998. In the minutes of the 5th meeting of the Board of Directors Resolution dated 24.10.1998, as against item no. 7, which deals with adoption of service regulations, practices and procedures of GRIDCO, it was resolved as follows:

"RESOLVED THAT the service regulations of GRIDCO concerning executives and non-executives including those of Circle and Division cadre be and are hereby approved for adoption in the company till such time the company frames its own service regulations for its employees and that the service regulations so adopted shall apply mutatis & mutandis to all the employees who will be transferred from

GRIDCO to NESCO in pursuance of transfer arrangement agreed between GRIDCO and NESCO."

"RESOLVED FURTHER THAT the practices and procedures followed by GRIDCO on the basis of various Govt. codes, orders, circulars as well as the practices and procedures prescribed by the Board of GRIDCO together with the General Condition of Supply Regulations. delegation of financial and administrative powers and responsibility to officers as different levels are approved for adoption in the company till such time they are varied and annulled by the Board of Directors of NESCO."

There is thus no iota of doubt that GRIDCO Officers Promotion Policy, as discussed above, *mutatis and mutandis* applies to the employees of NESCO, under which the petitioner has been rendering service, pursuant to adoption of the same by the Board of Directors in its resolution dated 24.10.1998. Consequentially, in respect of the petitioner, who is belonging to ST category, the provisions of the ORV Act should have been made applicable, while considering his case for promotion.

9. The petitioner, being a ST category candidate, obviously he is entitled to claim benefit of reservation available under ORV Act. The word "reservation" has attained a particular legal significance in matters relating to public employment. The concept is founded on separating individuals or groups having certain characteristics ('pertaining to backwardness') from the general category of candidates and conferring on them the benefit of special treatment.

10. MARC GALANTER in its *"Competing Equalities- Law and Backward Classes in India (Introduction)",* 1984 edition states as follows:

"It is discrimination made in favour of the backward classes vis-à-vis the citizens in general and has been referred to as compensatory discrimination or reverse discrimination or protective discrimination.

Our constitution expressly recognizes the necessity for such discrimination in matters relating to public employment and confers power on the State to make reservations covering important aspects of public employment including appointments in particular. The constitution envisages a balance between the rights of the backward classes and the general stream.

11. In Akhil Bharatiya Soshit Karmachari Sangh, (1981) 1 SCC 246 *Justice Krishna Iyer* has elaborately dealt with issue of reservation and stated:-

"to correct inherited imbalances must not be an overkill."

12. In Ajit Singh v. State of Punjab, (1999) 7 SCC 209, the apex Court held:-

"affirmative action stops where reverse discrimination begins."

13. In Indra Sawhney v. Union of India, AIR 1993 SC 477 the apex Court considered historical background, reasons and justifications for such reservation have been exhaustively dealt with by nine-judge Bench of the Supreme Court.

Taking into account the above parameters and applying the same to the present context, if the promotion policy specifically prescribes for applicability of ORV Act, non-application of the said provision amounts to violation of constitutional mandate.

14. As such, in the counter affidavit filed by opposite party no.3, it has been specifically stated at paragraph-14 as follows:

> *"That in reply to the averments made in Paragraph-17 of writ petition, it is pertinent to mention here that ORV Act is not applicable to the private Organization."*

Such pleading of opposite party no.3 states how the authority has very susceptibly tried to avoid the answer with regard to the applicability of ORV Act in the matter of promotion of Executives under the opposite parties. Though the extant promotion policy specifically states that ORV Act is applicable in the matter of promotion, the pleading of opposite party no.3, that ORV Act is not applicable to private organization, dehors the policy framed by the opposite parties.

15. In the facts and circumstances, by making a bald statement that ORV Act is not applicable to the private organization, the right of the petitioner for promotion on the ground of reservation cannot be taken away in view of the fact that the Board of Directors of NESCO in its resolution dated 24.10.1998, while approving the promotion policy, has adopted the applicability of ORV Act in the matter of promotion of GRIDCO Officers. Therefore, non-extension of benefits under the ORV Act to the petitioner is, not only contrary to the constitutional mandate, but also its own policy of promotion

adopted by opposite party no.3. In such view of the matter, this Court holds that opposite party no.3 is duty bound to follow the principles enshrined in ORV Act in the matter of promotion of its employees.

16. Next question is to be considered, whether junior to the petitioner has been promoted to E-3 grade much prior to the date the petitioner was given promotion. As it appears from paragraph-12 of the counter affidavit, opposite party no.3 has specifically admitted that some of the juniors of the petitioner had been given promotion to E-3 grade much prior to the petitioner and that Ashok Kumar Nayak, who was junior to the petitioner in the gradation list and continued as SDO in-charge, Dhamnagar, had been promoted to E-3 grade, because he had completed AMIE since 01.05.2005 and, as such, the DPC considered and recommended his case for promotion on 01.08.2006 and accordingly the benefit was extended to him.

17. As per the gradation list, Ashok Kumar Nayak was junior to the petitioner. As such, he has been given promotion on acquisition of AMIE qualification. But, the extant promotion policy does not provide to give promotion to the AMIE or the Degree Engineers to the next higher posts, i.e., from E-2 to E-3 grade on acquisition of such qualification. The only prescription in the policy is that one has to render minimum five years service in E-2 grade to be entitled for promotion to E-3 grade. Taking into consideration the initial appointment of the petitioner 1993, he, having completed five years in 1998, was eligible for promotion to E-3 grade, but the case of the petitioner was not taken into consideration because of pendency of the vigilance case against him.

18. The law is fairly settled in plethora of decisions of this Court, as well as the apex Court that pendency of criminal case or a departmental proceeding cannot disentitle a person to be considered for promotion. Had the case of the petitioner been considered in proper time, he would have been promoted to E-3 grade much earlier. If vigilance case was pending against the petitioner, his promotion, if found otherwise eligible, could have been kept in sealed cover, and on exoneration from the charges of the departmental proceeding and the criminal case, by opening the sealed cover he would have been given the benefit. But, such procedure has not been adopted in the instant case. In any case, the petitioner, in the considered opinion of this Court, is otherwise entitled to get the benefit of promotion from the date his junior has been promoted from grade E-2 to E-3. As has been already stated, in the meantime the petitioner has already been promoted to E-3 grade. He is

only entitled to get the consequential financial benefits for the differential period and continuity in promotional post so as to entitle him to be considered for next promotion.

19. In the facts and circumstances of the case, delineated above, this Court is of the considered view that applying the provisions of the ORV Act, the petitioner's case for promotion be considered in terms of the extant promotion policy of opposite party no.3 or he may be extended with the benefit of promotion from the date his junior has been promoted by granting all consequential service benefits as due and admissible to him in accordance with law.

20. The writ application is accordingly allowed. No order as to cost.

Writ application allowed.

2017 (II) ILR - CUT- 633

DR. B. R. SARANGI, J.

W.P.(C) NO. 11176 OF 2005

PRATAP KESHARI TRIPATHY ……..Petitioner

.Vrs.

CUTTACK DEVELOPMENT AUTHORITY & ORS. ……..Opp. Parties

SERVICE LAW – Regularization – Petitioner is not in employment w.e.f. 18.02.1999 and he having not been re-engaged or re-employed by the concerned employer, he can not claim for regularization – Moreover he has approached this court for re-engagement in 2005 without explaining the delay – Further in the absence of any work under the opposite parties the relief sought can not be granted – Held, for the above reasons the writ petition is liable to be dismissed. (Paras 17,18)

For Petitioner : M/s. P. K. Sahoo

For Opp. Parties : M/s. S. Swain, S.C. Panda & N.K. Behera

Decided on : 03.07.2017

JUDGMENT

Dr. B.R. SARANGI, J

The petitioner, who was working temporarily as Rent Collector under Cuttack Development Authority, has filed this writ petition seeking for

direction to regularize his services and grant all consequential benefits in accordance with law.

2. The Cuttack Development Authority (CDA) is a statutory body regulated by the provisions of Orissa Development Authority Act, 1962 and the Rules framed thereunder. It created 6 posts of Rent Collector in General Category in its 50th Authority Meeting held on 28.06.1997, and two posts of Rent Collector along with other posts in its 51st Authority Meeting held on 24.12.1997. Against the said posts, the petitioner, along with three others, was engaged as Rent Collector on ad hoc basis for a period of 44 days by office order dated 31.10.1997. His engagement was extended from time to time on 44 days basis, pursuant to Annexure-2 series, till 18.02.1999. Thereafter, no engagement order was issued, as a consequence of which, the petitioner is no more in employment. On the whole, the petitioner has only worked for 1 year and 56 days.

3. The petitioner, while working under the CDA, represented for regularization of his service. As the opposite parties did not take any action, the petitioner, along with three other Rent Collectors, filed OJC No.19047 of 1999 seeking for regularization of their services. In the said case, the opposite parties were noticed and filed their counter affidavit. But then, the opposite parties, pursuant to a settlement, offered oral assurance for regularization subject to withdrawal of the said writ petition. Pursuant thereto, the petitioner, along with three others, filed a memo on 23.02.1999, as a consequence of which, by order dated 25.02.1999 OJC No.19047 of 1999 was disposed of as withdrawn.

4. As the matter stood thus, on 15.07.1999, 15 disengaged workers, including 8 Rent Collectors, submitted representation before the Vice-Chairman, CDA for their 44 days engagement. In 59th Authority Meeting held on 13.08.1999 at agenda item No.14/59, the Vice-Chairman, considering the work load, was authorized to take a decision as to whether the disengaged persons can be re-engaged. Accordingly, on the basis of work available, the Vice-Chairman decided to re-engage only 7 Rent Collectors, excluding the petitioner, which was approved by the Chairman, CDA on 30.11.1999. Thereafter, by office order dated 18.12.1999, seven Rent Collectors and one Junior Clerk-cum-Typist were re-engaged on 44 days basis in different branches/sections of CDA w.e.f. 20.12.1999. Subsequently, the services of those 7 Rent Collectors were regularized by office order dated 03.10.2000. But the petitioner, who is senior to those 7 Rent Collectors, having denied engagement, has been discriminated. Hence this writ petition.

5. Mr. P.K. Sahoo, learned counsel for the petitioner states that the opposite parties, having re-engaged and subsequently regularized 7 Rent Collectors who are juniors to the petitioner, on the basis of work available, should not have denied such benefit to the petitioner, particularly when vacancies were available. Such action of the opposite parties is not only discriminatory but also arbitrary, unreasonable and contrary to the settled position of law. To substantiate his contention, learned counsel for the petitioner has relied upon the judgments of the apex Court in ***Amarkant Rai v. State of Bihar***, 2015 (3) SCALE 505, ***Rajpal v. State of Haryana***, 1996 SCC (L & S) 600 and of this Court dated 28.07.2015 in W.P.(C) No. 8350 of 2012 (***Suvendu Mohanty v. State***) and batch,

6. Mr. S. Swain, learned counsel for the CDA, referring to counter affidavit, states that 7 Rent Collectors were engaged pursuant to decision of 59th Authority Meeting of CDA held on 13.08.1999. Since there was no vacancy, the case of the petitioner was not taken into consideration. In any case, the petitioner, from the date of his disengagement, i.e., 18.02.1999 remained silent till 2005, when the present writ petition was filed. As such, delay in approaching the Court has not been explained in proper perspective, as a consequence of which, the writ petition suffers from delay and laches. It is further contended that, at the relevant point of time, because of ban imposed by the State Government with regard to engagement of DLR and NMR, the case of the petitioner could not be taken into consideration for engagement even on daily wage basis. More so, by the time the petitioner approached this Court in 2005, he was 38 years of age and, in the meantime, he must have attained more than 50 years of age. Thereby, in the event, at this belated stage, any engagement order is issued, it will be detrimental to the interest of the opposite parties.

7. Heard Mr. P.K. Sahoo, learned counsel for the petitioner and Mr. S. Swain, learned counsel for opposite parties no.2 and 3. Since pleadings have been exchanged between the parties, with their consent the matter is being disposed of at the stage of admission.

8. The claim of the petitioner revolves around the fact that although the persons disengaged along with him had been re-engaged by the authority on 18.12.1999 on 44 days basis, taking into consideration the work load available under the CDA, and subsequently they had already been regularized, the petitioner should not have been discriminated, particularly when he, along with others, had approached this Court in OJC No.1904 of

1999, which was withdrawn by the petitioner on 25.02.1999 stating to be pursuant to an oral settlement in which the opposite parties had offered for regularization of their services.

9. The claim of the petitioner that he should be absorbed and regularized in his service is absolutely misconceived one, inasmuch as by the time O.J.C. No.1904 of 1999 was filed the petitioner was no more in employment and, as such, he was disengaged from service with effect from 18.02.1999. A person, who is not in employment, cannot claim for regularization and absorption in service unless and until he is duly re-engaged or re-employed by the employer concerned. Admittedly, the petitioner was not re-engaged or re-employed after 18.02.1999.

10. In ***Meera Massey v. S.R. Mehrotra***, AIR 1998 SC 1153, the apex Court held that regularization means, one which is already working, doing or has done something which law did not permit but the same is being regularized, treated to be done in accordance with law, treat one as such.

11. In ***Ramchander v. Additional District Magistrate***, (1998) 1 SCC 183, the apex Court held that a retrenched employee cannot claim the relief of regularization unless his termination from service is found to be illegal. Thus, only an employee who is continuing in service for a long time is eligible for seeking such a relief.

12. In ***H.P. Housing Board v. Om Pal***, (1997) 1 SCC 269, the apex Court categorically held that the services of a temporary employee who stood removed cannot be regularized unless the order of termination itself is quashed by the Court.

13. Applying the aforementioned provisions of law, as laid down by the apex Court, to the present context, it appears from the pleadings available on records that the petitioner sought for the following reliefs:

> *"It is, therefore, prayed that this Hon'ble Court may be graciously pleased to issue notice on the opp. parties asking them to show cause as to why the petitioner shall not be absorbed in his post as rent Collector and his service shall not be regularized like other juniors have given absorption and regularized their services, if the opp. Parties fail to show cause or shows insufficient cause, then on hearing from both the parties, issue a writ of appropriate nature, directing to the opp. Parties to give absorption the petitioner as Rent*

Collector and regularize the service of the petitioner within a stipulated period/time".

On the face of the above relief sought, it is evident that the petitioner has never claimed for quashing of his disengagement order dated 18.02.1999. As such, the petitioner, by the time approached this Court in 2005, was no more in employment by virtue of termination order. Consequentially, he cannot claim for regularization of services and adjustment thereof in view of the law discussed above. Accordingly, the claim of the petitioner to regularize his service cannot sustain in the eye of law.

14. As such, the petitioner had approached this Court claiming for re-engagement in 2005 without explaining the delay in approaching this Court. In course of hearing, although learned counsel for the petitioner tried to explain that due to pendency of his representations filed before the authorities the petitioner approached this Court in 2005, yet that by itself cannot be a ground to approach this Court at a belated stage. The law is fairly settled that for approaching the Court without explaining delay in proper perspective, the writ petition suffers from delay and laches and, therefore, cannot be entertained.

15. Mr. S. Swain, learned counsel appearing for the CDA stated that at this moment there is no adequate work to give engagement, even if one Rent Collector post is lying vacant due to premature death of one Babu Bichitra Mohanty after his re-engagement by the authority. In such view of the matter, re-engagement of the petitioner, as claimed in this writ petition, is not practicable. In absence of work, question of issuance of any re-engagement order does not arise at all.

16. Coming to the decisions relied upon by learned counsel for the petitioner, in ***Amarkant Rai*** (supra) the apex Court held that the petitioner therein had rendered service for more than 29 years in the post of Night Guard and had served the College on daily wages. Therefore, taking into consideration the fact that the employee was continuing in service for a long time the apex Court held that he was eligible for relief and accordingly directed for regularization of his services. The ratio decided in the said case will have no application to the present case where the petitioner has rendered only one year and 56 days.

So far as the judgment in ***Rajpal*** (supra) is concerned, the apex Court in that case held that since the persons similarly situated were admittedly taken into service and their services had been regularized by the orders of the

apex Court, the appellant therein being the only person left out in the field also stood in the same position and was entitled to the same relief. The ratio decided in the said case is distinguishable from the present context in view of the fact that at that point of time, i.e. 18.02.1999 basing upon the availability of work re-engagement was given by the authorities (not by virtue of Court's order) to seven persons. Even if the petitioner was not re-engaged, that itself cannot create any right in his favour because he was no more in employment after 18.02.1999. The ratio decided in the said judgment cannot be of any application to the present case.

The case of ***Suvendu Mohanty*** (supra) is completely different from the case in hand, and as such, has no application at all.

17. For the discussions made above, this Court is of the considered view that the claim of the petitioner for absorption in his post as Rent Collector and regularization of his service, without having any employment with effect from 18.02.1999, is misconceived one. As such, the petitioner has approached this Court at a belated stage and, in absence of any work under the opposite parties, the relief sought for cannot be granted.

18. In the result therefore, the writ petition merits no consideration and is thus dismissed.

Writ Petition dismissed.

2017 (II) ILR - CUT- 638

S. PUJAHARI, J.

CRLA NO. 569 OF 2013

NILAMBAR PRADHAN .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

PENAL CODE, 1860 – Ss. 375, 376 (1)

Rape – When the alleged sexual intercourse is not against the will and with the consent of the victim, the same does not attract the definition of "rape" within the meaning of section 375 I.P.C. so as to attract the penal provision of section 376 of I.P.C .

In this case, evidence of the victim shows that on a false pretext she was taken by the accused in his motorcycle from her village to Bargarh where the accuse had sexual intercourse with her in a lodge – Though they passed through many villages and towns but the victim did not raise any alarm, even while staying in the lodge she did not express before any of the inmates or the staff of the lodge that the accused deceived her and brought her forcibly to Bargarh, rather on the next day morning she accompanied the accused to his friends house and did not disclose the incident before any one – Although the victim stated that she was extended threat by the accused while moving in the motorcycle the same is not convincing and did not inspire confidence as there is nothing on record that the accused was armed with any weapon of offence and there was protest by the victim – Held, the victim who had attained the age of discretion had voluntarily accompanied the accused, stayed with him in a lodge where she consented for sexual intercourse which does not attract the definition of "rape" within the meaning of section 375 I.P.C. so as to attract the penal provision of section 376 I.P.C. – The impugned judgment and order of sentence is setaside. (Paras 7,8,9)

For Appellant : Mr . Manas Chand

For Respondent : P.K. Pattnaik, (Addl. Govt. Advocate)

Date of Hearing : 06.01.2017
Date of Judgment: 06.01.2017

JUDGMETN

S.PUJAHARI, J.

The appellant herein calls in question the judgment of conviction and order of sentence passed against him in Sessions Case No.161/29/4 of 2010-2011 on the file of the Addl. Sessions Judge-cum-Special Judge (Vigilance), Bolangir. The learned Addl. Sessions Judge-cum-Special Judge (Vigilance), Bolangir vide the impugned judgment and order held the appellant (hereinafter referred to as "the accused") guilty of the charge under Section 376(1) of the Indian Penal Code (for short "I.P.C.") and sentenced him to undergo R.I. for seven years and to pay a fine of Rs.5000/-, in default, to undergo R.I. for a further period of six months.

2. The case of the prosecution as emanating from the first information report is that the accused on 06.09.2007 on a false pretext took the victim with him in a motorcycle assuring the victim's father that he would drop the victim in Block office at Tarava where her elder sister recently got employed.

However, the accused took the victim on false pretext to Bargarh where he kept her in a lodge and subjected her to sexual intercourse which was without her consent and against her will. The matter was reported at Bolangir Sadar Police Station whereafter she was subjected to medical examination, accused was arrested, incriminating materials were seized and on completion of investigation, charge-sheet was laid against the accused, he allegedly having committed offence punishable under Section 363 of I.P.C. read with Section 376 of I.P.C. The plea of the accused before the trial court was one of denial and false implication. Prosecution examined twelve witnesses to bring home the charge against the accused and also exhibited several documents. On the basis of evidence brought on record, the learned trial court being satisfied that the victim was above the age of eighteen years held the accused not guilty under Section 363 of IPC, but held him guilty under Section 376(1) of IPC and sentenced him as aforesaid.

3. The accused assailed the judgment of conviction solely on the plea that even if the case of sexual intercourse is upheld, but that being not against the will and without the consent of the victim, the judgment of conviction under Section 376 of IPC is indefensible.

4. The learned Addl. Government Advocate, however, defends the impugned judgment of conviction and order of sentence, the victim having deposed incriminating the accused.

5. What can be inferred from the materials on record the victim appears to have attained the age of discretion for a consensual sex at the relevant time, i.e., when she voluntarily accompanied the accused in a motorcycle from village- Chhantala on way to Tarva, but proceeded with the accused to Bargarh, remained in a lodge and spent the night there where the accused stated to have sexually assaulted her. The victim having attained the age of discretion and quite a grown up girl, when the accused was taking her on false pretext to Bargarh, but during travelling in motorcycle though she had opportunity to raise alarm to attract persons on the way, but neither did she shout for help from passerby nor made any attempt to leave the company of the accused. While she was put in the lodge, she also did not make any allegation or express before any of the inmates of the lodge about her being abducted. In such circumstances, it could be inferred that she was a consenting party, is the submission of the learned counsel for the accused.

6. The word ‘consent’ has been explained as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good

or evil on either side. It is further stated that 'consent' supposes three things- a physical power, a mental power and free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise or undue influence, it is to be treated as delusion, and not as deliberate and free act of mind. Every 'consent' to an act, involves a submission; but it by no means follows that a mere submission involves a consent, e.g., the mere submission of a girl to a carnal assault, she being in the power of a strong man, is not 'consent'. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it, there is 'consent'. Similarly, submission of body under the fear of terror cannot be construed as a consented sexual act. 'Consent' for the purpose of Section 375 of I.P.C. requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having fully exercised the choice between resistance and assent- whether there was consent or not, is to be ascertained only on careful study of all relevant circumstances. In this regard, reliance can be placed on a decision of the Apex Court in the case of ***State of H.P. vrs. Mango Ram,*** (2000) 7 SCC 224. 'Consent' is always a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former. The act of helplessness in the face of inevitable compulsions is not 'consent' in law. It is also not necessary that there should be actual use of force, as mere a threat of use of force is sufficient to come to a conclusion that there was compulsion to obtain consent.

