SUPREME COURT OF INDIA

PINAKI CHANDRA GHOSE, J. & ROHINTON FALI NARIMAN, J.

CRIMINAL APPEAL NOs. 1432-1434 OF 2011

STATE OF U.P. .....Appellant (s)

.Vrs.

SUNIL .....Respondent (s)

WITH

CRIMINAL APPEAL NOs. 1423-1424 OF 2011

REKHA SENGAR .....Appellant (s)

.Vrs.

STATE OF U.P. & ANR. .....Respondent (s)

CONSTITUTION OF INDIA, 1950 – Art. 20 (3)

Whether, compelling an accused to provide his fingerprints or foot prints etc. would come within the purview of Article 20 (3) of the Constitution of India i.e. compelling an accused of an offence to be a "witness" against himself ? Held, any person can be directed to give his foot prints for corroboration of evidence but the same cannot be considered as violation of the protection guaranteed under Article 20 (3) of the Constitution of India – However, if there will be non-compliance of such direction the Court may take adverse inference.

(Paras 7,11)

Case Laws Referred to :-

1. AIR 1968 SC 832= (1968) 2 SCR : Haroon Haji Abdulla -V- State of Maharashtra.
2. (1962) 3 SCR 10 : State of Bombay -V- Kathi Kalu Oghad & Ors.
3. (2010) 7 SCC 263 : Selvi -V- State of Karnataka.
4. (2014) 12 SCC 133 : Prakash -V- State of Karnataka.
5. (2010) 2 SCC 748 : Musheer Khan -V- State of M.P.

For Appellant (s) : Adarsh Upadhyay
For Respondent (s) : Aftab Ali Khan

Date of judgment : 02.05 2017

JUDGMENT

PINAKI CHANDRA GHOSE, J.

1. Present appeals have been directed against the judgment dated 23rd May, 2008 passed by the High Court of Judicature at Allahabad in Criminal

Appeal No.2968 of 2007 with Criminal (Jail) Appeal No.2757 of 2007 and Capital Reference No.12 of 2007, whereby judgment and order dated 04.04.2007 passed by the learned Additional Sessions Judge, Etawah in Sessions Trial No.424 of 2000 was set aside and the accused-respondent was acquitted of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Capital Sentence Reference for confirmation of the death sentence was consequently rejected.

1. Brief facts necessary for adjudication of the present case are as follows: One Kumari Rekha Sengar (PW-2), who is the complainant in the present case, got a phone call from her mother Smt. Shashi Prabha (now deceased) at about 11.00 to 11.30 pm on 02.09.2000 narrating that complainant's brother-in-law (Jeeja), namely, Suresh Pal Singh @ Guddu along with his friend had come to their house in Etawah, Uttar Pradesh, demanding Rs.50,000/- from her father and on refusal to meet the demand, they became very angry. The complainant herself had a talk with her brother-in-law and tried to pacify him but she failed as he cut the telephone call. Later when the complainant failed to have further communication on telephone, she left for her parents' house from Delhi. On reaching her parents' house she saw dead bodies of her father, mother, two sisters and their pet dog. Law was set into motion after an FIR was registered by the complainant on the basis of written report. The said Suresh Pal Singh was arrested on 04.09.2000 and on the basis of the confessional statement made by the accused, a knife, blood-stained clothes and other articles were recovered by the Investigating Officer (PW-7) in the presence of PW-4 and recovery memo Ext. Ka-8 was made. Involvement of respondent herein was also unearthed on the basis of the said confessional statement. After conclusion of the investigation charge-sheet was submitted before the learned Magistrate who committed the case to the Court of Additional Sessions Judge, Etawa, U.P. Accused Suresh Pal Singh died during the trial and therefore criminal proceedings against him stood abated. The Trial Court convicting the accused Sunil under Sections 302 & 429 read with Section 34 of IPC and awarded death sentence to him and imposed a fine of Rs.500/- for offence under Section 429 of IPC.

2. Being aggrieved, the accused-respondent preferred Criminal Appeal No.2968 of 2007 and Criminal (Jail) Appeal No.2757 of 2007 before the High Court. Capital Sentence Reference No.12/2007 was made by the Additional Sessions Judge, Etawa. The High Court by its judgment and order dated 23rd May, 2008 set aside the order of conviction and sentence passed

by the Trial Court and acquitted the accused-respondent. Consequently, Capital Sentence Reference No.12 of 2007 was rejected by the High Court. Hence, the State of U.P. and the complainant are before us by filing Criminal Appeal Nos.1432-1434 of 2011 and Criminal Appeal Nos.1423-1424 of 2011, respectively.

3. We have noticed that the High Court had allowed the criminal appeal of accused-respondent on the basis of failure on the part of the prosecution to prove its case beyond all reasonable doubt and on the basis of circumstantial evidence. The High Court in its finding made four important observations: (i) Evidence of PW-2 cannot be used against respondent herein for the reason of improvement in statement; (ii) The testimony of PW-1 showing his conduct as against human nature is not worthy of credence for the reason that he did not actually see the accused persons; (iii) Evidence of recovery of weapon and other articles may be relevant, but could not be relevant against accused-respondent herein; and (iv) Adverse inference cannot be drawn by the Court on refusal to give specimen palm impression in spite of the order of the Court.

4. We have heard the learned counsel for the parties at considerable length. During the course of hearing, learned counsel for the State of U.P. has submitted written arguments. It is the submission of the learned counsel for appellants that the case has been proved on the basis of circumstantial evidence. PW-1 has proved the factum of both accused last seen together outside the main door of house of deceased. This witness also identified both the accused before the Trial Court. Memo of recovered articles as a result of disclosure statement was not only admissible against accused Suresh Pal (now deceased) but is also admissible against accused-respondent herein. It was further submitted that confessional statement of the co-accused who died pending trial is relevant against the accused-respondent also. He therefore relied upon the judgment of this Court in the case of ***Haroon Haji Abdulla Vs. State of Maharashtra***, AIR 1968 SC 832 = (1968) 2 SCR 641, wherein this Court observed:

> "*No doubt both Bengali and Noor Mohammad retracted their statements alleging duress and torture. But these allegations came months later and it is impossible to heed them. The statements were, therefore, relevant. Both Bengali and Noor Mohammad were jointly tried with Haroon right to the end and all that remained to be done was to pronounce judgment. Although Bengali was convicted by the*

judgment, the case was held abated against him after his death. In Ram Sarup Singh and Others v. Emperor-(1), J was put on his trial along with L; the trial proceeded for some time and about six months before the delivery of judgment, when the trial had proceeded for about a year, J died. Before his death J's confession had been put on the record. R. C. Mitter, J. (Henderson, J. dubitante) allowed the confession to go in for corroborating other evidence but not as substantive evidence by itself. Of course, the confession of a person who is dead and has never been brought for trial is not admissible under S. 30 which insists upon a joint trial. The statement becomes relevant under s. 30 read with S. 32(3) of the Evidence Act because Bengali was fully tried jointly with Haroon. There is, however, difficulty about Noor Mohammad's statement because his trial was separated and the High Court has not relied upon it."

5. Learned counsel for the State of U.P. concluded his arguments by submitting that the prosecution version was not only corroborated by medical evidence of PW-5 and PW-6 but was also confirmed by FSL Report, which proved presence of human blood on the weapon of murder and clothes of both the accused. Since comparison of finger-prints and foot-prints were not clear, the Trial Court directed both the accused to give fresh foot-prints and finger-prints. On refusal to comply with this order by the accused for almost five years, even when the same was upheld in criminal revision before the High Court, the National Crime Records Bureau, New Delhi and the Trial Court had rightly treated it as an adverse inference against the accused-respondent herein.

6. Learned counsel appearing for the accused-respondent, on the other hand, submitted that the recovery of bag and articles (Ext.1) cannot be made admissible against co-accused who is respondent herein. Prosecution has not produced any witness or evidence to connect the accused-respondent with recovered bag or articles. The complainant (PW-2) has also improved her statement apropos presence of the accused-respondent. But, surprisingly, there was no mention of name or other details of the accused-respondent either in the written complaint/FIR or in the statement made before police. Learned counsel for the accused-respondent stoutly defended his client by concluding that drawing adverse inference against the accused due to his refusal to give specimen palm impression was not justified as earlier palm impression report came in negative and application moved by the accused

praying for sending footprints and fingerprints to some other laboratory was rejected by the Trial Court vide order dated 09.01.2007.

7. After careful perusal of the evidence and material on record, we are of the considered opinion that the following question would play a crucial role in helping us reaching an upright decision:

Whether compelling an accused to provide his fingerprints or footprints etc. would come within the purview of Article 20(3) of the Constitution of India i.e. compelling an accused of an offence to be a "witness" against himself?

It would be relevant to quote Article 20(3) of the Constitution of India which reads as follows:

"**Article 20: Protection in respect of conviction for offences**.
(1) … … …
(2) … … …
(3) No person accused of any offence shall be compelled to be a witness against himself."

8. The answer to the question above-mentioned lies in judicial pronouncements made by this Court commencing with celebrated case of ***State of Bombay Vs. Kathi Kalu Oghad & Ors.***, (1962) 3 SCR 10, wherein it was held:

> *"To be a witness' may be equivalent to 'furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body. 'Furnishing evidence' in the latter sense could not have been within the contemplation of the constitution-makers for the simple reason that – thought they may have intended to protect an accused person from the hazards of self incrimination, in the light of the English Law on the subject – they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice."*

9. We may quote another relevant observation made by this Court in the case of ***Kathi Kalu Oghad***, (supra).

> *"When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness."*

10. In ***Selvi Vs. State of Karnataka***, (2010) 7 SCC 263, a three-Judge Bench of this Court while considering testimonial character of scientific techniques like Narco analysis, Polygraph examination and the Brain-Electric activation profile held that

> *"145. The next issue is whether the results gathered from the impugned tests amount to 'testimonial compulsion', thereby attracting the prohibition of Article 20(3). For this purpose, it is necessary to survey the precedents which deal with what constitutes 'testimonial compulsion' and how testimonial acts are distinguished from the collection of physical evidence. Apart from the apparent distinction between evidence of a testimonial and physical nature, some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with. The relevant consideration for extending the protection of Article 20(3) is whether the materials are likely to lead to incrimination by themselves or 'furnish a link in the chain of evidence' which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.*

146. It is quite evident that the narco analysis technique involves a testimonial act. A subject is encouraged to speak in a drug-induced state, and there is no reason why such an act should be treated any differently from verbal answers during an ordinary interrogation. In one of the impugned judgments, the compulsory administration of the narco analysis technique was defended on the ground that at the time of conducting the test, it is not known whether the results will eventually prove to be inculpatory or exculpatory. We have already rejected this reasoning. We see no other obstruction to the proposition that the compulsory administration of the narco analysis technique amounts to 'testimonial compulsion' and thereby triggers the protection of Article 20(3)."

11. Thus, we have noticed that albeit any person can be directed to give his foot-prints for corroboration of evidence but the same cannot be considered as violation of the protection guaranteed under Article 20 (3) of the Constitution of India. It may, however, be noted that non-compliance of such direction of the Court may lead to adverse inference, nevertheless, the same cannot be entertained as the sole basis of conviction.

12. In a case where there is no direct witness to prove the prosecution case, conviction of the accused can be made on the basis of circumstantial evidence provided the chain of the circumstances is complete beyond all reasonable doubt. It was observed by this Court in the case of ***Prakash vs. State of Karnataka***, (2014) 12 SCC 133, as follows:

"51. It is true that the relevant circumstances should not be looked at in a disaggregated manner but collectively. Still, this does not absolve the prosecution from proving each relevant fact. "6. In a case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypotheses and should be consistent with only the guilt of the accused. (Lakhjit Singh Vs. State of Punjab, 1994 Supp (1) 173)"

13. It has also been the observation of this Court in ***Musheer Khan Vs. State of M.P.***, (2010) 2 SCC 748, apropos the admissibility of evidence in a case solely based upon circumstantial evidence that

"55. Section 27 starts with the word `provided'. Therefore, it is a proviso by way of an exception to Sections 25 and 26 of the Evidence Act. If the facts deposed under Section 27 are not voluntary, then it

will not be admissible, and will be hit by Article 20(3) of the Constitution of India. [See State of Bombay vs. Kathi Kalu Oghad, [AIR 1961 SC 1808].

56. The Privy Council in Pulukori Kottaya vs. King Emperor, [1947 PC 67] held that Section 27 of the Evidence Act is not artistically worded but it provides an exception to the prohibition imposed under the preceding sections. However, the extent of discovery admissible pursuant to the facts deposed by accused depends only to the nature of the facts discovered to which the information precisely relates.

57. The limited nature of the admissibility of the facts discovered pursuant to the statement of the accused under Section 27 can be illustrated by the following example: Suppose a person accused of murder deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, but as a result of such discovery no inference can be drawn against the accused, if there is no evidence connecting the knife with the crime alleged to have been committed by the accused.

58. So the objection of the defense counsel to the discovery made by the prosecution in this case cannot be sustained. But the discovery by itself does not help the prosecution to sustain the conviction and sentence imposed on A-4 and A-5 by the High Court."

14. From a perusal of the evidence on record, it could without any hesitation be said that the basic foundation of the prosecution had crumbled down in this case by not connecting the respondent with the incident in question. And when basic foundation in criminal cases is so collapsed, the circumstantial evidence becomes inconsequential. In such circumstances, it is difficult for the Court to hold that a judgment of conviction could be founded on the sole circumstance that recovery of weapon and other articles have been made.

15. After examining every evidence and material on record meticulously and in the light of the judgments cited above, we are of the considered opinion that the prosecution has miserably failed to connect the occurrence with respondent herein. Resultantly, the judgment and order passed by the High Court setting aside of conviction order passed by the Trial Court is hereby upheld.

16. The appeals are, accordingly, dismissed.

Appeals dismissed.

2017 (II) ILR - CUT-244

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

O.J.C. NO. 2129 OF 1995

PRAMOD KUMAR PANDA .....Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226

Whether Odisha State Housing Board is justified in canceling the allotment of the LIG House granted in favour of the petitioner's father for non-payment of watch and ward charges, in the absence of any provision in the regulations of the Board and when there was no default in payment of any installment ? Held, No.

In this case petitioner's father was allotted with an LIG House and he paid regular installments – He was intimated to take physical possession of the House, failing which he was to pay watch and ward charges – Possession could not be taken as the work was not completed – Subsequently his allotment was cancelled for non-payment of watch and ward charges – Hence the writ petition – Since regulations of the Board do not provide for cancellation of the allotment for non-payment of watch and ward charges, the impugned demand raised by the Board is illegal, hence quashed – Direction issued to the Board to handover physical possession of the House to the petitioner. (Paras 8, 9, 10)

For Petitioner : M/s. Sanjeev Udgata, R.K.Nayak, S.K.Rath, G.S.Pani & N.Tripathy

For Opp.Parties :Sri R.K.Mohapatra, Govt. Adv.
Sri D.Nayak

Date of judgment : 09.05.2017

JUDGMENT

VINEET SARAN, C.J

Heard Sri S.Udgata, learned counsel for the petitioner and Sri D.Nayak, learned counsel for the opposite party.

2. Pursuant to an application filed by the father of the petitioner for allotment of an LIG House, he was allotted House No. L-1729 under Dumduma Housing Scheme, by the Orissa State Housing Board (for short 'the Board'). Intimation of the same was given to the father of the petitioner

vide communication dated 21.8.1987 (Annexure-1). The father of the petitioner made the initial deposit as required under the allotment order and thereafter continued to pay the regular instalments and had also agreed to the enhancement of sale price from Rs.20,000/- to Rs.30,000/-. The registered agreement was executed on 18.8.1989 between the Secretary of the Board and father of the petitioner, according to which the father of the petitioner was required to pay the balance amount of Rs.22,500/- in 52 quarterly instalments.

3. There is no dispute about the fact that father of the petitioner continued to pay the regular quarterly instalments as per the agreement dated 18.8.1989. The father of the petitioner was thereafter required to take physical possession of the house by 15.11.1989, failing which he was to pay watch and ward charges @ Rs. 200/- per month. However, since the construction of the house was not complete, the father of the petitioner was not given possession on the schedule date, which was in November, 1989. The opposite party-Board, however, continued to levy watch and ward charges. Then in the year 1993, the father of the petitioner was intimated that he should pay Rs. 12,500/- towards watch and ward charges and take over the physical possession of the house on 30.8.1993. The house was still not complete, as according to the petitioner, there were no railings in the windows, no doors in the toilets, flooring and plastering of the house were in damaged condition, and there was no water and electricity connection and thus, the possession of the house could not be taken. Thereafter, on 10.2.1995 (Annexure-8), the opposite party-Board passed the impugned order cancelling the allotment made in favour of father of the petitioner, on the ground of non-payment of watch and ward charges. Challenging the same, this writ petition has been filed by the petitioner, who has become the allottee after the death of his father.

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

5. Though time had been granted in 1995 for filing of counter affidavit and even a Misc. Case No. 4230 of 1995 was filed by the opposite party-Board on 14.7.1995 seeking six weeks time to file counter affidavit, yet no counter affidavit has been filed, even though more than two decades has passed. On 24.4.2017, the matter was adjourned on the request of the learned counsel for the opposite party so as to enable him to obtain instruction. Even then, no counter affidavit has been filed. As such, the averments made in the writ petition remain uncontroverted.

6. It is a matter of record that registered agreement had been executed between the Board and the father of the petitioner on 18.8.1989. Though letter was issued by the Board to the father of the petitioner in 1989 for taking over possession of the house, but the same was not complete and ready for possession. The very fact that another letter was issued on 7.8.1993 requiring the father of the petitioner to take over the physical possession, would mean that the physical possession was not handed over to the father of the petitioner till that date. The averments made in the writ petition to the effect that the house was incomplete have not been controverted. As such, the question of handing over the physical possession of the house could not have been there as the house was not habitable, as besides the construction not being complete, there was no water and electricity connection provided.

7. The contention of the learned counsel for the petitioner is that Regulations of the Board do not provide for cancellation of the allotment for non-payment of watch and ward charges. The opposite party has not controverted the fact that the father of the petitioner was regularly paying the instalments due, which would also be clear from the cancellation order dated 10.2.1995, wherein only mention of the payment of watch and ward charges has been made and not for any default in payment of instalments for the price of the house. There was no default regarding payment of any instalment as on the date of the cancellation order.

8. In the absence of there being any provision for payment of watch and ward charges, and also in view of the fact that possession of the house had not been given to the father of the petitioner as per the schedule date, because the house was not complete in all respects for handing over possession, we are of the opinion that the levy of watch and ward charges cannot be justified in law, and consequently, cancellation of the allotment of LIG House bearing No. L-1729 under Dumduma Housing Scheme of the opposite party-Board cannot be justified in law.

9. Accordingly, the impugned order dated 10.2.1995 is quashed and the demand raised by order dated 7.8.1993 for payment of watch and ward charges is held to be illegal.

10. The petitioner shall be handed over the physical possession of the said house (L-1729) within two months from the date of filing of certified copy of this order before opposite party no.2-Chairman, Orissa State Housing Board. It is however made clear that in case any instalment for the payment of price of the house in question is still due, the same shall be paid

by the petitioner within six weeks of the possession being handed over and such demand being made from him.

11. The writ petition stands allowed. No order as to cost.

Writ petition allowed

2017 (II) ILR - CUT- 247

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

W.P.(C) NO. 7413 OF 2016

CHINTAMANI PATRA .....Petitioner

.Vrs.

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

TENDER – Lease of Sand Sairat – As per the conditions in the tender documents bidder has to submit Solvency Certificate for the bid amount plus royalty alongwith the bid documents, which was to be valid for 18 months – Though O.P.No.6 became the highest bidder, he did not deposit the Solvency Certificate for the entire amount alongwith the bid documents, even the term deposit submitted by him subsequently was not for 18 months – In the otherhand, the petitioner who became the second highest bidder, submitted Solvency Certificate for the entire amount alongwith the bid documents, valid for 18 months, raised objection before the Tahasildar not to accept the tender of O.P.No.6 and allow his tender to be accepted – However, the Tahasildar rejected his prayer and the bid of O.P.No.6 was accepted – Hence the writ petition – The terms and conditions laid down in the tender documents had to be strictly complied with by the parties – Held, the order of the Tahasildar where the bid of O.P.No.6 has been accepted is quashed – Since there is vast difference between the highest bid of O.P.No.6 and that of the second highest bid of the petitioner and sufficient time has lapsed as the bids were invited in March, 2016, direction issued to the authorities for initiation of fresh proceeding for grant of lease of the Sand Sairat in question.

(Paras 6 to 9)

For Petitioner : M/s. Samir Kumar Mishra, J.Pradhan, S.Pattanayak, S.Rout, S.S.Samal & P.K.Jena

For Opp.Parties : Sri B.P.Pradhan, A.G.A.

M/s. P.N.Mishra, S.Bahadur & P.K.Khuntia
M/s. S.Behera, S.L.Choudhury & P.K.Mohanty

Date of judgment : 03.07.2017

JUDGMENT

VINEET SARAN, CJ.

In response to tender call notice issued by opposite party no.4-Tahasildar, Banki on 29.02.2016 inviting tenders for long term lease of sairat source, namely, Kotadwar Sand Ghat, the bidders were to submit their bid documents along with necessary solvency certificate or bank guarantee valid for 18 months to the tune of the bid amount and royalty payable for a period of one year added together. There were other conditions also to be fulfilled but this is the one which is of concern in the present case. The bids were to be submitted in Form- 'J' along with other documents, between 21.03.2016 and 28.03.2016, which were to be opened on 29.03.2016. Six bidders had participated, in which the bid of opposite party no.6 was the highest at Rs.81,81,839/- and that of the petitioner was the second highest at Rs.58,19,999/-. The solvency certificate was to be provided by the respective bidders for the bid amount, plus the royalty amount for one year, which in the case of opposite party no.6 came to Rs.1,23,61,830/- and that of the petitioner came to Rs.99,99,999/-.

2. The admitted case of the parties is that the petitioner submitted the solvency certificate for an amount of Rs.1.00 crore along with the bid documents, which was valid for a period of 18 months. On the contrary, the solvency certificate furnished by opposite party no.6 along with the bid documents was for an amount of Rs.1,06,74,400/- instead of the requisite amount of Rs.1,23,61,830/-. The shortfall amount is said to have been deposited by the opposite party no.6 in the bank on 28.03.2016, by way of term deposit of Rs.17.00 lakh, for which a certificate was issued by the bank on 29.03.2016 and the same was submitted by the opposite party no.6 on the date of the opening of the financial bid, i.e. 29.03.2016.

3. The submission of the learned counsel for the petitioner is that because there was non-compliance of furnishing of the necessary solvency certificate of the entire amount by opposite party no.6 along with the bid documents, the bid of opposite party no.6 could not have been accepted, and that of the petitioner ought to have been accepted as he was the second highest bidder. Objection, in this regard, was raised before the Tahasildar at the time of opening of the bid, which was rejected by the Tahasildar vide

order dated 29.03.2016. The said order of the Tahasildar is also challenged in this writ petition.

4. We have heard Shri S.K. Mishra, learned counsel for the petitioner as well as Shri B.P. Pradhan, learned Addl. Government Advocate for the State-opposite parties 1 to 4, Shri P.N. Mishra, learned counsel for opposite party no.5-Andhra Bank and Shri S. Behera, learned counsel for the contesting private opposite party no.6 and perused the record. Pleadings between the parties have been exchanged and by consent of learned counsel for the parties, this writ petition is being disposed at the admission stage.

5. The background facts, as stated above, are not disputed by the learned counsel for the parties.

6. It is not disputed that the solvency certificate of the entire amount of Rs.1,23,61,830/- was not deposited by the opposite party no.6 along with the bid documents. On perusal of the terms and conditions of the tender notice, it is clear that submission of such solvency certificate, which was to be valid for a period of 18 months, was necessary to be furnished along with the bid documents, the last date of which was 28.03.2016. By merely depositing the balance amount of Rs.17 lakh with the bank by way of term deposit receipt, which was valid for a period of 400 days, would not be sufficient on two counts. Firstly, the certificate of having made such term deposit with the bank, issued by the bank on 29.03.2016, was submitted by opposite party no.6 on 29.03.2016, which was after the last date of submission of the tender documents, which was 28.03.2016. Secondly, the solvency certificate was to be valid for a period of 18 months, whereas the certificate of term deposit of Rs.17.00 lakh by opposite party no.6 with the opposite party bank was valid for a period of only 400 days, which would be for about 13 months and thus five months short of 18 months. The terms and conditions laid down in the tender documents had to be strictly complied with by the parties. If grant of relaxation by the Tahasildar or any other authority is permitted, and conditions are allowed to be varied after the last date of submission of documents, the same would create confusion, in which case, finality would not be able to be given to the tender process. The same can also not be permitted in law, as the furnishing of documents along with the bid was an essential condition of the tender notice.

7. It was a mandatory condition for the bidders to submit the solvency certificate for the bid amount plus royalty along with the bid documents, which was to be valid for 18 months. In the present case, the opposite party

no.6 has admittedly not furnished the same within the time provided for in the notice, and further the one provided subsequently was not in terms of the conditions laid down in the tender notice, because the solvency was to be valid for a period of 18 months, whereas the term deposit filed by the petitioner subsequently was only for 400 days. As such, the order of the Tahasildar accepting such bid of opposite party no.6 cannot be justified in law.

8. We may mention that we are not going into the question of sufficiency of providing the term deposit in lieu of the solvency certificate, because term deposit itself was not for the period required in the tender notice and was also submitted after the last date of submission of bid.

9. In such view of the matter, the order of the Tahasildar, whereby the bid of the opposite party no.6 has been accepted, is quashed. In the facts and circumstances of the case, since there is a vast difference between the highest bid of the opposite party no.6 and that of the second highest bid of the petitioner and sufficient time has lapsed since the bids were invited in March 2016, we accept the contention of the learned Addl. Government Advocate and direct that fresh proceeding be initiated as expeditiously as possible, for the grant of lease of the sand sairat in question. The writ petition stands allowed to the extent indicated above. No order as to costs.

Writ petition allowed.

2017 (II) ILR - CUT- 250

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

W.P.(C) NO. 18052 OF 2016

M/S. S.K. SAMANTA & CO. (P) LTD., KOLKATA, REPRESENTED THROUGH ITS EXECUTIVE DIRECTOR (CONTRACT), MR. BHOLANATH DAS .....Petitioner

.Vrs.

MAHANADI COALFIELDS LIMITED & ORS. .....Opp. Parties

TENDER – Petitioner was declared as the lowest bidder – However for non-compliance of a particular condition i.e. clause 6.1(d) of the e-tender document, for non-furnishing of an undertaking from

the Holding company, the authority cancelled the tender, forfeited his bid security and imposed punishment that in case of re-tender the petitioner would not be permitted to participate in terms of clause 17 (b) of the e-tender notice – Action challenged on the ground that clause 6.1 (d) is not mandatory and no reason assigned in the impugned order – Tender committee Recommendation is very clear that the tender committee after due application of mind scrutinized all technical and factual aspects and made the recommendation and the Managing Director has only approved such recommendation and passed the impugned order – No reasoned order need be passed while approving the recommendation of the Tender Committee, other wise it would amount to mere repetition of reasons given by the Tender Committee – However, the question would have been different, had the Managing Director differed /modified the Tender Committee recommendation (TCR) –Since the petitioner does not find any fault in the TCR, the contention of his counsel has no force – Held, the impugned order is justified and does not call for interference by this Court.

(Paras 11,12,13)

Case Laws Referred to :-

1. (1991) 3 SCC 273 : Poddar Steel Corporation –v- Ganesh Engineering Works & Ors.
2. 2017 (I) ILR-CUT-922 : Nestor Pharmaceuticals Limited –v- State of Odisha & Anr.
3. (2007) 14 SCC 517 : Jagdish Mandal –v- State of Orissa and Ors.

For Petitioner : Mr. S.P. Mishra, Senior Advocate
M/s. Soumya Mishra, N.K. Sahoo, R.R. Jaiswal, E. Agarwal, A. Mohanta & K.K. Moharna

For Opp. Parties : Mr. Jagannath Pattnaik, Senior Advocate.
M/s. D. Mohanty, A. Mishra, B. Panda & D. Behera

Date of hearing : 21.06.2017
Date of judgment : 21.06.2017

JUDGMENT

VINEET SARAN, CJ.

Although the records of the present case are very bulky, but the point involved is short. What we have to consider in the present case is as to whether a particular condition laid down in the e-tender document which, in the present case, is regarding furnishing an undertaking from the Holding Company, has been complied with or not ?

2. Brief facts of the case are that Mahanadi Coal Field Limited (for short 'MCL')-opposite party no.1 had issued a tender notice on 15.06.2015 (Annexure-1) inviting tenders for setting up of 10 MPTA Coal Washery at Jagannath area, MCL on Build Operate Maintain (BOM) concept. The last date for submission of the bids was 11.09.2015. Admittedly, on 09.09.2015 the petitioner-M/s. S.K. Samanta and Co (P) Ltd. entered into a Memorandum of Understanding with M/s. Schenck Process India Private Ltd. and M/s. MSDE Engineering Pvt. Ltd., with the petitioner being the lead partner of the consortium. The petitioner, being the Lead Member, was to comply with the requirement of financial eligibility criteria; M/s. Schenck Process India (P) Ltd. was to comply with the technical eligibility criteria regarding setting up of the Washery; and M/s. MSDE Engineering Pvt. Ltd. was to comply with the technical eligibility criteria regarding operation and maintenance of the Coal Washery. The petitioner, as Lead Member, submitted the bid through the consortium route and uploaded relevant documents on the e-procurement portal of the MCL, after furnishing requisite security deposit in the form of bank guarantee of Rs.50.00 lakh. As per the e-tender document, the technical bids were to be opened on 16.09.2015.