7. Reverting back, the evidence of the victim would go to show that she was taken by the accused on a false pretext from her village in his motorcycle to Bargarh and then though she had the opportunity to raise alarm and bring the notice of the people to escape from the clutches of the accused. They passed through many villages and towns and had enough opportunity to do the same, still the victim did not do the same and rather went with the accused to Bargarh in his motorcycle, stayed in a lodge in the night along with the accused where the accused stated to have had sexual intercourse with her. She also did not express before any of the inmates or the staff of the lodge that the accused deceived her and brought her forcibly to Bargarh. On the next day morning also after the sexual assault though the accused was stated to have taken her to one of his friend's house she also did not disclose the incident before any one, rather again she accompanied the accused to the bus stand and she travelled in a bus to Bolangir wherefrom her sister took her to the Police Station and lodged the report. No doubt, the victim stated that as

she was extended threat by the accused while she was being taken in the motorcycle she did not make protest, but the aforesaid inspires no confidence inasmuch as nothing is there on record indicating the fact that the accused was armed with any weapon of offence and also in the road she did not make any protest and stayed in the lodge. Since she did not protest at any time and also did not escape having the opportunity to disclose and to choose to flee away but voluntarily accompanied the accused, stayed in the lodge and also came back in a bus, it can very well be inferred from the aforesaid circumstances that the victim who had attained the age of discretion to consent for sexual intercourse voluntarily accompanied the accused and stayed with him in a lodge where she consented for sexual intercourse. In such circumstances, it would be unsafe to hold that the sexual assault, if any, was committed against her will and without her consent of the victim by the accused. Since the sexual intercourse was with the consent of the victim, there was no 'rape' when attained the age of discretion, the same does not attract the definition of 'rape' within the meaning of Section 375 of I.P.C. and, therefore, does not attract the penal provision of Section 376 of IPC. Therefore, the trial court has committed gross error in appreciation of evidence in holding that the sexual intercourse, as such, was a 'rape' punishable under Section 376 of IPC.

8. So, on re-appraisal of the evidence on record, this Court is of the view that no clear, cogent and convincing evidence is available on record indicating that the accused had committed rape on the victim against her will and without her consent in the lodge. The evidence of the victim is neither convincing nor there is any substance of truth therein. She is not a truthful witness. Her evidence is, therefore, not reliable and no absolute reliance can be placed on such tainted evidence. Consequently, the impugned judgment of conviction recorded under Section 376(1) of I.P.C. against the accused is unsustainable in the eye of law.

9. Accordingly, the appeal is allowed. The impugned judgment of conviction and order of sentence dated 16.11.2013 passed by the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Bolangir in Sessions Case No.161/29/4 of 2010-2011 convicting the appellant for commission of offence under Section 376 of the I.P.C. and sentencing him to undergo R.I. for seven years and to pay a fine of Rs.5000/-, in default, to undergo R.I. for six months, are set-aside. The appellant is acquitted of the said charge.

Since the appellant, namely, Nilambar Pradhan is in jail custody, he be set at liberty forthwith, unless his detention is required in connection with any other case. L.C.R. received be sent back forthwith along with a copy of this Judgment.

Appeal allowed.

2017 (II) ILR - CUT- 643

S. PUJAHARI, J.

CRA NO. 131 OF 1992

BHAGABAN DAS ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 – S.326

Conviction U/s 326 – Unless the grievous injury is caused voluntarily no conviction U/s. 326 is permissible.

In this case when the learned trial court was convinced from the proved fact that the stick held by the appellant accidentally came in contact with the head of the deceased, the conviction made by him is not sustainable as the hurt caused cannot be said to be voluntary – Moreover, when two views are possible from the available evidence on record, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted – Held, the impugned judgment of conviction and order of sentence is set aside. (Paras 10,11,12)

For Appellant : M/s. D.Nayak, R.C.Swain, A.K.Acharya & P.K.Mishra-2

For Respondent : Additional Standing Counsel

Date of Judgment: 04.05.2017

JUDGMENT

S.PUJAHARI, J.

The appellant has assailed the judgment of the learned Addl. Sessions Judge, Balasore, recorded in S.T. No.12/81 of 1991 holding the appellant guilty of charge under Section 326 of IPC simplicitor and sentencing him to undergo punishment of 6 years rigorous imprisonment on that count.

2. According to prosecution case, the appellant along with others formed an unlawful assembly armed with deadly weapons in the village- Kundisasan on 01.02.1990 at 3 p.m. and caused death of Babaji Das (hereinafter referred to as "the deceased") by inflicting simple and grievous injuries. According to prosecution, the offences under Sections 148, 302 read with Section 149 of IPC were committed by the appellant and his associates. The defence of the appellant and his associates was denial of the occurrence in the manner as alleged by the prosecution. According to the accused persons, the prosecution case was false. They examined defence witnesses and also proved documentary evidence. The defence witnesses were examined to support of the defence that prosecution party was aggressor and the appellant was assaulted by them. The injury sustained by the appellant was proved by Dr. Srikanta Mohanty (D.W.1) as Ext.G. The trial court while acquitting the appellant and his associates of the charge under Sections 148, 149 and Section 302 of IPC, returned the judgment of conviction and order of sentence against the appellant, as stated earlier.

3. Analyzing the evidence brought on record, the learned counsel for the appellant contended that the prosecution having failed to explain the multiple injuries sustained by the appellant where the genesis and origin of the occurrence shrouded in deep mystery erroneously held the appellant guilty under Section 326 of IPC. The learned counsel also contended that once the learned trial court observed that the appellant while wielding the stick in course of that occurrence where he sustained multiple injuries accidentally came in contact with the head of the deceased, but unfortunately held him guilty under Section 326 of IPC for voluntarily having caused grievous hurt which is neither sustained in fact nor in law.

4. Assailing the aforesaid contention, the learned counsel for the State submitted that non-examination of the injuries on the appellant was lost in wilderness when the prosecution evidence about the participation of the appellant was clear, cogent and credit worthy and where the learned trial court had distinguished truth from falsehood and chaff from the grain.

5. Before I delve into the question raised, I would like to say that the effect of non-explanation of injuries on the person of the appellant is a question of fact and not a question of law. In a murder case, the non-explanation of the injuries sustained by the appellant at about the time of occurrence or in course of incident is very important circumstances from which the Court can draw the following inferences;

i) that the prosecution has suppressed the genesis and origin of the occurrence and has thus not presented the true version of the prosecution;

ii) that the witnesses who have denied the presence of injuries on the person of the accused are lying on a most material point and, therefore, their evidence is nbelievable;

iii) that in case there is a defence version which explains the injuries on the person of the accused, it is rendered probable so as to throw doubt on the prosecution case ;

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greaterimportance when the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution case. Of course, there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case where the injuries ustained by the accused are minor and superficial and where the evidence is not only clear and cogent but also so independent and disinterested, so probable, consistent and creditworthy that the same out wits the effect of the omission on the part of the prosecution to explain the injuries.

6. Reverting back, Ext.G, the injury report of the appellant reveals the followings as emanating from the evidence of D.W.1 –Dr. Srikanta Mohanty.

> "3. On that day I also examined Bhagaban Das, son of Gopal Das of Kundi and found as under :-

(i) One bleeding incised wound, 1" x ¼" x ¼" over the front surface of the scalp.

(ii) One incised wound with bleeding 1" x ¼" x ¼", ½" lateral to the injury No.(i).

(iii) One bleeding incised wound, 1.1/2" x ½" x ½" over the right side of the scalp.

(iv) One bruise red in colour, 1.1/2" x 1.1/2" over the back of the scalp.

(v) One abrasion, ½" x ¼" over front surface of left thigh.

(vi) One abrasion, ½" x ½" on the front surface of left knee.

(vii) One bleeding incised wound with tail towards exilla, 2" x ½" x ¼" over the left side of the back, 6" below the shoulder.

6. Injured Bhagaban Das and Chakradhar Das were referred to Bhadrak hospital for better treatment and x-ray. I also received the discharge certificate of Chakradhar Das issued by the SCB Medical College, Cuttack."

7. In this backdrop, the evidence revealed that the parties were under loggerheads over a disputed plot where one Gajendra had erected a fence encroaching upon the disputed land and there was case and counter case over the issue. The learned trial court has dissected the evidence of 15 prosecution witnesses and observed that the deceased had sustained one lacerated injury on the right side of the head on the middle and another lacerated injury having size of 1" x ½" x ½" on the left side of the chin. Red bruise was present throughout the head extending to both sides of the ears, in front to the hair line and back up to occiput. In cross-examination, the Doctor, P.W.8 has stated that injury no.(i) is possible if the head comes in contact with electric pole and injury no.(ii) is also possible if the chin comes in contact with stone by fall. The doctor has further stated that by lathi blow ordinarily contusion and swelling are caused. So far injury no.(iii) is concerned, the doctor has stated that it was not possible by one single blow by hard and blunt weapon. In this backdrop, the learned trial court in paragraph-8 of its judgment has observed that four witnesses, who are independent of the two rival groups, had seen the occurrence, they are Manoranjan Patri and Pramod Behari Patri, but none of them have been examined by the prosecution. The I.O. had also neither examined those four independent and disinterested witnesses presented at the spot of occurrence and nor cited them as prosecution witnesses. In paragraph-9 of the judgment the trial court has held that all the witnesses chosen by the prosecution are all interested witnesses having in one way or the others inimically deposed towards the accused persons. The matter does not end there. In the said paragraph of the judgment the learned trial court has held that the prosecution in this case has also suppressed material facts as apparent from the record. In paragraph-10 it is also held that the name of the principal witness (P.W.2) does not find place in the F.I.R. (Ext.7) and while the name of such material witness was omitted from the F.I.R. remained unexplained by the prosecution. However, analyzing the merits of other prosecution witnesses, the trial court in paragraph-15 of the judgment has observed "the evidence of these witnesses, therefore, clearly indicates that they have not only suppressed the truth but also have exaggerated the fact by implicating the persons who were not named by them before the I.O. in their statement under Section 161 Cr.P.C. It is clearly

apparent that they have exaggerated their part of the case and suppressed the part played by the villagers of Kundisasan in the assault." Adding the evidence of P.W.1, the learned trial court in paragraph-16 of the judgment has further observed that evidence of P.W.1 clearly shows that all the witnesses were partisan witnesses and their sole aim is not only to conceal their part in the occurrence but also build up the case of the prosecution in an exaggerated manner to show that the accused persons had a motive to kill Babaji. In the said paragraph, the trial court has also taken note that "No explanation is given as to how accused Bhagaban and Chakradhar also received injuries though the I.O. has started a counter case in that regard". The judgment further reveals in paragraph-16 that the injury reports of the accused persons (Exts.F and G) show that Chakradhar and Bhagaban (appellant) also received injuries and out of them, one of the injuries of Chakradhar (accused) was grievous and cause by sharp cutting weapon. Furthermore, in paragraph-18 of the judgment the learned trial court has held that the I.O. in this case has not fairly investigated into the case and even has not examined the witnesses shown to be the eyewitnesses in Ext.7 (F.I.R.). Considering the nature of evidence brought on record and where material witnesses have been withheld, the learned trial court has observed that non-examination of Bhagaban Barik has adversely affected the prosecution case. In such premises, on considering the nature of the evidence adduced by the prosecution, the learned trial court has observed that all the prosecution witnesses are neither wholly reliable nor wholly unreliable, particularly when the learned trial court disbelieved the prosecution evidence that all the 7 accused persons had assaulted the deceased. The finding of the learned trial court is quoted hereunder :-

> "Though I disbelieve the fact that the other accused persons also assaulted Babaji, it being the emphatic evidence of them all that Bhagaban gave the only blow on the head of Babaji and this has also been supported by Bhagaban Barik whose nonexamination is highly lamented by the defence, I fell that accused Bhagaban cannot escape the responsibility of being the assailant. Barring the written report (Ext.7), it is no where indicated that accused Bhagaban aimed the blow at the head of Babaji. While he himself was under assault, he could not have aimed the blow at the head of Babaji. So while taking part in the assault he used the stick and it accidentally came in contact with the head of Babaji. In the circumstances, therefore, it cannot be said that he had the intention to kill nor had the knowledge that his

blow would hit the head of Babaji. In the circumstances, I can hold him guilty neither under Section 302 nor 304-Part-II of the Indian Penal Code. He cannot, however, escape the offence under Section 326 of I.P.C.

8. Cumulatively, the findings of the learned trial court revealed that prosecution witnesses suppressed the injuries sustained by the appellant and one Chakradhar had sustained a grievous injuries in course of the same occurrence, the witnesses were neither wholly reliable nor wholly unreliable, all the prosecution witnesses are highly partisan and interested witnesses and prosecution is guilty of suppression of material facts. In essence, the learned trial court has observed that prosecution has suppressed the genesis and origin of the occurrence and has not thus presented the true version which resulted in the death of the deceased and where the appellant had sustained multiple injuries including three bleeding wounds. It assumes much greater importance when the evidence consists of interested or inimical witnesses where material witnesses have been withheld. It is a case where a defence presented a version which competes in probability to show that the prosecution party are aggressor. That apart, when the learned trial court was convinced from the proved fact that the stick held by the appellant accidentally came in contact with head of Babaji holding him guilty under Section 326 of IPC is also unsustainable in law in view of the fact that the hurt caused cannot said to be voluntarily.

9. Section 326 of IPC provides as follows :-

> "Voluntarily causing grievous hurt by dangerous weapons or means.- Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

10. The word "Voluntarily" has been defined in Section 39 of IPC which is as under :-

> "Voluntarily" – A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it."

Unless the grievous injury is caused voluntarily, no conviction under Section 326 of IPC is permissible. When the learned trial court has held the stick held by the appellant accidentally came in contact with the head of the deceased, his conviction under Section 326 of IPC is fallacious. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in a case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

11. Cumulatively, the prosecution is required to explain the injuries on the body of the accused persons when it is established that the same were caused in that very incident, injuries were large in number and one of them is superficial in nature, it gives an impression that the true genesis of the occurrence of the incident was devilishly suppressed. The earned trial court once being of the considered opinion that the prosecution witnesses are not deposing the truth the whole truth particularly where material witnesses have been deliberately withheld and where the principal witness (P.W.2) was not named in the F.I.R., the learned trial court should not have convicted the appellant inasmuch as the truth and falsehood are so inextricably mingled together here in this case where it is not possible to separate the chaff from the grain. It is indeed difficult in fact to separate the truth from falsehood. If an attempt is made to separate the same, the third case would come out on the surface which it is not permissible in law. Therefore, the benefit thereof is to be extended in favour of the defence and against the prosecution for the reasons held by the learned trial court in its judgment. Hence, I have no hesitation in allowing the criminal appeal by acquitting the appellant of the charge under Section 326 of IPC.

12. Therefore, I would allow this criminal appeal and setaside the impugned judgment of conviction and order of sentence passed against the appellant. Consequently, the appellant is acquitted of the charge. The appellant being already on bail, the bail bonds shall stand cancelled and surety discharged. L.C.R. received be sent back forthwith along with a copy of this Judgment.

Appeal allowed.

2017 (II) ILR - CUT- 650

S. PUJAHARI, J.

CRLA NOs. 551 & 472 OF 2010

SOUMYA RANJAN PATTANAIK …….Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

AND

SUBASH PATTANAIK ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

PENAL CODE, 1860 – S.376

Rape – Delay of five months in lodging F.I.R. – Victim is an illiterate rustic Harijan – Delay is well explained and the evidence of the victim is proved to be genuine rather than fabricated – Held, in rape cases courts must consider human psychology and behavioural probability while assessing the evidence of the victim.

In this case on the date of occurrence the accused forcibly raped the victim and threatened her to kill her younger brother if she will disclose the incident to her parents, for which she remained dumb – There after the accused had also raped twice with the same threat – However, when some symptoms developed she consulted the village ANM, who informed her that she was pregnant by five months and after the ANM informed her mother, FIR was lodged – Subsequently the victim gave birth to a male child – Held, from the attending and succeeding circumstances with broad human probability, evidence of the victim is seen to be clear and convincing to hold that the appellant-Soumya Ranjan Pattnaik is guilty U/s. 376 IPC, inspite of the delay in lodging information and in the absence of corroboration.

(Para 9)

Case Law Referred to :-

1. 1989 CRI.L.J. 669 (Mad.) : Noble Mohandass -V- State of Tamilnadu

For Appellant : M/s. Manoj Ku. Pati, C.C.Nayak, B.P.Satapathy & S.S.Routray

For Respondent : Addl. Govt. Advocate

Date of Hearing : 21. 12.2016

Date of Judgment: 21.12.2016

JUDGMENT

S. PUJAHARI, J.

Since both these criminal appeals have been directed against the same impugned judgment of conviction and order of sentence dated 15.09.2010 rendered by the learned Special Judge, Keonjhar in Special Case No.23 of 2007, they are heard together and are disposed of by this common judgment to avoid any conflicting finding.

2. By the impugned judgment, the learned Special Judge, Keonjhar has convicted the appellant – Soumya Ranjan Pattnaik under Sections 376 and 506 of the Indian Penal Code (for short "I.P.C.") and sentenced him to undergo R.I. for a period of ten years and to pay a fine of Rs.50,000/-, in default, to undergo R.I. for a further period of three years under Section 376 of IPC and R.I. for a period of one year and to pay a fine of Rs.5000/-, in default, to undergo R.I. for a further period of three months respectively. The learned trial court has convicted the appellant – Subash Pattnaik under Section 506 of I.P.C. and sentenced him to undergo R.I. for one year and to pay a fine of Rs.5000/-, in default, to undergo R.I. for a further period of three months with further direction to pay the aforesaid fine amount, if realized from the appellants, to the victim as compensation. The learned trial court, however, found the appellants not guilty of the charge under Section 3(1)(x) of the S.C. & S.T. (P.A.) Act.

3. The facts of the case as disclosed by the prosecution are that an F.I.R. was lodged on 26.03.2007 at Soso Police Station incorporating, inter-alia, that the victim is a rustic illiterate Harijan spinster, aged about fourteen years, she was impregnated by appellant - Soumya Ranjan Pattnaik who finding her alone in her house, committed sexual intercourse by force on a day about five months preceding the date of filing of F.I.R. on 26.03.2007. It was under threat. Subsequently, thereafter on two other subsequent occasions the said appellant also subjected the victim to forcible sexual intercourse. Being under terrible fear, the victim could not divulge such act before her parents. Once, the local A.N.M. disclosed before the victim's mother that her daughter is impregnated, the crestfallen mother then confronted the victim who divulged before her as to what had happened. The victim's mother immediately rushed to the house of the appellants and when questioned the appellant – Subash Pattnaik as to why his son committed such a barbarous sexual act against an innocent minor girl, he threatened to torch the house and to drive out them from the village. Notwithstanding such threat, the victim's mother

immediately rushed to the Police Station and lodged the F.I.R. Thereafter, investigation was taken up and on completion thereof, charge-sheet was filed against the appellants before the S.D.J.M., Anandapur. In accordance with law the case was committed to the Special Court. After considering the materials brought on record and hearing the parties, the appellants were charged for the aforesaid offence. When the charge was read over and explained, the appellants pleaded not guilty and claimed for trial. The learned trial court after conclusion of the trial convicted the appellants as aforesaid.

4. Heard the learned counsel for the parties at length.

5. The learned counsel for the appellants would submit that there being no substantial material to hold that the victim was below sixteen years, there being inordinate delay of more than five months in lodging of F.I.R. and the version of the victim being not verses from bible, the conclusion of guilt recorded by the learned trial court is unsustainable.

6. Per contra, the learned counsel for the State submits that there is overwhelming material on record to hold that the victim is less than sixteen years of age where the consent being immaterial, the judgment of conviction and order of sentence do not call for any further consideration.

7. Before dilating upon the question raised, at the outset, I would like to examine the materials on record to ascertain whether finding of the learned lower Court that the victim was less than sixteen years of age is correct ?

It is not disputed before me that the victim and her parents are illiterate rustic Harijans. The evidence of the victim's mother, P.W.4 would go to show that the victim was 14 years old on the day when she was sexually assaulted by appellant - Soumya Ranjan Pattnaik. She has given her age as "42 years" on the date of her examination in Court on 17.12.2009. The victim who has been examined as P.W.6 on 17.12.2009, has stated on oath that she was 17 years old on that date and at the time of occurrence she was 14 years old. P.W.8 is the Medical Officer who with reference to the X-ray taken and ossification test of the victim by the Radiologist opined that the age of the victim was in between 14 to 17 years on the date of her examination. His report is admitted as Ext.3. In the F.I.R. it is mentioned that the victim was 14 years old on the date of first coitus. This is the gist of the evidence brought on record to establish that the victim was less than sixteen years old on the date of alleged occurrence when on the first occasion the appellant - Soumya Ranjan Pattnaik subjected her to sexual assault. Admittedly, no birth

certificate of the victim produced. It is to be remembered that the victim belonged to a remote rural area. Her parents and she herself are illiterate rustic Harijans. Nothing substantial being elicited to discard the age deposed by the victim and her mother, it would not proper to reject their testimony as to the age of the victim for non-submission of birth certificate or any School admission register. There is absolutely no variation in the age of the victim as given in the F.I.R. and deposed by the victim and her mother in Court on oath. There is no pinpoint challenge to their evidence relating to her age. Always mother is the best person to say as to correct age of her child. No doubt, the victim was sent for medical examination and her X-ray was conducted at Sub-Divisional Hospital, Anandapur for the purpose of ossification test. Unfortunately, neither the Radiologist who had taken X-ray nor the X-ray reports produced and proved in this case, although the doctor (P.W.9) with reference to the X-ray reports has stated that the victim was in between 14 to 17 years. The lower age suggested by the doctor tallies with the age given by the victim and her mother. That being the nature of evidence, the learned trial court held that the victim was less than sixteen years old. No other contrary material when placed on record, I am of the considered opinion that the victim was less than 16 years old. The inference drawn from the evidence brought on record supports such conclusion.

8. When it is brought on record that the victim was sixteen years and less on the day when she was subjected to forcible sexual intercourse by the appellant - Soumya Ranjan Pattnaik, her evidence on oath is to be considered on such background keeping in mind that she is an illiterate rustic Harijan girl. The learned trial court had elaborately discussed the evidence of the victim and her mother. When I sifted that evidence, I find that she has given a vivid narration of the event notwithstanding that she is a rustic Harijan. She has deposed that her parents being labourer by profession, they usually remained absent from the home. On one such occasion at about 11 a.m. she reached home from pond where she had been to wash utensils, the appellant - Soumya Ranjan Pattnaik who was concealed in the house, suddenly gagged her mouth by a cloth, tied her hands by a rope, undressed her and forcibly raped her. Since he threatened her to kill his younger brother if she divulged such incident before her parents, out of fear, she remained dumb. Her evidence further reveals that in two subsequent events the said appellant also putting her under such threat, committed sexual intercourse despite her repeated objection. She has also deposed that after few months thereafter when she developed some symptoms, she approached the local A.N.M.

where she ascertained from her that she was pregnant by five months. The A.N.M. also disclosed such fact before her mother whereafter the victim divulged everything before her mother explaining the reasons as to why she concealed such fact before them. Though the victim was subjected to cross-examination, but nothing elicited to discard her version outright. She denied the defence suggestion that appellant - Soumya Ranjan Pattnaik was not the author of that alleged pregnancy. Taking a leaf out of the evidence of the victim, her mother, P.W.4 has given a detail description of the events as to how she ascertained the factum of pregnancy from the local A.N.M. around 3 p.m. when she was coming from nearby forest with a bundle of firewood. She has also stated that on arrival home, being questioned, the victim narrated before her inculpating the appellant - Soumya Ranjan Pattnaik as the person who subjected her to rape and as to the circumstances in which she concealed the fact before them. Her evidence further reveals that when she rushed to the house of the appellants, the appellant - Soumya Ranjan Pattnaik denied his involvement and appellant – Subash Pattnaik threatened her to burn her house and oust her from village. She has proved the F.I.R. marked as Ext.1 and her signature therein marked as Ext.1/1. This is the gist of evidence adduced to inculpate the appellants with the offence charged.

9. I have given my anxious consideration to the evidence of P.Ws.4 and 6. Sifted the evidence with care and caution but did not find any substantial material to disbelieve and discard them. The witnesses are poorest of the poor Harijans having no axe to grind against the appellants. The learned counsel appearing on behalf of the appellants failed to convince this Court as to why such witnesses would come forward to depose against the appellants. Needless to say that in a case of this nature, particularly persons of such conservative Harijan people does not come forward to divulge such fact more so when the victim is a minor where sexual intercourse appears to have been made under influence of threat. That apart, since the victim is a minor, the question of 'consent' or no 'consent' does not affect her credibility. One cannot lose sight of the fact that no self-respect woman would put her honor at stake and falsely allege commission of rape on her. That being so, the testimony of the victim must be appreciated in the background of the entire case. The human psychology and behavioural probability must be looked into while appreciating such evidence. The inherent bashfulness and feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. It is also well settled law that testimony of an unsophisticated Harijan woman can

be accepted in spite of some minor and nominal discrepancies. It is also settled law that 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 has ever occurred. She would be conscious of danger of being ostracized by the society and being looked down by the society including by her own family members, relatives, friends and neighbours. She would face the risk of losing the love and respect of her matrimonial home happiness being shattered. If she is unmarried she would apprehend that it would be difficult to secure an alliance with suitable match from a respectable or an acceptable family. In view of these and similar factors, the victim 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 built-in assurance that the charge is genuine rather than fabricated. It is also established law that a girl or woman of such non-permissive society would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. Here, what the facts and circumstances reveals the victim would not have divulged at the risk of her chastity if she was not pregnated at the instance of appellant – Soumya Ranjan Pattnaik. Once she found to be impregnated she had no other option left but to divulge the name of the person who caused such act. In such circumstances, when the victim inculpate the appellant - Soumya Ranjan Pattnaik being conscious of the danger of inculpating such influential persons like the appellants, there is inbuilt assurance that charge is genuine rather than fabricated. 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 the victim of sex-offence is entitled to a great weight notwithstanding delay in lodging information or absence of corroboration. I find, as noticed by the learned trial court, there is no basic infirmity or embellishment in the evidence of the victim and her mother. Their testimony inspires confidence and is found to be reliable. The learned trial court has discussed threadbare such evidence which I noticed sieve through the judicial colander and passes through the gauges. In such scenario, I would like to place absolute reliance on the testimony of the victim to hold that on that fateful day which is about five months preceding 26.03.2007, the appellant - Soumya Ranjan Pattnaik subjected the victim to sexual assault knowing that she was a minor and which coitus possibly caused her pregnancy found by the A.N.M. and the record reveals that she had given birth to a male child on 22.03.2009. Attending and the succeeding circumstances are consistent with broad human probability and

there is no compelling reasons to differ from the conclusion arrived by the learned trial court that the evidence of the victim is clear, cogent and convincing and can be relied upon to hold that it was appellant - Soumya Ranjan Pattnaik who had raped the minor victim girl attracting the mischief of Section 376 of IPC. Therefore, this Court is of the view that the finding of guilt under Section 376 of IPC against appellant - Soumya Ranjan Pattnaik is unassailable and cannot be interfered with.

10. Now adverting to the conviction of the appellants under Section 506 of IPC, I find there is absolutely no material to hold that the appellants ever intimidated the victim's mother within the meaning of Section 503 of IPC. In the F.I.R. it is incorporated that once P.W.4 approached the appellants and questioned them as to why appellant - Soumya Ranjan Pattnaik raped her daughter, the appellant – Subash Pattnaik threatened to physically assault her and also threatened to torch her house. However, as P.W.4 she has deposed that appellant – Subash Pattnaik threatened her to burn her house and to drive them from village. Except this bald version, there is nothing on record to support the charge under Section 506 of IPC. To establish an offence of "criminal intimidation" punishable under Section 506 of IPC, there must be an 'intent' to cause alarm to the former by a threat to him of injury to himself or to the latter. The 'intent' itself might be complete, though it could not be affected. But, the existence of the intent seems essential to the offence, as also and equally to the attempt to commit the offence, since otherwise the attempt would be to do something not constituting the offence. Section 506 of IPC relates to punishment for "criminal intimidation". The gist of the offence is effect which the threat is intended to have upon the mind of the person threatened. To bring an offence within such parameter, the threat should be a real one and not just a mere word. When the person uttering it does not exactly mean what he says and also when the person at whom threat is launched does not feel threatened actually the offence of criminal intimidation punishable under Section 506 of IPC goes out of the way. [***See 1989 CRI.L.J. 669 (Mad.), (Noble Mohandass vrs. State of Tamilnadu)***]. I would repeat a threat, in order to be indictable, must be made with intent to cause alarm to the victim. Mere vague allegation by the accused that he is going to torch the house or to drive them from village cannot amount to criminal intimidation. To answer "criminal intimidation" the threat must cause, inter-alia, alarm in the mind of the victim. It must be shown in order to prove "criminal intimidation" that threat was with intent to cause alarm to that person. Unless that intent is proved, the charge must fail.

11. Reverting back to the evidence of P.W.4, that sworn testimony does not show that she was ever felt alarmed from the word uttered by the appellant – Subash Pattnaik. I do not find any clear and cogent materials from such evidence of P.W.4 to hold the appellants guilty of the charge under Section 506 of IPC. The learned trial court, as it appears, erred in law while holding the appellant guilty of the charge under Section 506 of IPC. The conviction of the appellants under Section 506 of IPC is, therefore, unsustainable and liable to be set-aside.

12. Now coming to the extent of sentence imposed under Section 376 of IPC against the appellant - Soumya Ranjan Pattnaik, I am of the considered opinion that in the peculiar facts and circumstances, if the substantive sentence of imprisonment is reduced to seven years maintaining the fine amount of Rs.50,000/- that would meet the ends of justice.

13. Resultantly, CRLA No.472 of 2010 filed by the appellant – Subash Pattnaik is allowed. However, CRLA No.551 of 2010 filed by the appellant - Soumya Ranjan Pattnaik is allowed in part. The substantive sentence imposed under Section 376 of IPC against the appellant - Soumya Ranjan Pattnaik is reduced to seven years R.I. and fine amount of Rs.50,000/- with default sentence are maintained. The fine amount of Rs.50,000/- (rupees fifty thousand), if realized, shall be paid to the victim as compensation. L.C.R. received be sent back forthwith along with a copy of this Judgment.

CRLA No. 472/10 is allowed.
CRLA No. 551/10, allowed in part.

2017 (II) ILR - CUT- 657

BISWANATH RATH, J.

C.R.P. NO. 16 OF 2014

SUBHASHREE PANDA & ORS. .....Petitioners

.Vrs.

PRASANTA KUMAR PANDA & ANR. .....Opp. Parties

FAMILY COURTS ACT, 1984 – S. 7 (C)

Husband filed suit for recovery of money – Pleadings show that the money involved in the suit was for settling a marriage dispute –

Such suit is barred before the Civil Court and the family Court is only competent to decide such suit.

In this case learned trial court is not correct in rejecting the application filed by the wife under order 7 Rule 11 C.P.C. – Held, the impugned order is set aside – Application under order 7, Rule 11 is allowed, declaring that the suit filed by the husband is not maintainable before the Civil Court. (Para 8)

Case Laws Referred to :-

1. AIR 2016 SC 2161 : (Balaram Yadav vrs. Fulmaniya Yadav)
2. AIR 2003 SC 2525 : (K.A.Abdul Jaleel vrs. T.A. Sahida),
3. AIR 2010 Kerala 130 : (Sindhu Sidharthan vrs. K.K.Sidharthan)
4. AIR 2002 Karnataka 399 : (H.P.Lakshmidevaraje vrs. G.P.Asharani Alias Nandini)

For Petitioners : M/s. S.K.Dash, A.K.Otta, A. Dhalsamanta & S.Das

For Opp. Parties : M/s. J.Katikia, A.Mohanty, P.Mohanty, B. Misra, S.Swain & D.Jena.

Date of hearing : 20.07.2017
Date of Judgment : 31.07.2017

JUDGMENT

BISWANATH RATH, J.

This Civil Revision involves an order dated 26.6.2014 rejecting an application under Order 7 Rule 11 of C.P.C. thereby rejecting the application at the instance of the wife-defendant for rejection of the plaint.

2. Short background involved in the case is O.P.1 filed C.S. No.558/2013 praying therein for recovery of a sum of Rs.2,52,500/- with cost and up-to-date interest. Facts as narrated in the plaint is that on suppressing the mental ailments of their daughter, defendant-petitioner nos.2 & 3 got married of their daughter, defendant no.3 with the plaintiff-O.P.1 herein. The marriage was solemnized on 26.6.2013. It is further pleaded that on arriving at a formal compromise of the dispute between the plaintiff and the defendants, on 8.9.2013 the defendant-petitioner no.2 received back the articles and cash of Rs.2,52,500/- handed over by the plaintiff no.2 upon acknowledging a receipt thereof. On receipt of the articles and the amount as well, the plaintiff claimed that the cash involved therein was the settled amount towards permanent alimony of the wife. On the premises that as the

defendant refused to sign the deed of compromise as well as in the joint application for dissolution of marriage, the plaintiff claimed, the defendants will be liable to return the said amount. Defendant-O.Ps. upon their appearance in the proceeding filed an application under Order 7 Rule 11 of C.P.C. for rejection of the plaint, inter alia, contending that the facts whatever involved in the plaint since involved a matter relating to marriage between the wife and husband and the benefits involved in order to attain a compromise in the matter of dissolution of marriage for the clear restriction in the Family Court Act, 1984, simple suit for recovery of the amount is not maintainable.

Both parties also advanced argument in the light of their pleadings available in the plaint as well as the objection by the husband and the pleadings available in the application under Order 7 Rule 11 of C.P.C. at the instance of the defendants.

Considering the rival contentions of the parties and taking into consideration the decision relied upon by the present petitioners, the trial court rejecting the application under Order 7 Rule 11 of C.P.C. with the observation that neither the plaint did not have a cause of action nor the Court is in ceisin is bereft of jurisdiction to decide such matter.

3. Challenging the impugned order, Sri Dash, learned counsel for the defendants in the court below while reiterating the stand taken in the Order 7 Rule 11 application, referring to the provisions contained in Section 7 of the Family Courts Act and relying on certain decisions reported in AIR 2016 SC 2161 (***Balaram Yadav vrs. Fulmaniya Yadav)***, AIR 2003 SC 2525 (***K.A.Abdul Jaleel vrs. T.A. Sahida)***, AIR 2010 Kerala 130 (***Sindhu Sidharthan vrs. K.K.Sidharthan)*** and AIR 2002 Karnataka 399 (***H.P.Lakshmidevaraje vrs. G.P.Asharani Alias Nandini)*** submitted that the suit is not maintainable for the involvement of the dispute involving marriage between the plaintiff and defendant no.3. it is also contended that the decisions relied on by him are all supporting the case of the petitioners and thus requested this Court for interfering with the impugned order and setting aside the same.

4. Sri Katikia, learned counsel for the husband-O.Ps. (plaintiffs in the suit) on the other hand while opposing the stand taken by the learned counsel for the petitioners all through under the premises that there being no involvement of prayer for restitution or dissolution of marriage involved therein, the suit is a simple suit for recovery of money involved.

Consequently in his attempt to justify the impugned order, Sri Katikia submitted that for no infirmity in the impugned order, there is no scope for interference in the impugned order by this court and clamed for dismissal of the Civil Revision.

5. Considering the rival claim of the parties, this Court finds, the question required here to be determined as to "whether for the involvement of the facts therein the suit will be treated as a simple suit for money decree and if not, is the civil suit maintainable under the circumstance ?"

Considering the rival contentions of the parties, from the plaint involving C.S.No.558/2013, this Court finds, the plaint contains the following pleadings :-

> 3. That the present suit concerns the plaintiffs, as the Defendants, by way of their preplan, malicious, motivated and illegal acts, cheated, dishonestly induced and extorted the plaintiffs, a sum of Rs.2,52,500/-, by fraudulently and dishonestly representing for an amicable settlement of the disputes between the plaintiffs and Defendants. Believing their words, the plaintiffs fulfilled their part of obligations by paying a sum of Rs.2,52,500/- and returned the articles. Upon receiving the same, the Defendants took a complete somersault by going back on their promises and did not settle the disputes, as promised and they have misappropriated and converted the money for their personal use.
>
> 4. The brief facts for filing the present suit are that on 1.3.2013, the Defendant No.2 send the marriage proposal of the Defendant No.1 with the plaintiff No.1, disclosing that Defendant No.1 is an educated, simple, homely and normal girl. On 13.5.2013, based on the said disclosures, the Ring Ceremony was held and Plaintiff No.1 had given his consent for the marriage. Whereas, the following material facts were deliberately concealed by the defendants from the plaintiffs and fraud/cheating was committed.
>
> i. That the Defendant No.1 was/is suffering from Paranoid Schizophrenia and mental disorder. If the Plaintiff No.1 would have been informed/known about it, prior to the Ring Ceremony/marriage, he would not have given his consent for marriage at all.
>
> ii. There were mis-representation and wrong disclosure of material facts in the marriage invitation cards, printed by the Defendants, as two sets of invitation cards were got printed by them, one for the

plaintiffs, where their correct address i.e. Talamali Sahi, Puri" was printed and in the set of cards printed for the relatives of the Defendants, the address of the Plaintiffs was intentionally and deliberately printed, as "Khurda Town". Copies of the marriage invitation cards of both verities printed by the Defendant No.2 are (Anexure-P1 Colly) and the copy of the marriage card of the Plaintiff No.1 is (Annexure-P2).

iii. The defendants had changed their ancestral residence from "Dolamandap Sahi", Puri to the present rented accommodation, only before few days of marriage. The Defendant No.2 and 3, also forced the Plaintiffs to proceed the marriage negotiations very fact, without waiting the Defendant No.1's LL.B. examination (from 29.7.2013 to 22.8.2013) and even without waiting the probation period of six months i.e. up to 27.7.2013 of the Plaintiff No.1. It is pertinent to mention that the intention behind the aforesaid concealment was to keep in secret about the material facts that the Defendant No.1 was/is suffering from mental disorder. The Defendants had full knowledge of its falsity and the deceit and fraud constituting the false statement and mis-representation were made willfully by the Defendants and reliance on the said false statement was made by the Plaintiffs, thereby causing loss to them.

5. On 26.6.2013, the marriage between the Plaintiff No.1 and Defendant No.1 was solemnized. Starting from the day one of the marriage, the Defendant No.1 exhibited a wide array of symptoms of mental disorder including insomnia, irritability, tendency to cause trouble by suspecting others' character and behaved in a very unnatural and abnormal manner. When the Plaintiff No.1 intimated the said abnormal behavior of the Defendant No.1 to the Defendant No.2 and 3, they confessed the same. Instead of giving any solution, they started planting thoughts in the mind of Defendant No.1, against the Plaintiffs, in order to gain control over her and to promote disharmony in her married life. In the circumstances, the marriage was not consummated and the Plaintiff No.1 did not go for honeymoon and even the marriage, was not registered. On 5.7.2013, at about 7.30 P.M., the Defendant No.1 called the Defendant No.2 and 3 to the Plaintiff No.1's house and in their presence, the Defendant No.1, due to her mental disorder, got excited and was unable to make differentiation between elders and younger in the family of the

plaintiffs and started scolding them by using filthy languages. When Plaintiff No.2 and his wife objected to the same, the Defendant No.1 assaulted the wife of te Plaintiff No.2 by pushing her around with great force and thrown her out of the room. At 11.00 P.M., the Defendant No.1 left the house along with her parents with most of her belongings including jewellery, putting a lock to the room. While crossing through the colony, the Defendants continued to abuse the family of the Plaintiffs' and the people of the entire colony came to know that the Defendant No.1 is an abnormal lady and suffering from mental disorder. On 6.7.2013, at 2 A.M., a complaint was lodged against the Defendants before the Kumbharapada Police Station, on which a formal station diary vide SDE No.136 was made. Whereas, the Defendants, especially, the Defendant No.1 continued to harass, cause mental torture, threatened to life and threatened of taking the job of the Plaintiff No.1. Therefore, the Plaintiff No.1 was constrained to lodge the second complaint dated 17.8.2013 before the said IIC with CC to SP, Puri. Copies of the complaints, as well as the extracts of the aforesaid order of Kumbhara Pada Police Station, Puri are Annexure-P3 (Colly).

9. The Defendants after coming to know about the pendency of the aforesaid petition and complaints, on 4.9.2013, voluntarily approached the Plaintiffs through Mr. Ashok Kumar Dash, Advocate for an amicably settlement of the disputes, with the conditions to return by the Plaintiffs, the gifted articles, brought by the Defendant No.1 at the time of marriage. A sum of Rs.2,52,500/- was also demanded by the Defendants towards permanent alimony of Defendant No.1 and for full and final settlement of all the disputes with the Plaintiffs and for giving the consent of Defendant No.1 in the aforesaid petition, filed by the Plaintiff No.1 for annulment of marriage., The said conditions were accepted by the Plaintiffs ina joint meeting held on 8.9.2013, which was presided over by Mr.Ashoki Kumar Dash, Advocate. Accordingly, both the parties came to the residence of the Plaintiff No.1and the Defendant No.2 and 3, after indentifying, verifying and counting all the articles, loaded the same in a Tata-407 Vehicle. A sum of Rs.2,52,500/- was also handed over by the Plaintiff No.2 to the Defendant No.2 towards full and final settlement of all the disputes between the Plaintiffs and the Defendants and for giving the consent of the Defendant No.1 in the

aforesaid petition, filed by Plaintiff No.1 for annulment of marriage. Whereas, the Defendant No.2 signed the acknowledgement of receipt of the articles and the acknowledgement of receipt of the sum of Rs.2,52,500/- and assured the Plaintiffs and Ld. Counsel Mr. Ashok Kmar Dash, Advocate to et the rest of documents signed from the Defendant No.1 from their residence, as she was present there that time. The Plaintiffs as well as Ld. Counsel Sh. Ashok Dash, advocate and few gentlemen, reposing trust and confidence upon the assurances given by theDefendant No.2 and 3, went to their residence, wherein they duly unloaded and received the aforesaid articles to their entire satisfaction. When the Plaintiffs and Ld. Counsel Sh.Ashok Dash, advocate requested them for signing the deed of compromise and joint application in terms of the settlement, the Defendants, took a complete somersault by going back on the promises made during the settlement and did not signed on the said documents. On the other hand, they grossly abused the Ld. Counsel Mr.Ashok Kumar Dash, Advocate, the Plaintiffs and other gentlemen, thereby threatening them to arrest by calling Police on the pretext of attempt to rape. The Defendants, by way of their aforesaid preplan, malicious, motivated and illegal acts, cheated, dishonestly induced and extorted the Plaintiffs by fraudulently and dishonestly representing for the aforesaid amicable settlement and fraudulently represented to take articles and money from the Plaintiffs, when actually, their intention was not to be settlement the disputes. The Plaintiffs would not have disbursed any amount but due to the preplan and false representations made by the Defendants, the Plaintiff No.2 paid the said amount. Believing their words, the Defendant No.2 being an advocate/Notary and the Defendant No.3 being a teacher the Plaintiffs fulfilled their part of obligations. Upon receiving both the articles and cash, the Defendants took a complete somersault by going back on their promises. The Defendants have illegally and dishonestly extorted the said monies and misappropriated and converted the same to their own use. Copies of the acknowledgement of receipt of the articles and cash for the sum of Rs.2,52,500/- by the Defendant No.2 is Annexure-P7 (Colly).

12. Thereafter, the plaintiffs contacted the Defendants and requested them to amicably resolve the dispute, without resorting to legal battle and to sign the Deed of compromise and joint application for annulment of the marriage, as promised by the Defendants. It was

> further requested that in case of the failure of the Defendants to avail the said option, to return te aforesaid amount of Rs.2,52,500/- along with interest. Whereas, the Defendants, neither signed the aforesaid Deed of compromise and joint application nor refunded the aforesaid amount of Rs.2,52,500/- along with interest. The plaintiffs, thereafter, had no option other than to issue the Defendants, legal notice dated 16.9.2013 through their counsel calling upon the Defendants to return the aforesaid amount of Rs.2,52,500/- along with interest, within 3 days from the date of receipt of the legal notice. The said legal notice was sent to the Defendants through Regd. AD and Speed post. The original legal notice dated 16.9.2013 is annexed herewith as Annexure-P9. The Postal receipts are annexed herewith as Annexure-P10 (Colly). Whereas, the Defendants refused to receive the said legal notice. The aforesaid original envelopes containing the legal notice returned to the counsel for the Plaintiffs are annexed herewith as Anexure-P11 (Colly).