It is an admitted position that the petitioner as well as Global Coal and Mining Pvt. Ltd. were the only two parties which were technically qualified. The financial bid was then opened on 20.09.2015, which was as per the scheduled date given in the tender document. The bid of the petitioner was the lowest, at a little over Rs.4863 crores, i.e. Rs.4863,31,92,735.09, whereas that of the other bidder, M/s. Global Coal and Mining Pvt. Ltd. was little over Rs.4881 crores, i.e., Rs.4881,46,15,734.06. On the same day, i.e. on 20.09.2015, the petitioner was declared as the lowest bidder. In terms of the tender document, the petitioner was to furnish the conformity documents by uploading the same on the e-portal of the MCL between 21.09.2015 and 21.10.2015, which, according to the petitioner, were duly uploaded. Then on 07.01.2016 the petitioner was notified by the MCL for further uploading certain documents by 17.01.2016. According to the petitioner, the required documents were uploaded on the e-portal of the MCL on 16.01.2016. At this stage, in response to the query made by MCL, the petitioner had uploaded one letter dated 26.05.2014 of M/s. Schenck Process Holding, GmbH, Germany (for short 'S.P. Holding, Germany'), wherein it was mentioned that M/s. S.P. Holding, Germany confirmed that M/s. Schenck Process India Pvt. Ltd. (for short 'M/s. S.P. India') and M/s. Schenck Process (Tianjin) Industrial Technology Co. Ltd., China (for short 'M/s. S.P. China') form part

of group of companies called "Schenck Process Group", which is ultimately owned by M/s. S.P. Holding, Germany. This was furnished by the petitioner, as the technical qualification for performing the part of the contract by M/s. S.P. India was to be carried out by M/s. S.P. China, which had the experience of such work and was a part of M/s. Schenck Process Group with M/s. S.P. Holding, Germany as the holding company.

Thereafter there was no communication with the petitioner-company from MCL. However, after getting the aforesaid information by way of documents furnished by the petitioner on 16.01.2016, the opposite party-MCL wrote to M/s. S.P. Holding, Germany on 11.04.2016 requiring them to furnish certain details and clarifications with regard to information furnished by the petitioner. There were five queries/clarifications sought by MCL vide its letter dated 11.04.2016, which were numbered as (a), (b), (c), (d) & (e). The relevant clarification of Clause (d) is reproduced herein below :

Clarification required from M/s. Schenck Process Holding GmbH, Germany.

a)	xxx	xxx	xxx
b)	xxx	xxx	xxx
c)	xxx	xxx	xxx

d) *If para b) & c) are affirmative, then a Letter of Undertaking in the letter head of M/s. Schenck Process Holding GmbH, Germany <u>as per CI. No. 6.1 (d) of Bid document</u> in the format given hereafter is required:*

Letter of Undertaking

In case of any untoward happenings towards the successful execution of the contract and / or event occurring that are distinct and different from the stipulated terms & conditions of this Bid Document as applicable and attributable to M/s. Schenck Process India Private Limited (formerly known as M/s. Schenck Process India Limited) account, its holding company, M/s. Schenck Process Holding GmbH, Germany shall be legally bound both jointly and severally to this contract for discharging all the contractual obligations on behalf of M/s. Schenck Process India Private Limited (formerly known as M/s. Schenck Process India Limited).

(emphasis supplied)

The said clarification was to be furnished by 30.04.2016. However, M/s. S.P. Holding, Germany sought for extension of time, which was granted and they were required to respond to the queries/clarifications by 31.5.2016. Then on 30th May, 2016, the Holding Company, i.e. M/s. S.P. Holding, Germany responded by giving replies to the other queries except Query No. (d). The MCL thereafter did not communicate with the Holding Company but instead, wrote to the petitioner on 08.06.2016 requiring them to comply with the undertaking as required under Clause 6.1(d) of the tender document, which was to be furnished by the Holding Company and also required confirmation to be obtained from the Holding Company that both M/s. S.P. India and M/s. S.P. China are subsidiaries of M/s. S.P. Holding, Germany. The said information/documents were to be furnished by the petitioner on or before 23.6.2016. As admitted in para-8 of the rejoinder affidavit, the petitioner submitted its response to the communication dated 8.6.2016 on 23.6.2016 by appending the copy of the communication sent by M/s. S.P. Holding, Germany on 30.5.2016, which was the same response that had been given by the said Holding Company directly to MCL.

Then on 5.7.2016, the process was initiated by the Tender Committee for cancellation of the bid of the petitioner for non-furnishing of the information and undertaking sought from them. The recommendation made by the Tender Committee was placed before the General Manager (Washery), MCL for cancellation of the tender. The General Manager (Washery), MCL thereafter submitted a summary report before the competent authority with the recommendation of the Tender Committee to cancel the tender and forfeit the bid security of the petitioner and that further in case of re-tender, the petitioner would not be permitted to participate in terms of Clause 17 (b) of the e-tender notice. The cancellation order was passed by the Chairman-cum-Managing Director on 6.10.2016, which was communicated by the General Manager (Washery), MCL on the same day i.e. 6.10.2016. Challenging the said cancellation of the tender and rejection of the bid of the petitioner as well as forfeiture of the bid security, and not permitting the petitioner to participate in the re-tender, this writ petition has been filed.

2. We have heard Shri S.P. Mishra, learned Advocate General along with Shri Nalini Kanta Sahoo, learned counsel appearing for the petitioner, as well as Mr. Jagannath Pattnaik, learned Senior Counsel along with Shri Debaraj Mohanty, learned counsel for opposite party- MCL and perused the record. Pleadings between the parties have been exchanged. With the consent of parties, this writ petition is disposed of at the stage of admission.

Facts as stated above are not disputed by the parties.

3. The contention of Shri S.P. Mishra, learned Senior Counsel appearing for the petitioner, is that the required undertaking to be given by the Holding Company in terms of Clause 6.1(d) of e-tender document was not an essential requirement, and the same could not be said to be mandatory and was merely an ancillary requirement as the petitioner-company, which was a Lead Member of the consortium, had already given an undertaking to indemnify the loses, if any, and for execution of the work. It is further submitted that undertaking to be given was on Ext.5 of the e-tender document, which, according to the petitioner, was a blank page and as such, it could not be understood as to what kind of undertaking was to be given. It is further submitted that one consortium Member i.e. M/s. S.P. India, had made a communication with MCL on 25.7.2016 enclosing a draft letter of undertaking to be given by M/s S.P. Holding, Germany and MCL has not yet responded to the same. As such, according to the petitioner, the matter regarding furnishing of undertaking by the Holding Company is still alive. Although it is admitted that the draft letter of undertaking sent on 25.7.2016 was not in terms of Clause 6.1(d) of the e-tender document or clarification/query made by the communication dated 11.4.2016, yet Shri S.P. Mishra, learned Senior Counsel for the petitioner, on having received instruction, has made a statement that the petitioner is ready and willing to give the exact undertaking as required by the communication dated 11.4.2016 within such time as may be granted by this Court. It was lastly submitted by Shri Mishra that no reason has been assigned in the impugned order dated 06.10.2016 for rejecting the bid of the petitioner, and cancellation of its tender and imposing further punishment, which clearly shows non-application of mind by the competent authority.

4. Per contra, Shri Jagannath Pattnaik, learned Senior Counsel for the MCL-opposite party no. 1 has contended that at the time of furnishing of the bid documents, there was no mention of M/s. S.P. China being involved in the performance of the contract and it was for the first time, that is on 16.01.2016, the petitioner had furnished documents to show that M/s. S.P. China would be performing the work on behalf of M/s. S.P. India (which was a member of the petitioner-consortium) and that the Holding Company of M/s. S.P. India and M/s. S.P. China was M/s. S.P. Holding, Germany. It is further contended that the communication dated 26.05.2014 by M/s. S.P. Holding, Germany, which the petitioner contends as an undertaking, said to be sufficient in compliance of Clause 6.1(d) of the e-tender document, was

brought on record for the first time on 16.01.2016, and the same can also not be construed to be an undertaking but merely a declaration given with regard to the status of the Holding Company vis-à-vis the subsidiary companies. It is further submitted that as per the e-tender notice, the petitioner had to file all the requisite documents in terms of Clause 17 of the e-tender document within a stipulated time. The petitioner had furnished certain documents between 21.9.2015 to 21.10.2015, but thereafter since certain documents were lacking, the petitioner was communicated on 7.1.2016 to furnish the remaining documents by 17.1.2016. It is contended that although certain documents had been furnished by the petitioner on 16.01.2016, but the requisite undertaking by the Holding Company, and certain clarifications, were not furnished by the petitioner. It is next contended that the communication by the MCL with M/s. S.P. Holding, Germany directly on 11.4.2016 was necessitated because of certain fresh information furnished by the petitioner on 16.01.2016 and when requisite undertaking was not furnished by M/s. S.P. Holding, Germany within the time given to them, the petitioner was required by the MCL on 8.6.2016 to furnish the required undertaking and other information, which the petitioner failed to do and merely resubmitted the communication of M/s. S.P. Holding, Germany dated 30.5.2016 to MCL on 23.06.2016, in response to the query made by MCL on 8.6.2016. Thereafter, the Tender Committee of the MCL had, on 05.07.2016, initiated proceedings for cancellation of the tender, which culminated in passing of the impugned order dated 6.10.2016, which was perfectly justified in law and in terms of the e-tender notice. It is thus contented that the writ petition is devoid of merit and liable to be dismissed.

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

6. The question as to whether furnishing of undertaking by the Holding Company, in case of a consortium, is an essential condition or not, is to be first answered/considered. Clause 6.1 (d) of the e-tender notice reads as under:

"SECTION -6
PRICE BID

6.1 BID PRICE

a)	*xxx*	*xxx*	*xxx*
b)	*xxx*	*xxx*	*xxx*
c)	*xxx*	*xxx*	*xxx*

d) In case the Bidder / Consortium Partner(s) being a Subsidiary company / JV Company, submitting its Bid on the financial strength and / or technical competence of its holding company / JV Partner(s), it has to obtain and produce a Letter of Undertaking as Exhibit-5, to the effect that in case of any untoward happenings towards the successful execution of the contract and / or event occurring that are distinct and different from the stipulated terms & conditions of the CRFQ & this Bid Document as applicable and attributable to Bidders / Consortium Partner's account, its holding company / JV Partner(s) shall be legally bound both jointly and severally to this contract for discharging all the contractual obligations on behalf of Bidder / Consortium Partner(s)."

The said clause is not under challenge in this writ petition. The question as to whether an undertaking by the Holding Company of a subsidiary company (which is a Member of the consortium) for successful execution of the contract is to be given or not, is not in dispute, as the same is clearly provided for in the aforesaid clause of the e-tender notice. Whether the same is an essential condition or a formal one, is to be considered.

7. Learned counsel for the petitioner vehemently argues that the same cannot be said to be an essential condition as the petitioner company, as Lead member of the consortium, had already given an undertaking for indemnifying any losses for successful completion of the project, as such an undertaking to be given by the Holding Company of a subsidiary company-Member of the consortium, would not be essential, because the interest of MCL is safeguarded by the undertaking given by the petitioner. In support of his submission, learned counsel for the petitioner has relied upon the decision of the Hon'ble apex Court in the case of ***Poddar Steel Corporation –v- Ganesh Engineering Works and others***, reported in (1991) 3 SCC 273 and the decision of a Division Bench of this Court in the case of ***Nestor Pharmaceuticals Limited –v- State of Odisha & another***, reported in 2017 (I) ILR-CUT-922.

8. We have gone through the aforesaid judgments relied upon by the learned counsel for the petitioner. In the case of Poddar Steel Corporation (supra), the bidders were required to submit their bids accompanied by earnest money to be deposited by cash or demand draft drawn by the State Bank of India, but the successful bidder, i.e. respondent no.1 therein, had deposited the earnest money by sending the cheque of Union Bank of India

drawn on its own branch. Thus, the question as to whether submission of cheque drawn on Union Bank of India by the successful bidder towards deposit of earnest money instead of demand draft to be drawn on State Bank of India was sufficient compliance of the condition of the tender call notice, was under consideration before the Hon'ble Apex Court. Answering the said issue, the Hon'ble Supreme Court, at paragraph-6 of the said judgment, held as follows:

> *"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank the clause no. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non- compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in GJ Fernandez v. State of Karnataka 7 Ors., [1990] 2 SCC 488 a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India & Ors., [1979] 3 SCC 489 but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the*

judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs."

In the case of *Nestor Pharmaceuticals Limited* (supra), the question as to whether the bank guarantee furnished by the bidder was strictly in the format as prescribed in the tender notice or not. The format in which a particular bank guarantee or an undertaking is to be given, may be varied, but in the present case where an undertaking is required to be given and the same has never been furnished, in any format, the question of considering the sufficiency of furnishing the said undertaking in a particular form, would not arise at all. It is true that once the essential requirement of furnishing bank guarantee or undertaking is fulfilled, this Court can go into the question as to whether the format in which the bank guarantee or undertaking has been furnished, fulfills the requirement of the tender document or not. But where the undertaking, as required in the e-tender document, has not at all been furnished, the question of this Court deciding whether the same was in proper format or not, cannot be there. Admittedly, Clause-17 of the e-tender document required furnishing of certain papers after acceptance of the bid. Along with Clause-17, the list of documents required to be furnished by the L-1 bidder has been given. In Block-A of the list of documents, at Sl. No. 6 is the requirement of undertaking by the Holding Company as per Clause 6.1 (d) of Section 6 of the bid document in format of Ext.5. Clause 6.1(d) specifically requires the undertaking by the Holding Company in the format given therein. Ext.5, which is said to be a blank page by the petitioner, is not actually a blank page, but in the page mentioned as Ext.5, it is stated that it is for an undertaking by the Holding Company as per Clause 6.1 (d) of the bid document. As such, it is clear to us that Ext.5 is for giving an undertaking by the Holding Company as per aforesaid Clause 6.1(d). Thus, the submission made by Mr. Mishra, learned Senior Counsel for the petitioner that Ext.5 in the bid documents is a blank page, is not correct, and there cannot be any confusion with regard to the same. The order dated 06.10.2016 passed by the Chairman-cum-Managing Director of MCL, impugned herein, is in continuation of the consideration as to whether the Tender Committee has given a detailed report with regard to non-furnishing of undertaking, as well as certain other informations. On the basis of the detailed report of the Tender Committee, the Chairman-cum-Managing Director has approved the recommendation of the Tender Committee (at pages 152-159) cancelling the tender and forfeiting the bid security of Rs.50.00 lakh of the petitioner. He

further approved the recommendation to the effect that re-tender is to be done, as well as the recommendation of the Tender Committee for not accepting the offer of the petitioner, in case of re-tender, as per Clause 17(b) of the notice inviting tender and also cancellation of the bid of the petitioner.

9. The principles laying down the scope of judicial review are no more res integra. The most celebrated decision in this aspect is *Tata Cellular –v- Union of India,* reported in AIR 1996 SC 11. The principles of scope of judicial review in contractual matters, laid down therein still holds the field and have been followed till today. Following the principles laid down in *Tata Cellular (supra)* and several other case laws, the Hon'ble Apex Court has summarized the following principles in ***Jagdish Mandal –v- State of Orissa and Others****, reported in (2007) 14 SCC 517* as follows:

> "19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions

10. Sri Mishra, learned Senior Counsel further submitted that no reason has been assigned in the impugned order dated 06.10.2016 justifying rejection of the bid of the petitioner, canceling of the tender as well as imposing further punishment under Clause 17(b) of the tender notice.

11. On careful perusal of records, particularly, the Tender Committee Recommendation (TCR), it is apparent that the Tender Committee has meticulously dealt with and scrutinized all technical and factual aspects and made the recommendation, as stated above, after due application of mind. The Managing Director has only approved the recommendation and passed the impugned order. No detailed/reasoned order need be passed while approving the recommendation of the Tender Committee, otherwise, it would amount to mere repetition of reasons given by the Tender Committee. The question would have been different, had the Managing Director differed/modified the TCR. In that event, the Managing Director would be required to give his own reason to justify his action. The petitioner in this case does not dispute or find any fault or short comings in the TCR. Thus, the contention of Mr. Mishra, learned Senior Counsel has no force.

12. It is further contended by the petitioner that in report of the Tender Committee, besides non-furnishing of undertaking on the letter-head of the Holding Company, the Tender Committee has also considered non-confirmation by M/s. S.P. Holding, Germany to the effect that M/s. S.P. India and M/s. S.P. China are subsidiaries of M/s. S.P. Holding, Germany. Such a certificate is said to have been given by M/s. S.P. Holding, Germany on 26.05.2014, with re-confirmation on 30.05.2016 in its communication in response to the query made on 11.04.2016, wherein it has been stated that M/s. S.P. India and M/s. S.P. China form part of Group of Companies called "Schenck Process Group". The same does not specify that M/s. SP Holding, Germany is the Holding Company of the two companies. Further, the certificate dated 26.05.2014 was issued prior to issuance of e-tender notice, and by communication dated 30.05.2016 also it was not clearly stated that it was subsidiary of M/s. S.P. Holding, Germany but only that it was a part of Schenck Process Group. As such, nowhere has it been stated that it is of subsidiary company of M/s. S.P. Holding, Germany, which was required to be given.

13. However, the same is a technical aspect. The main deficiency in furnishing of the documents by the petitioner is non-furnishing of undertaking as required by Clause 6.1 (d) of the e-tender notice. The said

undertaking has admittedly not been furnished till date, in any format, either as prescribed in the bid document or otherwise. As such, passing of the impugned order for non-compliance of such undertaking is fully justified in law. Thus, the order dated 06.10.2016 passed under Clause-17(b) of the bid document, impugned herein is also justified and does not also call for interference by this Court. Accordingly, the writ petition is dismissed. No cost.

Writ petition dismissed.

2017 (II) ILR - CUT-262

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

W.P.(C) NO. 5470 OF 2017

SONALI MAHANTA ……..Petitioner

.Vrs.

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

(A) EDUCATION – Admission into Ph.D. programme – In clause-1 of the advertisement NISER fixed 28 years for admission – Action challenged – Held, fixation of upper age limit of 28 years is arbitrary and unreasonable, hence clause-1 of the advertisement is liable to be quashed.

Ph.D. Course involves research work which requires perseverance, creativity, depth of knowledge as well as experience with academic excellence – A "research" comprises a creative work undertaken on a systematic basis in order to increase the stock of knowledge – Students undertake Ph.D. programme, not only for getting a better job but also to build up distinguished academic career and provide new vision and knowledge to the world at large – Had the research work been limited to a particular age, the world could not have seen the great scientists like Sir Isaac Newton and others – Held, NISER cannot create a restriction by fixing a ceiling in age for admission into Ph.D. programmes – Direction issued to NISER to consider the candidature of the petitioner if she is otherwise eligible for admission into Ph.D. Course. (Paras 8,10)

(B) EDUCATION – Admission into Ph.D. programme – Advertisement made for short listing of candidates without conducting entrance test – Action challenged – Short-listing of candidates on the basis of marks/scores of the UGC-NET is in conformity with clause 5.1

of the University Grants Commission (Minimum standards and procedure for award of M.Phil./ Ph.D. Degrees) Regulations, 2016 – Held, the above short-listing is permissible.

(Para 9)

For Petitioner : M/s. Ajodhya Ranjan Dash, S.K.Nanda-1, B.Mohapatra & N.Swain

For Opp.Parties : Sri A.K.Bose, Asst.Solicitor General
Sri T.K.Satpathy

Date of hearing : 15.05.17
Date of judgment : 15.05.17

JUDGMENT

K.R. MOHAPATRA,J.

The petitioner desirous of pursuing her Ph.D. Programme 2017 (Summer Session) under National Institute of Science Education and Research, Bhubaneswar (NISER) has filed this writ petition assailing certain conditions of the advertisement (Annexure-2) published for the said purpose, contending that the same are not in conformity with the Rules and guidelines applicable to NISER.

2. It is contended in the writ petition that the petitioner has completed her Master degree in English from Utkal University and is pursuing her M.Phill./Ph.D. in Linguistics under Jawaharal Nehru University (JNU). She also belongs to 'Kudmi' by caste, which was a backward community. She has also qualified the UGC-NET in Linguistics, which is an equivalent subject in English. As such, she is eligible to pursue a Ph.D. course under any leading University/ Institution of the country.

3. Pursuant to an advertisement, i.e., Advt. No. NISER/ACAD/Ph.D./2017-18(1) published by NISER (Annexure-2), the petitioner is intending to apply for the Ph.D. Programme-2017. Due to some unreasonable conditions incorporated in the advertisement under Annexure-2 she has been deprived of submitting her application and thus is constrained to file his writ petition.

4. The petitioner essentially assails the following conditions of the advertisement:

Eligibility

1. Age: Not more than 28 years on 1st April, 2017 (Born on / after 2 nd April, 1989)

xx **xx** **xx**

2. Candidates should have qualified the CSIR-UGCNET/GPAT/JEST/INSPIRE ((Doctoral fellowship under AORC Scheme/ JGEEBILS or any other equivalent national level examination, **valid for the current year** in the relevant area of research.

xx xx xx

Selection Procedure

xx **xx** **xx**

The short-listed candidates will be called for an interview, supplemented by a written test, if necessary, for the admission."

The petitioner further contends that there is no reservation of seats for backward classes, as applicable to the leading educational institutions of the country. Thus, the advertisement under Annexure-2 is not sustainable in the eye of law. Hence, she prays for setting aside the aforesaid to make to make provisions for reservation of seats for the backward classes as per the norms applicable to the educational institutions.

5. NISER through its Registrar (opp.party No.4) filed counter affidavit denying the allegations made in the writ petition. It is contended *inter alia* that fixing upper age limit in the impugned advertisement is neither discriminatory nor unreasonable nor irrational. NISER has not violated any provisions of law or UGC guidelines in fixing the upper age limit of 28 years for admission into Ph.D. Programme. Such a policy decision has been taken by the authorities of NISER giving utmost consideration to the future prospects of the students pursuing Ph.D Programmes. It is contended that on an average, a student takes five to seven years for successful completion of Ph.D. Programme and all the national Level Universities and Institutes mandate at least two to five years of post-Ph.D experience for recruitment at the entry level, such as, Assistant Professor or equivalent. Thus, keeping in view the future career prospects of a students pursuing Ph.D. Course, the upper age limit has been fixed at 28 years for enrollment into Ph.D. Programme. Further, NISER is governed by the prescribed norms and procedures for different academic programmers/courses under Homi Bhabha National Institute. Thus, the provision of Central Educational Institutions (Reservation in Admission) Act 2006 which deals with reservation policy in educational institutions could not be made applicable to NISER as per Clause 4 (b) of the Act. Accordingly, reservation in admission on the basis of caste, is not applicable toNISER. However it is conceded by NISER in the counter affidavit that the qualification of UGC-NET cannot be confined to

current year as mentioned in the advertisement as the said qualification remains valid for the upcoming years also. As such, the candidates awarded with CSIR-UGC NET-LS are eligible to pay for the Ph.D. Programme and NISER honors all such applications. So far as the selection procedure is convened, the NISER in its counter affidavit referring to Clause 5.1 of University Grants Commission (Minimum Standards and Procedure for Award of M.Phil/ Ph.D Degrees) Regulations, 2016 (for short 'the Regulations) contended that all the University / Institution deemed to be a University may decide separate terms and conditions for Ph.D. Entrance Test for those students who qualify UGC-NET etc. Thus, short-listing of candidates on the basis of the marks secured in UGC-NET followed by interview and supplemented by a written test, if necessary, for admission into Ph.D. Programme cannot be said to be arbitrary, irrational or unreasonable. Hence, the NISER prays for dismissal of the writ petition devoid of merit.

6. Learned counsel for the petitioner although raised several issues at the threshold, but taking into consideration the averments made in the counter affidavit confines his argument to the issue of fixing upper age limit at 28 years for admission into Ph.D. Programme as well as short-listing of candidates without conducting any written examination for the same. It is argued that University, like Jawaharlal Nehru University, Delhi University and Hyderabad University etc. do not have any ceiling of age for admission into Ph.D Programme/Course. Stipulation of upper age limit by NISER does not have any reasonable rexus with the object to be achieved, i.e. admission into Ph.D Programme. Acquiring Ph.D. Degree in any discipline is not meant for getting an employment only. On the other hand, it provides intellectual satisfaction and promotes academic excellence, which is a contribution to the society itself. Thus, stipulation of upper age limit in the impugned advertisement for admission in to Ph.D. Programme is irrational and discriminatory. Referring to Clause 5.1 of the Regulation, learned counsel for the petitioner submits that all the Universities and Institutions deemed to be Universities have to conduct entrance examination at the individual University/ Institution level for intake of students in Ph.D./M.Phil. Programme in different disciplines. Thus, short-listing of candidates without conducting any entrance test is arbitrary, unreasonable and *de hors* the Regulations. Hence, he prays for striking out the aforesaid two Clauses (quoted supra) from the impugned advertisement.

7. Mr. A.K.Bose, learned Assistant Solicitor General, referring to the contention raise in the counter affidavit, submits that fixation of upper age

limit for admission into Ph.D. Programme is justified and cannot be faulted with. He further submits that there is no prohibition in the Regulations or any other Rules for fixation of upper age limit for admission into a particular course. As the students primarily undertake Ph.D. for the purpose of employment, it would be helpful for them to build up their career, if they undertake such programme at an early age. As such, the policy decision of NISER, which is applicable to all the intending candidates desirous of undertaking Ph.D. course, cannot be said to be discriminatory or irrational. Further, referring to Clause 5.1 of the Regulations, Mr. Bose submits that short-listing of candidates is undertaken taking into consideration the marks secured in CSIR-UGC-NET/GATE/GPAT/JEST/INSPIRE etc. which is the basic requirement for undertaking Ph.D. course. The aforesaid examinations are national level written examination, conducted in various disciples by nationally acclaimed academic bodies, such as, CSIR, UGC, IIT, TIFR etc. This being the minimum eligibility criteria for applying for the Ph.D. Programme under NISER, there is no illegality or irregularity on short-listing the candidates basing on the marks/scores secured in such qualifying examination. Hence, he prays for dismissal of the writ petition.

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

The Ph.D. course involves research work which requires perseverance, creativity, depth of knowledge as well as experience with academic excellence. A 'research' comprises a creative work undertaken on systematic basis in order to increase the stock of knowledge of human culture and society, and the use of the said stock of knowledge to devise new applications. Students undertake Ph.D. Programme not only getting a better job offer, but also to build up distinguished academic career and provide vision and knowledge to the world at large. Had the research work been limited to a particular age, the world could not have seen the great scientists like Sir Isaac Newton, Galileo and Thomas A. Edison etc. Thus, there cannot be any reasonable nexus of fixing an upper age limit to a research work to be undertaken by a student. Further, contention of the petitioner to be the effect that leading Universities like Jawaharlal Nehru University, Delhi University or other leading Universities of the country have not fixed limit for admission into Ph.D. Courses goes uncontroverted and there is no reply to the same in the counter affidavit. The contention of Mr. Bose to the effect that there is no prohibition under the Regulation of any statute to fix an upper age limit, does not hold good, for the simple reason that when the Regulation does not provide for any upper age limit for admission into Ph.D. Programme, fixing

such a ceiling to the detriment of the intending students, is nothing but arbitrary and unreasonable. When there is no restriction of age for admission into the Ph.D. courses under the Regulations, which governs the fields for admission into Ph.D. Course, NISER cannot create a restriction by fixing a ceiling to the age for admission into Ph.D. Programmes. Thus, fixation of upper age limit of 28 years is arbitrary and unreasonable.

9. The selection procedure for admission into Ph.D. Programmes of NISER is governed by Clause 5.1 of the Regulations, which reads as follows:

> "**5. Procedure for admission:**
>
> 5.1 All Universities and institutions Deemed to be Universities shall admit M.Phil/Ph.D. students through an Entrance Test conducted at the level of Individual University/ Institution Deemed to be a University. The University/ Institution Deemed to be a University may decide separate terms and conditions for Ph.D. Entrance Test for those students who qualify UGC-NET (including JRF)/UGC-CSIR NET (including JRF)/ SLET/GATE/ teacher fellowship holder or have passed M.Phil Programme. Similar approach may have be adopted in respect of Entrance Test for M.Phil programme".

It provides that an entrance test ha to be conducted by the respective Institute governed under the Regulations for admission into Ph.D. Course. It further provides that such institution may decide separate terms and conditions for Ph.D. entrance test for the students, who are qualified in UGC-NET etc. In the instant case, NISER has undertaken mode of short-listing candidates by taking into consideration the marks/scores secured by the candidates in the examination of CSIR-UGC/NET/GATE/GPAT/JEST/INSPIRE etc., which is the basic requirement for admission into Ph.D. course. The same is followed by interview and supplemented by written test. The petitioner takes exception to the process of short-listing the candidates without any entrance examination. However, learned counsel for the petitioner admits that after short-listing of the candidates, a written examination would be heldfor admission into Ph.D.Programme.Thus, the contention of larnned counsel for the petitioner cannot be accepted. In our considered opinion, short-listing of candidates on the basis of marks/ scores of the UGC-NET, is conformity with Clause-5.1 of the Regulation.

10. In that view of the matter, we set aside Clause-1 of the advertisement, i.e 'Eligibility' criteria which relates to the upper age limit of the candidates and hold that there cannot be any upper age limit for admission into

Ph.D.Programme under NISER. Accordingly, we direct that the candidature for the petitioner shall be considered by the NISER, if she is otherwise eligible for admission into Ph.D. Course pursuant to the advertisement.

11. This writ petition is allowed to the extent stated above.

Writ petition allowed.

2017 (II) ILR - CUT- 268

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

W.P.(C) NO. 5411 OF 2017

SANTOSH KUMAR SADANGI .....Petitioner

.Vrs.

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

TENDER – All the terms and conditions of the tender call notice may not be followed in meticulous detail in its literal term, which can be liberalized/ relaxed at the discretion of the authority.

In this case owing to tender call notice the petitioner is required to submit fitness certificate of his two vehicles issued by the transport department alongwith his technical bid – Since he submitted fitness certificate in respect of one vehicle and copy of registration volume issued by the RTO in respect of the other vehicle his technical bid was cancelled – Hence the writ petition – Clause 1.9 of the tender paper confers power on the District Tender Committee to allow reasonable time to the tenderer for production of original document which was not followed though the petitioner was otherwise qualified – Held, rejection of the technical bid of the petitioner is arbitrary, unreasonable, hence the same is setaside – Direction issued to the District Tender Committee to open the price bid of the petitioner alongwith others and proceed with the matter in accordance with law.