From the pleadings available in the aforesaid paragraphs, there leaves no doubt that the attempts all involved in a negotiation for the annulment of the marriage between the husband and wife involved therein, the amount so settled between the parties as appears is in a way for settling a marriage dispute, the pleading is also intended to see a resolution of the marriage between the husband and wife. Considering the pleadings in the application under Order 7 Rule 11 of C.P.C. so also the reply by the plaintiff-husband to the above petition, there also leaves no doubt that there is no denial by either of the parties that the matter did not involve a marriage dispute.

6. Coming to consider the provision contained in Section 7 of the Family Courts Act, 1984 under Chapter-III, Section (1)(a) of the Act along with explanation reads as follows :-

"7. Jurisdiction-(1) Subject to the other provisions of this Act, a Family Court shall –

> (a) have an exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation.

Explanation-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely :-

a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage ;
b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status or any person ;
c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them ;
d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship ;
e) a suit or proceeding for a declaration as to the legitimacy of any person ;
f) a suit or proceeding for maintenance ;
g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

Looking to the provision referred to herein above, particularly Explanations (b)(c) & (f) referred to herein above, this Court finds, for the facts involved in the plaint, such suit before the civil forum will be the clear bar. Hence, this Court observes, the Family Court under the Family Courts Act is the only competent authority to decide such issues. Further for the facts involved therein, the suit cannot be treated as a simple suit for recovery of money. The court undertaking such process is bound to take up the question relating to validity of the marriage and the validity of the compromise involved therein to achieve dissolution of marriage and there is no other go. Further considering that the payment involving the purpose, this Court finds, the amount has become a property of a party involving dissolution of a marriage and such dispute otherwise cannot be decided unless appropriate proceeding is instituted in the Family Court available for the purpose.

7. Now looking to the decisions cited by the learned counsel for the petitioners, this Court finds, in the case of ***K.A.Abdul Jaleel*** (supra), in paragraphs-10, 11, 12, 13 & 14, Hon'ble apex Court has observed as follows :-

"10. The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. From a perusal of

the Statement of Objects and Reasons, it appears that the said Act, inter alia, seeks to exclusively provide within the jurisdiction of the Family Courts the matters relating to the property of the spouses or either of them. Section 7 of the Act provides for the jurisdiction of the Family Court in respect of suits and proceedings as referred to in the Explanation appended thereto. Explanation (c) appended to Section 7 refers to a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them.

11. The fact of the matter, as noticed hereinbefore, clearly shows that the dispute between the parties to the marriage arose out of the properties claimed by one spouse against the other. The respondent herein made a categorical statement to the effect that the properties were purchased out the amount paid in cash or by way of ornaments and the source of consideration for purchasing the properties described in Schedules 'A' and 'B' of the suit having been borne out of the same, the appellant herein was merely a trustee in relation thereto and could not have claimed any independent interest thereupon. It is also apparent that whereas the agreement marked as Exhibit A1 was executed on 17.09.1994, the appellant pronounced Talaq on 01.11.1995. The wordings 'disputes relating to marriage and family affairs and for matters connected therewith' in the view of this Court must be given a broad construction. The Statement of Objects and Reasons, as referred to hereinbefore, would clearly go to show that the jurisdiction of the Family Court extends, inter alia, in relation to properties of spouses or of either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of other; irrespective of the claim whether property is claimed during the subsistence of a marriage or otherwise.

12. The submission of the learned counsel to the effect that this Court should read the words "a suit or proceeding between the parties to a marriage" as parties to a subsisting marriage, in our considered view would lead to miscarriage of justice.

13. The Family Court was set up for settlement of family disputes. The reason for enactment of the said Act was to set up a court which would deal with disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings. The said Act was enacted despite the fact that Order 32A

> of the Code of Civil Procedure was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976, which could not bring about any desired result.
>
> 14. It is now a well-settled principle of law that the jurisdiction of a court created specially for resolution of disputes of certain kinds should be construed liberally. The restricted meaning if ascribed to Explanation (c) appended to Section 7 of the Act, in our opinion, would frustrate the object where for the Family Courts were set up.

Similarly in another decision of ***Balaram Yadav*** (supra), Hon'ble apex Court considering as to which Court has the jurisdiction over the dispute involved therein paragraph-7 held as follows :-

> "7.Under Section 7(1) Explanation (b), a Suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the Civil Courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status. Section 20 also endorses the view which we have taken, since the Family Courts Act, 1984, has an overriding effect on other laws."

In another case of ***Sindhu Sidharthan*** (supra), Hon'ble apex Court deciding the property involved one of the spouses where brings the dispute to the trap of family dispute and thus, comes within the jurisdiction of Family Court in paragraphs-16 & 17 has observed as follows :-

> "16. A careful reading of the plaint clearly shows that the spouses while the matrimony was in subsistence had initially great trust and faith in each other. The wife who was more educated, competent and qualified was assisting the husband in the management of his properties. It is to facilitate such management by her that the husband placing absolute matrimonial trust and implicit faith executed the Power-of- Attorney document. It is the alleged abuse of the position and status as a spouse (on whom complete matrimonial trust and faith was placed and in whose favour the Power-of-Attorney document was

executed to facilitate her to act on behalf of the other spouse) which is the foundation of the cause of action in this case. Even accepting any standards we find it impossible to construe that the dispute in the instant case is unrelated to the marital status of the parties or that it has to be reckoned as a non-family dispute.

17. To summarise, the dispute is between the spouses. It relates to an item of property of the husband. The dispute is whether the document executed by the wife in her capacity as a Power-of-Attorney Holder after the revocation of the instrument of Power-of-Attorney is valid or not. But the underlying substratum of the case is that the matrimonial trust and faith reposed had been abused. We are unable to accept the argument that the dispute is not a family dispute or that for that alleged reason it would go out of the sweep of Explanation (c) to Sec.7(1)."

8. For the observations of this Court herein above, the provision contained in Section 7 of the Family Courts Act and further for the decisions referred to herein above have a great bearing on the case at hand, this Court has no hesitation in holding the impugned order bad in law.

Under the circumstance, while answering the question framed herein above in favour of the petitioners, this Court while setting aside the order passed by the trial court involving the application under Order 7 Rule 11 of C.P.C., allows the said application and thereby declares the suit as not maintainable. No cost.

Revision allowed.

2017 (II) ILR - CUT- 669

BISWANATH RATH, J.

W.P.(C) NO. 19283 OF 2016

HATA BEHERA .....Petitioners

.Vrs.

COLLECTOR. KHURDA & ORS. .....Opp. Parties

ODISHA LAND REFORMS ACT, 1960-S.22

Flat belonging to Scheduled Caste person – Sale to non S.C. person – No question of sale of land – Land involved is already in the status of homestead and included in the comprehensive Development plan Area in Bhubaneswar, which should be kept away from the purview of the OLR Act – In this back ground whether for sale of a portion of a flat permission U/s 22 of the OLR Act is required ? – Held, no. (Paras 8,9,10)

For Petitioner : M/s B. Baug, M.R. Baug, R.R. Jethi & P.C. Das
For Opp. Parties : Mr. B.Behera, (ASC)

Date of Hearing : 22.06.2017
Date of Judgment: 07.07.2017

JUDGMENT

BISWANATH RATH,J.

By filing this writ petition, the petitioner has sought for quashing of the order dated 25.8.2016 passed by the opposite party no.3 vide Annexure-5 and the order dated 19.10.2016 passed by the opposite party no.4 as appellate authority vide Annexure-6 and further seeking a mandamus against the opposite party no.3 directing him to register the sale deed presented by the petitioner in respect of the particular disputed property mentioned in the sale deed.

2. Short background involved in the case is that Sri Hata Behera, the petitioner owning a piece of land in Khata No.611/2479 covered under Plot No.12/6076 measuring an area Ac.0.760 decimals in Mouza-Bhubaneswar Sahar, Unit No.41, Chandrasekharpur with kisam-homestead. To establish the status of land, the petitioner has filed khatian involving plot appearing at Annexure-1. Since the Mouza-Chandrasekharpur has been included in the Bhubaneswar Town Planning Area, for planning and development purpose, the petitioner's land comes within the jurisdiction of Bhubaneswar

Municipal Corporation as well as the Bhubaneswar Development Authority. Petitioner in order to develop the land, decided to construct multistoried building by entering into a memorandum of understanding with one M/s. Shree Jagannath Construction Pvt. Ltd. and as the situation developed, the petitioner applied for construction of multistoried building over the land in question involving Annexure-1.The Bhubaneswar Development Authority on consideration of the entire aspect granted the petitioner approval of plan of B+G+7 storied building vide Annexure-3. Construction of the building having been completed in all respect, further, being ready for sale to the intending buyers, who had already booked for purchasing the flats therein and paid advance token money, petitioner submitted sale deed involving one Smt. Rashmita Pattanaik for sale of Flat No.701 therein following his share before the Registering Authority for registration of the same. The registration being denied in the first instance, the petitioner moved W.P.(C).No.6991 of 2015 challenging the action of the Registering Authority.

3. During course of argument, the petitioner understanding the difficulties in the sale deed, chose to withdraw the said writ petition with liberty of the Court to submit a corrected sale deed for its registeration before the competent authority. As undertaken, the petitioner submitted a corrected sale deed for it's registration by the competent authority vide Annexure-4. This time, the registration of the instrument has been denied by the Sub-Registrar, Khandagiri, Bhubaneswar by his order dated 25.8.2016 on the premises that since the concept of apartment connotes two folds of ownership, firstly an absolute ownership in the particular apartment and secondly joint, undivided as well as undivisible co-ownership of such percentage of interest in the common areas and facilities as may be specified in the sale deed of apartment as appearing at Annexure-5. This order being challenged in appeal, the appellate authority dismissed the appeal by order dated 19.10.2016 observing that the petitioner i.e. appellant therein failed to provide sufficient papers/notifications to substantiate his case, so far as permission of competent authority for sale of S.C. person land to Non-S.C. person and other things are concerned. Further, on perusal of report of the Sub-Registrar, the appellate authority also observed that the sale deed is without mentioning the corresponding land, the undivided proportionate share of land as share of interest in other common facility in the proposed sale deed.

4. Assailing the impugned orders, Sri Baug, learned counsel appearing for the petitioner attacking the order of the original authority vide Annexure-

5 referring to the sale deed appearing at Annexure-4 submitted that the sale deed has a clear mentioning of the land involved therein and not only that the sale deed also contained a clear statement regarding the use of interest in the common area as well as facilities provided to the vendee. Sri Baug, learned counsel further contended that the order at Annexure-5 is not only contrary to the material information available in the instrument but also based on non-application of mind. Similarly, attacking the order at Annexure-6 passed by the appellate authority, Sri Baug, learned counsel contended that since the multistoried building has already been constructed with due permission of the competent authority over the disputed land with status of the land being homestead, as appearing in khatian, matter remains only for sale of flats. So, there is no question of sale of land in any case any further except mentioning of proportionate share in the respective sale deeds and therefore, the appellate authority dismissing the appeal following the provisions of O.L.R. Act is against law. Further, the appellate authority has also travelled beyond the questions raised by the original authority and under the circumstance, Sri Baug, requested this Court for interfering in both the orders and issuing necessary mandamus facilitating registration of the portion of the flat involving Annexure-4.

5. Sri Behera, learned Additional Standing Counsel appearing for the State referring to the provisions contained in Sub-Section 4 of Section 22 of the O.L.R. Act, while objecting the submissions of the learned counsel for the petitioner submitted that for the provision contained therein, the sale deed since involved land belonging to Scheduled Caste, must be accompanied by the written permission of the Revenue Officer for such transfer. Further, referring to the counter affidavit and the pleadings therein, Sri Behera, learned Additional Standing Counsel contended that the provision of O.L.R. Act is very much applicable to the present case and thus contended that there is no infirmity in either of the impugned orders leaving any scope for this Court for interfering in the same.

6. Considering the rival contention of the parties, this Court finds, there is no dispute that the disputed land following the declaration in the khatian not only remains in the status of Gharabari but also remains under the planning of Bhubaneswar Sahar and thus coming under the control of Municipal Corporation, Bhubaneswar as well as Bhubaneswar Development Authority. Further, the record-of-right discloses the land involved is at Mouza-Bhubaneswar Sahar, Unit No.41, Chandrasekharpur. This area having already come under the Comprehensive Development Plan area of

Bhubaneswar "Development Authority and the Bhubaneswar Municipal Corporation, can under no circumstance be treated as agriculture land. Besides, since the record-of-right already indicates the land is of the category of homestead, there is no scope otherwise to treat the land involved as agriculture land so as to apply the provisions under O.L.R. Act. There is no dispute that the construction over the disputed land is undertaken by Sri Hata Behera, which clearly appears from the approval of the Bhubaneswar Development Authority for construction of the building over the disputed plot appearing at Annexure-3.Therefore, there is also no dispute that multistoried residential apartment/building has come up over the disputed plot.Now, looking to the contents of the instrument presented for registration vide Annexure-4, this Court finds Sri Hata Behera, the petitioner is the vendor whereas Smt. Rashmita Pattanaik is the vendee. The instrument involving sale of a flat measuring 1900 sqfts within a super built up area, the sale deed clearly described the property involved therein. Further, the sale deed also has a clear disclosure on right and use of common area, common spaces, parking, lobbies, staircases and any other portion of the said building including the undivided share of each flat except the flat as clearly appearing at paragraph-7 of the copy of the sale deed. Thus, this Court finds the observation of the authorities below with regard to non-disclosure of correspondent land, the undivided proportionate share of land and the sale of interest in other common facilities in the proposed sale deed runs contrary to the information borne in the sale deed and there has been a mechanical disposal of registration issue making the obstructions in the above regard illegal. Now, coming to assess the submission of the rival parties on the issue of necessity of permission from competent authority under the Registration Act before sale of flats, the case hinges on determination on the question as to whether in case of sale of a portion of a flat, permission, as required under Section 22 of the O.L.R. Act, 1960 is required or not. Section 22 of the O.L.R.Act,1960 reads as follows:

> **22. Restriction on alienation of land by Scheduled Tribes -** (1) Any transfer of a holding or part thereof by a raiyat, belonging to a Scheduled Tribe shall be void except where it is in favour of - (a) a person belonging to a Scheduled Tribe or (b) a person not belonging to a Scheduled Tribe when such transfer is made with the previous permission in writing of the Revenue Officer : Provided that in case of a transfer by sale the Revenue Officer shall not grant such permission unless he is satisfied that a purchaser belonging to a

Scheduled Tribe willing to pay the market price for the land is not available, and in case of a gift unless he is satisfied about the bona fides thereof.

(2) The State Government may having regard to the law and custom applicable to any area prior to the date of commencement of this Act by notification direct that the restrictions provided in subsection (1) shall not apply to lands situated in such area or belonging to any particular tribe throughout the State or in any part of it.

(3) Except with the written permission of the Revenue Officer, no such holding shall be sold in execution of a decree to any person not belonging to a Scheduled Tribe. (4) Not withstanding anything contained in any other law for the time being in force where any document required to be registered under the provisions of clause (a) to clause (e) of sub-section (1) of section 17 of the Registration Act, 1908 purports to effect transfer of a holding or part thereof by a raiyat belonging to a Scheduled Tribe in favour of a person not belonging to a Scheduled Tribe, no registering officer appointed under that Act shall register any such document, unless such document is accompanied by the written permission of the Revenue Officer for such transfer.

(5) The provisions contained in sub-sections (1) to (4) shall apply, mutatis mutandis, to the transfer of a holding or part thereof of a raiyat belonging to the Scheduled Caste.

(6) Nothing in this section shall apply - (a) to any sale in execution of a money decree passed, or to any transfer by way of mortgage executed, in favour of any scheduled bank or in favour of any bank to which the Orissa Co-operative Societies Act, 1962 applies; and (b) to any transfer by a member of a Scheduled Tribe within a Scheduled Area.

Reading of the provision contained at Section 22 of the O.L.R. Act leaves no doubt that any transaction of holding or part thereof by a raiyat belonging to a Scheduled Caste to a non-Scheduled Caste shall remain void unless it accompanies a written permission of the Revenue Officer for such transfer.

7. The definition “holding” as placed in Sub-Section-11 of Section 2 of the O.L.R. Act reads as hereunder:

"Holding means a parcel of parcels of land forming the subject of a separate tenancy;"

Similarly, "land" is also defined under Sub-Section14 of Section 2 of the O.L.R. Act reads as hereunder:

"Land" means land of different classes used or capable of being used for agricultural purposes and include homestead.

It is also necessary to take note of the defecation of "homestead" in the O.L.R. Act.
Section 2 Sub-Section 12 dealing with 'homestead" reads as hereunder.

"Homestead" means any land, whether or not recorded as such, ordinarily used as house-site, ancillary or incidental to agriculture.

8. Reading of the definition "holding", "homestead" and "land" together, it leads to one conclusion that holding does not only include land but also includes land of different classes used or capable of being used for agricultural purposes. Looking to the khatian issued by the competent authority available at Annexure-1, it leaves no doubt that the land involved is already in the status of homestead. Further, reading of Section 22 of the O.L.R. Act, it also makes it clear that the restriction contemplated in Section 22 of the O.L.R. Act only involved transfer of holding. Going through the instrument submitted by the petitioner and as gathered from the submission of respective parties, this Court finds that there is no doubt that there is no involvement of sale of holding and the sale deed only involved sale of a portion of the super structure standing over the holding with mentioning of proportionate share. Further, since admittedly the particular land is already included in the Comprehensive Development Plan Area in Bhubaneswar in consideration of which there is already a plan approval by the competent authority, these lands ought to be kept away from the purview of the O.L.R. Act particularly looking to the status of the land, which has already been converted to homestead and remain unchallenged as on date.

9. For the discussions made hereinabove and particularly keeping in view of the provisions contained in Sub-section 11, 12 and 14 of Section 2 as well as clear provisions in Section 22 of the O.L.R. Act, this Court finds the findings of the both the authorities not only become bad in law but at the same time both the authorities below have also misdirected themselves dealing the issue involved.

10. Under the circumstance while interfering in both the impugned orders, this Court sets aside the impugned orders vide Annexures-5 and 6 and directs the opposite party no.3 to register the instrument submitted by the petitioner, copy of which is available at Annexure-4 within a period of seven days from the date of supply of the certified copy of this judgment.

11. In the result, the writ petition succeeds. No cost.

Writ petition allowed.

2017 (II) ILR - CUT-675

S. K. SAHOO, J.

CRLMC NO. 37 OF 2005

RAMESH SETHI & ORS. ……..Petitioners

.Vrs.

KUMARI BABITA NAIK & ANR. ……Opp. Parties

CRIMINAL PROCEDURE CODE, 1973 – S.301

Complaint Case – Death of Complainant – Case triable by the Special Court – Procedure relating to trial before a Court of session as laid down under chapter XVII of Cr.P.C has to be followed after commitment – Neither the complaint petition be dismissed nor the accused persons be acquitted – Legal heirs of the complainant, if so advised are at liberty to engage a counsel before the Special Court who shall act as provided U/s 301 of Cr. P.C. (Para 8)

For Petitioner : None
For Opp.Parties : None
For State : Mr. Chitta Ranjan Swain, Addl. Standing Counsel

Date of Hearing: 02.05.2017
Date of Order : 02.05.2017

ORDER

S. K. SAHOO, J.

None appears for the petitioners. Notice which was issued to opp.party no.1- Kumari Babita Naik by registered post with A.D. returned undelivered with an endorsement “dead since long”.

Heard Mr. Chitta Ranjan Swain, learned Additional Standing Counsel for the State.

In this application under section 482 of Cr.P.C., the petitioners have challenged the impugned order dated 23.11.2004 passed by the learned S.D.J.M., Bhanjanagar in I.C.C. Case No. 07 of 2003 in rejecting the petition filed by the petitioners to recall the order dated 07.02.2009 passed by the said Court in taking cognizance of the offences under sections 323/294/34 of the Indian Penal Code read with Section 3(1)(x) of the Scheduled Castes & the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter '1989 Act') and issuance of process against them.

2. The prosecution case, as per the complaint petition is that the opp. party no.1-complainant was suffering from pain in her left eye since last three years and in order to get rid of such pain, believing upon Lord Shiva, on 20.01.2003 early morning after taking her bath, she laid herself down on the stairs in the temple of Lord Shiva. When the priest of the said temple came to offer Puja and called her, she did not respond strongly believing upon the Almighty. It is the further case of the opp. party no.1-complainant that after sometime, the petitioners along with others came there and abused the complainant in filthy language and when the complainant did not stand up, all the petitioners dragged her from the stairs and assaulted her. The complainant raised hullah for which her parents along with others came there and seeing them, the petitioners left the spot.

3. On the basis of such complaint petition filed by the complainant, the initial statement of the complainant was recorded under section 200 of Cr.P.C. and inquiry contemplated under section 202 of Cr.P.C. was conducted, during course of which statements of some witnesses were recorded and after considering the materials available on record, the learned S.D.J.M., Bhanjanagar was of the opinion that there were sufficient materials to make out a prima facie case under sections 294/323/34 of the Indian Penal Code read with section 3(1)(x) of the 1989 Act and accordingly took cognizance of such offences and issued process against the petitioners.

4. On 15.11.2004 a petition was filed by the petitioners to recall the order of taking cognizance with respect to the offence under section 3(1)(x) of the 1989 Act on the ground that there was no material to attract the ingredients of such offence and all the witnesses had not been examined during inquiry as contemplated in a complaint case proceeding triable by a Court of Session and no documents had been produced to show that the

complainant is a member of Scheduled Caste or Scheduled Tribe. The opp.party no.1-complainant filed her objection to such petition filed by the petitioners. After perusing the recall petition as well as the objection filed by the complainant and other materials available on record, the learned Magistrate was of the view that the opp.party no.1-complainant stated that she is 'Pana' by caste and the complaint petition also indicates that the complainant is 'Pana' by caste residing at Harijan Sahi, Gayagauda. The learned Magistrate was further of the view that at that stage, it was not necessary for a detailed inquiry regarding the caste aspect and the complaint petition as well as the statement of the complainant is sufficient for such purpose. The learned Magistrate was of the view that all the witnesses are not required to be examined by the complainant in such case since it is not a sessions case and complainant cannot be compelled to examine all the witnesses named in the complaint petition against her will and desire even in a sessions case. Accordingly, the learned S.D.J.M. rejected the petition filed by the petitioners to recall the order of taking cognizance.