(Paras 7,8,9)

Case Laws Referred to :-

1. AIR 1991 SC 1579 : M/s Poddar Steel Corporation vs. M/s. Ganesh Engineering Works.
2. 2013 (6) Supreme 521 : Rashmi Metaliks Ltd. vs. Kolkata Metropolitan Development Authority.

For Petitioner : M/s. Anjan Kumar Biswal & R.K.Muduli.
For Opp. Parties : Additional Government Advocate
Mr. B.Sahoo

Date of Judgment: 23.06.2017

JUDGMENT

K.R. MOHAPATRA, J.

The petitioner, in this writ petition, seeks for a direction to set aside the decision of the authorities under Odisha State Civil Supplies Corporation (for short, 'the Corporation') in rejecting his technical bid for appointment of "Level-II Transport Contractor for Transportation of Food Grains from Rice Receiving Centre-cum-Departmental Storage Centres to Retail Centres" (for short, 'the Level-II Transport Contractor') as well as for a direction to open and consider his price bid for the said tender.

2. The averments in the writ petition reveal that pursuant to a Tender Call Notice dated 09.03.2017 for appointment of Level-II Transport Contractor, the petitioner submitted his bid along with relevant documents in respect of Berhampur Municipal Corporation as well as Sorada and Dharakot blocks. As per the schedule, the technical bid was opened on 23.03.2017 in presence of all the bidders and their representatives. The technical bid of the petitioner in respect of all the three units were rejected on the ground that there was no valid fitness certificate of the vehicle of the petitioner bearing registration No.OR 10 G 5541 and instead a copy of the registration volume of the said vehicle, obtained from R.T.O., Koraput, was produced, which was not acceptable. The same was verbally intimated to the petitioner. The representations of the petitioner in this regard were also not considered. As per the tender condition, the petitioner had documents of two vehicles owned by him, out of which fitness certificate in respect of vehicle No.OR 10 C 7657, produced by the petitioner, was valid up to 27.03.2017. Since the original fitness certificate of vehicle No.OR 10 G 5541 was misplaced at the relevant time, the petitioner had submitted a copy of the registration volume granted by the RTO, Koraput, which disclosed that the fitness of the said vehicle was valid till 21.04.2017. The petitioner however obtained fitness certificate of the said vehicle in prescribed form subsequently and submitted it before the authorities of the Corporation, which was not accepted as by that time the technical bid of the petitioner had already been rejected. Thus, it is contended in the writ petition that action of the opposite parties in

rejecting the bid of the petitioner is arbitrary and unreasonable. Hence, the writ petitioner seeks the aforesaid relief.

3. The Corporation filed its counter affidavit refuting contentions made in the writ petition. It is contended, inter alia, that although the petitioner had submitted the fitness certificate in respect of vehicle No.OR 10 C 7657, which was valid up to 27.03.2017, he had not submitted the fitness certificate in prescribed form in respect of vehicle No.OR 10 G 5541. On the other hand, he had submitted a copy of the registration volume of the vehicle issued by the RTO, Koraput. Since the fitness certificate in prescribed form was not produced along with tender papers and a copy of the registration volume of the said vehicle issued by the RTO, Koraput was enclosed to his technical bid, the same was not accepted. The certificate of fitness is being issued under Rule-22 of the Orissa Mover Vehicles Rules, 1993 (for short, 'OMV Rules'). Rule-22(1) of the said Rules prescribes that the certificate of fitness shall be granted or renewed by an Inspector of Motor Vehicles or Junior Inspector of Motor Vehicles or any person authorized by State Government for the said purpose. Clause-7 of the Tender Call Notice clearly provided that the statement of own vehicles along with attested photocopies of the registration certificate and fitness certificate issued by the Transport Department had to be attached to the technical bid. Further, Clause-2.3 provides that in case any document, as per the check list (Annexure-II to the Tender Call Notice), is not attached to the technical bid, then the tender papers can be rejected on that count alone. As such, the bid of the petitioner was not technically qualified to be considered for appointment of Level-II Transport Contractor. The same was also intimated to him verbally as per Clause-12 of the guidelines provided by the State Government. In that view of the matter, the writ petition would not be maintainable and is liable to be dismissed.

4. Heard learned counsel for the parties and perused the records, more particularly relevant provisions of the Tender Call Notice, which are relevant for adjudication of the case. Taking into consideration the contentions raised in the pleadings as well as submissions made by learned counsel for the parties, the only question that requires adjudication is that whether the submission of copy of registration volume of the vehicle bearing registration No.OR 10 G 5541, which disclosed that the fitness of said vehicle is valid up to 21.04.2017, is sufficient compliance of the terms and conditions of the Tender Call Notice.

Clause-7.1 of the Tender Call Notice reads as follows:

"7. **Requirement of vehicles**:

7.1 The tenderer shall have minimum 02 (Two) number of Transport Vehicles registered in his /her name/in the name of the family members. Additional requirement of vehicles can be availed on hire basis. A statement of own vehicles along with the attested photocopies of the Registration Certificate and Fitness Certificate issued by the Transport Department has to be attached to the Technical Bid." (*emphasis supplied*)

As per requirements of Clause-7.1, in addition to the attested photocopy of the registration certificate, the petitioner was required to enclose a copy of the fitness certificate issued by the Transport Department relating to his vehicles along with the Technical Bid. Admittedly, the petitioner had not submitted the fitness certificate of his vehicle No.OR 10 G 5541 and had submitted a copy of the registration volume issued by the RTO, Koraput in respect of the said vehicle along with technical bid. However, the fitness certificate in respect of vehicle No.OR 10 C 7657 was enclosed with his Technical Bid. The District Tender Committee did not accept copy of the registration volume of vehicle No.OR 10 G 5541, as sufficient compliance of production of the fitness certificate and rejected the technical bid of the petitioner as it fell short of minimum requirement of two transport vehicles registered in the name of the petitioner.

5. It is submitted by Mr.Biswal, learned counsel for the petitioner that production of the copy of the registration volume of the vehicle in respect of vehicle No.OR 10 G 5541 issued by the RTO, Koraput on 17.05.2017 and produced along with his technical bid, should have been treated to be sufficient compliance of submission of fitness certificate. The copy of the registration volume of the said vehicle clearly disclosed that it had a valid fitness for the relevant period. As the copy of the fitness certificate of the vehicle in question was lost, the petitioner had obtained the copy of the registration volume of the said vehicle on 17.05.2017 and produced it along with his technical bid. The Corporation in its counter affidavit has not disputed either the genuineness of the copy of the registration volume or the validity of the fitness of the said vehicle of the petitioner. It being hyper-technical, rejected the technical bid of the petitioner without providing any reasonable opportunity to make good the said minor deficiency. The learned counsel for the petitioner also relied upon Clause-15 of the Tender Call Notice, which reads as follows:

"15. **Clerical errors or omission(s) committed by the tenderer** :
In case of any clerical error or minor omission(s) in the tender paper, the District Tender Committee may take a suitable decision keeping in view the intension of the tenderer, if s/he is otherwise qualified."

(*emphasis supplied*)

Referring to the said Clause, it is submitted that the District Tender Committee could have taken a suitable decision in favour of the petitioner keeping in view his *bona fide* intention to participate in the tender. He further contended that as per Clause-1.9 of the Tender Call Notice, the District Tender Committee could have given reasonable time to the tenderer for production of the original documents, i.e., the fitness certificate of his vehicle, as he was otherwise qualified.

6. Mr.Sahoo, learned counsel for the Corporation, on the other hand, reiterating the contentions raised in the counter affidavit, submitted that technical bid of the petitioner was defective, inasmuch as, he had not enclosed the attested copy of the fitness certificate of his vehicle to it. Referring to Clause-2.3 of the Tender Call Notice, he submitted that in case any documents as per the check list (Annexure-II to the Tender Call Notice) is not attached to the technical bid, the bid shall be rejected out-right. It is submitted that since the petitioner had not produced the fitness certificate in question, the District Tender Committee had no other option but to reject his technical bid. Rule-22(1) of the OMV Rules provides that the Inspector of the Motor Vehicles/Junior Inspector of the motor vehicles or any person authorized in that behalf can issue a fitness certificate in prescribed form. Admittedly, the RTO is not the authority to issue a fitness certificate. Thus, a copy of the registration volume of the vehicle in question issued by RTO, Koraput cannot be treated to be sufficient compliance of production of the fitness certificate as per the check list. The petitioner had also never requested to produce the fitness certificate in question at the time of verification of the technical bid. Thus, the authorities had no other option but to reject his technical bid. Clause-7 (quoted supra) of the tender paper deals with requirement of vehicles. It provides that a tenderer shall have minimum two numbers of transport vehicles registered in his name. He has to submit a statement of his own vehicle along with attested copy of registration certificate as well as fitness certificate in respect of the said vehicles along with technical bid. The petitioner had, in fact, submitted copies of registration certificates in respect of the vehicles bearing No. OR 10 C 7657 and OR 10 G 5541. He, however could not produce fitness certificate in

respect of the vehicle bearing No.OR 10 G 5541. The copy of the registration volume of the said vehicle disclosed that the fitness certificate of the said vehicle was valid up to 21.04.2017. The District Tender Committee did not accept the same on two grounds, viz.

(i) it is not in Prescribed form of the OMV Rules;

(ii) the RTO, Koraput is not the authority to issue such certificate.

7. In order to assess correctness of the decision taken by the District Tender Committee, it is relevant to refer Clause-15 of the Tender Call Notice (quoted supra), which clearly stipulates that in case of minor omission(s), the District Tender Committee has the discretion to take a suitable decision keeping in view the intention of the tenderer, if he is otherwise qualified. It is not the case of the Corporation that the petitioner had ever made any endeavour or attempt to create any hindrance in the process of tender. Thus, the intention of the petitioner is clear in participating in the process of tender.

In such a situation, the ratio decided in ***M/s Poddar Steel Corporation vs. M/s. Ganesh Engineering Works***, AIR 1991 SC 1579, would be of great assistance for adjudicating the issue. In the said case, a tenderer was required to deposit the earnest money by banker's cheque of State Bank of India, but the tenderer had submitted the cheque of Union Bank of India duly authenticated by the Bank and bank's assurance to honour the same was also obtained. While answering the issue, at paragraph-6 of the said judgment, the Honble Supreme Court held as follow:

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

> be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

In the case of ***Rashmi Metaliks Ltd. vs. Kolkata Metropolitan Development Authority***, 2013 (6) Supreme 521, the tenderer was required to submit the latest income tax return with the tender papers, which was not filed. Discussing the facts and circumstances of the said case, the Hon'ble Supreme Court held that the income tax return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was attracted. In paragraph -13 of the said judgment, the Hon'ble Supreme Court held as follows:

> "….the filing of the latest Income Tax Return was a collateral term, and accordingly the Tendering Authority ought to have brought this discrepancy to the notice of the Appellant company and if even thereafter no rectification had been carried out, the position may have been appreciably different…"

In the instant case, Clause 7.1 of the tender condition made it clear that the tenderer should have minimum two numbers of transport vehicles in his/her name or in the name of his family member(s). The same is an essential condition to be complied with by the tenderer. Submission of attested photocopy of fitness certificate of the vehicle was also required to be produced along with technical bid. The petitioner had submitted documents to the effect that the vehicle had valid fitness for the relevant period. According to the petitioner, the copy of the registration volume of the vehicle was submitted along with the technical bid, as fitness certificate of the vehicle was misplaced. The Corporation does not challenge the genuineness of the copy of the registration volume but refused to accept the same, as according to it, the fitness certificate ought to have been issued by the Inspector of Motor Vehicles in the prescribed form and the copy of the registration volume was issued by the RTO, Koraput, who was not the authority to issue fitness certificate under the OMV Rules. The RTO maintains the registration volume of each vehicle registered in the concerned district, which also contains details, including fitness of the vehicle. RTO is an authority higher in rank to that of the Inspector of Motor Vehicles. Thus, the information supplied by him, which is borne out from the record of the vehicle prepared in course of due discharge of his duties, could not have been ignored on a hyper-technical plea.

Taking into consideration the view expressed in the case of *Poddar Steels (supra),* it can be safely said that all the terms and conditions of the Tender Call Notice may not be followed in meticulous detail in its literal term. The condition of the Tender Call Notice can be liberalized/relaxed at the discretion of the authority, namely, the District Tender Committee to achieve the object for which the tender is floated. In the instant case, Clause-15 of the Tender Call Notice (quoted supra) also gives such a discretion to District Tender Committee. But as it appears, the District Tender Committee has failed to exercise the discretion conferred on it.

8. Clause 1.9 of the tender paper also confers power on the District Tender Committee to give tenderer a reasonable time for production of the original documents as per his/her request on genuine ground. In the instant case, the petitioner has made out a case of not producing fitness certificate along with technical bid, for which he had produced copy of the registration volume of the vehicle. Intention of the petitioner was also very much clear to participate in the tender.

9. Taking into consideration the discussions made above, we are of the view that rejection of the technical bid of the petitioner by the District Tender Committee was arbitrary and unreasonable and the same is accordingly set aside. We, accordingly, direct the District Tender Committee to open the price bid of the petitioner along with others and proceed with the matter in accordance with law.

10. The writ petition is allowed to the extent stated above. No costs.

Writ petition allowed.

2017 (II) ILR - CUT- 275

INDRAJIT MAHANTY, J & BISWAJIT MOHANTY, J.

O.J.C. NO. 8352 OF 2000

STATE OF ORISSA & ORS. ……..,Petitioners

.Vrs.

GANESH CH. JENA & ORS. …….Opp. Parties

SERVICE LAW – Opposite Parties claim payment of Project Allowance/ Construction allowance for the period they worked in the forest area i.e. Sunei Irrigation Project, where there is no school, market or dispensary – Tribunal allowed their prayer – State

Government challenged the order – Industrial Tribunal allowed similar prayer to the employees of Ramiala Irrigation Project which is a Medium Irrigation Project similar to Sunei Irrigation Project and the award was upheld by this Court as well as the Apex Court – Tribunal not acted beyond its jurisdiction by allowing the original application – Held, there being no infirmity in the impugned order passed by the Tribunal this Court is not inclined to interfere with the same.

(Paras 6,7)

For Petitioner : Mr. M. Sahu (Addl. Govt. Adv.)

For Opp. Parties : M/s. Srinivas Mishra(1),Sarojananda Mishra, B.Dash, B.N.Mishra, N.K.Dash & R.C.Praharaj.
M/s. H,M. Dhal, L. Pani & P.K.Tripathy
M/s. S.K.Parida S.Dash & P.K.Patra

Date of Judgment : 31.03.2017

JUDGMENT

BISWAJIT MOHANTY, J.

In this writ application, the petitioners have prayed for quashing of the impugned order dated 28.6.1999 passed by the learned Orissa Administrative Tribunal, Bhubaneswar in O.A. No.72 of 1988.

2. The opposite parties filed O.A. No.72 of 1988 before the Orissa Administrative Tribunal with a prayer for payment of Project Allowance/Construction Allowance for the period they worked in the Sunei Irrigation Project. According to the opposite parties, Sunei Irrigation Project started from 1.5.1978 was a Medium Irrigation Project and it started functioning in inhospitable climate in the forest area in the district of Mayurbhanj. It was situated at a distance of about 25 Kms. from the nearest town. There was no school for the children of the opposite parties and no shops or markets or dispensary was available within 25 Kms. In such background, they demanded payment of Project Allowance/Construction Allowance as is being paid to the employees of all Major Projects in the State in consideration of the difficulties faced by the employees at the project sites. According to the opposite parties, when they made their demand, they were assured by the authorities that similar matter with regard to the Medium Irrigation Project like Ramiala Irrigation Project was pending disposal before the Industrial Tribunal and they have to wait till award is pronounced by that Tribunal. During December, 1980, the Industrial Tribunal in I.D. Case No.18 of 1980 allowed payment of Project Allowance/Construction Allowance to

the employees of Ramiala Irrigation Project. The present petitioners challenged the said award before this Court, which was dismissed by this Court. Ultimately, the State carried the matter to the Hon'ble Supreme Court and Hon'ble Supreme Court upheld the Award of the Industrial Tribunal. Ultimately the employees/workmen of Ramiala Irrigation Project which according to the opposite parties was a Medium Irrigation Project, were allowed the benefits of Project Allowance/Special Construction Allowance for the period of from 4.2.1975 to 28.2.1979. In such background, the opposite parties again represented to the authorities to allow the benefits of the Project Allowance as has been done in the case of the employees/workmen of Ramiala Irrigation Project. Since the approaches and pleas of the opposite parties at different levels remained unheeded, they approached the Orissa Administrative Tribunal by filing O.A. No.72 of 1988 for redressal of their grievances.

In reply before the Orissa Administrative Tribunal, the present petitioners relied on the memorandum dated 12.3.1963 by which Project Allowance was allowed to the staff employed in construction of Paradeep Port Project and Express-way Project etc. The said office memorandum is annexed as Annexure-1 in the present writ application. But a reading of the said memorandum reveals that it is only confined to the staff employed in construction of Paradeep Port Project and Express-way Project and this has nothing to do with the employees working in the Medium Irrigation Projects. There the petitioners also relied on Annexure-2, which deals with Project Allowance/Special Construction Allowance to the staff employed in construction of Major Irrigation/Power Projects. It has been made clear there that Project Allowance and Special Construction Allowance would be sanctioned only if execution of project involves establishment of a large construction organization and the construction is spread over a number of years. The above noted allowance was intended not only to compensate the staff for lack of amenities such as housing, schools, market, dispensaries but also to provide incentive for arduous nature of work in the major projects where timely completion is of utmost importance. Accordingly, a plea was advanced that the Project Allowance/Special Construction Allowance is only for Major Irrigation Project and since Sunei Irrigation Project where the opposite parties stated to have worked, is not a Major Irrigation Project, they are not entitled to Project Allowance/Special Construction Allowance. According to the petitioners the case of Ramiala Irrigation Project was totally different from that of Sunei Irrigation Project and there could not be any

comparison between the two projects as the two projects stood in different footings.

3. Learned Orissa Administrative Tribunal after applying its mind to the submissions made by both parties allowed the Original Application in favour of the opposite parties after coming to a finding that since the employees of Ramiala Irrigation Project which is a Medium Irrigation Project have been sanctioned Project Allowance/Special Construction Allowance under award of the Industrial Tribunal, which attained finality after dismissal of O.J.C. No.2330 of 1983 by the High Court of Orissa and dismissal of the S.L.P. (Civil) No.5570 of 1984 by the Apex Court and since the working conditions in all Medium Irrigation Projects are more or less similar, there can be no conceivable reason to deny Project Allowance/Special Construction Allowance to the opposite parties, who have worked in Sunei Irrigation Project, which is also a Medium Irrigation Project. Accordingly, learned Tribunal held that the opposite parties were entitled to Project Allowance/Special Construction Allowance at the same rate as has been paid to the employees of Ramiala Medium Irrigation Project under the award of Industrial Tribunal.

4. Challenging the order of the learned Orissa Administrative Tribunal, Mr. Sahu, learned Addl. Government Advocate submitted that the case of the employees of Sunei Irrigation Project to which opposite parties belong is different from the case of Ramiala Irrigation Project and he also submitted that as per office memorandum dated 22.9.1979 (Annexure-2) only the employees of Major Irrigation Project are entitled to Project allowance and Special Construction Allowance and since Sunei Irrigation Project is a Medium Irrigation Project, the learned Tribunal erred in allowing their Original Application and directing payment of Project Allowance/Special Construction Allowance to the opposite parties. Learned counsel for the opposite parties on the other hand defended the impugned order of the learned Tribunal and submitted that since the Sunei Irrigation Project is a Medium Irrigation Project like Ramiala Irrigation Project and since Sunei Irrigation Project was functioning in inhospitable climate in the forest area with no school, no shops and no markets within 25 Kms. the Tribunal has done no wrong in allowing the claim of the opposite parties.

5. Perused the impugned order and L.C.R., which includes the evidence of opposite party nos.1 and 14 recorded by the learned Tribunal.

6. From an analysis of materials available on record, it is clear that there is no dispute that Sunei Irrigation Project is a Medium Irrigation Project like Ramiala Irrigation Project and once Project Allowance/Special Construction Allowance have been allowed to the employees of Ramiala Irrigation Project pursuant to the orders of the Industrial Tribunal as confirmed by this Court as well as the Hon'ble Supreme Court, there is no earthly reason for not allowing the said benefits to the opposite parties for the period they have worked at Sunei Irrigation Project. The learned Tribunal has rightly held that though the office memorandum under Annexure-2 allowed Project Allowance/Special Construction Allowance to the employees of Major Irrigation Project on the ground that such a scheme was intended not only to compensate the staff for lack of amenities such as housing, schools, market, dispensaries but also to provide incentive for arduous work, such considerations are all the more applicable to the staff of Medium Projects because where Major Projects are undertaken, as a larger number of employees are engaged, practically new townships develop at the project sites and various staff amenities like hospital, dispensary, school, market etc. come up, but in case of Medium Projects, which are of relatively smaller dimensions, engaging lesser number of staff though not taking less time for completion, no such townships develop. The employees of the Medium Project like Sunei Irrigation Project, which is inside dense forest, were not provided with proper accommodation as per the evidence of opposite party no.1. In his evidence opposite party no.1 has also made it clear that there existed no facility for treatment of ailing workers or even for first aid treatment. There existed no medicine shop. Most of the workers suffered from malaria. No regular school was provided by the authorities. Though the villagers started a High School, there was no teacher there. Therefore, the learned Tribunal correctly held that the Project Allowance/Special Construction Allowance is all the more required for the staff of Medium Irrigation Project as an incentive for arduous work.

7. Considering all the above noted things, this Court is of the opinion that there exists no error apparent on the face of the impugned order and that the learned Tribunal has not acted beyond its jurisdiction by allowing the Original Application, and as such, we are not inclined to issue a writ of certiorari for quashing the impugned order. Accordingly,the writ application is dismissed. The order of stay dated 4.5.2001 stands vacated. The petitioners are directed to comply with the impugned order dated 28.6.1999 within three months. No costs. Send back the L.C.R. forthwith.

Writ application dismissed.

2017 (II) ILR - CUT- 280

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

W.P.(C) NO(s). 14105 OF 2016
WITH BATCH

SNIGDHA PANIGRAHI .....Petitioner

.Vrs.

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

ODISHA EDUCATION SERVICE (COLLEGE BRANCH) RECRUITMENT RULES, 1990 – RULES 4(2)(d), 5

Advertisement made by O.P.S.C. Dt. 24.06.2013 for recruitment of lecturers on the basis of career assessment and viva voce – Condition No. 6 of the advertisement provides power to screen out candidates basing on career marks starting from Matriculation till Post Graduation, ignoring higher qualifications such as Ph.D, Research activities, M.Phil degree and teaching experience – Candidates screened out and not been called for interview have challenged condition No. 6 before the Tribunal – Tribunal quashed the preliminary selection adopted by the O.P.S.C – Hence the writ petitions – Rule 5 of the recruitment Rules, 1990 confer power upon the commission to screen out candidates which was not amended till the date of advertisement – Even if Rule 5 was substituted vide notification Dt. 29.10.2013 deleting screening of candidates, the same has no application to the advertisement in question – So condition No. 6 of the advertisement is in pursuance to the provision of Recruitment Rules, 1990 as well as the provision of Regulation 6.1.0 of the notification Dt. 13.06.2013 – As a matter of fact a candidate having no good academic record can not impart teaching in the best way to maintain standard in education – Moreover, once a candidate participates in the selection process, can not turn around to question the method of selection – Held, the Commission has not erred in adopting the process of screening to focus upon more meritorious candidates, in order to choose best amongst all which is the purpose of Article 16 of the Constitution of India – Process for screening out the candidates is approved – Finding of the Tribunal to that effect is set aside – Direction issued to O.P.S.C. to proceed with the recruitment.

(Paras 21 to 25)

Case Laws Referred to :-

1. 1998 (II) OLR 502 : Dr. Tophan Pati Vrs. State of Orissa & Ors.
2. (2005) 3 SCC 212 : Government of Andhra Pradesh Vrs. J. B. Educational Soceity & Anr.
3. 1988 (Supp) SCC 82 : National Engineering Industries Ltd. Vrs. Shri kishan Bhageria & Ors.
4. 2013 8 SCC 633 : Jagdish Prasad Sharma and Others Vrs. State of Bihar & Ors.

5. AIR 2015 SC 1976 : P. Suseela & Others Vrs. University Grants Commission & Ors.
6. 1985 4 SCC 417 : Ashok Kumar Yadav & Ors Vrs. State of Haryana & Ors.
7. (1997) 3 SCC 124 : Osmania University, represented by its Registrar, Hyderabad, A.P. Vrs. Abdul Rayees Khan &Anr.
8. (2011) 1 SCC 150 : Vijendra Kumar Verma Vrs. Public Service Commission,uttarkhand & Ors.
9. AIR 2013 SC 1601 : Arunachal Pradesh Public Service Commission & Another Vrs.Tage habung and Ors.
10. (1976) 3 SCC 585 : Dr. G. Sarana Vrs. University of Lucknow & Ors.
11. (1995) 3 SCC 486 : Madan Lal & Ors. Vrs. State of Jammu and Kashmir and Ors.
12. (2010) 12 SCC 576 : Manish Kumar Shahi Vrs. State of Bihar.

For Petitioner : M/s. Budhadev Routray, Sr. Advocate, S. Das, R. P. Dalai, S. Jena, A. K. Mohanty, S. K. Samal, S. P. Nath, S. D. Routray

Mr. R. K. Rath, Sr. Advocate, Mrs. Pami Rath, N. R. Rout, J. P. Behera
Mr. M. S. Sahoo, AGA.
M/s. Jagannath Patnaik, Sr. Advocate, B. Mohanty, T. K. Pattnayak, A. Pattnaik, S. Pattnaik

For Opp.Parties :Mr. Pradipta Kumar Mohanty, Sr. Advocate, D. N. Mohapatra, Smt. J. Mohanty, P. K. Nayak, S. N. Das, A. Das, P.K. Pasayat.
M/s. Biswa Bihari Mohanty, J. N. Panda, M. Harichandan, B. Tripathy, B. Samantaray.
M/s. J. K. Mishra, Sr. Advocate, P.C. Behera, S. S. Mohanty.
M/s. J. Pradhan, S. Rout, P.K. Jena, Mis. P.S. Mohanty.
M/s. Biswa Bihari Mohanty, J. N. Panda, M. Harichandan, B. Tripathy, M/s. Samir Kumar Mishra, J. Pradhan, S. Rout, P.S. Mohanty, G. Pattnaik
M/s. S. Das, R. P. Dalai, K. Mohanty, S. Jena, S. D. Routray
M/s. Jagannath Patnaik, Sr. Advocate, B. Mohanty, T. K. Pattnayak, A. Pattnaik, S. Pattnaik
M/s. Srinibash Satapathy, S. K. Behera, S. S. Panda & P. K. Nayak
M/s. Debasis Mahakud, B. S. Rayagur, P. K. Mohanty

Date of hearing : 10.05.2017
Date of judgment : 18.05.2017

JUDGMENT

S. N. PRASAD, J.

In all these writ petitions since similar question is involved, as such directed to be heard together, accordingly the matters have been heard together and are being disposed of by this common order.

In these writ petitions the orders passed by the Odisha Administrative Tribunal in several original applications dtd.25.7.2016 are under judicial scrutiny wherein the Tribunal has adjudicated the legality and propriety of condition no.6 of the advertisement in question and the process of selection made in pursuance thereto, (the original applications are O.A. Nos.744, 767, 794, 767, 768, 688, 601, 254(C), 137, 138, 605, 619, 953(C), 2156(C) and 2270 of 2015).

2. The facts leading to the instant writ petitions are that one advertisement was issued on 24.06.2013 inviting applications for recruitment of 281 posts of Lecturers in different disciplines under Group-A of Odisha Education Service (College Branch) of Government Degree Colleges of the State under the Department of Higher Education in the scale of pay of Rs.15,600/-39,100/- carrying Academic Grade Pay of Rs.6,000/- with usual dearness allowances as may be sanctioned by the State Government from time to time reflecting therein the different numbers of vacancies in different disciplines with the reference of minimum educational qualification, method of selection and other conditions stipulated therein.

The advertisement which contains the method of selection provides that the selection of candidates for recruitment to the posts will be made on the basis of career assessment and viva voce. The Commission at their discretion has preserved their rights to shortlist the candidates to a reasonable number for conducting interview by making a preliminary selection on the basis of evaluation of their academic career taking into account the requisite minimum educational qualification.

The eligible candidates have submitted their online application in terms of the advertisement in question being advertisement No.5 of 2013-14 published by Odisha Public Service Commission (in short the Commission). The Commission has followed the method of selection by screening the number of candidates on the basis of evaluation of their academic career and thereafter called upon the candidates who have been found to be up to mark on the basis of evaluation of their career taking into account the requisite minimum educational qualification. The candidates, who have been screened out, have not been called upon to appear in the interview, as such they being aggrieved with the decision of the Commission for screening them out, have approached the Tribunal challenging the Clause No.6 of the advertisement in question, as also questioning the decision of the Commission with regard to the process adopted by it to screen out their candidature taking into account the academic qualification from Matriculation till Post Graduate, ignoring higher qualification such as Ph.D , Research Activities, M.Phil Degree and teaching experience, which according to them was in violation of the University Grants Commission guidelines which are mandatorily to be followed, as such rejection of their candidature is illegal.

3. The candidates who approached the Tribunal against the rejection of their candidature have taken the ground before it that the advertisement in question stipulates a condition under the heading 'Educational Qualification' that a candidate should possess Master's Degree in the concerned subject from a recognized University with at least 55% of marks or its equivalent grade with a 2nd Class in Bachelor's Degree along with NET, Ph.D Degree as required under the University Grants Commission (Minimum Standards and Procedure for award of Ph.D Degree) Regulations, 2009 and as such rejecting their candidature is in violation of the University Grants Commission Regulations, 2010 (in short UGC Regulations, 2009).

The other ground assailing the decision of the Commission in rejecting their candidature is that the reliance put by the Commission under the Orissa Education Service (College Branch) Recruitment Rules, 1990 is absolutely illegal being not in consonance with the UGC Regulations, 2010, as such giving go bye to the UGC Regulations, in consideration of their candidature and putting reliance upon the Recruitment Rules, 1990 is incorrect decision of the authorities due to which they have suffered since their candidature has been rejected at the thresh hold on the basis of the condition mentioned in clause No.6 and as such they have also assailed the condition No.6 of the advertisement in question, whereby and where under their screening out has been done by evaluating their academic career.

It has been urged that the UGC Regulations, will prevail upon the statute in view of the fact that UGC regulation is applicable to every University established or incorporated by or under a Central Act, Provincial Act or a State Act, every institution including a constituent or an affiliated College recognized by the Commission, in consultation with the University concerned under clause(f) of Section 2 of the University Grants Commission Act, 1956 and every institution deemed to be University U/s.3 of the said Act, and since the advertisement has been published inviting online applications to fill up the post of Lecturers in the Government Colleges, hence the provision of UGC Regulations, 2009 will be applicable, which provides the method of selection under clause No.6.1.0 which will be transparent, objective and credible methodology of analysis of merits and credentials of the applicants based on weightages given to the performance of candidates in different relevant dimensions and his / her performance on a scoring system proforma, based on the Academic Performance Indicators (API) as provided in the regulations in tables I to IX of Appendix III, provided that API scores will be used for screening purpose only and will have no bearing on expert assessment of candidates in Direct Recruitment / CAS, provided further that the API score claim of each of the sub-categories in the Category III will have the cap to calculate the total API score claim for Direct Recruitment category wise, as such according to the candidates whose candidature has been screened out, the Commission ought to have taken into consideration while screening out their candidature on the basis of API in

place of evaluating it by their Academic career. On these grounds the rejected candidates have approached the tribunal.

The tribunal has formulated four issues, while approving the action of the Commission for short listing of candidates, the procedure of preliminary selection adopted by the Commission has been quashed holding the process of screening out to be incorrect.

4. The said order has been challenged by the Public Service Commission in series of writ petitions on the ground that the Tribunal, while fixing the four issues, while answering the issue to the effect as to whether the impugned para 6 of the advertisement dtd.24.06.2013 issued by the OPSC prescribing short listing is violating of Recruitment Rules, 1990 as amended from time to time, the same has been answered in favour of the candidates whose candidature has been rejected by holding that the procedure adopted for short listing the candidature of candidates is not in accordance with para 6 of the advertisement, the Commission has challenged the said order on this specific finding since the other issues have been answered in its favour.

The ground of challenge is that the advertisement has been published on 24.6.2013 inviting online applications to fill up the post of Lecturers in different discipline. The advertisement contains the minimum educational qualification under clause no.3 and the method of selection is under clause no.6 by which the discretion has been given to the Commission to short list the candidates to a reasonable number for conducting interview by making a preliminary selection on the basis of evaluation of their Academic career.

According to him clause No.6 of the advertisement is in consonance with the provision of Recruitment Rules, 1990 wherein under Rule 4(d) the minimum qualification has been provided to the effect that he / she should have a Master's Degree in the relevant subject from a recognized University with at least 55% of marks or its equivalent grade and good Academic record, while Rule 5 provides the power to select through the Commission by screening out applications for calling candidates to appear in the interview.

By putting reliance upon these two provisions of law, it has been submitted that the statute provides to assess the candidature of one or the other candidates along with the minimum qualification with good Academic record with the power to adopt a procedure to screen out applications for calling candidates to appear in the interview and this statutory provision has not been amended in the subsequent amended Rules notified on 25th February, 1993, 8th December, 1995 and as such the Commission has followed the procedure to assess the candidature of one or the other candidates for short listing, has adopted the principle to assess their academic career and on the basis of the same the candidature of the candidates have been rejected, thereafter the candidates who have found to be up to mark after evaluation

of their academic career, have been called upon to participate in the interview and subsequently they have been found to be successful, hence it cannot be said that the Commission has acted arbitrarily and without any authority of law.

Submission has been made that the procedure adopted by the Commission is for all in a uniform way, hence it cannot be said that the Commission has adopted pick and choose policy, rather the Commission, in a very transparent and fair way, has stipulated the said condition in clause No.6 of the advertisement in question, but the candidates whose candidature has been rejected, have never questioned the said clause of the advertisement before participating in the selection process and when their candidature has been rejected, then only they have challenged the very clause before the Tribunal and the same has been entertained by it which according to the learned Senior Counsel representing the Commission, cannot be said to be proper on the part of the Tribunal on the basis of the principle that once a candidate has participated in the selection process he will cease to challenge the terms and conditions of the advertisement.

He submits that the clause No.6 of the advertisement in question is in terms of the provision of Recruitment Rules, 1990 under its provision of Rule 4(2)(d) and Rule 5 as also UGC Regulations, as such the Commission has acted within its authority.

He further submits that the Tribunal, however, has given finding while answering the issue regarding applicability of the UGC Regulation, but travelled in wrong direction regarding applicability of UGC Regulation so far as it has been adopted by the State but the legal proposition is settled that only in case of repugnancy the Central Rule will be applicable. According to him there is no inconsistency in between the State Rule and UGC Regulation regarding the educational qualification as well as process of selection.

He submits that on the one hand the clause 6 of the advertisement has been refused to be interfered with while on the other the Tribunal has questioned the parameter fixed for screening out the candidates, hence to that effect the order passed by the Tribunal is not proper.

5. Learned Senior Counsel appearing for the candidates whose candidature has been rejected, who are opposite parties in some of the writ petitions and also petitioners in some cases, while questioning the finding of the Tribunal so far as it relates to applicability of the provision of UGC Regulations, submits that the provision of UGC Regulations is binding upon the Commission being the selecting body in view of the provision of UGC Regulations, 2010 which is applicable to all the universities recognized by the Commission under the provision of clause (f) of Section 2 of the University Grants Commission Act, 1956 and subsequent thereto the University Grants Commission Regulation, 2013 has come which contains a

provision for overall selection process which shall be made on the basis of Academic Performance Indicators as provided under the regulation and table 1 to 11 of Appendix III, as such the Commission, while screening out the candidature of such candidates, ought to have taken into consideration the provision of screening out as per the UGC Regulation.

He submits that the Tribunal has given erroneous finding with respect to the issue framed by it regarding applicability of UGC Regulation over and above the Recruitment Rules enshrined by the State in exercise of power conferred under Article 309.

According to him, the provision of UGC regulation will be applicable over and above the Recruitment Rule, but the Tribunal, without appreciating this aspect of the matter, has adjudicated issue No.(a) against the candidates whose candidature has been rejected.

He further submits that since the vacancy is for the post of Lecturer, as such screening out the candidature of the candidates on the basis of Academic career giving go bye to the minimum educational qualification cannot be said to be just and proper.

So far as the finding of the Tribunal relating to the procedure adopted by the Commission to reject the candidature of the candidates on the basis of evaluation of Academic career, learned Sr. Counsel has submitted that the Tribunal is right in saying this while answering the issue in their favour and which according to him is in consonance with the UGC regulation.

6. The learned Sr. Counsel Mr. R. K. Rath who has argued on behalf of the candidates who have been found to be successful, has submitted that the finding of the Tribunal, so far as it relates to the procedure adopted by the Commission regarding screening out the candidature of the candidates is absolutely legal since the Commission has followed the statutory provision as contained in Recruitment Rules, 1990 and in pursuance to the provision of Rule 5 it is the discretion of the Commission being the constitutional body to follow the procedure to screen out the candidature of the candidates on the basis of good Academic record.

He further submits that since it is a question of entry in the higher education service as Lecturer, ignoring the Academic career to assess the candidature of one or the other candidates cannot be said to be proper selection process.

He has also relied upon one judgment passed by a coordinate Bench of this court rendered in the case of **Dr. Tophan Pati Vrs. State of Orissa and Others**, reported in 1998 (II) OLR 502.

7. Mr. Biswambar Mohanty, learned Counsel representing some of the selected candidates, in addition to the argument advanced on behalf of the learned Sr. Counsel for the Commission and Sr. Counsel Mr. R. K. Rath, has submitted that the reliance which has been put upon the provision of UGC Regulation 2010 or 2013 in its provision contained in 6.1.0 regarding assessment of the performance on the basis of Academic Performance Indicators, but the same is not applicable for the post of Lecturer as would be evident that the said provision provides assessment on the basis of Academic Performance Indicator as provided in tables I to IX of Appendix - III and from its perusal it is evident that there is no reference of post of Lecturer rather it starts from consideration of candidature of one or the other candidate on the basis of score for APIs is from the post of Asst. professor / equivalent cadre onward, reason being that the Lecturer being the basic entry post cannot be governed on the basis of the performance through Academic Performance Indicators giving go bye to the good Academic records, hence the argument advanced on behalf of the learned Sr. Counsel Mr. B. Routray in this regard cannot be said to be applicable with respect to the post of Lecturer.

8. Learned Sr. Counsel appearing for the University Grants Commission has submitted that the question involved in this case is only regarding repugnancy and it is settled that wherever there is inconsistency of the statutory provision in between Central and State legislation, the Central Act will prevail over the State and this is the paramount question which is to be decided by this court.

He submits that since the education is coming under the field of concurrent list, as such the U.G.C. regulation regulated under the provision of Section 26 of the U.G.C. Act, 1956 will prevail upon the Rule / Regulation formulated by the state Government in case of any inconsistency.

9. Learned Additional government Advocate appearing for State of Odisha has adopted the argument advanced on behalf of the Odisha Public Service Commission.

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

We thought it proper before entering into the factual aspect to deal with the statutory provisions which is relevant for the present issue, i.e.-

(i) The state of Odisha has come out with a notification on 20th March, 1990 by exercising its power conferred by the proviso to Article 309 of the Constitution of India to regulate recruitment of persons appointed to the Odisha Education Service (College Branch) known as Orissa Education Service (College Branch) Recruitment Rules, 1990 wherein the provision for direct recruitment to the post of lecturer has been given under Rule 4 which is being reflected herein below:-

"4.Direct Recruitment to the post of Lecturer.- (1) Recruitments to the service shall be made directly to the grade of Lecturers through the Commission.

(2). Xxxxx xxxxxx xxxx

(d) He / she should have Master's Degree in the relevant subject from a recognized University with at least 55% of marks or its equivalent grade and good academic record.

Xxxx xxxxxxxx xxxxxx"

We are concern here with the provision of Rule 4(2)(d) which provides the minimum educational qualification providing therein that a candidate should have a Master's Degree in the relevant subject from a recognized University with at least 55% of marks or its equivalent grade and **good academic record**.

Rule 5 provides selection by the Commission which speaks as follows:-

"5. Selection by the Commission- (1) The vacancies in the post of lecturer occurring in a year shall be notified to the Commission by the Government to recommend the names of eligible persons considered suitable by them for appointment to the posts. The Commission shall invite applications through open advertisement from eligible candidates and after conducting interview forward to the Government in respect of each subject a list of suitable candidates in order of merit for which requisition has been made. The Commission may screen out application for calling candidates to appear in the interview to be conducted by them. The selection of eligible candidates shall be made on the basis of merit.

(2). Xxxxxxxxxx

(3). Xxxxxxxxxxx"

Rule 5(1) confers power upon the commission to invite application through open advertisement from eligible candidates and after conducting interview forward to the Government in respect of each subject a list of suitable candidates in order of merit for which requisition has been made. The Commission may screen out applications for calling candidates to appear in the interview to be conducted by them. The selection of eligible candidates shall be made on the basis of merit.

This provision confers power upon the Commission to adopt the process to screen out the applications to invite the candidates to appear in the interview and thereafter the selection is to be made on the basis of merit.

The Recruitment Rules, 1990 also provides the different educational qualifications for the post of reader and for being eligible to the post of reader the first requirement is that the candidate must have possess the post of lecturer having Ph.D. degree from a recognized university in the concerned discipline and completed 8 years of service in the senior scale.

The provision of Recruitment Rules, 1990 reflects regarding selection procedure for the post of lecturer and reader.

The Government of Odisha has again come out with another notification on 25th February 1993 known as Odisha Education Service (College Branch) Recruitment (Amendment) Rules, 1993 whereby and where under certain provisions of the Recruitment Rules, 1990 has been amended but so far as it relates to the provision as contained in Rule 4(2)(d) and Rule 5 it has remained un-amended.

The State of Odisha has again come out with another amendment by issuing notification dtd.8th December, 1995 known as Odissa Education Service (College Branch) Recruitment (Amendment) Rules, 1995 by which also the provision as contained in Rule 4(2)(d) and Rule 5 has not been amended.

Again by virtue of notification dtd.14th September, 2012 another amendment has come known as Orissa Education Service (College Branch) Recruitment (Amendment) Rules, 2012 by which under the provision of Rule 4 in sub-rule 2 some provisions to clause (d) has been added to the following effect:-

> *"Provided that candidates belonging to the Scheduled Castes and Scheduled Tribes shall possess a Master's Degree in the concerned subject from a recognized University with at least 50% marks or its equivalent grade."*

It is evident that the provision of Rule 4(2)(d) has not been substituted, rather certain educational qualification has been added meaning thereby the original provision regarding having Master's Degree in the relevant subject from a recognized University with at least 55% of marks or its equivalent grade and good academic career remained un-altered.

One another notification issued on 29th October, 2013 by which the provision of Rule 5 for sub-Rule (1) has been substituted which is being referred herein below:-

> *"5. Selection by the Commission, - (1) The vacancies in the post of Lecturer occurring in a year shall be notified to the Commission by the Government. The Commission shall invite applications through open advertisement from eligible candidates and after conducting interview forward to the Government in respect of each subject a list of suitable candidates in order of merit for which requisition has been made. The selection of eligible candidates shall be made on the basis of merit."*

The difference in between the amendment having been made under the provision of Rule 5 in the Amended Rules, 2013 and the original Rule of 1990 is that the power conferred to the Commission to adopt the procedure of screening out

application for calling candidates who appear in the interview to be conducted by them has been deleted.

It is herein clarified that the advertisement has been issued on 24th June, 2013 and as such the amendment brought out by the State by virtue of Notification dtd.29th October, 2013 will not be applicable so far as the present recruitment process is concerned on the basis of the principle that once the recruitment process has been set on motion, it will be governed by the Rule which was in vogue at the time when the advertisement has been issued, admittedly, the Amended Rules, 2013 has been notified on 29th October, 2013, hence it cannot govern the procedure of appointment for an advertisement which has been issued prior to the said notification.

Hence, the provision as contained in Rule 5(i) will be of paramount consideration so far as the advertisement in question is concerned in the instant case.

11. The Government of India has come out with an Act to make provision for coordination and determination of standards in university and for that purpose a Commission has been established known as University Grants Commission by virtue of enactment of the University Grants Commission Act, 1956.

The Act 1956 provides power upon the University Grants Commission to make rules and regulation under the provision of Section 25 and 26. The University Grants Commission from time to time, in exercise of power conferred U/s.26, has made out regulations defining the qualification required to be possessed by any person to be appointed as teaching staff of the University having regard to the branch of education and regulating the maintenance of standards and coordination of facilities in the university.

The University Grants Commission, in supersession to the earlier regulations, has come out with the regulations time to time, one of it is known as University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education) Regulation 2009. The said regulation contains provision for recruitment and qualifications under the provision of regulation 3.0.0 wherein under 3.1.0 the process of direct recruitment to the posts of Asst. Professors, Associate Professors and Professors in the Universities and Colleges have been directed to be made on the basis of merit through all India advertisement and selections by the duly constituted Selection Committees as per the provisions made under these regulations to be incorporated under the Statutes / Ordinances of the concerned University.

The minimum educational qualification for the post of Asst. Professors and onward will be prescribed by the UGC in the regulations. The minimum requirement of a good academic record, 55% marks at the master's level and qualifying in the National Eligibility Test (NET) or an accredited test (State level eligibility test - SLET/SET) shall remain for the appointment of Asst. Professors which will be the minimum eligibility condition for recruitment and appointment of Asst. professors in the Universities / Colleges / Institutions, as would be evident from the UGC Regulation, 2009, for better appreciation the qualification prescribed for Asst. Professor for one of the disciplines is referred herein below:-

"*4.4.0 Assistant Professor*

4.4.1. Arts, Humanities, Sciences, Social Sciences, Commerce, Education, Languages, Law, Journalism and Mass Communication.

i. Good academic record as defined by the concerned university with at least 55% marks (or an equivalent grade in a point scale wherever grading system is followed) at the Master's Degree level in a relevant subject from an Indian University, or an equivalent degree from an accredited foreign university.

ii. Besides fulfilling the above qualifications, the candidate must have cleared the National Eligibility Test (NET) conducted by the UGC, CSIR or similar test accredited by the UGC like SLET / SET.

iii. Notwithstanding anything contained in sub-clauses (i) and (ii) to this Clause 4.4.1. candidates who are, or have been awarded a Ph.D. Degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of Ph. D. Degree) Regulations, 2009, shall be exempted from the requirement of the minimum eligibility condition of NET/SLET/SET for recruitment and appointment of Assistant Professor or equivalent positions in Universities/Colleges/ Institutions.

iv. NET/SLET/SET shall also not be required for such Masters Programmes in disciplines for which NET/SLET/SET is not conducted."

Likewise the qualification for the post of professor by way of direct recruitment, Principal, Associate Professors has been prescribed.

The University Grants Commission Regulation, 2013 has come which contains a provision under regulation 6.1.0 which is also there in the Regulation 2010. Under the Regulations, 2010 the Academic Performance Indicators have been provided for selection to the post of Associate Professors and onward. For better appreciation the provision of 6.1.0 of the regulation 2010 is reflected herein below:-

"6.1.0 While the API:

(a) Tables I and III of Appendix III are applicable to the selection of Professors / Associate professors / Assistant Professors in Universities and Colleges;

(b) Tables IV, V and VI of Appendix III are applicable to Directors / Deputy Directors / Assistant Directors of Physical Education and Sports; and

(c) Tables VII, VIII and IX of Appendix III are applicable to Librarians / Deputy Librarians and Assistant Librarians for both direct recruitment as well as Career Advancement Promotions, the ratio / percentage of minimum requirement of category-wise API Score to each of the cadres shall vary from those for university teachers and for UG/PG College Teachers, as given in these Tables of Appendix-III"

After the Regulations, 2010 having been amended by virtue of notification issued on 13th June 2013, the following provision has been made under 6.1.0 which is being reflected herein below:-

"*6.1.0. The overall selection procedure shall incorporate transparent, objective and credible methodology of analysis of the merits and credentials of the applicants based on weightages given to the performance of the candidate in different relevant dimensions and his / her performance on a scoring system proforma, based on the Academic Performance Indicators (API) as provided in this Regulations in Tables I to IX of Appendix-III.*

Provided that API scores will be used for screening purpose only and will have no bearing on expert assessment of candidates in Direct Recruitment / CAS.

Provided also that the API score claim of each of the sub-categories in the Category III (Research and Publications and Academic Contributions) will have the following cap to calculate the toal API score claim for Direct Recruitment / CAS.

Sub-Category	Cap as % of API cumulative score in application
III (A) Research papers (Journals, etc.)	30%
III (B) Research publications, (Books etc)	25%
III (C) Research Projects	20%
III (D) Research Guidance	10%
III (E) Training Courses and Conference / Seminar, etc.	15%

In order to make the system more credible, universities may assess the ability for teaching and / or research aptitude through a seminar or lecture in a class room situation or discussion on the capacity to use latest technology in teaching and research at the interview stage. These procedures can be followed for both direct recruitment and CAS promotions wherever selection committees are prescribed in these Regulations."

It is evident from the provision as contained in regulation 6.1.0 that the overall selection procedure based on academic performance indicators as provided in this regulation in table I to IX of Appendix-III is applicable from the post of Asst. Professor and onward, the same is evident from the following tabular chart:-

	Assistant Professor / equivalent cadres (Stage 1)	Associate Professor / equivalent cadres (stage 4)	Professor / equivalent cadres (Stage 5)
Minimum API Scores	Minimum Qualification as stipulated in these regulations	Consolidated API score requirement of 300 points from category III of APIs	Consolidated API Score requirement of 400 points from category III of APIs
SELECTION COMMITTEE criteria / weightages (Total Weightages = 100)	a) Academic Record and Research Performance (50%) b) Assessment of Domain Knowledge and Teaching Skills (30%) c) Interview performance (20%)	a) Academic Background (20%) b) Research performance based on API score and quality of publications (40%) c) Assessment of Domain Knowledge and Teaching Skills (20%) d) Interview performance (20%)	e) Academic Background (20%) f) Research performance based on API score and quality of publications (40%) g) Assessment of Domain Knowledge and Teaching Skills (20%) Interview performance (20%)

12. We have gathered from these two regulations that everywhere the academic record has been given paramount importance and that is for the obvious reason that if a candidate is having no good academic record from H.S.C. to the graduation level and if he obtained good marks in the post graduate level and thereafter, he cannot be said to be a perfect candidate and it will not be proper to ignore the educational qualification right from the HSC to the graduation level, this is for the reason that the post is to impart teaching in the higher education. A candidate having no good academic record cannot impart teaching in the best way in order to maintain standard in the education and that is the reason each and everywhere either in the State Law or the University Grants Commission Regulation a good academic record has been given much emphasis apart from the minimum educational qualification.

This contention also gets support from the division bench judgment passed by this court in the case of **Dr. Tophan Pati** (supra) although the fact pertains to the appointment of Lecturer in the Medical College but the ratio laid down therein at paragraph 40 makes the position very clear that in order to evaluate the performance of one or the other candidates, the entire academic record is necessary to be seen, the said process having been adopted by the Public Service Commission, was questioned before this court, but this court affirming the process adopted by the Commission to assess the candidature of such candidates on the basis of good academic record has been refused to be interfered with.

13. So far as the facts of the case in hand is concerned, the admitted position is that the advertisement has been published on 24.6.2013 inviting online applications for appointment as Lecturer in different disciplines. Under the provision of clause 3 the educational qualifications have been prescribed which is referred herein below:-

> *"3. Educational Qualification :*
>
> *A candidate should possess a Master's Degree in the concerned subject from a recognized University with at least 55% of marks or its equivalent grade with a 2nd Class in the Bachelor's Degree.*
>
> *Provided that candidates belonging to the Scheduled castes and Scheduled Tribes shall possess a Master's Degree in the concerned subject from a recognized University with at least 50% marks or its equivalent grade with a 2nd Class in the Bachelor's Degree.*
>
> *NET shall remain the compulsory requirement for appointment as Lecturer for those with post-graduate degree, but the candidates having Ph.D. Degree in accordance with the provisions of the University Grant Commission (Minimum Standards and Procedure for award of Ph.D. Degree) Regulations, 2009 on the concerned subjects shall be exempted from the requirement of the minimum eligibility conditions of NET/SLET/SET."*

Under clause 6 the method of selection has been provided which is being reproduced herein below:-

> *"6. Method of Selection:*
>
> *The selection of candidates for recruitment to the posts will be made on the basis of career assessment and Viva Voce. The Commission at their discretion may short-list the candidates to a reasonable number, for conducting interview by making a preliminary selection on the basis of evaluation of their academic career taking into account the requisite minimum educational qualification."*

The candidates have filled up their application form for consideration of their candidature. The Commission has initiated the process of screening out the candidature of the candidates on the basis of provision as made under clause 6 of the advertisement and accordingly rejected the candidature of candidates whose names are figuring at page 48 of writ petition under the heading '**List of candidates who have not been considered by the commission for interview**'. Those candidates have approached before the Tribunal questioning the legality and propriety of the clause 6 of the advertisement as also cancellation of their candidature by screening out on the basis of evaluation of their marks obtained in academic career.

The Commission has appeared before the Tribunal and filed a detail counter affidavit stating therein that the Commission has not committed any illegality. The provision of Recruitment Rules, 1990 as well as UGC Regulations have been followed in its strict sense. The condition of screening out the candidates has been enshrined in the advertisement in pursuance to the provision of Rule 5 of the Recruitment Rules, 1990. The candidature has been evaluated on the basis of minimum qualification and good academic record as contained in rule 4 (2)(d) of the Rules, 1990. The specific statement made in the counter affidavit at paragraph 4 which is being reflected herein below:-

> *"4. That, accepting the conditions of the aforesaid advertisement, the applicant had submitted her application for recruitment to the post of Lecturer in Anthropology. The Commission while taking steps for conducting direct recruitment of the aforesaid discipline had as per the condition of the advertisement cited supra based on the principle of academic career taking into account the requisite minimum educational qualification and called the candidates for interview. In absence of any provision in the recruitment rules to that effect, the Commission had at their discretion taken the following decision:-*
> *No. of candidates called for V.V.test:-*
>
> *Where the number of vacancies up to 2(two), the number of candidates to be called for interview may be 5(five), where the number of vacancies exceeds 2, the number of candidates to be called for the interview may be twice the number of vacancies.*
>
> *Career weightage for Lecturer (College Branch):-*
>
> | | | |
> |---|---|---|
> | *HSC* | - | *20% weightage* |
> | *+2* | - | *20% weightage* |
> | *Degree* | - | *20% weightage* |
> | *PG Degree* | - | *40% weightage* |
>
> *Although the applicant was a candidate for the aforesaid post, she was not called to the interview / V.V. test due to her lower position / rank in the*

career assessment. Being aggrieved, she has filed this O.A. challenging the selection procedure of the O.P.S.C. with a prayer to declare the same as illegal and unconstitutional."

The tribunal after framing four issues has finally disposed of the original application. The issues are:-

(a) Whether UGC Act and Regulation made thereunder are binding on the State – respondents and the OPSC while recruiting Lecturers in degree Colleges;

(b) Whether the impugned para 6 of the advertisement dtd.24.6.2013 prescribing procedure for short listing issued by the OPSC is violative of Rules, 1990;

(c) Whether the procedure of short listing is rational and reasonable and has been done as per para 6 of the advertisement;

(d) Whether the applicants, those who are ad hoc appointees are to be regularized after obtaining concurrence of O.P.S.C.;

(e) Some other points as applicable to individual applicants.

14. We thought it proper to discuss the finding of the Tribunal issue-wise in order to see the legality and propriety of the same.

We have taken the issue no.(a) which pertains as to whether UGC Act and regulation made thereunder are binding upon the state – respondent and the OPSC while recruiting lecturers in degree colleges.

It is not in dispute that the Constitution provides the concurrent list under which the education comes. It is also the constitutional mandate that in case of inconsistency between the State Law and the Central Law, the Central Legislation will prevail.

We have discussed herein above the purpose for enactment of University Grants Commission Act, 1956 which is solely for the purpose to maintain standard in the education system across the country and for that purpose the provision has been made therein U/s.25 and 26 to formulate rules and regulations in order to maintain uniformity in the educational system in the country.

Rule 26 of the University Grants Commission Act, 1956 empowered the Commission to formulate regulations to define the qualification that should ordinarily be required by any person to be appointed to the teaching staff of the university having regard to the branch of education in which he is expected to give instruction, i.e. under the provision of regulation 26(1)(e).

The University Grants Commission from time to time has formulated regulation issued in the year 1998, then in the year 2000, 2002, 2010 and 2013

known as University Grants Commission regulation providing the educational qualification for the candidates who intend to be considered for different posts in the University, i.e. Asst. Professor, Associate Professor, Professor, etc.

It is also to be noted that the post of Lecture is under the category of Asst. Professor consisting of the post of Lecturer, Lecturer Senior Scale, Lecturer Senior Grade, Lecturer Selection Grade having different pay scales.

The State of Odisha has formulated the Recruitment Rules, 1990 known as Orissa Education Service (College Branch) Recruitment Rules, 1990 wherein the educational qualification for the post of Lecturer has been provided under Section 4(2)(d) according to which 55% marks in the Master' Degree is the minimum education qualification for a candidate to be eligible to be considered for the post of lecturer. The Recruitment Rules, 1990 has been amended in the year 1993, 1995 and in the year 2012 the educational qualification as per the University Grants Commission regulation has been incorporated making it mandatorily to be possessed by the candidates for consideration of their candidature to hold the posts of Lecturer or the posts onward. It is evident that after the Amendment Rule, 2012 the minimum educational qualification which were in the Recruitment Rules, 1990 i.e. possessing 55% minimum marks in the Master's Degree has been added with other qualification as per the UGC norms i.e. possessing NET / SLET etc.

It is also evident from different recruitment rules enacted by the State that the provision of Section 4(2)(d) so far as it relates to good academic record has not been altered and there cannot be any reason to alter for the reason that even in the UGC regulation for each and every post apart from the minimum educational qualification the good academic record is mandatorily to be possessed by one or the other candidate which would be evident from the UGC regulation wherein the reference of good academic record is there for each and every post apart from the minimum educational qualification.

It is also not in dispute that even under UGC regulation, under the 'minimum educational qualification' good academic record as defined by the concerned university with at least 55% marks at the Master's Degree has been provided to be minimum eligibility condition.

15. We have appreciated the argument advanced on behalf of learned counsel for University Grants Commission regarding the principle of repugnancy, it is not in dispute that the law relating to the doctrine of repugnancy is under part XI of the Indian Constitution which describes the legislative relationship between the State and the Centre. Further, Art.244 establishes the doctrine of repugnancy which acts as a safeguard to solve disputes arising between the States and the Union. The term repugnancy means inconsistency between the State made law and the Union made law.

Chapter one of Part-XI of the constitution deals with the subject of distribution of legislative power of the Parliament and the legislature of the state. Art. 245 of the constitution provides that the parliament may make laws for the whole or any part of the territory of India and the legislature of the state may make laws for the whole or any part of the State.