5. In case of **Adalat Prasad -Vrs.- Rooplal Jindal & Ors. reported in (2004) 29 OCR (SC) 264**, it has been held as follows:-

> "16. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of sections 200 & 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking section 203 of the Code because the Criminal Procedure Code does not contemplate a review on an order. Hence, in the absence of any review power or inherent power with the subordinate criminal Courts, the remedy lies in invoking Section 482 of Code."

Therefore, the petition dated 15.11.2004 which was filed by the petitioners before the learned S.D.J.M., Bhanjanagar for recalling the order of taking cognizance was not at all maintainable in the eye of law.

6. Since nobody appeared on behalf of the petitioners to argue the matter, on perusal of the grounds taken in the application under section 482 Cr.P.C., it appears that the main ground taken is that all the witnesses cited in the complaint petition were not examined before the learned Magistrate during the inquiry and since the case is triable by the learned Special Judge

which is also a Court of Session, the proviso to sub-section (2) of section 202 of the Cr.P.C. has been flouted.

The proviso of sub-section (2) of section 202 of Cr.P.C which deals with postponement of issue of process, comes under Chapter XV. When it appears to the Magistrate that the offence complained of is triable by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath. While interpreting this proviso, a Division Bench of this Court in the case of **Charan Rout -Vrs.- Prafulla Kumar Mangaraj reported in (1996) 11 Orissa Criminal Reports 322** held as follows:-

> "8. The choice being that of the complainant, he may choose not to examine himself. Consequences of such non-examination are to be considered by the Court during trial. Effect of non-examination of a particular witness is a matter which comes for scrutiny during trial. Similar would be the process in case of non-examination of complainant. But there is no statutory mandate for the Magistrate to direct complainant to examine himself. His duty ends by calling upon the complainant to produce all his witnesses. The question whom the complainant would choose to examine and effect of non-examination of any particular witness are not dealt with in the proviso to sub-section (2) of section 202.
>
> 9. In our view, therefore, the Magistrate has no statutory obligation to call upon the complainant to examine himself as a witness. He is only required to call upon the complainant to produce all his witnesses and examine them on oath. He cannot force the complainant to examine himself. The expression "call upon" means essentially "require", "direct". What is to be directed under the proviso is the production of all the witnesses, and their examination on oath."

In case of **Shivjee Singh -Vrs.- Nagendra Tiwary reported in (2010) 46 Orissa Criminal Reports (SC) 798,** it is held that the use of the word "shall" in proviso to section 202 (2) of Cr.P.C. is prima facie indicative of mandatory character of the provision contained therein, but a closer and critical analysis thereof along with other provisions contained in Chapter XV and sections 226 and 227 and section 465 would clearly show that non-examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issuance of process.

The word "all" appearing in proviso to section 202 (2) is qualified by the word "his". This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. The choice being that of the complainant, he may choose not to examine other witnesses.The consequence of such non-examination is to be considered at the trial and not at the stage of issuing process. It is further held that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of proviso to section 202(2) of Cr.P.C. is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint.

Thus, the complainant is not bound to examine himself during inquiry under section 202 of Cr.P.C. after recording of his initial statement under section 200 of Cr.P.C. The complainant is also not bound to examine all the witnesses named in the complaint petition even if it is a case triable by a Court of Session and he is at liberty to examine any of them and decline the rest by filing a memo. The Magistrate cannot compel the complainant to examine himself or all or any of his witnesses. On the prayer of the complainant, the Magistrate has power to summon witnesses during inquiry. The provision is mandatory in the sense that only the witnesses whose statements are recorded either under section 200 of Cr.P.C. or 202 of Cr.P.C. shall be permitted to be examined before the Court of Session otherwise it would be a surprise to the accused and he will be seriously prejudiced during trial in the absence of any previous statements of such witnesses.

In case of **Vidyadharan -Vrs.- State of Kerala (2004) 27 Orissa Criminal Reports (SC) 11** while dealing with 1989 Act, it has been held as follows:-

> "12. Section 14 of the Act says that:
>
> "for the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under this Act."
>
> 13. So, it is for trial of the offences under the Act that a particular Court of Session in each district is sought to be specified as a Special Court. Though the word 'trial' is not defined either in the Code or in

> the Act, it is clearly distinguishable from 'inquiry'. The word 'inquiry' is defined in section 2(g) of the Code as 'every inquiry, other than a trial, conducted under this Code by a Magistrate or Court'. So the trial is distinct from inquiry and inquiry must always be a forerunner to the trial. The Act contemplates only the trial to be conducted by the Special Court. The added reason for specifying a Court of Session as a Special Court is to ensure speed for such trial. "Special Court" is defined in the Act as "a Court of Session specified as a Special Court in Section 14" (vide Section 2(1)(d)).
>
> 14. Thus, the Court of Session is specified to conduct a trial and no other Court can conduct the trial of offences under the Act. Why did Parliament provide that only a Court of Session can be specified as a Special Court? Evidently the legislature wanted the Special Court to be a Court of Session. Hence, the particular Court of Session, even after being specified as a Special Court, would continue to be essentially a Court of Session and designation of it as a Special Court would not denude it of its character or even powers as a Court of Session. *The trial in such a Court can be conducted only in the manner provided in Chapter XVIII of the Code* which contains a fascicule of provisions for 'trial before a Court of Session".

Therefore, a case under section 3(1)(x) of 1989 Act is triable by a Special Court and the trial of such case has to be conducted in the manner provided in Chapter XVIII of the Cr.P.C. under the heading of the trial before a Court of Session. Merely because the complainant choose to examine some of his witnesses mentioned in the complaint petition but not all, it cannot be said that the proviso to sub-section (2) of section 202 of Cr.P.C. has been flouted and therefore, the order of taking cognizance is vitiated in the eye of law.

In view of such analysis, the grounds taken by the petitioners that impugned order is vitiated in the eye of law as all the witnesses cited in the complaint petition were not examined before the learned Magistrate during the inquiry, is not acceptable.

7. In the petition under section 482 of Cr.P.C. filed by the petitioners, another ground has been taken that there are no prima facie materials to attract the ingredients of the offence under section 3(1)(x) of the 1989 Act and therefore, the order of taking cognizance of such offence is not sustainable in the eye of law.

Not only in the complaint petition, the complainant has mentioned her caste as 'Pana' and that she was residing at Harijan Sahi, Gayagauda but also she has stated in her evidence that she is 'Pana' by caste. As per section 3(1)(x) of the 1989 Act, whoever, not being a member of a scheduled caste or a scheduled tribe intentionally insults or intimidates with intent to humiliate a member of a scheduled caste or a scheduled tribe in any place within public view shall be punished with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

Thus there is prima facie material that the complainant-opp.party no.1 is a member of scheduled caste and the occurrence in question took place in a public place within public view which attracts the ingredients of the offence and therefore, no illegality has been committed by the learned Magistrate in taking cognizance of such offence.

Therefore, I find no fault with the impugned order passed by the learned Magistrate in rejecting the petition filed by the petitioners to recall the order of taking cognizance and issuance of process.

8. No doubt the notice has returned undelivered with an endorsement that opp.party no.1 is dead since long. The complaint case is now to be committed to the Court of Session as per the provisions under sections 208 and 209 of Cr.P.C. in view of the decision of the Hon'ble Supreme Court in case of **Gangula Ashok –Vrs.- State of A.P. reported in (2000) 18 Orissa Criminal Reports (SC) 364** and it is to be tried before a Special Court. The Special Public Prosecutor has to conduct the case.

In case of **Ashwin Nanubhai Vyas -Vrs.-State of Maharashtra reported in AIR 1967 SC 983** where the question came up for determination was that when the offences under sections 493/496 of the Indian Penal Code which are exclusively triable by Court of Session, what would be the effect of the death of a complainant on an inquiry under Chapter XVIII in respect of offences requiring a complaint by the person aggrieved, after the complaint has been filed, it was held as follows:-

> "6. Mr. Keswani, however, contends that section 198 provides that the cognizance of the case can only be taken on the complaint of a person aggrieved and the only exception to this general rule is where the complainant is a woman, who according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic, or is from sickness or infirmity unable to make a

> complaint. He contends that what applies to the initiation of the proceeding must also apply to the continuance of the proceeding. He submits that if cognizance could not be taken unless a complaint was made in the manner provided in the section, the court cannot proceed with the inquiry unless the same condition continues to exist. In other words, because the section insists on a complaint of a person aggrieved, Mr. Keswani contends that continued presence of the person aggrieved throughout the trial is also necessary to keep the court invested with its jurisdiction except in the circumstances mentioned in the proviso and summarised above. *We do not agree.* The section creates a bar which has to be removed before cognizance is taken. Once the bar is removed, because the proper person has filed a complaint, the section works itself out. If any other restriction was also there, the Code would have said so. Not having said so, one must treat the section as fulfilled and worked out. There is nothing in the Code or in Chapter XVIII which says what, if any, consequence would follow if the complainant remains absent at any subsequent hearing after filing the complaint. In this respect Chapter XVIII is distinctly dissimilar to the Chapters dealing with the trial of summons and warrant cases where it is specifically provided what consequence follows on the absence of the complainant."

It was further held that there is no provision in the Cr.P.C. or Chapter XVIII thereof for acquittal or discharge of the accused on failure of the complainant to attend, which is a deliberate departure from Chapters on trial of summons and warrant case, suggesting to the Magistrate to proceed with the committal enquiry although the complainant is absent and accordingly held that the committal enquiry of the accused charged under Sections 493 and 496 of the Indian Penal Code did not abate on account of complainant's death after filing of complaint and that mother of the complainant could be allowed to conduct the prosecution.

In case of **Shri Balasaheb K. Thackeray & Anr. -Vrs.- Shri Venkat @ Babru & Anr. reported in (2006) 34 OCR (SC) 777** wherein the question was raised as to what is the effect of the death of the complainant in a complaint case, the Hon'ble Court relying upon the case of **Ashwin Nanubhai Vyas** (supra) and **Jimmy Jahangir Madan -Vrs.- Bolly Cariyappa reported in 2004 (12) Supreme Court Cases 509** held that if any permission is sought for by the legal heirs of the deceased complainant to

continue prosecution, the same shall be considered in its proper perspective by the Court.

In case of **Rashida Kamaluddin Syed -Vrs.-Shaikh Saheblal Mardan reported in (2007) 37 Orissa Criminal Reports (SC) 368**, it was held that on the death of the complainant Shaikh Saheblal Mardan, the case did not abate. It was, therefore, open to the sons of the complainant to apply for continuation of proceedings against accused persons. It was held that by granting such prayer, no illegality has been committed by the Court.

In the last two cases, the provision under section 302 of Cr.P.C. was considered which deals with the permission to conduct the prosecution before a Magistrate.

So far as the Court of Session is concerned, section 301 of Cr.P.C. is very relevant which reads as follows:-

> **"301. Appearance by Public Prosecutors.- (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.**
>
> (2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case."

There is an ocean of difference in the two provisions i.e. sections 301 and 302 of Cr.P.C. The difference is that in the case of a pleader acting on instruction of a private person in assisting the Public Prosecutor or Assistant Public Prosecutor conducting the prosecution, his role is limited as provided under section 301 of Cr.P.C. whereas under section 302 of the Cr.P.C., the pleader acting on the instruction of the informant or an aggrieved party can himself conduct the prosecution before the Magistrate on the basis of permission granted by such Magistrate. If a private person is aggrieved by the offence committed against him or against any one in whom he is interested, he can approach the Magistrate and seek permission to conduct the prosecution by himself or by a pleader. It is open to the Magistrate to consider his request. If the Magistrate thinks that the cause of justice would

be best served by granting such permission, he can grant such permission. The private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needful in the Court on his behalf. However, in view of section 301 of the Cr.P.C., the rights of the complainant are only subordinate to the rights of the State and it is for this reason that when the Public Prosecutor conducts the case, a complainant or his counsel has no right of audience. A counsel instructed by a private person cannot conduct the prosecution in the trial before a Court of Session. Private counsel appointed by the complainant can only assist the Public Prosecutor in prosecuting the case. He cannot argue the case on behalf of the Public Prosecutor. He has to work under the directions of the Public Prosecutor but he cannot cross-examine the witness. Of course, he can submit written argument with the permission of the Court. Therefore, section 301 of Cr.P.C. limits the role of a counsel engaged by any private party to act in the Court of Session during the prosecution "under the directions of the Public Prosecutor or Assistant Public Prosecutor".

Therefore, even though in this case, the complainant-opposite party no.1 is dead as per the report of the postal authority but since the case is triable by the Special Court where the procedure relating to trial before a Court of Session as laid down under Chapter XVIII of Cr.P.C. has to be followed after commitment, neither the complaint petition can be dismissed nor the accused persons can be acquitted on the ground of death of the complainant. The legal heirs of the complainant, if so advised are at liberty to engage a counsel before the Special Court who shall act as provided under section 301 of Cr.P.C. In view of the above discussion, I find no infirmity or illegality in the impugned order and accordingly, the CRLMC application stands dismissed.

Petition dismissed.

2017 (II) ILR - CUT- 685

S. K. SAHOO, J.

CRLMC NO. 956 OF 2005

RAMESH CH. SABAT & ANR. .....Petitioners

.Vrs.

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

ODISHA SAW MILLS AND SAW PITS (CONTROL) ACT, 1991 – Ss. 14, 17

Timber smuggling activities – Prosecution report prepared by the Forester was forwarded by the Conservator of Forests to the Court – Magistrate took cognizance u/s. 14 of the Act, 1991 – Order challenged on the ground that the Court can not take cognizance for any offence under the Act, 1991, unless the Licensing Officer or any person authorized by the State Government or the Licensing Officer upon enquiry finds sufficient reason to believe that an offence has been so committed and shall make a report to the Court within thirty days from the date of receipt of the complaint as provided U/s. 17 of the Act.

In this case, the Conservator of Forests has simply forwarded the prosecution report to the Court much after the period of thirty days which is not in compliance of section 17 of the Act – Held, in the absence of any enquiry U/s. 17(2) of the Act, 1991 and in the absence of any finding by the Licensing Officer that there is sufficient reason to believe that an offence has been committed under the Act, 1991, the impugned order passed by the learned JMFC, mechanically taking cognizance of the offence is quashed.

For Petitioners : Miss. Deepali Mohapatra
For Opp.Parties : Mr. Chitta Ranjan Swain, A.S.C.

Date of Hearing : 17. 04.2017
Date of Judgment: 17.04.2017

JUDGMENT

S. K. SAHOO, J.

Heard Miss Deepali Mohapatra, learned counsel for the petitioners and Mr. Chitta Ranjan Swain, learned Addl. Standing counsel for the State.

The petitioners Ramesh Chandra Sabat and Jivan Chandra Pattanaik have filed this application under section 482 of Cr.P.C. challenging the impugned order dated 04.12.2004 passed by the learned J.M.F.C., Aska in

2(b) C.C. Case No.11 of 2004 in taking cognizance of offence under section 14 of the Orissa Saw Mills and Saw Pits (Control) Act, 1991 (hereafter for short '1991 Act').

The sole contention raised by the learned counsel for the petitioners while challenging the impugned order is that as per section 17(1) of the 1991 Act, no Court shall take cognizance of any offence punishable under the 1991 Act except on a report in writing of the facts constituting such offence made by Licensing Officer or any person duly authorized by the State Government or the Licensing Officer in that behalf. If any other person makes a complaint in writing to the Licensing Officer or to any authorized person then as per sub-section (2) of section 17, the Licensing Officer or the authorized person shall conduct an enquiry and finding sufficient reason to believe that an offence has been so committed, shall make a report to the Court within thirty days from the date of receipt of the complaint. It is contended by Miss Mohapatra that the Court cannot take cognizance of any of the offence under 1991 Act except as provided under section 17. She contended that in the present case, the offence was detected on 21.01.2004 and the Forester of Sherogodo Section prepared the prosecution report on 20.05.2004 and then it was placed before the Forest Range Officer, Aska, Ganjam who forwarded the report on 10.06.2004 to the Conservator of Forests who in turn forwarded it to the learned J.M.F.C., Aska on 20.11.2004. According to the learned counsel for the petitioners, both the provisions i.e. sub-section (1) and sub-section (2) of section 17 of the 1991 Act have not been followed in the case and therefore, the prosecution report has no sanctity in the eye of law and the learned J.M.F.C., Aska should not have taken cognizance of offence under section 14 of the 1991 Act on the basis of such prosecution report.

On 20.03.2017 after recording the submissions made by the learned counsel for both the parties, this Court directed the learned counsel for the State to take specific instruction as to whether the State Government or the Licensing Officer has authorized anybody under section 17 of the 1991 Act to submit a report in writing before the Court to take cognizance of offence. The learned counsel for the State, Mr. Swain placed the letter dated 23.03.2017 of the D.F.O., Ghumsur South Division wherein it is indicated that the State Government or Licensing Officer has not authorized anybody under section 17 of the 1991 Act but the D.F.O., Ghumusur South Division has authorized the Forest Range Officer, Deputy Range Officer, Forester and field staff of Ghumusur South Division to participate in the protection of

forests and to curb the timber smuggling activities and to conduct raids on illegal saw mill premises etc.

In view of sub-section (1) of section 17 of 1991 Act, a Court as enumerated under section 18 of the said Act can take cognizance of any offence punishable under 1991 Act only on the report in writing of the facts constituting of such offence of the following persons:-

(i) Licensing Officer;
(ii) Any person duly authorized by the State Government;
(iii) Any person authorized by the Licensing Officer.

As per section 2(e) of 1991 Act, "Licensing Officer" means licensing officer appointed under section 3. As per the section 3 of the 1991 Act, any officer not below the rank of the Divisional Forest Officer can be appointed as a Licensing Officer by the State Government by notification.

The other persons, who are not coming under any of the above categories as per section 17(1) of 1991 Act, cannot submit a report to the Court directly for taking cognizance of offence. Such persons have to make a complaint in writing alleging the commission of an offence under 1991 Act either to the Licensing Officer or to the person authorized under sub-section (1) of section 17. Thereafter, the procedure as laid down under sub-section (2) of section 17 has to be followed. The Licensing Officer or the authorized person shall conduct an enquiry and if he finds sufficient reason to believe that an offence has been so committed, he shall make a report to the Court within thirty days from the date of receipt of the complaint. A patently regulatory imposition in the matter of lodging of a report for such offence is discernible assuredly to obviate frivolous and wanton complaints by all and sundry. Therefore, in every circumstance, the report of the Licensing Officer or that of the person duly authorized either by the State Government or the Licensing Officer is necessary for a Court to take cognizance of any offence punishable under 1991 Act.

On the basis of the instruction received by the learned counsel for the State, it is very clear that in view of the authorization by the D.F.O., Ghumsur South Division, though there is no prohibition on the part of the Forest Range Officer or the Forester to conduct raid in the illegal saw mill premises and to participate in the forest protection and to curb the timber smuggling activities but they cannot directly make a report in writing to the Court to take

cognizance of offence under the 1991 Act in view of the bar under section 17 of the 1991 Act.

The Forester in this case has submitted the prosecution report to the Forest Range Officer who in turn has forwarded it to the Conservator of Forests on 10.06.2004. The prosecution report prepared by the Forester which was forwarded to the Court of learned J.M.F.C., Aska by the Conservator of Forests cannot be said to be a report in writing by the Licensing Officer or by the any person duly authorized by the State Government or the Licensing Officer in that behalf in consonance with sub-section (1) of section 17 of 1991 Act. The Conservator of Forests has not conducted any enquiry after receipt of the report of the Forester to ascertain as to whether there are sufficient reason to believe that an offence under 1991 Act has been committed or not and that to within thirty days from the date of receipt of the prosecution report. It appears that much after the stipulated period of thirty days, only on 20.11.2004 the Conservator of Forests has simply forwarded the prosecution report to the Court of learned J.M.F.C., Aska, Ganjam.

In absence of any enquiry as contemplated under sub-section (2) of section 17 of the 1991 Act and in absence of any finding by the Licensing Officer that there is sufficient reason to believe that an offence has been committed under the 1991 Act, when the prosecution report prepared by the Forester was forwarded to the Court by the Conservator of Forests five months after its receipt from the Forest Range Officer, I am of the view that the prosecution report which has been submitted in this case is not in consonance with the provision under section 17 of the 1991 Act. Therefore, the learned J.M.F.C., Aska has committed illegality in accepting such prosecution report and taking cognizance of the offence basing on such report. When there is a specific bar for taking cognizance, the Court should have been more careful while accepting such prosecution report and should not have mechanically taken cognizance of the offence under section 14 of the 1991 Act.

Therefore, the impugned order suffers from non-application of mind and cannot be sustained in the eye of law and in order to prevent abuse of the process and to secure the ends of justice, invoking the inherent power under section 482 of Cr.P.C., I am inclined to quash the impugned order. Accordingly, the CRLMC application is allowed.

Petition allowed.

2017 (II) ILR - CUT- 689

S.K. SAHOO, J.

CRLREV NO. 71 OF 2017

KISHORE KUMAR CHOUDHURY ……..Petitioner

.Vrs.

STATE OF ORISSA ……..Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.457

Release of vehicle – Vehicle seized for carrying narcotic drugs – Petitioner is the owner of the vehicle but not an accused in the case – Condition of the vehicle is deteriorating as it is lying unattended being exposed to sun and rain – Learned Sessions Judge was not justified in rejecting the petition U/s. 457 Cr.P.C. relying on the provision U/s. 60(3) of the N.D.P.S. Act – The conditions stipulated for not confiscating the vehicle after the end of trial as per section 60 (3) of the N.D.P.S. Act, i.e. it was so used without the knowledge or connivance of the owner himself, his agent, if any and the person-in-charge of the vehicle and that each of them had taken all reasonable precautions against such use, is not applicable at the stage of consideration of interim release of the vehicle U/s. 457 Cr.P.C – Held, the impugned order is set aside – Direction issued for release of the vehicle in favour of the petitioner with conditions fixed by this Court.