The legislative field of the parliament and the State legislature has been specified in Article 246 of the Constitution of India which reads as follows:-

> *"Art.246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").*
>
> *(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List")*
>
> *(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in the Constitution, referred to as the "State List")*
>
> *(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List."*

Art. 254 of the Constitution which contains a mechanism for resolution of conflict between the Centre and State Legislature enacted with respect to any matter enumerated in list III of the 7th Schedule read as under :-

> *"254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States:- (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.*
>
> *(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an*

existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

This issue has been dealt with by the Hon'ble Apex Court in the case of **M. Karunanidhi Vrs. Union of India and Another**, reported in (1979) 3 SCC 431 in the said case, the principle to be applied for determining repugnancy between a law made by a Parliament and the law made by the State Legislature were considered by the Constitution Bench of the Hon'ble Apex Court and at paragraph 8 the Hon'ble Apex Court has been pleased to hold as follows:-

"*8. It would be seen that so far as clause (1) of Article 254 is concerned it clearly lays down that where there is a direct collision between a provision of a law made by the State and that made by Parliament with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the State law would be void to the extent of the repugnancy. This naturally means that where both the State and Parliament occupy the field contemplated by the Concurrent List then the Act passed by Parliament being prior in point of time will prevail and consequently the State Act will have to yield to the Central Act. In fact, the scheme of the Constitution is a scientific and equitable distribution of legislative powers between Parliament and the State Legislatures. First, regarding the matters contained in List I, i.e. the Union List to the Seventh Schedule, Parliament alone is empowered to legislate and the State Legislatures have no authority to make any law in respect of the Entries contained in List I. Secondly, so far as the Concurrent List is concerned, both Parliament and the State Legislatures are entitled to legislate in regard to any of the Entries appearing therein, but that is subject to the condition laid down by Article 254(1) discussed above. Thirdly, so far as the matters in List II, i.e., the State List are concerned, the State Legislatures alone are competent to legislate on them and only under certain conditions Parliament can do so. It is, therefore, obvious that in such matters repugnancy may result from the following circumstances :-*

1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.
2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall

prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) of Article 254.

3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List an entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.

So far as the present State Act is concerned we are called upon to consider the various shades of the constitutional validity of the same under Article 254(2) of the Constitution."

Thereafter the Hon'ble Apex Court, after referring to catena of judgments have laid down the following propositions at paragraph 38:-

"38. Craies in his Interpretation on Statute Law 6th Ed. p. 369 observes as follows:-

"Many earlier statutes contain clauses similar in effect to the general rule, but without the confusing words as to contrary intention. These statutes, of some of which a list is given below, seem not to be affected by the above rule, save so far as it enables the revisers of the statute-book to excise the particular clauses. In accordance with this rule, penalties imposed by statute for offences already punishable under a prior statute are regarded as cumulative or alternative and not as replacing the penalty to which the offender was previously liable."

Such an intention is clearly discernible from the provisions of section 29 of the State Act. Mr. Venu Gopal tried to rebut this argument on the ground that section 29 would have no application where the inconsistency between

the dominant statute and the subordinate statute is direct and complete. We have already found on a discussion of the various provisions of the State Act that there is no direct inconsistency at all between the State Act and the Central Acts, and this affords a sufficient answer to the argument of Mr. Venu Gopal. Having, therefore, given our anxious consideration to the import and ambit of section 29 it seems to us that the provisions of section 29 would be presumptive proof of the fact that there is no repugnancy between the State Act and the Central Acts nor did either the legislature or the President intend to create any repugnancy between these Acts as a result of which the criticism regarding the repugnancy is completely obliterated in the instant case and we, therefore, hold that the State legislature never intended to occupy the same field covered by the Central Acts."

In the case of **Government of Andhra Pradesh Vrs. J. B. Educational Soceity and Another**, reported in **(2005)** 3 SCC 212, the Hon'ble Apex Court, while discussing the scope of Art. 246 and 254 and considering the proposition laid down by it in the case of **M. Karunanidhi** (supra) with respect to the situation in case of repugnancy arises has been pleased to hold at paragraph 9 as follows:-

"9. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I, notwithstanding anything contained in clauses (2) and (3) of Article 246. The non obstante clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union Legislature in the event of an overlap of the law made by Parliament with respect to a matter enumerated in List I and a law made by the State legislature with respect to a matter enumerated in List II of the Seventh Schedule."

In the case of **National Engineering Industries Ltd. Vrs. Shri kishan Bhageria and Others**, reported in 1988 (Supp) SCC 82 it has been opined by their Lordships therein that the best test of repugnancy is that if one prevails the other cannot prevail.

In the light of this proposition we have examined the issue as to whether there is any inconsistency in between the provision of the recruitment Rules 1990 and its subsequent amendments enacted upon by the State Government vis-à-vis the UGC regulations issued by the University Grants Commission in exercise of power conferred under Section 26 of the said Act.

On close scrutiny of both these provisions regarding the educational qualification we have not found anything inconsistent since in both the provision the minimum educational qualification with good academic record with at least 55% marks at the master's degree besides that the candidate must have cleared the

National Eligibility Test conducted by UGC, CSIR or similar test accredited by the University Grants Commission like SLET/SET

In view of such a situation there is no inconsistency in between both the provisions so far as educational qualification is concerned.

So far as the process of selection is concerned, we have also examined the issue.

Under the recruitment Rules, 1990 the procedure for selection has been provided under Rule 5 which confers power upon the Commission to screen out the candidates.

We have gone through the notification dtd.13th June 2013 issued by the University Grants Commission incorporating therein a provision under regulation 6.1.0 which has been quoted above, on its perusal it is evident that the University Grants Commission makes a provision for overall selection procedure which shall incorporate transparent, objective and credible methodology of analysis of the merits and credentials of the applicants based on weightages given to the performance of the candidate **in different relevant dimensions** and his / her performance on a scoring system proforma, based on the Academic Performance Indicators (API) as provided in this Regulations in Tables I to IX of the Appendix-III, provided that API scores will be used for screening purpose only and will have no bearing on expert assessment of candidates in Direct Recruitment / CAS.

It is evident from the said provision that while selecting, the overall selection procedure is to be made to assess the performance of candidates in different relevant dimensions and performance on scoring system based on API, meaning thereby the overall assessment on the basis of the academic record which comes under different relevant dimensions apart from that the academic performance indicators is to be seen and that would be the parameter to screen out the candidates.

It is also clear from the said provision that the selection procedure by assessing the candidates on different relevant dimensions and academic performance indicators will be used only for screening purpose having no bearing on expert assessment of candidates in direct recruitment.

This provision if read together along with the provision as contained in Rule 5 of the Recruitment Rules, 1990, makes the position very clear that even for screening out, the process is to be made by assessing the performance of one or the other candidate on the basis of different relevant dimensions and if it will be read together with the minimum educational qualification of the post of Asst. Professor under which the Lecturer comes, the good academic record is also to be possessed by one or the other candidate apart from the minimum educational qualification and

as such the entire performance of the candidate is to be seen while assessing their performance.

In view of the discussion having been made herein above and the principle of repugnancy as has been discussed in the preceding paragraphs basing upon the provision of Articles 246 and 254 of the Constitution of India and the judgments rendered by Hon'ble Apex Court, we are of the considered view that there is no inconsistency in between these two provisions.

After having discussed this aspect, we are of the considered view that the Tribunal, has formulated the point no.(d) which was not required to be formulated, reason being that if any statute has been made by the Central Legislation and the State Legislation is inconsistent with each other, admittedly whether adopted by the state or not the Central Legislation will prevail, that is the constitutional mandate as discussed above.

Since we have already held herein above that both the statutes are having consistent provision so far as the minimum educational qualification is concerned or the procedure for selection, hence there is no question of any adoption by the state legislation or the enactment formulated under the regulation by the University Grants Commission.

According to us, the UGC regulation under its provision as contained in regulation no.6.1.0 of the notification dtd.13th June, 2013 the overall selection procedure is to depend upon the performance of the candidates in different relevant dimensions and his performance on scoring system proforma based on the academic performance indicators and the assessment of API will have no bearing on expert opinion, further the minimum educational qualification is good academic record along with 55% marks in the Master's Degree level with Ph.D. / NET etc., if the provision of 6.1.0 of the notification dtd.13.6.2013 as contained in regulation 6.1.0 will be read together with the minimum educational qualification of the post, it would be evident that the overall performance of a candidate will depend upon good academic record, minimum educational qualification and the annual performance indicator and thereafter the candidate is to appear before the expert committee for their assessment of performance for finally being selected and engaged.

The provision of Section 5 of the Recruitment Rules, 1990 enshrined by the State Government in exercise of power conferred under Article 309 of the Constitution of India is still in vogue, however amended time to time, the last amendment having been done by notification dtd.29th October, 2013 wherein the power of discretion for screening out the candidates which has been vested upon the commission under the provision of Rule 5 has been amended and the said power has been repealed but the notification dtd.29.10.2013 will not be applicable for the present reason being that the advertisement is dtd.24.6.2013 hence the effect of

notification dtd.29.10.2013 will not be given so far as the advertisement in question is concerned.

Even if the part of the power of screening out the candidates as provided under Rule 5 of the recruitment Rules, 1990 has been deleted, then also it makes no difference since the U.G.C. regulation speaks for screening out and as such the amended Rule, 2013 will be said to be inconsistent with the U.G.C. regulation, hence the provision of U.G.C. regulation will prevail on the principle of repugnancy which provides under the provision of regulation 6.1.0 to assess the performance of one or the other candidate by assessing on different relevant dimensions and the academic performance indicators.

16. So far as the case in hand is concerned, an advertisement has been issued incorporating a condition under condition no.6 reserving power to screen out the candidates on the basis of the evaluation of career marks and the candidates after knowing about the said condition as contained in condition no.6, have made their applications, but when their candidature has been rejected on comparative evaluation of academic record along with the minimum educational qualification, they have approached the Tribunal.

We after going through the rival submission, statutory provision as well as the regulation as also the judgments rendered by Hon'ble Apex Court are of the considered view that both on the point of educational qualification and procedure of selection there is no inconsistency in the regulation formulated by the UGC and the recruitment rules, 1990.

It is settled that while fulfilling the post, the recruiting agency is supposed to follow the statutory provision.

We have to see here that whether the commission has followed the statutory provision issued by the University Grants Commission and the State.

We, on examination of the factual aspect having been discussed herein above at length, are of the considered view that inserting a condition under condition no.6 of the advertisement cannot be said to be an illegal exercise of the Commission which the tribunal has held that there is no infirmity with the condition no.6 of the advertisement.

The tribunal, however, has declared the decision of the commission regarding the process of assessment on the basis of academic record by holding in the impugned order that it should have been done on the basis of the marks obtained in the minimum educational qualification leaving apart the good academic record, we have to see the legality and propriety of this finding of the tribunal.

We, after discussing in detail the provision of rule 5 of the recruitment rules, 1990 vis-à-vis the provision of regulation 6.1.0 of the University Grants

Commission notification dtd.13th June 2013 have already held herein above that the statue provides method for screening out and according to our considered view, the condition contained under condition no.6 of the advertisement in question, the same is in pursuance to the provision of recruitment rule 1990 as well as the provision of regulation 6.1.0 of notification dtd.13th June, 2013, hence the finding given by the Tribunal so far as it relates to deprecating the method of process evolved by the commission for screening out the candidates on the basis of evaluation of career academic marks is not proper and the same has been given without appreciating the provision of UGC regulation vis-à-vis the recruitment rules, 1990 wherein the screening is to be made on the basis of overall performance including the good academic record otherwise the minimum qualification providing for the post of having good academic record would be redundant and it is settled that in the rule no word will be said to be redundant rather each and every word has got its implication.

It is further settled that when the wide advertisement is being made in pursuance to the recruitment rule, the prime object is to select more suitable and the selection of more suitable would only be done if the overall performance of a candidate would be scrutinized as per the minimum educational qualification as provided under the statute governing the field, herein the minimum educational qualification to be possessed by a candidate is of having good academic record along with 55% marks in the post graduation with NET /SLET, etc. as also the annual performance indicator (API) for screening out and thereafter the candidate is supposed to be assessed by the expert committee, we find from the regulation 6.1.0 of the notification dtd.13th June, 2013 that there will be two stages of scrutiny, i.e. the first would be said to be preliminary and the second would be final and in the preliminary stage the good academic record, the minimum educational qualification and the annual performance indicator are of paramount consideration and only then the screening-in candidate would be called upon to participate in the interview before the expert committee.

We, after going into the details as discussed herein above, are of the considered view that the tribunal has given wrong finding in this regard.

17. The other finding of the tribunal is also bad in the eye of law wherein it has been observed in the order that the process of evaluation on the basis of evaluation of academic record is not in consonance with the recruitment rule, we have already discussed in detail that the process which has been reflected in the advertisement for screening out the candidate on the basis of evaluation of academic marks is based upon the recruitment rules, 1990 vis-à-vis UGC regulation 2013 issued by the University Grants Commission.

18. Mr. B. Mohanty arguing for one of the successful candidate, has submitted that the annual performance indicator is only meant for the post of Asst. Professor

onward, since the post is of Lecturer, hence the principle evolved by the UGC to assess the candidature of one or the other candidate on the basis of annual performance indicator will not be applicable for the post of lecturer, but according to us this argument has got no substance in view of the fact that the post of Asst. Lecturer is under the category of Asst. Professor having four grades, i.e. Lecturer, Lecture Sr. Scale, Lecturer Sr. Grade and Lecturer Selection Grade having different pay scales and as such it cannot be said that the annual performance indicator will not be applicable for the post of lecturer.

19. The intervener has relied upon the judgment rendered in the case of **Jagdish Prasad Sharma and Others Vrs. State of Bihar and Others**, reported in 2013 8 SCC 633, that judgment also pertains to the principle of repugnancy which we have already dealt in detail in the preceding paragraphs of this judgment.

The judgment rendered in the case of **P. Suseela & Others Vrs. University Grants Commission & Others**, reported in AIR 2015 SC 1976 the same pertains to the minimum educational qualification provided by the UGC under its regulation which has been held to be not bad on the ground that they followed dictate of the central govt. which we have already discussed in detail, more over it is not a case of having no qualification of one or the other candidate.

20. It is settled that if no procedure is provided for making a selection, the selection body is authorized to adopt their selection process but it should be fair, transparent and may not suffer from malice and if this conditions are not there, the procedure of selection cannot be judicially reviewed by the court of law, but certainly if the process of recruitment is not fair, transparent and suffers with malice, certainly it is amenable to the judicial review by the court of law.

The proposition settled in this regard as has been laid down by the constitution bench of Hon'ble Apex Court in the case of **Ashok Kumar Yadav and Others Vrs. State of Haryana and Others**, reported in 1985 4 SCC 417 wherein their lordships have been pleased to hold that the procedure for selection are only be looked into under the power of judicial review by a court of law having its competency wherein the process suffers from vice of malice and arbitrariness, but we have not found anything on record that any malice or biasness has been committed by the commission, rather right from the day when the advertisement has been issued the condition has been inserted under condition no.6 to apprise the candidates that this is the procedure for selection, hence it cannot be said that the selection process is illegal or the selection process suffers from bias or malice and in absence thereof the selection process cannot be said to be illegal.

In the case of **Osmania University, represented by its Registrar, Hyderabad, A.P. Vrs. Abdul Rayees Khan and Another**, reported in (1997) 3 SCC 124 it has been held by their Lordships at paragraph 9 as follows:-

"9. Xxxxxxx generally the court may not interfere with the selection, relating to educational affairs, and academic matters may be left to the expert body to select best of the talent on objective criteria. What is the objective criteria is a question of fact in each case. Each case depends upon its own facts and the circumstances in which the respective claims of competing candidates has come up for consideration. No absolute rule in that behalf could be laid. Each case requires to be considered on its own merit and in its own setting, giving due consideration to the views expressed by the educational experts in the affairs of their administration or selection of the candidates."

In the case of **Vijendra Kumar Verma Vrs. Public Service Commission, uttarkhand and Others**, reported in (2011) 1 SCC 150 wherein the issue raised for assessing the suitability of one or the other candidate and the Hon'ble apex court while dealing with such situation has held at paragraphs 29, 30 and 31 as follows:-

"29. Now, while deciding the submission of the counsel appearing for the appellant that judging the suitability of the candidate by laying down the benchmark of basic knowledge of computer operation being sufficient or insufficient is vague, we are of the opinion that possessing of basic knowledge of computer operation is one of the criteria for selection and in order to judge such knowledge, an expert on the subject was available at the time when the candidate was facing the Interview Board. In order to ascertain the candidate's knowledge of computer operation, he put questions and thereafter he gave remarks that the candidate has sufficient knowledge or that he does not have sufficient knowledge.

30. It is also to be considered that the Indian judiciary is taking steps to apply e-governance for efficient management of courts. In the near future, all the courts in the country will be computerized. In that respect, the new judges who are being appointed are expected to have basic knowledge of the computer operation. It will be unfair to overlook basic knowledge of computer operation to be an essential condition for being a judge in view of the recent development being adopted. Therefore, we are of the considered opinion that requirement of having basic knowledge of computer operation should not be diluted. We also deem fit not to comment over the standard applied by the expert in judging the said knowledge as the same is his subjective satisfaction. However directions can be recommended to make the procedure more transparent. The directions in respect of same have already been given by the High Court we do not think proper to prescribe the directions for the same separately.

31. The aforesaid procedure for testing the knowledge may not be foolproof but at the same time it cannot be said that the same was not reasonable or

that it was arbitrary. Therefore, after giving very thoughtful consideration to the issues, we are of the opinion that the appellant has failed to make out any case before us for interference with the orders passed by the High Court. We find no merit in this appeal and the same is dismissed."

The other issue fell for consideration before the Hon'ble Apex court in the case of **Arunachal Pradesh Public Service Commission and Another Vrs. Tage habung and Others**, reported in AIR 2013 SC 1601 wherein the question of decision of selection committee in selecting one or the other candidate fell for consideration and by taking note of the broader aspect, the Hon'ble apex court considering the suitability / merit of one or the other candidate have observed at paragraph 28 as under:-

"28. There cannot be any dispute that the merit of a candidate and his suitability is always assessed with reference to his performance at the examination. For the purpose of adjudging the merit and suitability of a candidate, the Commission has to fix minimum qualifying marks in the written examination in order to qualify in the viva voce test. It is now well settled that fixing the qualifying marks in the viva voce test after the commencement of the process of selection is not justified but fixing some criteria for qualifying a candidate in the written examination is necessary in order to shortlist the candidates for participating in the interview."

21. There is no dispute about the settled proposition that a person who consciously takes part in a process of selection cannot turn around and question the method of selection as has been held by Hon'ble Apex Court in the case of **Dr. G. Sarana Vrs. University of Lucknow & Others**, reported in (1976) 3 SCC 585 wherein the three judges bench of the Hon'ble Apex Court has been pleased to hold at paragraph 15 as follows:-

"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal's case where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting:

"It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point."

In the case of **Madan Lal & Ors. Vrs. State of Jammu and Kashmir and Ors.**, reported in (1995) 3 SCC 486 similar view has been taken by Hon'ble apex court which held that:-

"9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla1 it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

In the case of **Manish Kumar Shahi Vrs. State of Bihar**, reported in (2010) 12 SCC 576 Hon'ble Apex Court has reiterated the principle laid down in the earlier judgments and observed as follows:-

"We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct

of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

In view of the settled proposition and comparing with the facts of the case, since the candidates whose candidature has been rejected by screening out on the basis of the provision as contained in condition no.6 of the advertisement and only after being screened out they have challenged the condition no.6, hence on the basis of the principle settled that once the candidate participates in the selection process, cannot turn around and question the method of selection.

We have considered the factual aspect in the light of the legal settled proposition and have found that the Commission has not committed any unfairness or non-transparency rather the statute has been followed for making the selection and the same was within the knowledge of the candidate from its inception but they have not chosen to question the same rather they have participated by making applications.

In view thereof we are of the considered view that the Commission has not erred in adopting the process for screening out the candidates. The Commission rather has bifurcated the selection process in 2 stages only for the purpose of scrutinizing the candidature of one or the other candidates to give focus upon the more meritorious candidates to chose best amongst all and that is the purpose of Art.16 of the Constitution of India to make wide publication so that best amongst all be chosen to advance the efficiency and merit in the system, that is the intent of the University Grants Commission Act, 1956.

We have also taken into consideration prejudice part whether caused to the candidates whose candidature has been rejected. Even assuming the contention of the such candidates would be accepted that the screening of their candidature was incorrect, then also no prejudice will be said to be caused to them reason being that even if at the time of interview if the comparative merit of one or the other candidate would have been prepared on the basis of good academic record with the minimum educational qualification, then also they will be ranked below than such candidates who have been found to be suitable to participate in the interview otherwise if they would have best they would not have been screened out at the preliminary stage.

The Commission only bifurcated this into two parts, first pre-interview and thereafter the consideration on the basis of minimum education qualification, hence according to us no prejudice is said to be caused to such candidates, rather the Commission, by following the said procedure, has acted with all fairness and transparency.

22. Learned Sr. Counsel has also advanced argument that the candidature should have been considered only on the basis of minimum educational qualification that is having minimum 55% marks along with NET SLET, etc. but that is not acceptable to us in view of the educational qualification having been adopted by the recruitment rule under its amendment brought in the year 2012 and the UGC regulation, containing the minimum educational qualification having good academic record and the provision of regulation 6.1.0 of the notification dtd.13th June 2013 upon which the emphasis has been laid down by the learned Sr. Counsel, but if the provision as contained in the said regulation will be scrutinized minutely, it would be evident that the same also speaks with respect to two stages of selection, the first stage is the pre-interview stage and the other stage is the after screening out of the candidate.

So far as the first stage is concerned, the screening cannot be made only on the basis of the minimum educational qualification otherwise there would be no meaning of having good academic record inserted in the minimum educational qualification which finds support from the provision of regulation 6.1.0 which provides the method of selection procedure by assessing the performance of one or the other candidate on the basis of different relevant dimensions and the annual performance indicators, the different relevant dimensions to assess the performance of one or the other candidates will certainly include the good academic record and as such the argument advanced in this regard is not sustainable.

23. In the entirety of facts and circumstances of the case the finding of the Tribunal so far as it relates to point no. (a) as well as point no.(d) are not sustainable accordingly set aside.

So far as other findings are concerned, that also covers on the basis of our detailed discussion made herein above.

24. In the result the process adopted by the OPSC for selecting the Lecturer in pursuance to the advertisement No.5 of 2013-14 so far as it relates to process adopted for screening out the candidates is hereby approved.

25. We have been informed that the process of recruitment of the post of Lecturer is at hold, hence we direct the OPSC to proceed with the matter. Accordingly all the writ petitions stand disposed of.

Writ petitions disposed of.

2017 (II) ILR - CUT- 313

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

W.P.(C) NO. 696 OF 2014

ARJUN CHARAN SAHOO .....Petitioner

.Vrs.

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

SERVICE LAW – Petitioner was awarded nine black marks, while working as Cipoy – Dismissal from service – Hence the writ petition for reversion of punishment from dismissal to that of compulsory retirement – Rule 836 of the Odisha Police Rules meant to get rid of the employee whose conduct is bad and for that the authorities have been conferred with the power to reduce the rank or compulsory retirement or removal or dismissal – In this case, the petitioner had rendered 17 years service and punishment imposed upon him relates to unauthorized absence, not related to his integrity or moral turpitude – In the above back ground the order of dismissal, is said to be harsh and award of compulsory retirement would be just and proper – Held, the impugned order is quashed and the matter is remitted back to the authorities to pass appropriate order and to take consequential steps. (Paras 7, 8)

Case Laws Referred to :-

1. (2007) 7 SCC 257 : Union of India & Anr. -V- S.S.Ahluwalia
2. (2014) 2 SCC 748 : Ishwar Ch. Jayaswal -V- Union of India & Ors.

For Petitioner : M/s. Ajit Ku. Choudhury & K.K. Ahluwalia

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

Date of hearing :13.4.2017
Date of judgment:13.4.2017

JUDGMENT

S.N.PRASAD,J.

This writ petition is under Articles 226 and 227 of the Constitution of India assailing the order dated 27.11.2013 passed by the Odisha Administrative Tribunal,Cuttack Bench, Cuttack O.A.No.401(C) of 2011 whereby and where under the petitioner has been dismissed from service in exercise of power conferred under Rule 836 of the Orissa Police Rules.

2. Brief facts of the case is that the petitioner while working as Cipoy in the Orissa State Armed Police, 7th Battalion, Bhubaneswar w.e.f. 5.4.1985 awarded nine Black Marks during the service period, hence the disciplinary

authority initiated a proceeding against him bearing No.30 of 2000 and in exercise of powers conferred under Rule 836 of the Orissa Police Rules petitioner has been dismissed from service.

3. Learned counsel representing the petitioner at the outset has submitted that he is not arguing on the merit of the issue, rather he has tried to impress upon the Court regarding the provision of Rule 836 of the Orissa Police Rules that in case of award of nine Black Marks the consequence would be reduction in rank or compulsory retirement or removed or dismissal, in view thereof, it has been submitted that when there is other punishments apart from punishment of dismissal, consideration may be made for reversing the punishment of dismissal to that of punishment of compulsory retirement so that the petitioner may get his pension since he has performed regular duty for period of 17 years.

He further submits that the main intent of the provision of Rule 836 of the Orissa Police Rules is to get rid of the incumbent when nine black marks have been award, even accepting the entire allegations against him is correct which is unauthorized absence, as such the order of dismissal is harse taking into consideration that he has already put 17 years of service and in case of dismissal from service he will be deprived of getting pensionary benefits.

4. Learned counsel representing the State of Odisha has submitted on merit that there is no error in conducting departmental proceeding and the authorities after taking into consideration of nine black marks imposed punishment upon him and exercising the power under Rule 836 of the Orissa Police Rules, he has been dismissed from service and as such on merit the petitioner has got no case.

So far as reversion of punishment from dismissal to that of compulsory retirement, it has been fairly submitted by the learned Additional Government Advocate that it is up to the Court to consider it.

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

6. It is not in dispute that High Court sitting under Article 226 of the Constitution of India cannot pass order regarding quantum of punishment unless there exists sufficient reason and unless shocking to the conscience of the Court of the sovereign and impropriety of the punishments.

So far as the contention of the petitioner that the order of dismissal be reversed to the order of compulsory retirement so that the petitioner may get

pension, we are of the opinion that merely on sympathy the order of punishment cannot be reversed. So far as the quantum of punishment is concerned, the Hon'ble Apex Court in **Union of India and another v. S.S.Ahluwalia,** (2007) 7 SCC 257 has held that if the conscience of the Court is shocked as to the severity or inappropriateness of the punishment imposed, it can remand the matter back for fresh consideration to the disciplinary authority concerned.

The Hon'ble Apex Court in another judgment rendered in **Ishwar Chandra Jayaswal v. Union of India and others**, (2014) 2 SCC 748 has been pleased to held at para-5 as follows:

> *"It is now well settled that it is open to the Court, in all circumstances, to consider whether the punishment imposed on the delinquent workman or officer, as the case may be, is commensurate with the Articles of Charge levelled against him. There is a deluge of decisions on this question and we do not propose to travel beyond Union of India v. S.S. Ahluwalia (2007) 7 SCC 257 in which this Court had held that if the conscience of the Court is shocked as to the severity or inappropriateness of the punishment imposed, it can remand the matter back for fresh consideration to the Disciplinary Authority concerned. In that case, the punishment that had been imposed was the deduction of 10% from the pension for a period of one year. The High Court had set aside that order. In those premises, this Court did not think it expedient to remand the matter back to the Disciplinary Authority and instead approved the decision of the High Court."*

In **Union of India v. P.Gunasekaran (supra),** the Hon'ble Apex Court in paragraph 20 has held as follows:

> *"Equally, it was not open to the High Court, in exercise of its jurisdiction under Article 226/227 of the Constitution of India, to go into the proportionality of punishment so long as the punishment does not shock the conscience of the court. In the instant case, the disciplinary authority has come to the conclusion that the respondent lacked integrity. No doubt, there are no measurable standards as to what is integrity in service jurisprudence but certainly there are indicators for such assessment. Integrity according to Oxford dictionary is "moral uprightness; honesty". It takes in its sweep, probity, innocence, trustfulness, openness, sincerity, blamelessness,*

immaculacy, rectitude, uprightness, virtuousness, righteousness, goodness, cleanness, decency, honour, reputation, nobility, irreproachability, purity, respectability, genuineness, moral excellence etc. In short, it depicts sterling character with firm adherence to a code of moral values."

We, on consideration of the judgment as quoted above, have considered the facts of this case which is not in dispute, that is, the petitioner while working under the Orissa State Armed Force, 7th Battalion has been inflicted punishment of 9 Black Marks,the authorities have resorted to the provision of Rule 836 of the Orissa Police Rule initiated departmental proceeding against him, the petitioner has been dismissed from service after being participated in the departmental proceeding. Provision of Rule 836 of the Orissa Police Rules which is being quoted herein below:

"Effect of nine black marks – Nine black marks shall entail reduction in rank or compulsory retirement or removed or dismissal. Whenever any Member of the police below the rank of Deputy Superintendent of Police, has been awarded nine black marks, proceedings shall be drawn up against him with a view to awarding any of the above punishments."

It is confirmed from the Rule 836 of the Orissa Police Rule as quoted above that in case of 9 black marks, it entails reduction in rank or compulsory retirement, or removed or dismissal. Whenever any member of the police below the rank of Deputy Superintendent of Police has been awarded nine black marks, proceedings shall be drawn up against him with a view to awarding any of the above punishments.

7. We have examined the charge leveled against the petitioner mainly relates to unauthorized absence. There is no reference of any moral turpitude. We have considered the fact that the petitioner has rendered service of 17 years and he does not dispute having 9 black marks which suggests that he has not contested for reinstatement of his service rather he is concerned only with reversal of the order of dismissal to order of compulsory retirement so that he may get pension and survive his remaining life along with his family members who are depending upon him. It is not disputed that the provision of Rule 836 of the Orissa Police Rules meant to get rid of such employee whose conduct is bad and for that the authorities have been conferred with the power to reduce the rank or compulsory retirement or removal or dismissal.

In the case in hand, since punishment imposed upon the petitioner is related to unauthorized absence and not related to his integrity and moral turpitude and as such the order of dismissal will be said to be harse considering the fact that there is also other punishment provided in Rule 836 of the Orissa Police Rules regarding compulsory retirement since the petitioner has already rendered 17 years of service and if the order of punishment of compulsory retirement will be awarded in place of the order of dismissal, the purpose of the department would be served, i.e. getting rid of the petitioner but simultaneously since he has performed his duty continuously for a period of 17 years, it is entitles him for the benefit of pension for the period for which he has rendered his service.

8. We, after taking into consideration this factual aspects and applying the ratio of the judgment referred to above, are of the considered view that awarding of punishment of compulsory retirement would be just and proper. In view thereof, we are inclined to interfere with the order impugned and the same is quashed and the matter be remitted back before the authorities to pass appropriate order in the light of the observations made herein above within period of eight weeks from the date of receipt of this order and take consequential steps.

9. In the result, the writ petition is disposed of.

Writ petition disposed of.

2017 (II) ILR - CUT- 317

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

W.P.(C) NO. 23837 of 2013

JAYA PRAKASH MOHANTY ……..Petitioner

.Vrs.

STATE OF ODISHA REPRESENTED BY ITS SECRETARY, HOME DEPARTMENT & *ORS.* ……..Opp. parties

DISCIPLINARY PROCEEDING – Doctrine of equality must apply to all those who are equally placed – Equal treatment should also be maintained while imposing punishment and any discrimination would violate Article 14 of the constitution of India.

In this case the petitioner was departmentally proceeded and given punishment of compulsory retirement where as in another Departmental Proceeding for the similar type of charges one Monoj Kumar Behera was let off with only censure which is discriminatory being violative Article 14 of the Constitution of India, so doctrine of equality applies to this case –Held, the punishment of compulsory retirement passed by the Disciplinary Authority as well as the Appeal Committee are quashed – Since charge Nos1 and 2 are proved against the petitioner, he may be awarded with punishment of stoppage of four annual increments without cumulative effect – Direction issued to the authority to reinstate the petitioner in service and to extend consequential service benefits including financial benefits to him.

(Paras 15,16,17)

Case Laws Referred to :-

1. (2006) 6 SCC 548 : Anand Regional Coop. Oil Seedsgrowers' Union Limited –V- Shailesh Kumar Harshadbhai Shah.
2. (1998) 2 SCC 407 : Director General of Police and Others v. G. Dasayan.
3. 2013 (II) OLR (SC) 48 : Rajendra Yadav –V- State of M.P. & others.

For Petitioner : M/s. L .Kanungo, S. Das, S.N. Das, S.K. Mishra & L.N. Ray

For Opp. Parties : Bibhu Prasad Tripathy , A.G.A

Date of hearing : 20.03.2017
Date of judgment: 30.06.2017

JUDGMENT

DR. D.P.CHOUDHURY, J.

Challenge has been made to the order dated 12.1.2007 (Annexure-9) of compulsory retirement passed by the Disciplinary Authority and order dated 17.4.2013 (Annexure-10) passed by the Appeal Committee confirming the order of the Disciplinary Authority.

2. FACTS

The factual matrix leading to the writ petition is that the petitioner was appointed as a driver in the judgeship of Kandhamal, Phulbani and during the relevant period, he was attached to the Office of Chief Judicial Magistrate, Boudh for plying the office Jeep bearing registration No.OLR 2594. During his incumbency as a driver, he was departmentally proceeded vide D.P. No.14/2005 and the charges against him were as follows:

"OFFICE OF THE DISTRICT JUDGE KANDHAMAL
BOUDH, PHULBANI
DISCIPLINARY PROCEEDING No.14/2005

1.Name, Rank and Grade of the Officer proceeded against:		Shri Jaya Prakash Mohanty Driver C.J.M. Court Boudh Now on deputation to the Court of JMFC Kantamal
2.Rank	:	Class-III
3.Whether Permanent or Temporary	:	Temporary
4.Scale of Pay	:	Rs.3,200/- to Rs.4,900/-

DETAIL OF CHARGES

You Sri Jaya Prakash Mohanty Driver, C.J.M., Court Boudh now on deputation to the Court of J.M.F.C., Kantamal, is charged as follows:

CHARGE NO.1

That, it appears that during your incumbency as Driver C.J.M. Court Boudh, you were not reported regarding depositing of Road Tax from March'02 to March'04 of the Office Jeep bearing ORL-2594 to your immediate authority of the Registrar, Civil Courts, Phulbani as the R.C.Book of the said vehicle was with you. Further the Regional Transport Authority, Phulbani has charged Tax Rs.1240/- + penalty of Rs.2480/- in Total Rs.3220/- for payment. Due to your latches the office has already paid Rs.2480/- excess as penalty to the R.T.A. Phulbani.

Your above action amounts to gross negligence in duty, carelessness, disobedience of order and dereliction in duty and thereby you have violated the Rule-3 of the Orissa Govt. Servants Conduct Rules, 1959, punishable as contemplated under Rule 15 of the Orissa Civil Services (CCA) Rules-1992.

CHARGE NO.2

That, it appears from the available records that you have not handed over the R.C.Book of the Office Jeep bearing Regd. No.ORL-2594 to the bidder. On being asked, you have stated that the R.C.Book of

the said vehicle has been completely damaged by white ants as it was kept inside the garage. Due to your negligence, the R.C.Book of the said vehicle has been damaged.

Your above action amounts to gross negligence in duty, carelessness, misconduct and dereliction in duty and thereby you have violated the Rule-3 of the Orissa Government Servants Conduct Rule, 1959 punishable as contemplated under Rule 15 of the Orissa Civil Services (CCA) Rules, 1962.

CHARGE NO.3

That, the Chief Judicial Magistrate, Boudh has intimated vide his office Letter No.1920 dated 22.09.2005 that you were driving his personal vehicle to bring him from his residence to the Court and back from 20.1.2005 to 16.8.2005 at his own request, without prior permission of the District Judge.

Your above action amounts to carelessness, dereliction in duty and misconduct and thereby you have violated the Rule 3 of the Orissa Govt. Servants Conduct Rules, 1959 punishable as contemplated under Rule-15 of the Orissa Civil Services (CCA) Rules, 1962

Charge No.4

That the Judicial Magistrate, First Class, Kantamala has intimated in his letter no.1249 dated 29.09.2005 that you have remained absent unauthorizedly from 1.9.2005 to 29.9.2005 in the office without prior permission of the authority, for which many difficulties are being experienced in attending the day to day office work.

Your above action amounts to misconduct, unauthorized wilful absence, carelessness and dereliction in duty and thereby you have violated the Rule 3 of the Orissa Govt. Servants Conduct Rules, 1959 punishable as contemplated under Rule-15 of the Orissa Civil Services (CCA) Rules, 1962.

You are hereby called upon to submit your Written Statement of defence, if any, within 15 days from the date of receipt of the communication, if no written statement of defence is received within the period fixed, it would be presumed that, you have no defence to make.

You may also state in writing if you desire to be heard in person.

Sd/-District Judge,

Kandhamal-
Boudh,Phulbani"

3. The opposite party no.3, being the Disciplinary Authority, appointed opposite party no.4 as Enquiring Officer. The petitioner submitted his written statement stating that the charges made against him are baseless and he has no fault because it was the duty of the Registrar, Civil Court to pay the road tax of the Jeep and his predecessor was responsible for non-payment of the road tax of the said Jeep. It is also mentioned in the written statement submitted by the petitioner that there was no Almirah or table given to him to keep the registration certificate (RC Book) of the Jeep and the same has been kept in the Garage of the Jeep for which the white ants damaged the R.C.Book of the Jeep. He further submitted in writing that on being directed by the C.J.M., Boudh, he was driving his private vehicle when the office Jeep became out of order. Moreover, he remained absent with the permission of the authority as he was required to depose before the District Judge and remained absent further due to illness of his family members. So, he prayed to exonerate him from the charges.

4. The Enquiring Officer, opposite party no.4 submitted his report after examining all the witnesses from both sides to the effect that the prosecution has proved all the charges except Charge No.3 and accordingly, sent the report to the Disciplinary Authority, opposite party no.3, who issued notice to show cause but the petitioner did not attend the opposite party no.3 and opposite party no.3 passed order retiring the petitioner compulsorily from service because of his gross misconduct, insubordination and negligence in duty. The petitioner preferred appeal before the Appeal Committee of this Court and the Appeal Committee were pleased to reject the Appeal Memo of the petitioner and confirmed the order of compulsory retirement passed by the opposite party no.3. Against such order of compulsory retirement, the present writ petition is filed on various grounds.

5. <u>SUBMISSIONS</u>

Mr.Kanungo, learned counsel for the petitioner submitted that the Enquiring Officer and the Disciplinary Authority have committed gross error by not considering the plea taken by the petitioner in the written statement although the predecessor of the petitioner Sri Manoj Kumar Behera was also proceeded departmentally vide D.P.No.15/2005 for non-payment of the road tax of the said Jeep and payment of penalty imposed on delayed payment of road tax of the said Jeep, but in that proceeding, said Manoj Kumar Behera

was let off by issuing warning. He further submitted that since for the same nature of allegation, his colleague Manoj Kumar Behera was only issued a warning, he is being discriminated by awarding punishment of compulsory retirement. In support of his contention, he relied upon the decision reported in ***Rajendra Yadav –V- State of M.P. & others; 2013 (II) OLR (SC) 48*** wherein Their Lordships have observed that doctrine of equality applies to all who are equally placed, even among person who are found guilty. So, learned counsel for the petitioner submitted that for the self-same allegation, when Manoj Kumar Behera, the colleague of the petitioner was awarded with only censure, petitioner could have been awarded similar punishment by applying the doctrine of equality without being discriminated.

6. Mr.Kanungo, learned counsel for the petitioner submitted that there is no proper assessment of the evidence adduced by the petitioner because in the Enquiry Report, there was no discussion about any material leading to wrong conclusion. Since the Registrar, Civil Courts is the Judge-in-Charge of the vehicles of the judgeship, the necessary documents are all to be kept with the Registrar, but in this case, the responsibility is fixed on the petitioner with ulterior motive. The payment of road tax of the Jeep in delay was not the fault of the petitioner but it is the fault of the Nazir as he has got the duty to pay the road tax. He further submitted that since the petitioner was under the control of the then Chief Judicial Magistrte, he has no option than to drive the personal vehicle under his instruction. However, that charge has been dropped being not proved.

7. So far Charge No.4 is concerned, the petitioner has left the headquarters with the permission of the authority concerned and extended leave by applying through post and the same having being duly received by the Office, the charge of unauthorized absence or negligence in duty was disproved. According to him, the Disciplinary Authority, without being biased by the report of the Enquiring Officer, should have considered the case of the petitioner on going through the material placed before him but the opposite party no.3 passed harsh order of punishment disproportionate to the charges levelled against the petitioner. Learned counsel for the petitioner submitted that the punishment apart from being discriminatory is also disproportionate to the charge made against the petitioner. The Appeal Committee has also lost sight of the fact that the punishment awarded is disproportionate to the charges proved against the petitioner for which said order is also vulnerable.

8. Mr.B.P.Tripathy, learned Additional Government Advocate, by referring to the counter affidavit filed by the opposite parties, submitted that there is no illegality in the impugned order passed by the Disciplinary Authority as well as by the Appeal Committee because the petitioner is charged with gross negligence and dereliction in duty besides the charge of gross misconduct. According to him, due to negligence of the petitioner, the opposite party no.4 had to pay the penalty of Rs.2480/- to the Regional Transport Authority, Phulbani with road tax in respect of the Jeep bearing registration No.ORL-2594. Not only this but also due to the sole negligence of the petitioner, the entire R.C.Book of the said jeep has been damaged by white ants although it was his duty to keep the document of the vehicle in safe custody.

9. Learned Additional Government Advocate further submitted that the petitioner was plying the personal vehicle of the Chief Judicial Magistrate without any permission from the authority for the period when the said Jeep became out of order. He again contended that the petitioner was granted C.L. and permission from 01.09.2005 to 05.09.2005 to give evidence before the District Judge, Phulbani, but thereafter he did not resume his duty on 06.09.2005 and as such remained absent from his duty unauthorizedly till 03.10.2005 by sending telegrams only on two occasions, i.e. on 12.09.2005 and 20.09.2005 in a casual manner, which would go to show that the petitioner has no regard for discipline and as such he disobeyed the order of the authority. He further stated that said Manoj Kumar Behera has been also punished by the Disciplinary Authority as the order has been passed by cautioning him. So, it cannot be said that Sri Behera was let off without any punishment and moreover, the petitioner is facing four charges whereas Sri Behera was facing only charge of negligence for non-payment of the road tax of the vehicle for certain period from 1999 to 2002. Hence, the plea of the petitioner that he was discriminated when Shri Behera was let off with minor punishment is incorrect. As such, Mr.Tripathy, learned Additional Government Advocate submitted that the petitioner has no case and the writ petition should be dismissed.

10. <u>POINT FOR DETERMINATION</u>

The main point for determination is; (1) Whether the order of compulsory retirement passed by the Disciplinary Authority is illegal and improper?

11. DISCUSSIONS

On perusal of the details of Charges (Annexure-1) and the Enquiry Report (Annexure-B/3), it appears that Charge No.3 has not been proved. It is trite in law that reevaluation of evidence adduced before the Enquiring Officer is impermissible, but if there is manifest error in the procedure while conducting the enquiry, the Court will not hesitate to interfere. In the instant case, the Charge No.1 relates to non-payment of road tax of the Jeep bearing Registration No.ORL-2594 for the period from March 2002 to March, 2004 because of non-reporting about such payment of tax to the Registrar, Civil Court by the petitioner. Due to such non-payment, later the Regional Transport Authority, Phulbani charged tax of Rs.1240/- along with penalty amount of Rs.2480/- and in total Rs.3720/- was paid by the opposite party no.4. It is not out of place to mention here that one Manoj Kumar Behera, the predecessor of the petitioner, was driving the said office Jeep. It is also revealed from the counter affidavit of the opposite parties that from March, 1999 to February, 2002, road tax for the said Jeep had not been paid for which said Manoj Kumar Behera was also proceeded vide D.P. No.15/2005. It is also revealed from the counter affidavit that from the year 1999 till 2004, the road tax along with penalty was paid by the office of the District Judge. When Manoj Kumar Behera was the predecessor of the petitioner and proceeded for the self-same reasons, it cannot be said that the petitioner was solely responsible for non-payment of the road tax. Apart from this, the judicial notice can be taken from the concerned rules or procedure that the payment of road tax for the vehicle is not only the duty of the driver but also of the Nazir, who is under the direct control of the Registrar, Civil Court and the Registrar, Civil Courts is the Judge-in-Charge of all the vehicles under the relevant rules. No doubt, the petitioner, being the driver of the vehicle has got onerous duty for payment of the road tax so that the vehicle can run on the road. But, it was not his only duty to report about the non-payment of road tax whereas the other officers have equally got responsibility to ensure the payment of road tax of the vehice on time.

12. The petitioner was found guilty of negligence as the RC Book of said vehicle has been damaged by white ants while the same being kept in the garage of the Chief Judicial Magistrate. In this regard, the plea of the petitioner that the opposite party no.4, being the Drawing and Disbursement Officer (D.D.O), has got the responsibility to be in custody of the RC Book of the vehicle is not only evasive but also against the relevant provisions of law. The driver is always required to possess the RC Book of the vehicle so

that the vehicle, on checking, can be found with all required documents as per the M.V.Act and Rules made thereunder.

13. So far Charge No.4 is concerned, it is admitted by the opposite parties that the petitioner had left Headquarters with permission to depose and remained absent subsequently. It is equally admitted by the opposite parties in the counter affidavit that the petitioner has made telegram time to time extending his leave. When it is admitted fact that the petitioner has left Headquarters with permission and has also sent telegrams from time to time, we are of the considered view that the petitioner has made all efforts asking for leave from 05.09.2005 onwards and finally, he joined his duty on 04.10.2005. So, the period of absence right from 01.09.2005 till 03.10.2005 cannot be said to be without any prior information to the authority nor the same can be termed as unauthorized absence. There is no plea of the opposite parties that the petitioner was issued with any notice to resume his duty, but he failed to attend. Thus, we are of the opinion that Charge No. 4 cannot be said to have been successfully proved against him.

14. Now the Charge Nos.1 and 2 levelled against the petitioner only remained on paper being proved against him although allegations pertaining to Charge No.1 against his predecessor Sri Behera being proved, he has been issued with the order of caution. Nothing is found from the counter that the petitioner was earlier punished under any disciplinary proceeding. Thus the case of the petitioner is similar to the case of Sri Behera so far as Charge No.1 is concerned, but the punishment are not equally awarded.

15. It is reported in the case of ***Rajendra Yadav –V- State of M.P. & others (Supra)*** where Their Lordships, at paragraphs-12 and 13, have observed as follows:

> "**12.** The Doctrine of Equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The Disciplinary Authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences.

> **13.** The principle stated above is seen applied in few judgments of this Court. The earliest one is ***Director General of Police and Others v. G. Dasayan*** ***(1998) 2 SCC 407,*** wherein one Dasayan, a Police Constable, along with two other constables and one Head Constable were charged for the same acts of misconduct. The Disciplinary Authority exonerated two other constables, but imposed the punishment of dismissal from service on Dasayan and that of compulsory retirement on Head Constable. This Court, in order to meet the ends of justice, substituted the order of compulsory retirement in place of the order of dismissal from service on Dasayan, applying the principle of parity in punishment among co-delinquents. This Court held that it may, otherwise, violate Article 14 of the Constitution of India. In ***Anand Regional Coop. Oil Seedsgrowers' Union Limited –V- Shailesh Kumar Harshadbhai Shah (2006) 6 SCC 548***, the workman was dismissed from service for proved misconduct. However, few other workmen, against whom there were identical allegations, were allowed to avail of the benefit of voluntary retirement scheme. In such circumstances, this Court directed that the workman also be treated on the same footing and be given the benefit of voluntary retirement from service from the month on which the others were given the benefit."

With due regard to the above decision, it appears that the doctrine of equality must apply to all those who are equally placed; even who are found guilty for similar charges. The equality of treatment would also be maintained while imposing punishment and there cannot be discrimination as the same would violate Article 14 of the Constitution of India. Applying the said principle in the instant case, it appears that when Manoj Kumar Behera in D.P. No.15/2005 was let off with caution as revealed from the counter of the opposite parties, the order of punishment of compulsory retirement passed against the petitioner is discriminatory being violative of Article 14 of the Constitution of India. On the other hand, the doctrine of equality must be applied in the present case.

16. Apart from this, we are of the considered opinion that neither the Disciplinary Authority nor the Appeal Committee could examine proportionality of the punishment to the charges levelled against the petitioner. When there are only charges of non-reporting about non-payment of road tax and damage to the RC Book of the vehicle proved, award of punishment like compulsory retirement, in our considered opinion, is

disproportionate to the charges proved against him in terms of the discussions made above. Hence, the order of passing compulsory retirement against the petitioner is illegal and improper. The point for discussion is answered accordingly.

17. CONCLUSION

From the foregoing discussions, it is made clear that the punishment awarded to the petitioner is not in consonance with the principles of law vis-a-vis the charges proved against him for which the same cannot be sustained in law. We, therefore, are of the view that the said order of compulsory retirement passed by the Disciplinary Authority vide Annexure-9 and the order passed by the Appeal Committee vide Annexure-10 are liable to be quashed and the Court do so. On the other hand, considering the gravity of Charge Nos.1 and 2 proved against the petitioner, he may be awarded with the punishment of stoppage of four annual increments without cumulative effect. Accordingly, it is directed that the petitioner be reinstated in service and the consequential service benefits including the financial benefits be extended to him. It is made clear that the petitioner would be extended the financial benefits notionally and the entire exercise must be completed within a month from the date of this order. The Writ Petition is disposed of accordingly.

Writ Petition disposed of.

2017 (II) ILR - CUT- 327

DR. A.K. RATH, J.

CMP NO. 464 OF 2017

VIBGYOR STRUCTURAL CONSTRUCTION PVT. LTD. ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……...Opp. parties

PRACTICE & PROCEDURE – Whether mentioning of a wrong provision or non-mentioning of any provision of law by itself will take away the jurisdiction of a Court, if it is otherwise vested in it by law ? Held, No.

In this case, the O.P.-Government filed appeal before the learned District Judge alongwith an application U/s. 5 of the Limitation Act, 1963 for condonation of delay and another petition seeking time to pay court fee, without mentioning the provision of section 149 C.P.C – Learned District Judge considered to have source to exercise such power and accordingly while condoning delay U/s. 5 of the Limitation Act, allowed time to pay Court fee U/s. 149 C.P.C – Held, the impugned order is not perfunctory on the ground of non filing of proper application seeking time to file Court fees. (Paras 7,8,9)

LIMITATION ACT, 1963 – S.5

Condonation of delay – Government is the applicant – The expression "sufficient cause" should be considered with pragmatism in justice-oriented approach rather than technicalities – Since Government is a impersonal machinery and public interest will suffer, certain amount of latitude is permissible.

In this case, Government has filed the appeal, in which the offices of the authorities are situated at different places of the state – Nothing is shown to conclude that there was intentional delay on behalf of the appellants to file the appeal or to pay the court fees – Held, the impugned order condoning the delay can not be said to be illegal warranting interference by this court. (Paras 6,7)

Case Laws Referred to :-

1. (1987) 2 SCC 107 : Collector, Land Acquisition, Anantnag & Anr. -V- Mst. Katiji & Ors.
2. AIR 1996 SC 1623 : State of Haryana -V- Chandra Mani & Ors.
3. (2009) 12 SCC 175 : J. Kumardarsan Nair -V- Iric Sohan & Ors.

For Petitioner : Mr. Kalyan Patnaik
For Opp. Parties : Mr. P.C. Panda, AGA

Date of hearing :10.05.2017
Date of judgment:15.05.2017

JUDGMENT

Dr. A.K.RATH, J.

This petition challenges the order dated 18.3.2017 passed by the learned District Judge, Sambalpur in RFA No.04 of 2016. By the said order, learned District Judge rejected the application dated 14.3.2016 of the respondent-petitioner to dismiss the appeal for nonpayment of court fees.

2. Shorn of unnecessary details, the short facts of the case are that the petitioner as plaintiff instituted C.S. No.26 of 2008 in the court of the learned

Civil Judge (Senior Division), Sambalpur for a decree of Rs.27,77,889/- impleading the opposite parties as defendants. The suit was decreed. Assailing the judgment and decree, the defendants filed RFA No.04 of 2016 before the learned District Judge. Since there was delay in filing the appeal, an application under Section 5 of the Limitation Act was filed. The respondents-opposite parties also filed an application seeking time to pay court fees. While the matter stood thus, the appellant-petitioner filed an application on 14.3.2016 to dismiss the appeal for non-payment of court fees. It is stated that an amount of Rs.99,584.25 was payable towards court fees. The appeal was filed beyond the prescribed period of limitation and without payment of court fees. There was inordinate delay in payment of court fees. Learned appellate court assigned the following reasons and condoned the delay;

> "…… The present case also involves realization of a huge sum of Rs.27,77,889/- with 9% interest per annum from the date of filing of suit till realization. The office of appellant No.4 situates in the district of Keonjhar and the office of appellant No.2 situates at Khurdha and the office of appellant No.3 which is the Superintending Engineer situates at Sambalpur. This is an appeal filed by the Government in which the offices of the authorities are situated at different places of the State. Nothing is shown to conclude that there was any intentional delay on behalf of the appellants to file the appeal or to deposit the deficit court fee. When such case involves realization of a huge sum of money of the Government which is public money amounting to more than Rs.27 lakhs, in my considered opinion, for the ends of justice the delay should be condoned u/s.5 Limitation Act and deficit court fee should be accepted u/s. 149 CPC."

3. Mr. Kalyan Patnaik, learned counsel for the petitioner submitted that there was delay of 335 days in presenting the appeal. An amount of Rs.99,584.25 was payable towards court fees. No proper application was filed seeking time to file court fees. Successive applications were filed seeking time to pay court fees. The reasons assigned in the application for condonation of delay do not constitute sufficient cause. Learned appellate court has not considered the matter in its proper perspective and condoned the delay in filing the appeal.

4. Per contra, Mr. P.C Panda, learned Addl. Government Advocate, submitted that an amount of Rs.99,584.25 was payable towards court fees. After the judgment and decree, the G.P., Sambalpur applied certified copy of

the judgment on 1.12.2014. He sent the judgment and decree on 6.1.2015 to defendant no.4 with his opinion. The same was received on 19.1.2015 whereafter the defendant no.4 forwarded the same to defendant no.2 on 5.2.2015. Defendant no.2 submitted the same to the Government on 16.2.2015. Since the Government wanted some relevant documents, on 4.3.2015 the G.P applied certified copy of the documents. On 19.3.2015, the same was supplied to the defendant no.4. Thereafter, the matter was referred to the Law Department. On 16.6.2015, the Government took a decision to file appeal before this Court. On 8.7.2015 all the papers were submitted to the office of the Advocate General who furnished opinion that the appeal should be filed before the learned court below. The documents were returned to defendant no.4. After taking necessary instruction from the Government, the appeal along with an application under Section 5 of the Limitation Act for condonation of delay was filed. He further submitted that without proper sanction of the competent authority, the court fees could not be paid for which an application was filed seeking time to pay court fees. Though the provision of CPC has not been mentioned in the application, the same can be construed as an application under Section 149 CPC. The appellants were preventedby sufficient cause in not filing the appeal on time. Learned appellate court is justified in condoning the delay.

5. In Collector, Land Acquisition, Anantnag and Another Vs. Mst.Katiji and Others (1987) 2 SCC 107, the apex Court held as follows:

> "1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
>
> 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties. 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
>
> 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a nondeliberate
> delay.

> 5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
>
> 6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and
> is expected to do so."

6. As held by the apex Court in the case of State of Haryana v. Chandra Mani and others, AIR 1996 SC 1623, the State is an impersonal machinery. When the State is an applicant praying for condonation of delay certain amount of latitude is permissible. If the case brought by the State is lost for such default, no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detention of sufficient cause for explaining every day's delay. The court should decide the matter on merit unless the case is hopelessly without merit.

7. An amount of Rs.99,584.25 was payable towards court fees. Without prior sanction, the defendants-appellants could not have paid the court fees. Learned appellate court is justified in granting time to pay the court fees. An application seeking extension of time for payment of court fees has been filed. Further the appellants had filed an application under Sec.5 of the Limitation Act for condonation of delay. The reasons assigned by the learned appellate court constitute sufficient cause. The learned appellate court has rightly condoned the delay. Though proper provision of CPC has not been mentioned but the same can be construed as an application under Section 149 CPC.

8. It is trite that mentioning of a wrong provision or no mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. While exercising its power, the court will merely consider whether it has the source to exercise such power or not. (J.Kumardasan Nair Vrs. Iric Sohan and others (2009) 12 SCC 175.

9. The order passed by the learned appellate court cannot be said perfunctory or flawed warranting interference of this Court under Article 227 of the Constitution. But then, the learned appellate court is not justified in

imposing cost. There was delay of 335 days in filing the appeal. In view of the same, the delay is condoned subject to payment of cost of Rs.3500/- (rupees three thousand five hundred) which shall be paid to the learned counsel for the respondent within a period of two months.

Petition dismissed.

2017 (II) ILR - CUT- 332

DR. A.K. RATH, J.

C.M.P. NO. 1670 OF 2014

DESHARANJAN TRIPATHY @ TUKUNA …….Petitioner

.Vrs.

JADUMANI @ JADUNATH TRIPATHY & ORS. ……..Opp. parties

LIMITATION ACT, 1963 – ARTS. 64, 65

Whether the plaintiff can seek a declaration that he has acquired title by way of adverse possession in a suit for specific performance of Contract ? Held, No.

In a case of agreement to sell, even if the proposed vendee put in possession of the property, such possession is only permissive unless it is proved to be adverse – Moreover the plea of title and adverse possession are mutually inconsistent and the later does not begin to operate until the former is renounced – Since the learned trial Court has rightly rejected the application of the petitioner for amendment, the present petition sans merit, hence dismissed.

(Paras 5 to 9)

Case Laws Referred to :-

1. AIR 1996 SC 910 : Mohan Lal (deceased) through his LRs. Kachru & Ors. -V- Mirza Abdul Gaffar & Anr.
2. ILR (1965) Mad 254 : Annamalai Chettiar & Anr. -V- Muthiah Chettiar & Anr.
3. AIR 1983 Orissa 107: Baruna Giri & Ors. -V- Rajakishore Giri & Ors.

For Petitioner : Mr. M.M.Sahu

For Opp. Parties : Mr. Swarup Patnaik

Date of Hearing :11.4.2017

Date of Judgment:21.4.2017

JUDGMENT

DR.A.K.RATH, J.

This petition challenges the order dated 2.12.2014 passed by the learned Ist Addl. Civil Judge (Sr.Division), Bhubaneswar in C.S.No.1842 of 2010. By the said order, the learned trial court rejected the application under Order 6 Rule 17 C.P.C. for amendment of the plaint.

2. The petitioner as plaintiff instituted the suit for specific performance of contract and other ancillary reliefs impleading the opposite parties as defendants. The case of the plaintiff is that the suit plot no.4626 having an area of A0.59 decimal was recorded in the name of late Nityanada Tripathy, defendant nos. 1 and 2 in the Consolidation R.O.R. published in the year 1984. The parties were in possession of their respective shares. The defendant no.1 was in possession of an area Ac.0.19 2/3 decimals from the northern side of the suit plot. To press his legal necessity, he evinced an intention to sell the same to the plaintiff, who is the owner of contiguous chaka. The defendant no.1 executed an agreement for sale, received a part consideration and delivered possession in favour of the plaintiff on 20.3.1997. He was ready and willing to perform his part contract. When defendant no.1 had not executed the sale deed, he instituted the suit seeking the aforesaid reliefs. While the matter stood thus, the plaintiff filed an application under Order 6 Rule 17 C.P.C. to amend the plaint. In the proposed amendment, the plaintiff sought to incorporate the plea that possession of the land was delivered to him. He is in possession of the suit land and acquired title by way of adverse possession. An alternative prayer has been sought for declaration that the plaintiff has acquired right, title and interest by way of adverse possession. The defendant no.1 filed objection. The learned trial court held that the proposed amendment will change the nature and character of the suit and rejected the same.