Case Law Referred to :-

1. (2013) 54 OCR 876 : Basanta Kumar Behera -Vrs.- State of Orissa
2. (2013) 54 OCR 893 : Balabhadra Nayak -Vrs.- State of Orissa
3. (2009) 44 OCR 859 : Subash Chandra Panda -Vrs.- State of Orissa

For Petitioner : Mr. Amulya Ratna Panda

For Opp. Party : Mr. Deepak Kumar, Addl. Standing Counsel

Date of Hearing: 20.03.2017

Date of Order : 20.03.2017

OEDER

S. K. SAHOO, J.

The petitioner Kishore Kumar Choudhury has filed this revision petition challenging the impugned order dated 13.01.2017 passed by the learned Sessions Judge, Phulbani in Criminal Miscellaneous Case No.9 of 2016 which arises out of G.R. Case No.79 of 2016 of the learned Special Judge, Phulbani corresponding to Phiringia P.S. Case No.84 dated

30.06.2016 in rejecting the petition under section 457 of Cr.P.C. filed by the petitioner for release of his white colour Toyota ETIOS bearing Registration No.OD-02V-0053.

Mr. Amulya Ratna Panda, learned counsel for the petitioner submitted that the case was instituted on 30.06.2016 on the basis of the first information report lodged by one Dhiren Kumar Behera, officer in charge, Phiringia Police Station against six accused persons namely Sagar Swain, Haribandhu Kanhar, Pratap Kumar Swain, Jagadish Sahani, Santosh Kumar Jena and Subash Chandra Chandan which was registered under sections 20(b)(ii)(C) and 29 of the N.D.P.S. Act and in connection with such offence, the vehicle of the petitioner was seized on 30.06.2016.

The petition under section 457 of Cr.P.C. filed by the petitioner was rejected by the learned Sessions Judge, Phulbani on the ground that though there was no quarrel that the petitioner is the registered owner of the vehicle but section 60(3) of the N.D.P.S. Act provides that a conveyance used in carrying any narcotic drug is liable for confiscation, unless the owner proves that it was used without his knowledge or connivance or of his agent or the person in charge of the conveyance and that each of them had taken reasonable precaution against such use. It was further held that whether or not the petitioner had knowledge of the conveyance for being used for transporting the narcotic drug and whether he had taken precaution against such use is a matter to be decided during the trial of the case and since the vehicle was found carrying contraband ganja and the petitioner had not furnished any material to indicate that the vehicle was being used as a taxi for hire and that accused Jagadish Sahani was engaged as a driver for the petitioner, therefore, the Court held there was no prima facie material on record to show that the petitioner had no knowledge of the conveyance being used for transportation of the narcotic drugs and accordingly, the petition under section 457 of Cr.P.C. was rejected.

Learned counsel for the petitioner contended that after the seizure of the vehicle since 30.06.2016, the vehicle is lying in an unattended condition in the Phiringia Police Station premises in open air being exposed to sun and rain and the condition of the vehicle is likely to be deteriorated and since there is no bar under the N.D.P.S. Act for interim release of the vehicle and confiscation, if any, in terms of section 60(3) of the N.D.P.S. Act may be done only after the conclusion of trial, therefore, unless the seized vehicle is released in favour of the petitioner, he will be seriously prejudiced

particularly when the petitioner is not an accused in the case. In support of such contentions the learned counsel for the petitioner placed reliance in the cases of **Basanta Kumar Behera -Vrs.- State of Orissa reported in (2013) 54 Orissa Criminal Reports 876**, **Balabhadra Nayak -Vrs.- State of Orissa reported in (2013) 54 Orissa Criminal Reports 893** and **Subash Chandra Panda -Vrs.- State of Orissa reported in (2009) 44 Orissa Criminal Reports 859.**

In the case of **Subash Chandra Panda** (supra), this Court after analyzing the relevant provision under section 60 of the N.D.P.S. Act and provisions under sections 451 and 457 of the Cr.P.C. has been pleased to hold as follows:-

> "4. Taking into consideration the stage of confiscation of a vehicle or conveyance and protection of an innocent owner in the provision of the Act itself, as discussed supra, the obvious question that arises for consideration is as to whether an innocent owner of a vehicle or conveyance shall be made to suffer till an order for confiscation is passed or such an innocent owner is to be protected by taking resort to Section 451 or Section 457 of the Code.
>
> 5. Chapter-V of the Act provides for procedures relating to power to issue warrant and authorization, power of entry, search, seizure and arrest without warrant or authorization, power of seizure and arrest in public place and so on. Section 52 under Chapter-V of the Act provides for disposal of persons arrested and articles seized. Section 55 of the Act clearly mandates the police to take charge of articles seized and delivered. Section 51 of Act makes provisions for applicability of the provisions of the Code of Criminal Procedure in the manner provided in the Section which reads thus:-
>
> "51 Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures- The provisions of the Code of Criminal Procedure, 1973, shall apply, in so are as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act."
>
> A cursory reading of the aforesaid provision in Section 51 of the Act makes it clear that the provisions of the Cr.P.C. will not apply if they are inconsistent with the provision of the Act in respect of warrants issued, arrests, searches and seizures made under the Act. There is

provision in Section 55 of the Act interdicting an Officer-in-charge of a Police Station to take charge of and keep in Safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of the Police Station and which may be delivered to him. There is no express provision in the act for release of the property like vehicle or conveyance in interim custody of a rightful owner. Provision contained in Section 51 of the Act does not expressly bar operation of the provision of the Cr.P.C. if they are not inconsistent with the provision of the Act. Taking into consideration the stage of the confiscation proceeding in the scheme of the trial as provided under Section 60(3) of the Act, safe custody of the articles seized and delivered to a police officer under Section 55 of the Act pending order of the Magistrate, absence of any specific provision in the Act for release of valuable articles like vehicle etc. in the interim custody of the registered owner and especially in view of the mandate for confiscation of a vehicle or conveyance after the trial is concluded and further fact that the commercial price of such an article is to be protected in the interest of justice, I have no hesitation to hold that operation of Sections 451 and 457 Cr.P.C. is not specifically excluded by Section 51 of the Act. In my view, I am supported by the decisions rendered in the case of **B.S. Rawant v. Shaikh Abdul Karim**, **1989 Criminal Law Journal 1998**; **Madanlal v. State NCT of Delhi**, **2002 Criminal Law Journal 2605**; and **Sujeet Kumar Biswas v. State of U.P. 2001 Criminal Law Journal 4431**.

Section 60(3) of the Act by making provision for-protecting the interest of an innocent owner before confiscating his vehicle also lends support to my aforesaid view that an innocent owner till an order of confiscation is passed is entitled to interim custody of the vehicle pending trial of the case.

6. Such being the position of law, the safe custody of the property in question can be given in interim zima of the rightful owner if motion to that effect is made before the competent court either under Section 451 Cr.P.C. or Section 457 Cr.P.C., as the case may be."

In the case of **Basanta Kumar Behera** (supra), after analyzing section 63 of the N.D.P.S. Act, it has been held as follows:-

"From the above provision, it is clear that a vehicle used in the commission of the offence is liable for confiscation, which means

that on proof of commission of offence and that the vehicle was used in such commission, at the conclusion of trial, the vehicle in question shall be confiscated. The confiscation of a vehicle ensures to the benefit of the State. If not confiscated, the property in question has to be returned or released in favour of the rightful owner entitled for possession or to the person from whom it was seized. In case the property is not released and the trial continues for long time, its value gets diminished due to damage caused by exposure to sun and rain and in that even whether it is confiscated or not confiscated, no body gains anything and, on the contrary, in the event of confiscation, the State would stand to lose and in the event of no confiscation, the owner will be the loser. This is the reason for which in the case of **Sunderbhai Ambala Desai -Vrs.- State of Gujurat**, **(2003) 24 OCR (SC) 444**, the Hon'ble Supreme Court has stipulated guidelines for prompt interim release of the vehicle seized in connection with the commission of an offence.

No provision in the N.D.P.S. Act has been brought to the notice of the Court which bars interim release of the vehicle where the owner has been implicated in the offence as one of the accused."

In the case of **Balabhadra Nayak** (supra), it is held as follows:-

"There is no other provisions in the Cr.P.C. except Section 457 Cr.P.C. for passing order for interim release of the vehicle by the criminal Court. In case the words "Police Officer" occurring in Section 457(1) Cr.P.C. is given a restricted meaning so as to exclude officers of other departments like Excise etc. who are invested with power to investigate into the offence, effect seizure and launch prosecution and to report such seizure to the criminal Court, it would cause injustice to the persons claiming to be entitled to custody of the property. Therefore, the words "Police Officer" in Section 457 Cr.P.C. must include in Excise Officer reporting such seizure to a criminal Court in connection with the enquiry or trial of any criminal case.

Section 60(3) of the N.D.P.S. Act is no bar for interim release of the vehicle as the said provision is only substantive in nature and speaks of the liability of the vehicle to be confiscated where the owner fails to prove that it was used without his knowledge or connivance or the knowledge and connivance of his aget in charge of the vehicle.

> In the light of the discussions made above, I allow the revision and set aside the impugned order and direct the learned Sessions Judge - cum- Special Jduge, Ganjam, Berhampur to release the vehicle in question in favour of the petitioner after being satisfied about the petitioner's ownership over the vehicle in question."

Mr. Deepak Kumar, learned Addl. Standing Counsel for the State opposed the prayer for release of the vehicle on the ground that it is involved in the commission of an offence under the N.D.P.S. Act but does not dispute the legal position as specified by this Court that in absence of any bar for interim release of the vehicle under N.D.P.S. Act, the Court can exercise its power under section 457 of Cr.P.C. for interim release of the vehicle in favour of the rightful owner.

In view of the submissions made by the learned counsel for the respective parties and taking into account the ratio laid down in the aforesaid cases, I am of the view that the learned Sessions Judge was not justified in rejecting the petition under section 457 of Cr.P.C. relying on the provision under section 60(3) of the N.D.P.S. Act. The conditions stipulated for not confiscating the vehicle after the end of trial as per section 60(3) of the N.D.P.S. Act i.e. it was so used without the knowledge or connivance of the owner himself, his agent, if any and the person-in-charge of the vehicle and that each of them had taken all reasonable precautions against such use, is not applicable at the stage of consideration of interim release of the vehicle under section 457 of Cr.P.C.

Accordingly, the impugned order passed by the learned Sessions Judge, Phulbani in Criminal Miscellaneous Case No.9 of 2016 which arises out of G.R. Case No.79 of 2016 of the learned Special Judge, Phulbani corresponding to Phiringia P.S. Case No.84 dated 30.06.2016 is not sustainable in the eye of law and the same is hereby set aside.

It is directed that the vehicle i.e. white colour Toyota ETIOS bearing Registration No.OD-02V-0053 shall be released in favour of the petitioner immediately subject to the following conditions:-

(i) the petitioner shall produce the original registration certificate, insurance paper before the concerned police station which shall be verified properly and true attested copies thereof shall be retained by the investigating officer/I.I.C. of the police station;

(ii) the petitioner shall furnish property security worth of Rs.1,00,000/- (rupees one lakh) for each vehicle;

(iii) the petitioner shall keep the vehicle insured at all times till the conclusion of the trial and produce the insurance certificate before the Trial Court as and when required;

(iv) the petitioner shall not change the colour or any part of the engine and chasis number of the vehicle;

(v) the petitioner shall furnish two photographs of the vehicle before taking delivery of the same;

(vi) the petitioner shall not transfer the ownership of the vehicle in favour of any other person;

(vii) the petitioner shall produce the vehicle before the Court as and when called upon;

(viii) the petitioner shall not allow the vehicle to be used in the commission of any offence. Accordingly, the Criminal Revision petition is disposed of.

Revision disposed of.

2017 (II) ILR - CUT- 695

S. K. SAHOO, J.

CRLREV NO. 598 OF 2016

KAMAL KUMAR NANDA ……..Petitioner

.Vrs.

STATE OF ORISSA (VIG.) ……Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.401

Petitioner was the complainant in a trap case – During trial he retracted from his previous statements recorded under sections 161 and 164 Cr.P.C. which led for the acquittal of the accused – Prosecution started against him for giving false evidence and charge framed U/s. 12 of the P.C.Act, 1988 and Sections 181, 182 I.P.C. – Hence this revision to quash the charge.

In this case, there is no material on record that the petitioner has abetted the commission of the offence under sections 7 and 11 of the P.C.Act, 1988 so framing of charge U/s. 12 of the said Act suffers from non-application of mind – Moreover since no complaint made, either by the concerned public servant i.e. J.E. Subhanath Majhi or by any other public servant to whom Subhanath was administratively subordinate, the charge against the petitioner under sections 181 and 182 I.P.C. is not proper in view of section 195(1)(a)(i) Cr.P.C. – Further section 132 of the Evidence Act, 1872 does not apply to a statement made by a person during an investigation U/s. 161 Cr.P.C. – So far statement of a witness U/s. 164 Cr.P.C. is concerned it is recorded being sponsored by the investigating agency – If on compulsion by the I.O. a witness implicates an accused in the crime but during trial he exonerates the accused, it would be travesty of justice to prosecute such witness for giving false evidence – Held, in the absence of any incriminating statements and the previous statements given by the petitioner before the I.O. and Magistrate not being substantive in nature the learned trial court is erred in framing the charges – The impugned order framing charge against the petitioner is quashed.

(Para 5)

Case Laws Referred to :-

1. AIR 2015 SC 1816 : R.Dineshkumar @Deena -V- State
2. AIR 1968 SC 938 : Laxmipat Choraria -V- State of Maharashtra

For Petitioner : Mr. H.S.Mishra, Dr. A.K.Tripathy, A.K.Mishra, R.Dash & A.S.Behera

For Opp. Party : Mr. Sangram Das, Standing Counsel (Vig.)

Date of hearing : 21.03.2017
Date of Judgment: 21.03.2017

JUDGMENT

S. K. SAHOO, J.

This revision petition has been filed by the petitioner Kamal Kumar Nanda with a prayer to quash the impugned order dated 19.07.2016 passed by the learned Special Judge (Vigilance), Bolangir in C.T.R. Case No. 1 of 2012 in framing charge under section 12 of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') and sections 181 and 182 of the Indian Penal Code.

2. The petitioner was the complainant-decoy in a trap case vide C.T.R. Case No.5 of 2008 which arises out of Sambalpur Vigilance P.S. Case No.25

of 2007 in the Court of learned Special Judge (Vigilance), Bolangir in which one Subhanath Majhi, Junior Engineer was the accused who was chargesheeted under section 13(2) read with section 13(1)(d) and section 7 of the 1988 Act. During course of trial, the petitioner was examined as a witness but he retracted from his previous statements recorded under sections 161 and 164 of Cr.P.C. and the accused Subhanath Majhi was acquitted of the charges.

After the order of acquittal passed on 04.05.2011, one Sabitarani Panda, Inspector of Police, Vigilance, Sambalpur Division, Sambalpur lodged a first information report before the Superintendent of Police, Vigilance, Sambalpur on 30.06.2011 against the petitioner for giving false evidence in Court in C.T.R. Case No.5 of 2008 and accordingly, Sambalpur Vigilance P.S. Case No.55 dated 30.06.2011 was registered under section 12 of the 1988 Act and sections 182, 192 and 211 of the Indian Penal Code. After completion of investigation, charge sheet was submitted against the petitioner for such offences.

3. At the time of framing of charge on 16.02.2016, the petitioner filed a petition under section 239 of Cr.P.C. for discharge. The learned Trial Court rejected the petition vide order dated 19.07.2016 and framed charge against the petitioner on the very day under section 12 of the 1988 Act and sections 181 and 182 of the Indian Penal Code which is impugned in this revision petition. The charge was read over and explained to the petitioner who refuted the charge, pleaded not guilty and claimed to be tried. The charge framed by the learned Trial Court is extracted herein below:-

> "That you on 23rd day of March, 2011 abetted the commission of offences punishable under section 13(2) and section 7 of the P.C. Act by Subanath Majhi, who was a public servant and the entire prosecution case rested on your testimony regarding demand and acceptance of the bribe and you also lodged the first information report stating about demand of bribe by Subanath Majhi, to prepare bills but the evidence led on behalf of the prosecution created considerable doubt on the prosecution case and thereby committed an offence punishable under section 12 of the Prevention of Corruption Act, 1988 and within my cognizance.
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> That you on 23rd day of March, 2011 being legally bound by an oath to state the truth, on a certain subject i.e. to prove demand of bribe money of Rs.2,800/- by Subanath Majhi, being a public servant, did

make to such public servant touching that subject, a statement which was false and which you knew to be false and thereby committed an offence punishable under section 181 of the Indian Penal Code and within my cognizance.

That you on 22nd day of May, 2007 lodged F.I.R. before D.S.P., Vigilance, Bolangir who is a public servant that Junior Engineer Subanath Majhi was demanding bribe from you, falsely intending D.S.P. Vigilance to investigate the matter which he would not have investigated had he known that your allegation is false and thereby committed an offence punishable under section 182 of the Indian Penal Code and within my cognizance."

4. Mr. H.S. Mishra, learned counsel for the petitioner while challenging the impugned order dated 19.07.2016 passed by the learned Trial Court in framing the charge, emphatically contended that it suffers from non-application of judicial mind and the ingredients of the offences are not attracted in the facts and circumstances of the case and the charge has been framed in a mechanical manner without keeping in view the provisions laid down under section 195(1)(a)(i) of Cr.P.C. and section 132 of the Evidence Act. The learned counsel for the petitioner relied upon the decision of the Hon'ble Supreme Court in case of **R. Dineshkumar @ Deena -Vrs.- State reported in A.I.R. 2015 S.C. 1816.**

Mr. Sangram Das, learned Standing Counsel for the Vigilance Department on the other hand supported the impugned order for framing charge by the learned Trial Court and assiduously contended that the petitioner who was the star witness on behalf of the prosecution and at whose instance, the prosecution was launched stated falsehood before the learned Trial Court on oath in favour of the accused retracting from his previous statements under sections 161 and 164 of Cr.P.C. which led to the acquittal of the accused and his statement that he forcibly thrust the tainted money into the pocket of the accused and while he was returning back, the accused brought out the money from his pocket and called him and told him to take back the money and at that time the vigilance officials arrived there and challenged the accused to have demanded and accepted the bribe money from him, is contrary to the statements made before the police and Magistrate and therefore, the learned Trial Court was justified in framing the charge. The learned Standing Counsel for the Vigilance Department relied upon a

decision of the Hon'ble Supreme Court in case of **Laxmipat Choraria - Vrs.- State of Maharashtra reported in A.I.R. 1968 S.C. 938.**

5. Section 12 of the 1988 Act reads as follows:-

"**12. Punishment for abetment of offences defined in section 7 or 11**- Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than three years but which may extend to seven years and shall also be liable to fine."

Section 7 and section 11 of the 1988 Act read as follows:-

"**7. Public servant taking gratification other than legal remuneration in respect of an official act**- Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavor to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than [three years] but which may extend to [seven years] and shall also be liable to fine.

Explanations-

(a) "Expecting to be a public servant". If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

(b) "Gratification". The word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money.

(c) "Legal remuneration". The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government or the organization, which he serves, to accept.

(d) "A motive or reward for doing". A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, comes within this expression.

(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and, thus, induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an offence under this section.

11. Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant- Whoever, being a public servant, accepts or obtains or agrees to accept or attempts to obtain for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine."

Section 12 of the 1988 Act makes it clear that for a person to be guilty there under, it is not necessary that the offences mentioned therein should have been committed pursuant to the abetment or in other words, it is immaterial whether or not the offence was committed in consequence of the abetment. 'Abetment' has not been defined under the 1988 Act; therefore profitably referring to its exhaustive definition in section 107 of the Indian Penal Code, it enumerates that a person abets the doing of a thing when he does any of the acts mentioned in the following three clauses;

(i) instigates any person to do that thing, or

(ii) engages with one of more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(iii) intentionally aids, by any act or illegal omission, the doing of that thing.

So far as the first two clauses are concerned, it is not necessary that the offence instigated should have been committed. For understanding the scope of the word "aid" in the third clause, it would be advantageous to see Explanation 2 in Section 107 I.P.C. which reads thus:

> "Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

It is thus clear that under the third clause when a person abets by aiding, the act so aided should have been committed in order to make such aiding an offence. In other words, unlike the first two clauses, the third clause applies to a case where the offence is committed.

Abetment under the Indian Penal Code involves active complicity on the part of the abettor at a point of time prior to or at the time of the actual commission of the offence, and it is of the essence of the crime of abetment that the abettor should substantially assist the principal culprit towards the commission of the offence. Nowhere concurrence in the criminal acts of another without such participation therein as helps to effect the criminal act or purpose is punishable under the Code.

Therefore, it is apparent that unless there is clinching material available on record that a person has abetted any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, he cannot be prosecuted under section 12 of the 1988 Act.

In this case, the accusation as per Sambalpur Vigilance P.S. Case No.25 of 2007 is not that the petitioner abetted the commission of crime by Junior Engineer Subhanath Majhi. He was the complainant in the case and merely because during course of trial, he resiled from his previous statements and did not support the prosecution case will not be construed that he has abetted the commission of offences under section 7 and 11 of the Prevention of Corruption Act.

On perusal of the heading of the charge framed under section 12 of 1988 Act, it appears that the learned Trial Court has mentioned that the

petitioner has abetted the commission of offences punishable under section 13(2) and section 7 of 1988 Act. Abetment of offence under section 13(2) of 1988 Act is not punishable under section 12 of the Act. Only abetment of offence punishable under section 7 or section 11 is punishable under section 12 of the Act. It is further mentioned under the heading of such charge that the evidence led on behalf of the prosecution created considerable doubt on the prosecution case. If that be so, it is not understood as to why charge was framed against the petitioner under section 12 of the 1988 Act.

Law is well settled that statement of a witness recorded under section 161 of Cr.P.C. during the investigation is not a substantive piece of evidence and in view of the proviso to sub-section (1) of section 162 of Cr.P.C., such statement can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Similarly statement recorded under section 164 Cr.P.C. can never be used as substantive evidence of truth of the facts but may be used for contradiction and corroboration of a witness who made it. The statement made under section 164 Cr.P.C. can be used to cross examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witness. When a witness gives a statement to the Magistrate under section 164 Cr.P.C. and later during the trial disowns it and gives a different version, either the statement given by him before the learned Magistrate may be true or his deposition before the learned Trial Court may be true, but both may not be true. The statement of a witness under section 164 of Cr.P.C. is recorded being sponsored by the investigating agency. If on compulsion by the investigating officer, a witness implicates an accused in the crime in his 164 Cr.P.C. statement but during trial, he states differently and exonerates the accused and further states that on compulsion, he gave the 164 Cr.P.C. statement, it would be travesty of justice to prosecute such witness for giving false evidence. Similarly a witness cannot be prosecuted for perjury for resiling from his statement recorded by police under section 161 of Cr.P.C.

If a witness deposing during trial deviates from his previous statements recorded either under section 161 or section 164 of Cr.P.C., it cannot be said that he has abetted the accused who is facing trial for the commission of an offence. Therefore, on the face of the accusation, I am of the view that framing of charge under section 12 of the 1988 Act suffers from non-application of mind and cannot be sustained in the eye of law.

Coming to the other charges i.e. under sections 181 and 182 of the Indian Penal Code, the two sections read as follows:-

> "**181. False statement on oath or affirmation to public servant or person authorized to administer an oath or affirmation**- Whoever, being legally bound by an oath [or affirmation] to state the truth on any subject to any public servant or other person authorized by law to administer such oath [or affirmation], makes, to such public servant or other person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.
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> **182. False information, with intent to cause public servant to use his lawful power to the injury of another person**- Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant-
>
> (a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or
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> (b) to use the lawful power of such public servant to the injury or annoyance of any person,
>
> shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

Section 195(1)(a)(i) of the Code of Criminal Procedure states that no Court shall take cognizance of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Obviously offences under sections 181 and 182 of the Indian Penal Code come within the purview of section 195(1)(a)(i) of Cr.P.C. This section is one of the sections which prohibit a Court from taking cognizance of certain offences unless and until a complaint has been made by some particular authority or person. As the section creates an absolute bar against the Court taking cognizance of the offence except in the manner provided by the section, if the Court takes cognizance against the provision, the cognizance should be illegal and

without jurisdiction. Once the order of taking cognizance is held to be illegal, the subsequent order of framing charge is also illegal and liable to be quashed.

In the present case, when no complaint as described under section 2(d) of Cr.P.C. has been made either by the public servant concerned i.e. Junior Engineer Subanath Majhi or by any other public servant to whom Subhanath Majhi was administratively subordinate, the prosecution against the petitioner for the offences punishable under sections 181 and 182 of the Indian Penal Code on the basis of the first information report lodged by Sabitarani Panda, Inspector of Police, Vigilance, Sambalpur Division, Samablpur cannot be sustained in the eye of law and therefore, I am of the view that the submission of charge sheet against the petitioner under sections 181 and 182 of the Indian Panel Code and consequential order of framing of charge by the learned Trial Court under such offences is not proper and justified.

Coming to the section 132 of the Evidence Act, it reads as follows:-

> "**132. Witness not excused from answering on ground that answer will criminate**- A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness to a penalty or forfeiture of any kind:
>
> Proviso.- Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be provided against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

In case of **Laxmipat Choraria -Vrs.- State of Maharashtra reported in A.I.R. 1968 S.C. 938** while analysing this provision the Hon'ble Supreme Court has been pleased to held as follows:

> "7. Now there can be no doubt that Ethyl Wong was a competent witness. Under S. 118 of the Indian Evidence Act all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. Under S. 132 a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any criminal proceeding (among others) upon the ground

that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The safeguard to this compulsion is that no such answer which the witness is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. In other words, if the customs authorities treated Ethyl Wong as a witness and produced her in Court, Ethyl Wong was bound to answer all questions and could not be prosecuted for her answers. Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks section 132 (Proviso). In India, the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection. The protection is further fortified by Article 20(3) which says that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answers questions from the witness box waives the privilege which is against being compelled to be a witness against himself because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself."

In case of **R. Dineshkumar alias Deena -Vrs.- State reported in A.I.R. 2015 S.C. 1816**, the Hon'ble Supreme Court has held as follows:-

"36. On the other hand, both Justice Ayyar and Justice Kernan opined that the compulsion is the obligation arising out of law, but not the compulsion imposed by the Judge.

"It seems to me that the Legislature in India adopted this principle, repealed the law of privilege, and thereby obviated the necessity for an inquiry as to how the answer to a particular question might criminate a witness, and gave him an indemnity by prohibiting his answer from being used in evidence against him and thus secured the benefit of his answer to the cause of justice, and the benefit of the rule, that no one shall be compelled to criminate himself, to the witness when a criminal proceeding is instituted against him. The conclusion I come to is that Section 132 abolishes the law of privilege and creates an obligation in a witness to answer every

> question material to the issue, whether the answer criminate him or not, and gives him a right, as correlated to that duty, to claim that the answer shall not be admitted in evidence against him in a criminal prosecution." (per Muttusami Ayyar, J.)
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> 46. Section 132 existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee Under Article 20 of the Constitution of India. As pointed out by Justice Muttusami Ayyar in Gopal Doss (supra), the policy Under Section 132 appears to be to secure the evidence from whatever sources it is available for doing justice in a case brought before the Court. In the process of securing such evidence, if a witness who is under obligation to state the truth because of the Oath taken by him makes any statement which will criminate or tend to expose such a witness to a "penalty or forfeiture of any kind etc.", the proviso grants immunity to such a witness by declaring that "no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding". We are in complete agreement with the view of Justice Ayyar on the interpretation of Section 132 of the Evidence Act."

Section 132 of the Evidence Act abolishes the law of privileges and creates an obligation on a witness to answer any question material to the issue, whether the answer criminates him or not, and gives him a right, as correlated to that duty, to claim that answer shall not be admitted in evidence against him in criminal prosecution. The proviso to the section lays down that if a witness is compelled to give an answer, he shall not be liable for arrest or prosecution on that statement and that statement will be not proved in any criminal proceeding except for perjury for that very statement. Of course, the witness is protected only if he gives the answer under compulsion but if he answers voluntarily, he loses the protection. Therefore, when a witness is summoned in a criminal case, he is legally bound to answer the questions including the questions which are likely to criminate him directly or indirectly but no answer in criminal case given by a witness on compulsion can criminate him accordingly. However, if a witness during course of his examination in Court, voluntarily states something and thereby gives certain incriminating answers, such answers will subject him to criminal prosecution and in such case, the proviso to section 132 of the Evidence Act will not come to his rescue. Section 132 of the Evidence Act does not apply to a

statement made by a person during an investigation under section 161 of Cr.P.C. rather it refers to a person who enters the witness box and is sworn as a witness.

In the present case, even though it is accepted for the sake of argument that the petitioner deposed before the learned Trial Court voluntarily and not on compulsion but in absence of any incriminating statements and the fact that the previous statements given by the petitioner before the investigating officer and the Magistrate are not the substantive piece of evidence, the learned Trial Court erred in framing the charges.

Even though strong suspicion is sufficient to frame charge but when the materials available on record taken on its face value do not disclose the ingredients of the offences under which the charge has been framed and the mandates under section 195(1)(a)(i) of Cr.P.C. have not been followed, I am of the view that the impugned order cannot be sustained in the eye of law.

Accordingly, the revision petition is allowed. The impugned order dated 19.07.2016 passed by the learned Special Judge, Vigilance, Bolangir in C.T.R. Case No.1 of 2012 in framing charge under section 12 of the Prevention of Corruption Act, 1988 and sections 181 and 182 of the Indian Penal Code against the petitioner stands quashed.

Revision allowed.

2017 (II) ILR - CUT- 707

DR. D.P. CHOUDHURY, J.

O.J.C. NO. 15285 OF 2001
WITH BATCH

M/S. SRINIWAS TRADING COMPANY ……..Petitioner(s)

.Vrs.

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

ODISHA AGRICULTURAL PRODUCE MARKETS ACT, 1956 – S.11

Collection of market fee – There must be actual purchasing or selling of agricultural produce in the market area so as to enable the RMCs to collect market fee.

In this case, the petitioners have neither sold nor purchased agricultural produces i.e. Kendu leaves inside the market area but the Regulated Market Committee (RMC) collected market fees from them – Hence the writ petition – Since the actual sale and purchase of kendu leaves completed by auction took place outside the market area and it was not marketed inside the market area, levy and collection of market fee from the present petitioners is illegal – Direction issued to the opposite parties-RMCs to refund the market fee collected from the petitioners within four months from the date of the judgment, failing which the same shall carry interest at the rate of 9% P.A. from the date of collection till the date of actual payment.

(Paras 42 to 46)

Case Laws Referred to :-

1. 1991 (II) OLR 58 : M/s.Ganesh Rice Mills and another –V- Attabira Regulated Market Committee & Ors.
2. (2011) 13 SCC 290 : Agricultural Market Committee, Andhra Pradesh and Ors. -V- M.K.Exports, Andhra Pradesh & Ors.
3. 1973 ILR 277 : Deochand Champalal and others –V- Chairman, Nowarangpur Market Committee and Anr.
4. AIR 1962 SC 97 : Mohammad Hussain Gulam Mohammad & Anr.–V- State of Bombay & Anr.
5. 74 (1992) CLT 861 : Sri Ramkaran Agarwal and another –V- Regulated Market Committee, Bhadrak.

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Miss.S.Ratho, Addl. Govt. Advocate
For State in all the cases.

Date of hearing :17.04.2017
Date of judgment:24.04.2017

JUDGMENT

DR. D.P.CHOUDHURY, J.

In O.J.C. Nos.15285 and 17356 of 2001, W.P.(C) No.10423 of 2003, W.P.(C) No.12694 of 2005, challenge has been made with regard to illegal collection of market fees by the Regulated Market Committee (hereinafter called "the RMC") under Orissa Agricultural Produce Markets Act, 1956 (in short "the Act, 1956"). Since the question of law arising out of all these writ petitions is common, they are being disposed of by this common order.

2. The factual matrix leading to the case of the petitioners in all the above writ petitions is that the petitioners are trading companies dealing with supply of Kendu Leaves to Sri Lanka. The petitioners receive orders from the buyers from Sri Lanka and supply the same after procuring the Kendu Leaves

in the auction held by Orissa Forest Development Corporation Limited, Bolangir, Kendu Leaves Division (hereinafter called "the O.F.D.C."). The sale of Kendu Leaves inside the State of Orissa is controlled by the Orissa Kendu Leaves (Control of Trade) Act, 1961 (in short 'the Act, 1961'). Kendu Leaves were procured by the petitioner-companies is only for export to foreign buyers and not to be sold or marketed in the concerned market area. While the goods are being transported to Tuticorin for Shipment to Sri Lanka, various check-gates created under the RMCs, like Kantabani, Tikaballi and others, were levying and collecting market fees illegally and arbitrarily. Since the opposite parties are collecting the market fees without any sanction of law, the petitioner had to file OJC No.7479 of 1995 and this Court, on 2.11.1995 in Misc. Case No.6899 of 1995, passed an order restraining the RMC from collecting the market fees provided the petitioners are not coming under Section 11 of the Act, 1956. In spite of restrain order passed by this Court, the opposite parties 4 and 5 continued to levy and collect market fees from the petitioners.

3. Be it stated that the petitioner made declaration and produced other documents purportedly indicating that the Kendu Leaves as has been purchased from O.F.D.C. were for exporting to Sri Lanka but opposite parties 4 and 5 arbitrarily and illegally collected the market fees in spite of the fact that provisions of Section 11 of the Act, 1956 read with Rule-48 of the Rules made thereunder are not applicable to the petitioners. Export of goods to foreign company has been exempted from levy of the tax under the Constitution of India and Sales Tax laws have also exempted levy of tax on exports. So, the levy of market fees on Kendu Leaves which are to be exported to foreign company is also against the Constitutional Mandate and Government Policies. Since the action of the opposite parties 4 and 5 are illegal, arbitrary and unjust, the petitioners in all the above writ petitions have prayed for issuance of Writ of Mandamus restraining them from collecting marketing fees from the petitioners and to direct the opposite parties 4 and 5 to refund the market fee already collected from the petitioners.

4. In O.J.C. Nos.1956, 2398, 2835, 3382, 3610, 3747, 3988, 4387 and 4388, of 1993, O.J.C. Nos.980 and 4373 of 1994, OJC Nos.7479, 7724, 8147, 8244, 8245 and 8246 of 1995, OJC Nos.1081 and 5743 of 1996, OJC. Nos.12740 to 12743 of 2000, W.P.(C) Nos.1714 and 4153 of 2002, the petitioners are manufacturer of BIDI and for that manufacturing process, they used to purchase raw material of Tobaco and Kendu Leaves from different parts of India and State of Orissa which are fully controlled by monopoly of

State of Orissa through the O.F.D.C., a Government of Orissa undertaking. The petitioners incidentally carry on business involving purchase, sale and export of Kendu Leaves. Be it stated that the entire buying and selling of Kendu Leaves after obtaining licence/lease of different coupes from the Forest Department of State of Orissa on payment of consideration under the Act, 1956 take place at the outside market area of opposite parties-RMCs. But the RMCs under the Act, 1956 collected the market fees from the petitioners for transportation of Kendu Leaves within the market area of the respective opposite parties-RMCs. The Rules under the Act, 1961 also provided for grant of transport permit in statutory form on application to Divisional Forest Officer and thus the trade of Kendu Leaves are under the wide provisions of the Act, 1961.

5. Be it stated that the opposite party no.1, under Section 6 of the Act, 1961 by notification dated 25.11.1988, added Kendu Leaves to the items of agricultural produce specified in the schedule to the Act. By virtue of such notification, the RMCs collected the market fees. So, that notification was challenged before this Court in OJC No.2398/1993 and as an interim measure, RMC was restrained from collecting market fees under the Act. Similarly, under the Orissa Forest Act, 1972 (in short 'the Forest Act'), forest produce includes the Kendu Leaves under Secton-2(g)(i)(a). It is stated that Section 26 of the Act provides that the State Government may by notification add to amend and cancel any of the items of agricultural produce specified in the Schedule. Such power cannot obviously include Kendu Leaves which is now the subject matter of Forest Act and as such the State Government has no jurisdiction to issue notification under Section 26 of the Act, 1956 in respect of forest produce as defined under the Forest Act to be the agricultural produce.

6. Moreover, Kendu Leaves being the forest produce under the Forest Act, its trading is entirely controlled under the Act, 1961 and issuance of notification under Section 26 of the Act, 1956 to bring the Kendu Leaves under the purview of the Act, 1956 is illegal. So, the collection of market fees from the petitioners on the Kendu Leaves transported by the petitioners through the geographical limits of areas of NH5, although they are not transacted even in the market area, are per se illegal and improper. So, in these writ petitions, the petitioners have prayed for quashing of the notification dated 25.11.1988 issued under Section 26 of the Act, 1956 and further prayed for issue of Mandamus restraining the opposite parties from collecting the market fees in respect of the trade, commerce and purchase or

sale of Kendu Leaves within the State of Orissa. But, during hearing of the writ petitions, petitioners, in the above cases, have submitted not to press the issue relating to vires of the notification dated 25.11.1988 issued under Section 26 of the Act, 1956.

7. In O.J.C. No.8758 of 1996, O.F.D.C. is the petitioner and it acts as a forest contractor under the permission of the State Government and takes up the trade and distribution of forest produce as allotted to them by State Government. So far as trading of Kendu Leaves is concerned, the petitioner-Corporation is appointed as an agent of the Government to sell the Kendu Leaves collected by the Forest Department. The collection and sale of Kendu Leaves is governed by the Act, 1961 and the Rules made thereunder and the Corporation used to make bundles according to their size and quality and then issued the auction sale notice of Kendu Leaves and stored in different godowns at different places. It is alleged, inter alia, that after Kendu Leaves being made as agricultural produce under the Act, the RMCs of respective areas are collecting the market fees from the buyers who are none other than the BIDI manufacturers. The federation of the buyers approached the petitioner-Corporation but the RMCs continued to collect the market fees on Kendu Leaves supplied by the Corporation to the buyers. The petitioner-Corporation made prayer on the similar manner to issue Writ of Mandamus to the opposite parties-RMCs for not collecting the market fees by detaining the vehicle carrying Kendu Leaves by the purchasers or by the Corporation at the check gates with the consequential relief to refund the amount already collected.

8. On contrary, opposite party-RMCs of different places have filed counter affidavit stating that under Section 26 of the Act, 1956, the Kendu Leaves have been added as agricultural produce in the schedule of the Act by the State Government in its notification dated 25.11.1988. Under the Act, the RMCs are competent to collect the market fee on the agricultural produce as enumerated in the Schedule of the Act. On the other hand, under Section 11 of the Act, 1956 provisions have been made for collection of the market fee. After such Kendu Leaves added as an agricultural produce, the RMCs are competent to levy the market fee upon the petitioners. It is the case of the RMCs that OFDC used to call the auction and in the auction, the petitioners after became successful bidder to procure Kendu Leaves and they carry the same through the market area of the respective RMCs. Section 11 of the Act authorizes the RMCs to levy and collect such fees from every items of the agricultural produce marketed in the market area or leaving its market yard.

The purpose and object of setting up of market area with the specified performance to look into the interest of purchasers of agricultural produce so that they can get the best competitive price in the open market and they are not to pay the middlemen.

9. It is the further case of the RMCs that the legislature has enacted the Orissa Kendu Leaves (Control of Trade) Rules, 1962 (hereinafter called as "the Rules, 1962") with the purpose that the State used to collect the Kendu Leaves grown by any person either in Government land or in private land and pay the fees for the said collection to the pluckers as well as to private growers. But the said collection cannot be equated with the purchase by the State because after the Kendu Leave are collected, they are processed and after processing, they have been packed which is known as Kendu Leaves coming under the meaning of "agricultural produce". Even if the agricultural produce is termed as "forest produce" under Orissa Forest Act, 1972, the Kendu Leaves cannot be seized to be "agricultural produce".

10. The aims and object of the three State Act, i.e, Orissa Forest Act, Orissa Kendu Leaves (Control and Trade) Act, 1961 and the present Act, 1956 are different from each other. The Forest Act has got object of preservation and development of all forest produce and to increase the forest produce and as such to regulate them. Similarly, the Orissa Kendu Leaves (Control and Trade) Act, 1961 is enacted to provide for regulation and trade in Kendu Leaves by creation of state monopoly of such State. The purpose of the present Act, 1956 is to check unfair trade practices and undue exploitation of agricultural producers from the middlemen. It is also the object of this Act to collect fee which should be utilized for the interest of the agriculturists.

11. Be it stated that under Section 11 of the Act, 1956 read with Rule 48 of the Rules, 1958 made thereunder, the Market Committee is empowered to levy market fee on any notified agricultural produce which are sold or brought for sale or for storage in market yard for which every agricultural produce coming within the area of market are leviable. Even though the purchase is not taken place in the market area, it shall be presumed that every agricultural produce including the Kendu Leaves brought within the market area is for the purpose of buying or selling. Sub-section(6)(b) of Section 4 of the Orissa Agricultural Produce Markets (Amendment) Act, 1984 specifically states that when any agricultural produce brought into any market area for the purpose of processing only, or for export, is not processed or exported therefrom within thirty days from the date of its arrival therein, it shall, until the contrary is proved, be presumed to have been brought into the market

area for buying or selling. So, until contrary is proved the agricultural produce brought into market area is within the control of RMCs and as such entail levy of fees. This Court vide judgment dated 24.1.1992 passed in OJC No.4359 of 1992 has categorically laid down the dictum that unless the contrary is proved, the presumption is drawn that transaction took place in the market area because of which the levy of fees becomes realisable. Moreover, under clause-13 of the auction sale notice, the petitioners who are traders are liable to pay the duties, sales tax and other tax etc. over and above the sale price as per law for which the RMC are also entitled to levy the fee even if they had paid duties on Kendu Leaves they bought for export. It is, therefore, stated that the collection of revenue by RMCs from the petitioners who trade on Kendu leaves are justifiable and at no cost, it is illegal, when the objectives and reasons of the three State Acts are different. So, it is prayed to dismiss the writ petitions.

12. The opposite parties 1 to 4 have filed counter affidavit similar to the above counter filed by the RMCs. These opposite parties filed the Gazette Notification wherein under Section 26 of the Act, 1956 the State Government has added Sal Leaves and Kendu Leaves under the heading Grass, Fodder, Forest and other miscellaneous items as agricultural produce specified in the Schedule of the Act. They take the plea that since the State Government is competent to add any forest produce as agricultural produce to the Schedule of the Act, 1956, it has been justifiably added.

13. SUBMISSION

Mr.R.P.Kar, learned counsel for some of the petitioners submitted that the issue in question has already been set at rest by the decision of this Court in the case of ***M/s. I.T.C. Limited and another –V- State of Orissa and others (OJC NO.5989 of 1991)*** and according to him, the Division Bench of this Court has categorically held that the petitioner-company in that case being allowed to lift the stock of Sal Seeds from various godowns including Keonjhar godown, which has been situated in the market area of keonjhar Regulated Market Committee but the same being not marketed within the market area, levy of market fee by the concerned RMC was of without jurisdiction. In that case, this Court has relied upon the decision in OJC No.3511 of 1989. So, he submitted that since in the present cases, the petitioners have simply transported the Kendu Leaves from the godown of OFDC through the market area under RMC without the same being marketed in the market area, the RMCs have no power to levy the market fee. He also

drew the attention of this Court to the case of ***M/s.Ganesh Rice Mills and another –V- Attabira Regulated Market Committee and others; 1991 (II) OLR 58*** where Their Lordships have observed that the Market Committee is competent to levy and collect market fees on agricultural produce, marketed in the area and in that case, since the purchase of paddy has taken place outside the market area, the marketing thus taken place beyond the market area and as such, not within competence of the Marketing Committee to levy fee thereon and in that case also, it is observed that merely because a portion of National Highway falls within the market area, it would have no authority to restrict movement of the agricultural produces on the National Highway and collect market fee on purchases that had been effected outside the market area.

14. Mr. Kar also stressed on the decision of the Hon'ble Supreme Court in the case of ***Agricultural Market Committee, Andhra Pradesh and others –V- M.K.Exports, Andhra Pradesh and others; (2011) 13 SCC 290;*** where Their Lordships, at paragraph-16, have observed that the fee is levied by the Market Committee on sale or purchase of any notified agricultural produce or livestock or products of livestock in the notified market area by virtue of Section 12(1) of the A.P.Agricultural (Produce and Livestock) Markets Act, 1966. So, he submitted that the Market Act has got main elements of sale or purchase within the market area so as to attract levy of fee by the concerned RMC but not otherwise. Same analogy is also applicable to the present case.