3. Mr.Sahu, learned counsel for the petitioner argued with vehemence that pursuant to agreement to sell, defendant no.1 has received a part consideration. He delivered possession of the suit land to the plaintiff. Thereafter the plaintiff merged the suit plot with his plot. The plaintiff is in possession of the suit land peacefully, continuously and with the hostile animus to defendant no.1 for more than a statutory period and, as such acquired title by way of adverse possession. The proposed amendment is formal and will not change the nature and character of the suit. The learned trial court committed a manifest illegality in rejecting the application for amendment.

4. Per contra, Mr.Patnaik, learned counsel for opposite party no.1 submitted that the plaintiff has instituted the suit for specific performance of contract. In the proposed amendment, he sought the prayer for declaration of title by way of adverse possession. The plea is inconsistent. He relied upon a decision of the Apex Court in the case of Mohan Lal (Deceased) through his Lrs. Kachru and others Vrs. Mirza Abdul Gaffar and another, AIR 1996 SC 910.

5. The seminal question hinges for consideration is whether the plaintiff can seek a declaration that he has acquired title by way of adverse possession in a suit for specific performance of contract ?

6. In Annamalai Chettiar and another v. Muthiah Chettiar and another, ILR (1965) Mad 254, a Division Bench of Madras High Court held thus:

> "In the case of an executory contract of sale where the transferee is put in possession of the property in pursuance of the agreement of sale and where the parties contemplate the execution of a regular registered sale deed the position is different. The purchaser who gets possession in such cases is in possession in a derivative character and in clear recognition of and in acknowledgement of the title of the vendor. The animus of the purchaser throughout is that he is in possession of the property belonging to the vendor, and that the former's title has to be perfected by a duly executed registered deed of sale under which the vendor has to pass on and convey his title.
>
> xxx xxx xxx
>
> In the instant case the possession of the respondent was in pursuance of and under the agreement of sale, right from the inception, and therefore, clearly permissive in character besides being in recognition and acknowledgement of the title of the owner.
>
> xxx xxx xxx
>
> …….in the conception of adverse possession there is an essential and basic difference between a case in which the other party is put in possession of the property by an outright transfer, both parties stipulating for a total divestiture of all the rights of the transferor in the property, and a case in which, there is a mere executory agreement of transfer both parties contemplating a deed of transfer to be executed at a later point of time. In the latter case the principle of estoppel which applies between mortgagor and mortgagee or a lessor and lessee clearly applies, estopping the transferee from contending

> that his possession, while the contract remained executory in stage, was in his own right and adversely against the transferor. Adverse possession implies that it commenced in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper, referable to a contract, it cannot be adverse.
>
> xxx xxx xxx
>
> ……if a person is in actual possession and has a right to possession under a title involving a due recognition of the owner's title his possession will not be regarded as adverse in law, even though he claims under another title, having regard to the well recognised policy of law that possession is never considered adverse if it is referable to a lawful title. The purchaser who got into possession under an executory contract of sale in a permissible character cannot be heard to contend that his possession was adverse."

7. The aforesaid decision was cited with approval by a Division Bench of this Court in Baruna Giri and others and Rajakishore Giri and others, AIR 1983 Orissa 107. This Court held that even after the contract to sell, title clearly resides in the vendor, and even though the proposed vendee has taken possession, his possession under the contract and is, therefore, clearly permissible.

Where, therefore, the origin of possession of the proposed vendee is proved to be permissive it will be presumed to be so un-less and until something happened to make it adverse. Unless the proposed vendee asserts any hostile or overt act to show that he disclaimed the title of the vendor, his possession would not be adverse. The mere fact of long possession is not sufficient to alter the character of permissive possession into an adverse one.

8. The plea of title and adverse possession are mutually inconsistent and the later does not begin to operate until the former is renounced as held by the apex Court in the case of P.T. Munichikkanna Reddy and others v. Revamma and others, (2007) 6 SCC 59. In Mohal Lal (supra), the appellant had come into possession of the suit-lands pursuant to an agreement of sale dated March 8, 1956. He paid part consideration of Rs.500/- and obtained possession of the lands. Subsequently, the respondent purchased the lands by sale deed dated March 23, 1960. In the meanwhile, the appellant's for specific performance of the contract for sale was dismissed and became final. The respondent filed the suit for possession. The trial court decreed the suit.

On appeal, it was reversed and dismissed. In second appeal, the High Court set aside the judgment and decree of the appellate court and restored the decree of the trial court. The matter went to the Apex Court. The question arose before the apex Court as to whether the appellant was entitled to retain possession of the suit property. Two pleas had been raised by the appellant in defence; one was that having remained in possession from March, 8, 1956, he has perfected his title by prescription. Secondly, he pleaded that he was entitled to retain his possession by operation of Section 53-A of the Transfer of Property Act, 1882. The apex Court held thus :

> "As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor of his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., upto completing the period of his title by prescription nec vi nec clam nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

9. In view of the decisions cited supra, the inescapable conclusion is that the petition, sans merit, deserves dismissal. Accordingly, the same is dismissed. No costs.

Petition dismissed.

2017 (II) ILR - CUT- 336

DR. A.K. RATH, J.

R.S.A. NO. 44 OF 2017

KASINATH TUNG .....Appellant

.Vrs.

JYOTI MANJARI NAYAK .....Respondent

CIVIL PROCEDURE CODE, 1908 – O-8, R-6A(1)

Whether the defendant can file counter claim in respect of the property which is not the subject-matter of the suit ? Held, No.

The words "any right" appearing in Rule 6-A(1) of Order 8 C.P.C. mean right over the suit land and the same must be in respect of cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit – Held, the defendant can not file a counter claim in respect of the property, which is not the subject-matter of the suit. (Paras 13,14)

Case Laws Referred to :-

1. AIR 2001 SC 965 : Santosh Hazari -V- Purushottam Tiwari
2. 1989 (I) OLR- 379 : Sudarsan Prusty -V- Rabindranath Prusty & Ors.
3. 1995 (II) OLR 348 : Braja Kishore Sahu & Ors. -V- Smt. Sailabala Sahu & Ors.
4. (2008) 4 SCC 594 : Anathula Sudhakar -V- P. Buchi Reddy (Dead) by L.Rs & Ors.
5. (2008) 15 SCC 150 : Kurella Naga Druva Vudaya Bhaskara Rao -V- Galla Jani Kamma @Nacharamma

For Appellant : Mr. Bibhu Prasad Das.

Date of hearing : 11.05.2017
Date of judgment: 11.05.2017

JUDGMENT

DR.A.K.RATH, J.

Defendant is the appellant against an affirming judgment.

02. Respondent as plaintiff instituted C.S. No. 218 of 2009 in the court of the learned Civil Judge (Senior Division), Angul for recovery of possession and permanent injunction impleading the appellant as defendant. The case of the plaintiff is that she purchased the suit land from one Rabindra Naik by means of a registered sale deed dated 19.11.2007. She is the owner in possession of the suit land. The defendant, who has no manner of title over the same, created disturbance in her possession.

03. Pursuant to issuance of summons, defendant entered appearance and filed a written statement-cum-counter claim denying the assertions made in the plaint. The case of the defendant is that he has purchased the plot no.121/134 appertaining to Khata No. 91 from one Brundabati Naik on 05.07.1995. He is in possession of the said land. The plaintiff is not sure of the suit land. She asserts possession over the suit land and as such the defendant filed counter claim seeking declaration of his right over the suit land.

04. On the inter se pleadings of the parties, the learned trial court struck twelve issues. To substantiate the case, the plaintiff had examined four witnesses including herself and on their behalf fifteen documents had been exhibited. Defendant had examined five witnesses including himself and on their behalf, twelve documents had been exhibited. The suit was decreed. The defendant has filed R.F.A. No. 06 of 2015 in the court of the learned District Judge, Angul, which was eventually dismissed.

05. Mr. Das, learned counsel for the appellant, submits that in absence of any prayer for declaration of right, the simple suit for recovery of possession and permanent injunction is not maintainable. The suit land is not identifiable. Learned appellate court has not dealt with all the issues and as such the judgment is vulnerable. He relies upon the decisions of the apex court in the case of *Santosh Hazari vs. Purushottam Tiwari*, AIR 2001 SC 965 and this Court in the case of *Sudarsan Prusty vs. Rabindranath Prusty and others*, 1989 (I) OLR-379, *Braja Kishore Sahu and Others vs. Smt. Sailabala Sahu and Others*, 1995 (II) OLR 348.

06. The plaintiff asserts that she is the owner in possession of Plot no. 121/318 appertaining to Khata No.148, area of Ac.0.04 dec. of mouza-Panchamahala in the district of Angul. According to her, defendant has no manner of title over the same. The defendant in the written statement-cum-counter claim pleaded that he has purchased plot no.121/234 appertaining to Khata No. 91 from one Brundabati Naik on 05.07.1995.

07. In the case of *Sudarsan Prusty vs. Rabindranath Prusty and others*, 1989 (I) OLR-379, this Court held that in case of perpetual injunction, possession of the plaintiff is material to be decided. When the plaintiff is not in possession, a simple suit for injunction would not be maintainable. The same view has been reiterated in the case of Braja Kishore Sahu (supra).

08. Unless the defendant raises a cloud over the plaintiff's title, there is no need to file a suit for declaration of her right over the suit land. In Anathula Sudhakar vs P. Buchi Reddy (Dead) by L.Rs & Others, (2008) 4 SCC 594, the apex court in Paragraph 14 of the report held thus:

> "14. We may, however, clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie

right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that the defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title."

The same view was reiterated in the case of *Kurella Naga Druva Vudaya Bhaskara Rao vs. Galla Jani Kamma alias Nacharamma*, (2008) 15 SCC 150.

09. The next question falls for consideration as to whether the learned appellate court had dealt with all issues.

10. In Santosh Hazari (supra), the apex court held thus:

"15. xxx xxx xxx .The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. The task of an appellate Court affirming the findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with

reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi v. Bijendra Narain Choudnary, AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage, adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of the fact (See Madhusudam Das v. Smt. Narayani Bai, AIR 1983 SC 114). The rule is-and it is nothing more than a rule of practice-that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the creditability of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to whether the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact (See Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh, AIR 1951 SC 120). Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court

> in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

11. In paragraph-7 of the judgment, the learned appellate court came to hold that the vendors of the appellant and respondent had two distinct lands having plot numbers and khata numbers. There appears to be no dispute with regard to the identity of the land. A land can be identified either by plot number or by boundary. Since the lands of the respondent and appellant respectively are clearly identifiable and distinguishable and since they claim their title and possession over the respective lands having distinct plot numbers and khata numbers, no dispute exists in identity of the suit land. The defendant in his written statement pleaded that he does not have nexus with the suit land. The appellate court in a well discussed judgment delved deep into the matter and dismissed the appeal.

12. In view of the specific case of the defendant that he has no claim over the suit land, both the courts are justified in negativing the claim of the defendant.

13. The matter may be examined from another angle. The counter claim filed by the defendant is thoroughly misconceived. The defendant has filed the counter claim in respect of the property, which is not the subject-matter of the suit.

14. In case of Purna Chandra Biswal vs. Kiran Kumari Brahma (C.M.P. No. 1699 of 2014 disposed of on 17.03.2017), this Court held thus:-

> "9. The words "any right" appearing in Rule 6(A) (1) of order 8 CPC mean right over the suit land. The same must be in respect of cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit. Thus the defendant cannot file a counter claim in respect of the property, which is not the subject-matter of suit."

15. As a sequel to the above discussion, the appeal is dismissed, since the same does not involve any substantial question of law. No costs.

Appeal dismissed.

2017 (II) ILR - CUT- 342

DR. A.K. RATH, J.

C.M.P. NO. 1663 OF 2014

RANJAN KUMAR BEHERA @ NAIK ……..Petitioner

.Vrs.

DOMBURUDHAR BEHERA & ORS. …….Opp. parties

EVIDENCE ACT, 1872 – S.65(a)

Paternity of child – DNA test – Direction for such blood test can be given by a Court only if a strong prima-facie case is made out to that effect but it should not be directed as a mater of course or in a routine manner, whenever such a request is made – It is the duty of the Court to consider diverse aspects including presumption U/s 112 of the Evidence Act, Pros and cons of such order and the test of "eminent need" whether it is not possible to reach the truth without use of such test.

In this case plaintiff field an application before the learned Civil Judge (Sr. Divn.) Jeypor for DNA test of himself and his son defendant-No.1 which was allowed by the said Court – Hence this petition – Though it is the case of the plaintiff that defendant No.1 was born in the year 1981 but he filed the suit in the year 2009 – The learned trial court though held that defendant No.1 was born during continuance of a valid marriage between the plaintiff and defendant No.3 and the said marriage was dissolved in the year 1986 and there is no clear evidence on record that plaintiff at any point of time did not have access to defendant No.3 before birth of defendant-No.1, abruptly directed the DNA test of the plaintiff and defendant No.1 – Held, since the plaintiff has not made out a strong prima-face case, the impugned order by the learned trial court allowing his application for DNA test is quashed.

(Paras 13,14,15)

For Petitioner : Mr. Debabrata Dash
For Opp. Parties : Mr. Gopinath Mishra

Date of Hearing : 19.04. 2017
Date of Judgment: 01.05.2017

JUDGMENT

DR. A.K. RATH, J.

This petition challenges the order dated 13.11.2014 passed by the learned Civil Judge (Sr. Divn.), Jeypore in C.S. No.62 of 2009, whereby learned trial court allowed the application of the plaintiff for conducting the DNA test of the plaintiff and defendant no.1.

02. Opposite party no.1 as plaintiff instituted the suit for declaration that he is not the father of the defendant no.1 (petitioner herein), permanent injunction and certain other ancillary reliefs impleading the petitioner as well as opposite party nos.2 and 3 as defendants. The petitioner is defendant no.1 in the suit. The case of the plaintiff is that the marriage between the plaintiff and defendant no.3 was solemnized in the year 1979 according to Hindu customs and rites. After marriage, the defendant no.3 resided in the house of the plaintiff. Prior to the marriage, the defendant no.3 had affairs with defendant no.2. While the matter stood thus, defendant no.3 gave birth to defendant no.1 in the year 1981. Defendant no.3 had extra marital relationship with defendant no.2 even after marriage. In the village meeting, she confessed the same. Dissension cropped up in the family. From 1.5.1986, the defendant nos.2 and 3 are living together as husband and wife. It is further stated that his father-in-law admitted the defendant no.1 in the school describing him as the son of the plaintiff without his knowledge. In the electoral roll, defendant no.1 has been described as the son of the plaintiff. The electoral roll prepared without his knowledge. On 01.07.2009, the defendant no.1 married to one Meenakshi Choudhury. He forcibly entered into the house of the plaintiff for which F.I.R. was lodged.

03. Pursuant to issuance of summons, the defendant no.1 entered appearance and filed written statement-cum-counter claim praying, inter alia, for a declaration that he is the legitimate son of the plaintiff and defendant no.3 during subsistence of their lawful wedlock and certain other ancillary reliefs.

04. In course of hearing, the plaintiff had examined as P.W.1. At this juncture, application was filed by the plaintiff to conduct D.N.A. test of the plaintiff and defendant nos.1 and 2. Defendant no.1 filed objection to the same stating therein that the plaintiff is his father. Since his birth, he resided with the plaintiff. He has married and leading a blissful marital life. In the event, he will be compelled to give blood sample for D.N.A. test, the result of the test will hamper his prestige, which cannot be compensated with money. The plaintiff cannot compel him to give blood for D.N.A. test. There is sufficient evidence on record to show the paternity of the plaintiff and legitimacy of the defendant no.1.

05. Learned trial court came to hold that the material record reveals that marriage between the plaintiff and defendant no.3 was solemnized in the month of ‘Baisakh’ in the year 1979 as per the Hindu customs and rites. After

marriage, defendant no.3 resided in the house of the plaintiff. The plaintiff had alleged that prior to marriage defendant no.3 had illicit relationship with defendant no.2. The same was discovered subsequently. The plaintiff had sexual intercourse with defendant no.3 for about six months against her desire. The plaintiff had alleged that defendant no.3 gave birth to defendant no.1 because of the illicit relationship with defendant no.2. It further held that defendant no.1 was born during continuance of a valid marriage between the plaintiff and defendant no.3. The marriage between the plaintiff and defendant no.3 was not dissolved till the year 1986. There is no clear evidence on record that the plaintiff at any point of time did not have access to the defendant no.3 before birth of defendant no.1. Having recorded such a finding, learned trial court abruptly directed the D.N.A. test of the plaintiff and defendant no.1.

06. Heard Mr. Dash, learned counsel for the petitioner and Mr. Mishra, learned counsel for the opposite party no.1.

07. Mr. Dash, learned counsel for the petitioner, submitted that defendant no.1 is the son of the plaintiff. At the time of institution of the suit, defendant no.1 was 30 years. Defendant no.1 married to one Meenakshi Choudhury and leading a blissful marital life. Out of their wedlock, two children are born. In order to deprive the defendant no.1 from the property, the plaintiff has instituted the suit. Defendant no.1 will suffer ignominy, in the event his blood sample is collected for D.N.A. test. Right of privacy of defendant no.1 cannot be pervaded by directing D.N.A. test. There must be strong prima facie case before directing D.N.A. test. There is no finding with regard to the same. In view of the same, the impugned order is vitiated.

08. Per contra, Mr. Mishra, learned counsel for the opposite party no.1 supported the impugned order. He submitted that the plaintiff is not the father of the defendant no.1. When the paternity of defendant no.1 is dispute, the same can be resolved only when D.N.A. test is conducted. Learned trial court has rightly allowed the application. He relied upon the decisions of the apex Court in the case of *Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another,* AIR 2014 SC 932 and *Dipanwita Roy vs. Ronobroto Roy,* AIR 2015 SC 418.

09. Before proceeding further, it is apt to refer the decision of the apex Court in the case of *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another,* AIR 2010 SC 2851. The apex Court held thus:

"13. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test.

14. There is no conflict in the two decisions of this Court, namely, Goutam Kundu (*AIR 1993 SC 2295 : AIR SCW 2325)* and Sharda (*AIR 2003 SC 3450 : 2003 AIR SCW 1950).* In Goutam Kundu, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. In the case of Sharda while concluding that a matrimonial court has power to order a person too undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA can be given by the court only if a strong prima facie case is made out for such a course. In so far as the present case is concerned, we have already held that the State Commission has no authority, competence or

power to order DNA. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court over looked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that Court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court."

10. In *Nandlal Wasudeo Badwaik* (supra), the apex Court held as follows:

"15. xxx xxx xxx

Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had or had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl-child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No.2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.

> 17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.
>
> 18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.
>
> 19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."

11. The apex Court in the case of *Dipanwita Roy* (supra) held that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegations, which constitute one of the grounds, on which the

concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The legitimacy of a child should not be put to peril.

12. The decision in the case of *Nandlal Wasudeo Badwaik* (supra) is distinguishable on facts inasmuch as D.N.A. test had already been conducted in the said case, as would be evident from paragraph 19 of the said report.

13. On a conspectus of the decisions of the apex Court in the case of *Bhabani Prasad Jena* (supra) and *Dipanwita Roy* (supra), it is evident that when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test. There must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. Any order for DNA can be given by the court only if a strong prima facie case is made out for such a course. Depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegations, which constitute one of the grounds, on which the concerned party would either succeed or lose. If the direction to hold such a test can be avoided, it should be so avoided.

14. It is admitted by the parties that the defendant no.1 has married to one Meenakshi Choudhury in the meantime and out of their wedlock, two children are born. He is more than 35 years. The assertion of the plaintiff is that the defendant no.1 was born in the year 1981. He rose from the deep slumber and instituted the suit in the year 2009. In the school admission register and electoral roll, the defendant no.1 has been described as the son of the plaintiff. The plaintiff has not made out a strong prima facie case. In a matter relating to paternity of a child, D.N.A. test should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. Though learned trial court came to hold that the defendant no.1 was born during continuance of a valid marriage between the plaintiff

and defendant no.3 and the said marriage was dissolved in the year 1986 and there is no clear evidence on record that the plaintiff at any point of time did not have access to the defendant no.3 before birth of defendant no.1, but abruptly directed the D.N.A. test of plaintiff and defendant no.1. For a just decision in the case, D.N.A. test is not eminently needed. On the available material on record, the court can decide the issue of paternity.

15. In view of the same, the order dated 13.11.2014 passed by the learned Civil Judge (Sr. Divn.), Jeypore in C.S. No.62 of 2009 is quashed. The petition is allowed. No costs.

Petition allowed.

2017 (II) ILR - CUT- 349

DR. B.R. SARANGI, J.

O.J.C. NO. 1758 OF 2002

SUDARSAN BAGHA & ANR. .....Petitioners

.Vrs.

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

ELECTRICITY – Electrocution death of the petitioner's son – Writ petition claiming compensation – No material before this Court to come to a conclusion that there is negligence on the part of the authority concerned, so as to entitle the petitioner to get compensation – Held, unless the petitioner is able to satisfy the Court that there is negligence on the part of the electricity authority, no compensation can be paid to him – However liberty granted to the petitioner to file a properly constituted application before the appropriate forum, particularly before the learned Civil Court, and satisfy the Court regarding negligence on the part of the authority concerned for entitlement of compensation.

For Petitioners : M/s. U.C. Mohapatra

For Opp.Parties : M/s. P. Acharya, B. Dash.
Mr. D.K. Pani, ASC.

Date of Order: 03.05.2017

ORDER

DR. B.R. SARANGI, J.

Heard Mr. U.C. Mohapatra, learned counsel for the petitioner, Mr. B. Dash, learned counsel for opposite party no.4 and Mr. D.K. Pani, learned Addl. Standing Counsel.

The petitioner has filed this application claiming compensation to the tune of Rs.3,00,000/- due to death of his son on electrocution.

Mr. U.C. Mohapatra, learned counsel for the petitioner states that the son of the petitioner, who was standing bare footed on wet sand cum concrete surface four to five feet away from the electric pole, the ceramic insulator attached to pole suddenly brushed and fell down on the ground with a loud sound, as result of which, the pole stay and surrounding areas on which the pole stands becomes electrically charged leading to premature death of his son. To substantiate his contention, he has relied upon the inquest report, as well as the post mortem report in Annexures-1 and 3 respectively. In the post mortem report, the cause of death has been indicated as due to electrocution. Therefore, the petitioner claims for Rs.3,00,000/- for premature death of his son.

Mr. B. Dash, learned counsel for opposite party no.4 states that since there is disputed questions of fact are involved in this case, the writ petition is not maintainable. In addition to that, it is contended that the death having been occurred in the year 1999 and after expiry of three years of period, i.e., in year 2002, the petitioner could not have approached this Court by filing the present writ petition and, as such, unless the petitioner is able to satisfy the Court that there is negligence on the part of the electricity authority, no compensation can be paid to him. So far as factual matrix is concerned, the allegation of the petitioner is not correct in view of the fact that if the ceramic insulator in respect of a 11 KV line bursts with a fraction of 0.05 second the supply will be tripped/isolated from the respective 33/11 KV Grid automatically. Apart from that the current will never pass through the so called HT stay to the earth as alleged by the petitioner because one insulator is also provided to the said HT stay in between the earth and the pole. In that view of the matter, the claim of the petitioner for compensation at this stage, does not arise.

Considering the contention raised by learned counsel for the parties and after going through the records, the factum of death of the son of the petitioner due to electrocution cannot be disputed, rather the only dispute to be considered that whether the said death is caused due to negligence on the part of the electricity authority. More so, no materials have been produced before this Court to come to a conclusion that there is negligence on the part of the authority concerned, so as to entitled the petitioner to get compensation. Apart from the same, negligence of the part of the authority has to be adjudicated by the competent forum not in the present writ petition.

In such view of the matter, this Court is not inclined to entertain this application. However, liberty is granted to the petitioner to file a properly constituted application before the appropriate forum, particularly, before the learned Civil court, for just and proper adjudication of the matter so as to satisfy the court that there is negligence on the part of the authority concerned for entitlement of compensation. With the above observation, the writ petition stands disposed of.

Writ petition disposed of.

2017 (II) ILR - CUT- 351

DR. B.R. SARANGI, J.

W.P.(C) NO. 5648 OF 2017

ODISHA AUTOMOBILES DEALERS ASSOCIATION (OADA) .....Petitioner

.Vrs.

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

ODISHA MOTOR VEHICLES TAXATION ACT, 1975 – S.5 r/w Rule 177 of Odisha M.V. Rules, 1993

Huge leakage of M.V.revenue at dealer/manufacturer point – Tax collected in advance for the number of vehicles mentioned in their trade certificate was not in conformity with the total number of registration of vehicles made by the dealers – Transport Commissioner issued Order Dt. 29.03.2016 instructing RTOs to collect tax on the basis of total number of vehicles possessed and registered during the entire year – Action challenged – Section 5 of the Act gives statutory backing to the authority for collection of tax at the annual rate in advance from the dealers of motor vehicles in respect of the vehicles in his possession in course of his business under the authorization of trade certificate granted under the Central Motor Vehicle Rules, 1989 – So even the vehicles on the basis of trade certificate for which tax has already been collected in advance, for balance vehicles which were in possession in course of business, the dealer is liable to pay tax U/s. 5 of the Act – Further the Transport Commissioner is empowered under Rule, 177 of Odisha M.V.Rules 1993 to issue the impugned Order – Held, the action of the authorities is well within their jurisdiction which does not warrant interference by this Court.

(Paras 43 to 46)

Case Laws Referred to :-

1. 2014 (II) OLR 1070 : Sujit Kumar Dhir v. R.T.O., Keonjhar.
2. (1976) 2 SCC 152 : Gurucharan Singh v. Kamla Singh.
3. (2003) 7 SCC 465 : Madan Lal v. State of Uttar Pradesh.
4. AIR 1952 SC 366 : State of Travancore-Cochin v. Bombay Company Ltd.
5. AIR 1953 SC 333 : State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory.
6. AIR 1972 SC 23 : Commissioner of Gift Tax v. P. Gheevarghese, Travancore Timbers and Products.
7. AIR 1955 SC 176 : Narain Swadeshi Mills v. Commissioner of Excess Profits Tax.
8. (1976) 3 SCC 512 : Board of Revenue v. A.M. Ansari.
9. AIR 2002 SC 1582 : Commissioner of Sales Tax v. Sai Publication Fund.
10. (2007) 4 SCC 1 : Federal Bank Ltd. v. State of Kerala
11. (2006) 13 SCC 195 : State of M.P. v. Mukesh.
12. AIR 2001 SC 3379 : CCE v. Kisan Sahkari Chinni Mills.
13. AIR 2003 SC 144 : Tata Iron & Steel Co. Ltd. v. Collector Central Excise.
14. AIR 1999 SC 719 : Tripura Goods Transport Association v. Commr. of Taxes.
15. (2005) 1 SCC 299 : State of Kerala v. Alex George.
16. AIR 1963 SC 1062 : Gursahai v. CIT.
17. AIR 1961 SC 1047 : Sales Tax Commissioner v. Modi Sugar Mills.
18. AIR 1952 SC 16 : Commissioner of Police, Bombay v. Gordhandas Bhanji
19. (1985) 3 SCC 267 : Ram and Shyam Company v. State of Haryana & ors.

For Petitioner : Mr. A.K.Parija, Sr. Advocate, M/s. S.Mohanty, S.P.Sarangi, D.K.Das, P.K.Das, V.Mohapatra & T.Pattnaik.
Mr. R.P.Kar, Mr. J.Pal, Mr. G.Mukherjee,
Mr. S.Pani (for petitioners in different connected Writ Petitions)

For Opp.Parties :Mr. B.K.Sharma, Standing Counsel (Trpt. Deptt.)

Date of hearing : 02.05.2017
Date of judgment:18.05.2017

JUDGMENT

DR. B.R. SARANGI, J.

Odisha Automobiles Dealers Association ("OADA"), the petitioner herein, being a trust registered under the District Sub-Registrar, Khurda, has filed this writ application seeking to challenge the communication dated 29.03.2016 in Annexure-2 issued by the Transport Commissioner-cum-Chairman, State Transport Authority (STA) instructing all the Regional Transport Officers (RTOs) to collect tax from the dealers/manufacturers on the basis of the total number of vehicles possessed and registered during the entire year, as well as consequential demand notices in Annexure-3 series issued by the RTOs.

2. At the outset, it is of relevance to mention that several writ petitions had been filed by individual dealers challenging the selfsame circular dated 29.03.2016 on different grounds. Although all those writ petitions were taken up for hearing together with this writ petition, with the consent of learned counsel for the parties, this writ petition was chosen as a lead case to be decided first by giving opportunity to all the counsel appearing in different writ petitions to present their case so that the judgment which would be passed in the instant writ petition would govern the batch of cases. Since pleadings between the parties have been exchanged, with the consent of learned counsel appearing for parties, this writ petition is being disposed of finally at the stage of admission.

3. The communication dated 29.03.2016 in Annexure-2 issued by the Transport Commissioner-cum-Chairman, State Transport Authority (STA), by which the petitioner trust is essentially aggrieved, reads thus:

"No. 4775 / TC
LVI -41/2016 Dated 29.03.16

To

All Regional Transport Officers

Sir,

It is observed that there is huge leakage of M.V. revenue at dealer/manufacturer points while collecting tax for vehicle in their possession.

As per the Rule-35 of CMVR-1989 an application for the grant/renewal of trade certificate shall be made in form-16 accompanied by appropriate fees as specified in Rule-81 by the dealer/manufacturer. Separate application shall be made for each class of vehicle as per rule 34 of CMV Rules. On receipt of

application from the dealers the grant/renewal of trade certificate is issued under Rule-35 of CMVR-1989 by the Registering Authority to the dealers/manufacturers.

Accordingly under Rule-36 of OMV Rule 1993 (1) The manufacturer/ dealer shall furnish to the registering Authority having jurisdiction in the locality with the information in Form XIII & XIV, in respect of the vehicles received in stock & sold by him during the every month by 15th of the succeeding months.

(2) The manufacturer/dealer should furnish the copy of the certificate in form-21 prescribed under rule-47 of CMV Rule-1989 to the registering authority & the concerned region when the vehicle is intended to be registered.

All the dealers or manufacturers are bound to submit monthly returns in form-XIII & XIV under rule- 36 of OMV-1993. A certificate in form-XIV are being furnished to the registering authority that the maximum nos of vehicles covered under the trade certificate has never been exceeded at any point of time. This need to be obtained from each dealer/ manufacturer, scrupulously.