15. Mr.Kar, learned counsel for some of the petitioners also drew the attention to the decision of this Court in the case of ***Deochand Champalal and others –V- Chairman, Nowarangpur Market Committee and another; 1973 ILR 277*** where the Division Bench of this Court have been pleased to follow the decision of the Hon'ble Supreme Court in the case of ***Mohammad Hussain Gulam Mohammad and another –V- State of Bombay and another; AIR 1962 SC 97*** where Their Lordships have held that under Section 11 of the Act, 1956, there are two restrictions on the power of the Market Committee and the first restriction is that the fee fixed must be within the maxima prescribed by the Rules and the second restriction is that fee has to be levied not on the produce brought into but **only on such produce as is actually sold.** So, he submitted that the levy of market fee by the RMC on the Kendu Leaves or any other material transported by the petitioners or stored by the petitioners in the market area without having been any buying or selling thereon is illegal and the opposite parties may be directed to refund the fees already collected.

16. Mr.S.Ray, learned counsel for some of the petitioners, while adopting the arguments of Mr.Kar, submitted that the Act, 1956 being the Act with the aim and object to levy fees on buying and selling of agricultural produce in the market area, it has no any jurisdiction to the agricultural produce brought into the market area for its transportation to the outside the State and particularly they are exported to Sri Lanka. He submitted that the Kendu Leaves transacted by the petitioners for whom he is appearing were transported after procuring the same from depot of the State Government. They were transported to export to Sri Lanka but the check gates of the different RMC in the State of Orissa forcibly collected the market fee which is not legal and proper. He submitted that when there is no transaction within the market area and the petitioners have already paid the sale price at their auction centre at Sambalpur and Bhubaneswar and they are again to pay export fee at a destination of shipping to Sri Lanka, the RMCs are not entitled to levy and collect any fee thereon.

17. Learned counsel for the rest of the petitioners, without making further arguments, have thoroughly supported the arguments of the above petitioners.

18. Learned Additional Government Advocate and the learned counsel appearing for the RMCs submitted that the aim and object of the Act, 1956 is very specific and it is meant to curtail the harassment to the agricultural producers and abolition of middlemen interference. They further submitted that the Act of 1956 is exhaustive and takes care of all the agricultural producers. They submitted that Section 11 of the Act, 1956 read with Rule 48 of Rules, 1958 direct the Marketing Committee to levy and collect the market fee from the agricultural producers. Since the petitioners are not agricultural producers but are traders and they were doing transaction, of course not with reference to buying and selling but storing and transporting the Kendu Leaves. They further submitted that the levy of fee is within the competency of the State Government. It is true that trading of Kendu Leaves is within the domain of the State Monopoly but that Act, 1961 is meant for protecting the Kendu Leave producers or growers but not for the petitioner-traders, even if the petitioner-traders have paid the auction price and used to lift the Kendu Leaves from the godown of the OFDC situated inside the market area for their onward transportation to different places outside the State. The word “marketing” under the Rules framed under the Act, 1956 also denotes the storing, transporting and other activities by amendment of “marketing” being brought in 2007.

19. Learned Additional Government Advocate and learned counsel for the RMCs also drew attention of the Court to the decision of this Court in the case of ***Sri Sri Gour Sunder Rice and Oil Mills and another –V- Bargarh Regulated Market Committee and another; Vol.33(1991) O.J.D. 251 (Civil)*** where the Division Bench of this Court has been pleased to decide that rice and paddy being two different commercial commodities, the mere fact that market fee has been levied on paddy would be of no ground to exempt imposition of market fee on rice. Their Lordships have further observed in that case that the levy of fee is not permissible on agricultural produce brought from outside the market area into the market for the use by the industrial concern situated within the market or for export subject to the condition that a declaration in respect of the produce has been made and certified in Form IV. Since in this case, no declaration has been made and the fact is not well established by the petitioners to the effect that the agricultural produce brought into the area of the market is not meant for transaction of the same, the RMCs have rightly collected the market fee under Section 11 of the Act, 1956.

20. **Main Point For Consideration**

(i) Whether the levy and collection of market fee under the Act, 1956 by the RMCs from the petitioners on Kendu leaves is legal and proper?

21. **DISCUSSION**
POINT NO.(i)

It is not in dispute that the petitioners are dealing in Kendu Leaves. It is also not in dispute that OFDC have got godowns inside the market area of respective RMCs. It is the admitted fact that the RMCs have already collected the market fee by the time of filing of the writ petitions under Section 11 of the Act, 1956. It is also not in dispute that the petitioners have neither sold nor bought any agricultural produces, namely, Kendu Leaves inside the market area.

22. The only contention of both the parties about the leviability of market fee by the market committee and collection of same from the petitioners as the Kendu Leaves are brought into the market area of the marketing committee. Before going to the fact, it is necessary to take note of the relevant provisions of the Act, 1956 vis-à-vis other relevant State Acts.

23. The Act, 1956 was enacted and assented by the President of India on 22.1.1957 and published in the extraordinary issue of Orissa Gazette on

8.2.1957. The said Act was enacted to provide for better regulation of **buying and selling** of agricultural produce and the establishment of markets for agricultural produce in the State of Orissa. When it came first to Statute Book, there were thirty Sections with a schedule which includes the agricultural produce as defined under Section 2(1)(i). In that schedule, Sal Leaves and Kendu Leaves did not find place in the Schedule as agricultural produce.

24. The aforesaid Act got first amendment in 1984 in respect of certain provisions particularly Sections 2, 4, 11 and 28 for the purpose of this case. Section 2(1)(i) has also been amended. On the other hand, "agricultural produce" means such produce (whether processed or not) of agricultural, forest, animal husbandry, agriculture, horti-culture and pisciculture as are specified in the schedule. Similarly, Section 11 of the Act, 1956 has been amended in the following manner:

> "11. It shall be competent for a Market Committee to levy and collect such fees (hereinafter referred to as the market fees) not being less than one rupees from every purchaser for every hundred rupee worth of agricultural produce marketed in the market area in such manner as may be prescribed and at such rate as may be specified in the bye-laws:
>
> Provided that the rate of fees to be specified in the bye-laws shall not exceed three percent of the value of agricultural produce sold in the markets within the market area:
>
> Provided further that no such fees shall be levied and collected in the same market area in relation to any agricultural produce in respect of which fees under this section have already been levied and collected therein:
>
> Explanation-For the purpose of this section all notified agricultural produce leaving a market yard shall unless the contrary is proved, be presumed to have been brought within such yard by the person in possession of such produce."

25. Similarly the Act, 1956 was further amended in 2006 by incorporating certain provisions with regard to the establishment of private markets and contract firms.

26. In accordance with the provisions of Section 27 of the Act, the State Government made Rules in 1958 which has been published in the Gazette on

30.5.1958. In the Rules, the words "market" and "market yard" have been defined. That Rule also prescribes the manner of levy and collection of fees vide Rule 48 which is very important for the purpose of this case. Thereafter, the Rules, 1958 have been amended on 29.11.1974 in the following manner:

> "48. Market fees. (1) The Market Committee shall levy and collect fees on agricultural produce brought and sold in the market area at such rates as may be specified in the bye-laws.
>
> (2) The market committee shall also levy and collect licence fees from traders, general commission agents, brokers, weighmen, measurers, surveyors and other persons operating in the market according to rates specified in the bye-laws.
>
> (3) No fees shall be levied on agricultural produce brought from out-side the market area into the market area for use by the industrial concerns situated in the market area or for export and in respect of which a declaration has been made and a certificate has been obtained in Form-IV:
>
> Provided that if such agricultural produce brought into the market area for export is not exported or removed therefrom before the expiry for twenty days from the date on which it was so brought, the market committee shall levy and collect the fees on such agricultural produce from the person bringing the produce into market area at such rates as may be specified in the bye-laws.
>
> (4) The seller who is himself the producer of the agricultural produce offered for sale and the buyer who buys such produce for his own private and/or household use shall be exempted from payment of any fees under this rule:

27. Rule 48 has also been amended again on 3.8.1996, which is reproduced as under:

> "48. (1) The Market Committee shall levy and collect market fees from:
> (a) a purchaser notified agricultural produces marketed in the market area;
>
> (b) The person deemed to be a purchaser under the explanation to Section 11 of the Act in respect of the notified agricultural produce; and

(c) The persons bringing any notified agricultural produce into the market area for the purpose of processing or for export only, but not processing it therein or exporting it therefrom within the period of thirty days as provided in the provisos to Sub-section(6) of Section 4 of the Act, at such rates as may be specified in its bye-laws, subject to the minima and the maxima specified in Section 11 of the Act;

(2) The Market Committee shall levy and collect licence fees from traders, adatyas, brokers, weighmen, measures, surveyors and warehousemen operating in the market area at such rates as may be fixed in its bye-laws.

(3) A person brining any notified agricultural produce from outside the market area into the market area, for the purpose of processing by his industrial concern situated within the market area, if any, or for export from such area, shall be subject to levy of market fee unless he furnishes a declaration in respect of the produce and the certificate in Form-IV, to any Officer or servant of the Market Committee specifically authorized by the Committee in that behalf at the time of entry of the said produce into the market area

Provided that if the agricultural produce is not used by the industrial concern and is removed from the market or if it is not exported within twenty days of the purchase, the Market Committee shall levy and collect fees on such agricultural produce from the industrial concern or the persons furnishing the certificate at such rates as may be specified in its bye-laws.

(4) Retail sale of agricultural produce by the producer shall be exempted from any fees.

Explanation-"Retail Sale" in respect of any agricultural produce means the sale of such agricultural produce in any calendar day not exceeding the quantity or value specified in the bye-laws of the Market Committee.

(5) Purchase of any agricultural produce in any calendar day not exceeding the quantity or value specified in the bye-laws of the Market Committee, by a buyer for his domestic or household consumption shall be exempted from the payment of any fee.

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."

28. It appears that Sub-Rules-1, 3 and 5 have been incorporated to the text-book vide O.J.E. No.794 dated 3.8.1996. On a conjoint reading of Sub-Rules-1 and 3, it appears that if the agricultural produce is marketed in the market area, the purchaser was liable to pay the fees. Similarly, the persons bringing scheduled agricultural produce to market area for the purpose of processing or for export only, but do not process it within a period of thirty days or exporting the same within a period of thirty days, such person is liable to pay the fee as levied under Section 11 of the Act. At the same time, if a person is bringing any notified agricultural produce from outside the market area into market area for the purpose of processing by his industrial concern situated within the market area, if any or for export from such area as well as area would not be levied with market fee if he produces 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. Again it is said that if the agricultural produce is not removed from the market area within twenty days of the purchase, the marketing committee shall levy and collect the fees. Further, such restriction is not applicable to the domestic and household buyer. Thus, the germane of the provisions is that the market fee is not leviable from the persons who do not make sale or purchase in the market area. Of course, the persons who store the Kendu Leave in their godown at the market area has to give declaration as required under Rule, 48 of the Rules, 1958.

29. From the foregoing provisions, it appears that Rule, 48 has been completely changed with effect from 3.8.1996 but before or after the amendment, the object of the Act, 1956 about leviability of agricultural produces upon selling or buying of the same in market area remain intact and there is no change to the basic object and reasons behind the enactment of the Act, 1956.

30. The Act, 1961 was enacted vide Orissa Act, 28 of 1961 having been assented by the Governor on 23.12.1961. Some provisions of the Act have been amended in 1961 by Amendment Act 6 of 1969. The aim and object of this Act to stop the monopoly of private persons to purchase Kendu Leaves from the Kendu Leave growers or kendu Leaves owners and sell the same

without having any middlemen between the Kendu Leave growers and retail purchaser. The very object of the Act is to stop the exploitation to the Kendu Leave growers or Kendu Leave pluckers.

31. After the Kendu Leaves are purchased by the Government or by its agents, the same are sold or disposed of in the manner as prescribed under the Orissa Kendu Leave (Control and Trade) Rules.

32. Orissa Forest Act, 1972 also defines the forest produce and the same includes the Kendu Leaves. The purpose of Indian Forest Act or Orissa Forest Act is to codify Forest Laws in order to bring same within the scope of one enactment. The further purpose of the Act is to regulate the transit of the forest produce and the duty leviable on timber and other forest produce. The comparison of the above three State Acts amply disclose that the three State Acts have got different aims and objects without overlapping on each other. The statutory provisions are to facilitate the common man not to be exploited. On the other hand, the main purpose of these three State Acts have got aims of inclusive growth. When the Act, 1958 has got aim of levy and collect the fee for the larger interest of the respective market, the object of the Act, 1961 is to stop unfair trade practice by middlemen and facilitate poor Kendu Leave growers or the pluckers to earn money by selling the Kendu Leaves to Government or their agents. On the other hand, Indian Forest Act or Orissa Forest Act, as the case may be, have got aim to make laws with rational idea to discourage deforestation and encourage aforestation. Not only this, but also the Forest Act has got object to regulate the forest produce for its utility but not to allow the same to be removed by whims of forest dwellers or forest offenders. Thus, the purpose of the three State Acts are important in their respective jurisdiction.

33. It is reported in the case of ***Deochand Champalal and others (Supra)*** where Their Lordships have been pleased to follow the decision of the Hon'ble Supreme Court in the case of ***Mohammad Hussain Gulam Mohammad and another (Supra)*** where Their Lordships at paragraph-7 have been pleased to observe in the following manner:

> "xx xx xx
>
> There are thus two restrictions on the power of the market committee under section 11; the first is that the fee fixed must be within the maxima prescribed by the Rules and naturally till such maxima are fixed it would not be possible for the market committee to levy fees, and the second restriction is that fees have to be charged not on the

produce brought into but only on such produce as is actually sold. Rule 53 provides that the market committee shall levy and collect fees on agricultural produce bought and sold in the market area at such rates as may be specified in the bye-laws. The Rules nowhere prescribe the maxima within which the bye-laws will prescribe fees. The first attack therefore on the Rules is that it will not be open to the market committee to prescribe any fee under section 11 till the State Government prescribes the maxima by the Rules, which it has not done so far. Further there is an attack on Rule 54 which lays down that the fees on agricultural produce shall be payable as soon as it is brought into the principal market yard or sub-market yard or market proper or market area as may be specified in the bye-laws. The argument is that this rule allows fees to be charged on the produce brought into the market irrespective of whether it is actually bought and sold, and this is against Section 11. As we read Section 11, there is no doubt that the State Government is expected to specify the maxima within which the market committee shall fix fees and until such maximum is specified by the State Government in the Rules it would not be possible for the market committee to fix any fees under section 11.

xx xx xx xx"

From the aforesaid decision, it is clear that the restriction under Section 11 is that fees has to be charged not on the produce brought into but only on such produce as is actually sold. It is needless to say that the main object of the Act, 1958 is to collect the fee if there is actual buying and selling in the market area.

34. It is reported in the case of ***M/s. Ganesh Rice Mills and another (Supra)*** where Their Lordships at paragraph 3 has observed in the following manner:

"3.The authority to levy market fee is as provided in Section 11 of the Act which says that it is competent for the Market Committee to levy and collect such fee, referred to as the market fee, on the agricultural produces marketed in the area. Admittedly the purchase of paddy has taken place outside the market area, the villages of purchase being not included in it. The marketing thus having taken place outside the market area, the Market Committee of the opp. party No. 1 would not have the authority to collect any market fee in respect of the transactions. Merely because a portion of the National Highway falls

within the market area of the opp. party No. 1, it would have no authority to restrict movement of the agricultural produces on the National Highway and collect market fee on purchases that had been effected outside the market area.

xx xx xx xx"

With due regard to the above decision, it appears that if the Kendu Leaves are transported by vehicle on National Highways which run within the market area of RMC, then market fee is not chargeable.

35. A Division Bench of this Court in the case of ***M/s. I.T.C. Limited and another (Supra)*** at paragraph-5 have observed in the following manner:

"xx xx xx xx

In this case, the transactions of sale took place in Bhubaneswar and as per Annexure-3, the petitioner company was allowed to lift the stock of Sal seeds from various godowns including Keonjhar godown. Though the Keonjhar godown situates within the 'Market Area" of keonjhar Regulated Market Committee, as Sal seeds were not marketed within the market area, the levy of market fee by opp. Party no.4 is without jurisdiction. The fees which has already been collected by the opp. Party no.4 as "Market fee" is, therefore, refundable to the petitioner."

36. With due respect to the above decision, it is clear that unless there is buying and selling inside the market area prior to 2007 amendment, the properties brought into the market area for the above purpose cannot be said to be subject matter for levy and collection of fees by RMCs.

37. In another decision in the case of ***Sri Ramkaran Agarwal and another –V- Regulated Market Committee, Bhadrak; 74 (1992) CLT 861*** where Their Lordships at paragraph-6 have observed as under:

"xxx xxx xxx

Thus, the paddy brought from outside the market area to the industrial unit of the petitioners shall not be leviable with market fees, if the same has been brought for use by the industrial unit itself. In the present case, it has been asserted by the petitioners and not denied by the opposite party that the paddy which is brought to the industrial unit is neither brought for sale nor in fact sold as such. They also allege that the paddy is not brought to the unit for the purposes of storage. Thus the paddy brought by the petitioners for use

by their industrial unit itself which is situated within the market area, according to the plain reading of sub-rule(3) of Rule 48 would be exempted from levy of market fees.

Xxx xxx xxx"

With due respect to the above decision, it is clear that if the agricultural produce is brought from outside to the industrial unit which is situated in the market area for their own use, the same will not be leviable.

38. From the aforesaid discussions, it has been consistently held by the Hon'ble Supreme Court and this Court that there must be actual purchasing or selling of the agricultural produce in the market area so as to enable the RMCs to collect the market fee. Moreover, Rule 48 of the Rules, 1958 amended from time to time has stressed upon within the certain period for the utilization of the same by industrial unit or export of the same are exempted. However, the main object and reason is the buying or selling of the agricultural produces or stored for such purpose in the market area.

39. Now adverting the facts of the batch of cases, it appears that there are allegations about the collection of market fees by the RMCs without having jurisdiction. In the counter affidavit, the RMCs have also reiterated that there is justification of levy of fee to be collected from the petitioners. In the counter, it is specifically admitted that the Kendu Leaves which are auctioned at Sambalpur and Bhubaneswar but the godowns of OFDC are situated in the market area and under Sub-section 6 of Section 4 unless contrary proved, the Kendu Leave being the agricultural produce brought within the market area is deemed to have been brought for buying and selling. At the same time, it is admitted by the opposite parties that actual purchase of the Kendu Leaves does not take place inside the market area of their respective RMCs. The contention of the learned counsel for the RMCs is clear that once the agricultural produce is purportedly brought into the market area, the respective market committee has got competence to levy the market fee even if there is no sale or purchase. Also in the counter affidavit, they have said that even if the petitioners have purchased the Kendu Leaves for export only but used to lift the same from godown situated within the market area within a period of 90-150 days for which they are leviable.

40. It is not revealed from the counter that in the cases where the petitioners have stored the Kendu Leaves after sale or brought for sale and kept the same beyond thirty days although it is admitted that auction sale of Kendu Leaves takes place at Sambalpur or Bhubaneswar where the auction sale is completed after the petitioners purchased the Kendu leaves on being

highest bidders. Section 64(2) of the Sale of Goods Act, 1930 is placed before for better reference:

> "(2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made, any bidder may retract his bid"

In view of the aforesaid provision, once the auction caller has struck of the hammer of highest bid, the auction sale is complete irrespective of the fact that the Kendu Leaves are not lifted then and there but lifted from the godown of the OFDC inside the market area later on. There it is clear that Kendu Leaves either have been transported from the godown after sale at places other than market area or have been only transported through the market area by carrying the transport permit from the respective State Government and the agencies for the State Government.

41. Relying upon the decision of the Division Bench of this Court in the case of ***M/s.I.T.C. Limited and another (Supra),*** in the case at hand, even if godowns of OFDC are situated inside the market area of the respective RMCs, the Kendu Leaves being not marketed within the market area, levy of market fee is without jurisdiction. Similarly, following the decision of this Court in the case of ***M/s.Ganesh Rice Mills and another (Supra),*** in the present cases, the Kendu Leaves being transported on the National Highways falling within the market area, cannot be said to be leviable.

42. In both the decisions, it is necessary for the RMCs to prove that there was actual selling or buying of Kendu Leaves inside the market area. But, in the instant cases, there is no marketing of such Kendu Leaves inside the market area as observed above.

43. In the case of ***Agricultural Market Committee, Andhra Pradesh and others (Supra)*** where the Hon'ble Supreme Court have observed about the leviability of the market fee on sale and purchase of agricultural produce inside the market area so as to attract the concerned Market Act. In the instant cases, there being no sale or purchase within the market area in accordance with law, the levy and collection of market fee by the RMCs is also illegal and improper.

44. Learned Additional Government Advocate, citing the decision of this Court in the case of ***Sri Sri Gour Sunder Rice and Oil Mills and another (Supra)***, submitted that in absence of proof of declaration about the

properties brought into the market area for the purpose of transaction, the RMCs can levy the market fee. After going through the facts of that case, it appears that the petitioners in that case had brought the agricultural produce into the market area for transaction, but did not produce necessary declaration and certificate in Form-IV. In the instant case, the facts are different because the sale and purchase completed by auction took place outside the market area. Therefore, the aforesaid decision cited by the learned Additional Government Advocate is not applicable to the facts of these cases.

45. Thus, in view of the decisions of the Hon'ble Supreme Court as well as of this Court, there being no any sale or purchase of Kendu Leaves inside the market area or marketed inside the market area, the genesis of the Act, 1956 being not proved, the levy and collection of market fee upon the Kendu Leaves from the present petitioners is illegal and improper. Point No.(i) is answered accordingly.

46. CONCLUSION

Since it has been already observed, as above, that collection of market fee by the respective RMCs from the petitioners at their respective check gates are contrary to the legal provisions, this Court is of the view that the said collection of the market fee is illegal and devoid of jurisdiction and directs the RMCs not to collect the same. It is, therefore, directed that the opposite parties-RMCs shall refund the market fee collected so far from the petitioners within a period of four months to the petitioners from the date of this judgment failing which the same shall be refunded with interest at the rate of 9% per annum from the date of collection till the date of actual payment. The writ petitions are disposed of accordingly. Interim orders, if any, in the writ petitions stand vacated.

Writ Petitions disposed of.