Section-5 of OMVT act 1975 entails that – Notwithstanding the provisions contained in [Section 3, 3-A, 4, 4-A or 4-B], a tax at the annual rate specified below shall be paid in advance by a manufacture of dealer in Motor vehicles in respect of the vehicles in his possession in the course of his business as such manufacture or dealer under the authorization of trade certificate granted under the Motor Vehicles Rules.

While reviewing the mv revenue collection of different RTOs, it is found that the tax are being collected in advance from the dealers for the nos. of vehicles mentioned in their trade certificate which is not in conformity with the total no of registration of vehicles made by the dealers. You are therefore directed to collect the tax from the dealers/manufacturers on the basis of total no of vehicle possessed & registered during the entire year by the dealer.

Further, you are instructed to be more vigilant at dealer point through regular checking & conducting raids to collect the tax for the vehicles possessed by the dealers.

Transport-Commissioner, Odisha"

4. Mr. A.K. Parija, learned Sr. Counsel appearing along with Mr. S. Mohanty, learned counsel for the petitioner argued with vehemence that the demand made by the R.T.Os. to pay the trade certificate tax on number of vehicles sold, rather than the number of vehicles possessed, during 12 months period is contrary to law. During pendency of this writ petition, demands were raised forcing the dealers to pay the tax prior to 2016, though the circular had come into force w.e.f. 29.03.2016. Therefore, the demands so raised, on the basis of total number of vehicles possessed and registered during the entire year, prior to issuance of circular, are absolutely misconceived. As per the provisions contained in Motor Vehicles Act, 1988 and Rules framed thereunder, no person shall ply a vehicle without registration, but the dealers are permitted to ply the vehicle without registering for a specific purpose as per the proviso to Section 39 of the Motor Vehicles Act, 1988. The trade certificate holders/dealers are not required to make registration of the vehicle, but at the same time they are not allowed to keep in possession the vehicles in excess of what has been granted under the trade certificate. Prior to 29.03.2016, there was not a single instance of demand raised on the basis of the sale of the number of vehicles by the dealer, save and except the levy of tax only on the basis of trade certificate for possession of the vehicles at a given point of time. The assessment, having been done by the assessing officer, namely, the RTO, construing the number of vehicles sold in a year in excess of vehicles in possession pursuant to trade certificate issued by the authority, is without any authority of law. Referring to various provisions of Motor Vehicles Act, 1988; Central Motor Vehicles Act, 1988; Central Motor Vehicles Rules, 1989; Orissa Motor Vehicles Taxation Act, 1975 and Orissa Motor Vehicles Taxation Rules, 1976, it is contended with vehemence that the dealers are not liable to pay the trade certificate tax as per Section-5 of the Orissa Motor Vehicles Taxation Act, 1975, because a dealer never possessed any vehicle in excess of the trade certificate granted in its favour at a given point of time. For the vehicles sold, tax having been received by the authority, with their registration, dealers cannot be liable to pay registration tax. In view of such position, the demand so raised, being illegal, arbitrary, unreasonable and unconstitutional, is liable to be quashed.

5. Mr. R.P. Kar, learned counsel appearing for a set of individual dealers contended that the tax for possession of vehicles is being assessed under Section 5 of the Orissa Motor Vehicles Taxation Act, 1975, and for registration under Sections 3, 4A, 4B of the said Act. If the vehicles, which

have been registered, are sold from a particular dealer in a year, it will construe that the said dealer was in possession of the vehicles beyond the number of vehicles admissible under the trade certificate issued, and for that the said dealer is liable for clubbed tax, or hybrid tax**,** which the authority cannot do.

6. Mr. J. Pal, learned counsel appearing for another set of dealers contended that in view of the provisions contained under Section 5 of the Orissa Motor Vehicles Taxation Act, 1975, notwithstanding the number of vehicles sold, a dealer is liable to pay tax only against those covered under the trade certificate in advance and there is no rationality of vehicles sold and vehicles covered under the trade certificate. Considering the number of vehicles sold and in possession of the dealer in a year, no demand can be raised on the basis of circular issued on 29.03.2016 and, as such, the demands so raised cannot sustain in the eye of law and are liable to be set aside.

7. Mr. G. Mukherjee, learned counsel appearing for another set of dealers contended that as per Rule-33 of the Central Motor Vehicle Rules, 1989, a dealer is exempted from registration of vehicles, subject to condition that, he obtained a trade certificate from the registering authority having jurisdiction of the area in which his place of business comes. Therefore, a dealer is liable for trade certificate tax for possession of the vehicles as per the certificate issued to it to keep the maximum number of vehicles at a given point of time mentioned therein for the purpose of sale.

8. Mr. S. Pani, learned counsel appearing for another set of dealers contended that the dealers, who had kept in excess of the vehicle in possession beyond the trade certificate granted by the authority, were issued with no show cause notice, when demands were raised by the authorities. As such, the demands so raised cannot legally sustain.

9. Mr. B.K. Sharma, learned Standing Counsel for the Transport Department contended that the circular dated 29.03.2016 issued by the Transport Commissioner to the R.T.Os., which is challenged by the petitioner, is an inter-departmental communication and its copy was not supposed to be available with the dealers. As such, the said communication made by the authority concerned, being well within its competence, is not open to challenge. Furthermore, the demand so raised in the shape of tax and penalty is appealable and revisable, in view of the provisions contained in the Orissa Motor Vehicles Taxation Act, 1975 and Rules framed thereunder,

which is covered by the judgment of this Court in ***Sujit Kumar Dhir v. R.T.O., Keonjhar, 2014 (II) OLR 1070.*** It is further contended that though the trade certificate is issued to a dealer to possess a fixed number of vehicles at a given point of time, ultimately at the end of a year if it is found that the dealer has possessed more number of vehicles than granted under the trade certificate and subsequently sold the same, then such dealer will be liable to pay the trade certificate tax. Similarly, even if at a given point of time the dealer does not exceed the number of vehicles possessed pursuant to the trade certificate, but at the end of the year if it is found that the said dealer has sold beyond the number of vehicles indicated in trade certificate, for which number of vehicles indicated in trade certificate the advance tax has already been received, then also he will be liable to pay the trade certificate tax, as he had possessed such number of vehicles which had been sold by him. He also contended that since the vehicles are movable properties, the provisions of the Sale of Goods Act, 1930 are applicable. Therefore, the possession, sale and registration are to be read conjointly, as the sale and registration are intrinsically connected to each other. When a vehicle is sold, a sale certificate under Form-21 is issued and accordingly, registration is made under Form-20. The sale certificate is to be granted by the manufacturer or the dealer under the prescribed Form-21 and, as per the provisions contained in Section-6, if the vehicle is owned or possessed, then the dealer is liable to pay the trade certificate tax. It is admitted that if at a given point of time a dealer is found that he has kept vehicles in excess of certificate issued, the penalty has to be imposed. As such, the authorities have not committed any illegality or irregularity in raising such demand against the dealers in consonance with the circular issued on 29.03.2016 so as to warrant interference by this Court at this point of time.

10. For just and proper adjudication of the case, the relevant provisions, which are required to be considered for this case, are reproduced below:-

> "***Section 2(8) of the Motor Vehicles Act, 1988***
>
> "**dealer**" includes a person who is engaged-
> [(a) ***]
>
> (b) in building bodies for attachment to chassis; or
> (c) in the repair of motor vehicles; or
>
> (d) in the business or hypothecation, leasing or hire purchase of motor vehicles.

Section 39 of the Motor Vehicles Act, 1988

Necessity for registration*- No person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place unless the vehicle is registered in accordance with this Chapter and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner:*

Provided that nothing in this section shall apply to a motor vehicle in possession of a dealer subject to such conditions as may be prescribed by the Central Government.

Section 191 of the Motor Vehicles Act, 1988

Sale of vehicle in or alteration of vehicle to condition contravening this Act*. – Whoever being an importer of or dealer in motor vehicles, sells or delivers or offers to sell or deliver a motor vehicle or trailer in such condition that the use thereof in a public place would be in contravention of Chapter VII or any rule made thereunder or alters the motor vehicle or trailer so as to render its condition such that its use in public place would be in contravention of Chapter VII or any rule made thereunder shall be punishable with fine which may extend to five hundred rupees :*

Provided that no person shall be convicted under this section if he proves that he had reasonable cause to believe that the vehicle would not be used in a public place until it had been put into a condition in which it might lawfully be so used.

Section 192 of the Motor Vehicles Act, 1988

Using vehicle without registration. – *(1) Whoever drives a motor vehicle or causes or allows a motor vehicle to be used in contravention of the provisions of section 39 shall be punishable for the first offence with a fine which may extend to five thousand rupees but shall not be less than two thousand rupees for a second or subsequent offence with imprisonment which may extend to one year or with fine which may extend to ten thousand rupees but shall not be less than five thousand rupees or with both :*

Provided that the Court may, for reasons to be recorded, impose a lesser punishment.

(2) Nothing in this section shall apply to the use of a motor vehicle in an emergency for the conveyance of persons suffering from sickness or injuries of for the Transport of food or materials to relieve distress or of medical supplies for a like purpose.

Provided that the person using the vehicle reports about the same to the Regional Transport Authority within seven days from the date of such use.

(3) The Court to which an appeal lies from any conviction in respect of an offence of the nature specified in Sub-section (1), may set aside or vary any order made by the Court below, notwithstanding that no appeal lies against the conviction in connection with which such order was made.

Section 2 (g) of the Central Motor Vehicle Rules, 1989

"**Trade certificate**" means a certificate issued by the registering authority under rule 35.

Rule 33 of the Central Motor Vehicle Rules, 1989

33. Condition for exemption from registration.—*For the purpose of the proviso to section 39, a motor vehicle in the possession of a dealer shall be exempted from the necessity of registration subject to the condition that he obtains a trade certificate from the registering authority having jurisdiction in the area in which the dealer has his place of business in accordance with the provisions of this Chapter.*

Rule 34 of the Central Motor Vehicle Rules, 1989

Trade certificate.—(1) *An application for the grant or renewal of a trade certificate shall be made in Form 16 and shall be accompanied by the appropriate fee as specified in rule 81.*

(2) Separate application shall be made for each of the following classes of vehicles, namely:—

(a) motor cycle;

(b) invalid carriage;

(c) light motor vehicle;

(d) medium passenger motor vehicle;

(e) medium goods vehicle;

(f) heavy passenger motor vehicle;

(g) heavy goods vehicle;

(h) E-rickshaw;

(i) E-cart;
(j) any other motor vehicle of a specified description.

Rule 35 of the Central Motor Vehicle Rules, 1989

Grant or renewal of trade certificate.—*(1) On receipt of an application for the grant or renewal of a trade certificate in respect of a vehicle, the registering authority may, if satisfied that the applicant is a bona fide dealer and requires the certificates specified in the application, issue to the applicant one or more certificates, as the case may be, in Form 17 71[within thirty days from the date of receipt of such an application] and shall assign in respect of each certificate a trade registration mark consisting of the registration mark referred to in the notification made under sub-section (6) of section 41 and followed by two letters and a number containing not more than three digits for each vehicle, for example:-*

AB—Represent State Code.
12—Registration District Code.
TCI—Trade certificate number for the vehicle.
(2) No application for trade certificate shall be refused by the registering authority unless the applicant is given an opportunity of being heard and reasons for such refusal are given in writing.

Rule 37 of the Central Motor Vehicle Rules, 1989

Period of validity.*—A trade certificate granted or renewed under rule 35 shall be in force for a period of twelve months from the date of issue or renewal thereof and shall be effective throughout India.*

Rule 39 of the Central Motor Vehicle Rules, 1989

Use of trade registration mark and number*.—(1) A trade registration mark and number shall not be used upon more than one vehicle at a tune or upon any vehicle other than a vehicle bona fide in the possession of the dealer in the course of his business or on any type of vehicle other than the one for which the trade certificate is issued.*

(2) The trade certificate shall be carried on a motor vehicle in a weatherproof circular folder and the trade registration mark shall be exhibited in a conspicuous place in the vehicle.

Rule 41 of the Central Motor Vehicle Rules, 1989

Purposes for which motor vehicle with trade certificate may be used.— *The holder of a trade certificate shall not use any vehicle in a public place under that certificate for any purpose other than the following:—*

(a) for test, by or on behalf of the holder of a trade certificate during the course of, or after completion of, construction or repair; or
(b) for proceeding to or returning from a weigh bridge for or after weighment, or to and from any place for its registration; or

(c) for a reasonable trial or demonstration by or for the benefit of a prospective purchaser and for proceeding to or returning from the place where such person intends to keep it; or

(d) for proceeding to or returning from the premises of the dealer or of the purchaser or of any other dealer for the purpose of delivery; or
(e) for proceeding to or returning from a workshop with the objective of fitting a body to the vehicle or painting or for repairs; or

if) for proceeding to and returning from airport, railway station, wharf for or after being transported; or

(g) for proceeding to or returning from an exhibition of motor vehicles or any place at which the vehicle is to be or has been offered for sale; or

(h) for removing the vehicle after it has been taken possession of by or on behalf of the financier due to any default on the part of the other party under the provisions of an agreement of hire-purchase, lease or hypothecation.

Rule 42 of the Central Motor Vehicle Rules, 1989

Delivery of vehicle subject to registration*.—No holder of a trade certificate shall deliver a motor vehicle to a purchaser without registration, whether temporary or permanent.*

Rule 43 of the Central Motor Vehicle Rules, 1989

Register of trade certificate.*—(1) Every holder of a trade certificate shall maintain a register in Form 19 in duplicate which shall be in a bound book, with pages numbered serially.*

(2) The particulars referred to in Form 19 except the time of return under column 7, shall be entered in the register before the commencement of each trip by the holder of the trade certificate or

his representative and a duplicate copy of Form 19 made prior to the commencement of each trip shall be carried during the trip by the driver of the vehicle and shall be produced on demand by any officer empowered to demand production of documents by or under the Act.

(3) The holder of a trade certificate shall, at the end of a trip, fill in column 7 of Form 19 (both original and duplicate), and the register and the duplicate shall be open for inspection by the registering authority.

Rule 47 of the Central Motor Vehicle Rules, 1989

Application for registration of motor vehicles.—*(1) An application for registration of a motor vehicle shall be made in Form 20 to the registering authority within a period of 73[seven days] from the date of taking delivery of such vehicle, excluding the period of journey and shall be accompanied by—*

(a) sale certificate in Form 21;

(b) valid insurance certificate;

(c) copy of the proceedings of the State Transport Authority or Transport Commissioner or such other authorities as may be prescribed by the State Government for the purpose of approval of the design in the case of a trailer or a semi-trailer;

(d) original sale certificate from the concerned authorities in Form 21 in the case of ex-army vehicles;

(e) proof of address by way of any one of the documents referred to in rule 4;

(f) temporary registration, if any;

(g) road-worthiness certificate in Form 22 from the manufacturers, 75[Form 22-A from the body builders];

[(h) custom's clearance certificate in the case of imported vehicles along with the licence and bond, if any:

Provided that in the case of imported vehicles other than those imported under the Baggage Rules, 1998, the procedure followed by the registering authority shall be same as those procedure followed for registering of vehicles manufactured in India, and;

(i) appropriate fee as specified in rule 81.

(j) proof of citizenship;

(k) proof of legal presence in India in addition to proof of residence in case of foreigners;

Provided that for a period of six months, on and from the date of publication of the Central Motor Vehicle (Amendment) Rules, 2015, in respect of the models of the E-rickshaws and E-carts existing prior to publication of the Central Motor Vehicles (Sixteenth Amendment) Rules, 2014 and the notification published vide S.O. 2590(E), dated 8th October, 2014, the application for registration under this sub-rule shall be made in Form 20 to the registering authority within a period of ninety days after obtaining the type approval certificate and shall be accompanied by –

(i) road-worthiness certificate in Form 22 to be issued by manufacturer or dealer or registered E-rickshaw or E-cart Association; and

(ii) Sale certificate in Form 21 to be issued by manufacturer or dealer or registered E-rickshaw or E-cart Association for presentation along with the application for registration.

(1) Technical specifications and any other document as may be required by the registering authority in respect of the modular hydraulic trainer.

(2) In respect of vehicles temporarily registered, application under sub-rule(1) shall be made before the temporary registration expires.

[(3) On and from the 1st January, 2015, every vehicle manufacturer shall, in accordance with Form 20, Form 22 and Form 22A, upload the vehicle details in the portal https://www.vahan.nic.in/makermodel.]

**(3) The modular hydraulic trailer, registered under these rules shall ply in public place in laden condition subject to such other conditions as may be determined by the Central Government from time to time.*

Section 3, 3(A), 4, 4(A) & 5 of the Orissa Motor Vehicle Taxation Act, 1975

***3. Levy of tax** – (1) Subject to the other provisions of this Act, 2[***] there shall be levied on every motor vehicle used or kept for use within the State a tax at the rate specified in [Schedule-I] [Schedule-III];*

(2) The State Government may be notification from time to time, increase the rate of tax specified in [Schedule-I] [Schedule-III];

Provided that such increase shall not exceed fifty percent of the rate specified in [Schedule-I] [Schedule-III];

(3) All references made in this Act to [Schedule-I] [Schedule-III]; shall be construed as references to [Schedule-I] [Schedule-III] as for the time being amended in exercise of the powers conferred by this section.

3.A. Levy of additional tax – *(1) Subject to the other provisions of this Act, [there shall be levied on every public service vehicle and goods carriage] used or kept of use within the State, an additional tax at a rate specified in [Schedule-I].*

(2) The State Government may, by notification from time to time, increase the rate of additional tax specified in[Schedule-I];

Provided that such increase shall not exceed fifty percent of the rate specified in [Schedule-I].

(3) The provisions contained in Sub-sec. (3) of Sec. 3[***] Sub-sec. (1) to (3) of Sec. 4, Secs. 6 and Secs 11 to 20 shall mutatis mutandis apply in relation to the additional tax payable under Sub-sec. (1) as they apply in relation to the tax payable under Sec. 3]

4. Payment of tax and declaration of liability – *(1) The tax shall be paid in advance within such time and such manner as may be prescribed, to the Taxing Officer by the registered owner of person having possession or control of the vehicle.*

(2) The period in respect of which tax is to be paid under Sub-sec. (1) may be –

(a) a year at the rate specified in [Schedule-I] hereinafter referred to as the annual rate; or

(b) one or more quarters at one-fourth of the annual rate for each quarter; or

(c) any period less than a quarter expiring on the last date of any quarter at one-twelfth of the annual rate of every month or part of a month comprising such period.

Provided that in the case of a vehicle and annual rate of tax in respect of w3hich does not exceed [five hundred rupees] the tax shall be paid either annually or for a period of two quarters at a time.

[Provided further that the State Government may, by notification, allow payment of tax monthly in respect of any motor vehicle or class of motor vehicles and in such case one-twelfth of the annual rate of tax specified in [Schedule-1] is to be paid for each month] and

(3) Notwithstanding anything contained in this section, the State Government may, by notification, from time to time, direct that a temporary tax token may be issued in respect of a [vehicle] plying temporarily in the State on payment of such tax and subject to such conditions as may be specified in the notification.

[X X X]

(4) At the time of making of payment of tax for any period under Sub-sec (1) –

(a) a valid certificate of registration and a valid certificate of insurance in respect of the motor vehicle complying with the provisions of the Motor Vehicles Act, shall be produced before the Taxing Officer; and

(b) there shall be delivered to the Taxing Officer a declaration in duplicate in the prescribed form with the prescribed particulars specifying the Taxing Officer from whom the tax token, if any, had been last obtained and showing that the tax payable for the vehicle is the amount actually paid.

4-A. Levy and payment of one-time tax – [*(1) Notwithstanding anything contained in Sections 3 and 4 of this Act, but subject to the other provisions of this section, there shall be levied and paid in respect of every vehicle of the descriptions specified in items 1 and 2 and every Motor Vehicle (being a motor car, Omnibus and Motor Cab) covered by item 6 of Schedule -1 which is used personally or kept for personal use, one time tax at the rate equal to a standard rate as specified in Schedule-III or five per centum of the cost of the vehicle whichever is higher.*

Provided that in the case of a vehicle which is on road in State of Orissa, whether purchased or acquired inside or outside the State of Orissa, one time tax shall be at the rate as specified in Schedule-III;

Provided further that the vehicles in respect of which one time tax has already been realized shall not be liable to pay tax.

(2) The levy and payment of one-time tax shall be for the life-time of the vehicle in respect of which such tax is paid.

(3) The levy and payment of one-time tax shall be compulsory in respect of vehicles registered on or after the appointed date and optional in respect of the vehicles registered prior to that date.

(4) Where, after payment of one-time tax, a vehicle is removed to any other state on transfer of ownership or change of address, or its registration is cancelled for any reason other than that mentioned in Sub-sec. (5) of Sec. 55 of the Motor Vehicles Act 59 of 1988 [***] the owner of the vehicle shall be entitled to a refund which shall be the balance of the one-time tax paid by him under Sub-sec. (1) as may remain after deducting from such tax one-tenth thereof for each completed year or part thereof commencing on the date from which the one-time tax was paid till the date on which the vehicle is so removed or its registration is so cancelled or the vehicle is so altered, as the case may be :
[***]
[***]
[***]
(6) The provisions of Secs. 10 and 16 relating to temporary discontinuance of the use of vehicle and rebate on payment of tax, respectively, shall not apply to a vehicle in respect of which one-time tax is leviable under this section.

Section 5 of Motor vehicles Taxation Act, 1975

5. Tax payable by Manufacturers and Dealers – Notwithstanding the provision contained in [Section 3, 3-A, 4, 4-A or 4-B], a tax at the annual rate specified below shall be paid in advance by a manufacturer of dealer in motor vehicles in respect of the vehicles in his possession in the course of his business as such manufacturer or dealer under the authorization of trade certificate granted under the Motor Vehicles Rules.

[Description of Motor vehicles Annual rate

1.Motor Cycles -

(a) where the total number of vehicles does not exceed ten	…	*Rs. 2000.00*
(b) where such total number exceeds ten plus…		*Rs.2000.00 Rs. 200.00 for each Vehicle exceeding ten.*

2. Motor vehicles other than Motor Cycles Weighing not more than 3048 kilograms Unladen-

(a) where the total number of vehicles Does not exceed ten	…	*Rs. 5,000.00*
(b) where such total number exceeds ten plus	…	*Rs.5000.00 Rs. 500.00 for each Vehicle exceeding ten*

3.Motor vehicles weighing not more than 3048 kilograms unladen-

(a) where the total number of vehicles Does not exceed ten	…	*Rs. 10,000.00*
(b) where such total number exceeds ten	…	*Rs.10,000.00 plus Rs. 1000.00 for each Vehicle exceeding ten (emphasis supplied)*

Section 14 of the Orissa Motor Vehicle Taxation Act, 1975

14. Recovery of tax and penalty - *(1) Any tax due and not paid as provided for by or under this At and any sum directed to be recovered by way of penalty under Sec. 13 may be recovered as arrears of public demand [or in accordance with the provisions contained in Schedule-II]*

[1-A Any tax levied under this Act shall be deemed to be a first charge on the vehicle to which it relates.]

(2) The motor vehicle in respect of which the tax is due or in respect of which any sum has been directed to be recovered as penalty under Sec. 13 or its accessories may be distrained and sold in pursuance of this section whether or not such vehicle or accessories is or are in the possession or control of the person liable to pay the tax or penalty.

(3) Notwithstanding anything contained in this Act or the rules made thereunder, no person shall be liable to tax or penalty accruing for

any period on account of any motor vehicle, the tax or penalty due in respect of which as already been paid by some other person.

Section 20 of the Orissa Motor Vehicle Taxation Act, 1975

Offences – (1) Whoever –

(a) uses a motor vehicle or keeps a motor vehicle for use without having paid the tax or [differential tax] in respect of such vehicle; or

(b) delivers in respect of a motor vehicle any declaration or undertaking wherein the particulars required by or under this Act to be therein set for the are not fully and truly stated, shall, on conviction, be punishable with fine not exceeding, for the first offence twice and for every subsequent offence, four times the amount of annual tax payable for the vehicle in respect of which the offence is committed.

(2) Whoever not being a person liable to pay tax drives a motor vehicle knowing or having reason to believe that the tax or additional tax payable in respect of such vehicle has not been paid shall, on conviction, be punishable for the first offence with fine which may extend to three hundred rupees and for every subsequent offences with fine which may extend to five hundred rupees.

Rule 7 of the Orissa Motor Vehicles Taxation Rules, 1976

7. For the vehicles in respect of which no [tax/additional tax] is payable under Sec. 8, the declaration may be filed in Form 'BB' along with the documents prescribed and the notification in which the exemption of tax for the vehicle has been notified.

Provided that no such declaration shall be filed or [tax/additional tax] token granted in respect of the vehicle which is declared off road;

Provided further that dealers of manufacturers paying [tax/additional tax] under Sec. 5 shall submit the declaration in plain paper stating legibly therein category wise make and model of the vehicles and maximum number thereof for which [tax/additional tax] is being paid and certify the maximum number has never been exceeded at any point of time during the previous quarters, along with trade certificate and invoices, dispatch note instead of registration certificate and insurance certificate.

(emphasis supplied)

Rule 36 of the Orissa Motor Vehicles Rules, 1993

36. ***Furnishing of return by the manufacturer or dealer -*** *(1) The manufacturer or dealer shall furnish to the registering authority having jurisdiction in the locality the information in Form XIII and Form XIV in respect of the vehicles received in stock and sold by him during every month by fifteenth of the succeeding month.*

(2) The manufacturer or dealer shall furnish a copy of the sale certificate in Form 21 prescribed under Rule 47 of the Central Motor Vehicles Rules, 1989 to the registering authority of the concerned region where the vehicle is intended to be registered.

FORM XIII
[See Rule 36 (1)]

Furnishing of information in respect of the vehicles received in stock by manufacturer or dealer

1.Name of the Dealer of Manufacturer (Trade Certificate holder) with address:
2.Trade Certificate Nos.

3.Details of receipt of stock (Category-wise)

Sl. No.	*Date of Receipt*	*No. of units received*	*Invoice No. and date*	*Remarks*
(1)	*(2)*	*(3)*	*(4)*	*(5)*

Signature of Trader
Certificate Holder

FORM XIV
[See Rule 36 (1)]

Furnishing of information in respect of vehicles sold by manufacturer or dealer

1.Name of the Dealer or Manufacturer (Trade Certificate Holder) with address.

2.Trade Certificate No.

3.Details of Sale (Category-wise)

Date of sale	Sale letter No.	Name and address of purchaser	Engine No.	Chasis No.	Trade Regn. Mark allotted	R.T.O. to whom endorsed for Registration
(1)	(2)	(3)	(4)	(5)	(6)	(7)

Signature of Trader
Certificate Holder

Certificate

This is to certify that the maximum number of vehicles covered under the trade certificates has never been exceeded at any point of time.

Signature of Trader
Certificate Holder

Rule 177 of Orissa Motor Vehicles Rules, 1993

All the Officers of the Orissa Motor Vehicles Department shall be Subordinate to the Commissioner and shall exercise the powers and perform the duties as assigned to them from time to time under the Act and these rules and the notification issued thereunder. They shall carry out the instructions and order issued by the Commissioner from time to time."

11. The members of the petitioner trust, being the dealers within the meaning of Section 2(8) of the Motor Vehicles Act, 1988, are engaged in the business of hypothecation, leasing or hire-purchase of motor vehicles. In view of the provisions contained under Section 39 of the Motor Vehicles Act, 1988, no person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place unless the vehicle is registered and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner. Thereby, restriction has been imposed with regard to plying of a vehicle without any registration number by the person or even owner of a vehicle in a public place. But, proviso to Section 39 authorized a dealer, who is in possession of the vehicle, to ply a vehicle without registration subject to conditions as prescribed by the Central Government. In other words,

therefore, the restriction imposed to ply a vehicle by a person or owner is not applicable to a dealer who possessed a motor vehicle subject to condition prescribed by the Central Government without any registration. The motor vehicle cannot be driven or caused to be driven or caused to be used in any public place or any other place for any of the parties indicated therein without requisite registration. Section 40 thereof deals with registration where to be made, where as Section 41 deals with registration how to be made. Section 42 deals with special provision for registration of motor vehicles of diplomatic officers, whereas Section 43 deals with temporary registration and Section 44 deals with production of vehicle at the time of registration. Section 45 deals with refusal of registration or renewal of the certificate of registration. Section 191 deals with sale of vehicle in or alteration of vehicle to condition contravening the Act. If any dealer contravenes Chapter-VII or any rule made thereunder, shall be punishable with fine which may extend to hundred rupees. Section 192 deals with using vehicles without registration, which clearly specifies that whosoever drives a motor vehicle or causes or allows a motor vehicle to be used in contravention of the provisions of Section 39 shall be punishable as per the provisions mentioned therein.

12. Chapter-III of the Central Motor Vehicles Rules, 1989 deals with registration of motor vehicle. Under sub-heading "trade certificate", Rule-33 puts a condition for exemption from registration as per the proviso to Section 39, which provides that if a motor vehicle in the possession of a dealer/ manufacturer shall be exempted from the necessity of registration subject to the condition that he obtains a trade certificate from the registering authority having jurisdiction in the area as his place of business in accordance with the provisions of the chapter. Rule-34 deals with trade certificate, which specifically provides that application for grant or renewal of a trade certificate, shall be made in Form-16 appended to the rules. Clause-5 of Form-16 clearly states the number of certificates required. Meaning thereby, when an application is submitted by a dealer to a registering authority concerned, he has to furnish detailed information as prescribed in Form-16. In addition to the same, prescribed the number of certificates required for him and the same has to be made by way of declaration. Therefore, the trade certificate has to be granted on the basis of application submitted by the dealer requiring him to provide the number of certificates to be granted by the registering authority for the purpose of trade certificate. On consideration of the said application in Form-16 under Rule-34(1), the registering authority in turn granted a form of trade certificate in Form-17 under Rule-35(1)

wherein it is specified at sl.no.1, the serial number of certificate and at sl.no.2, the full name and address of certificate holder.

13. The validity of the trade certificate granted under Rule-35 shall be in force for a period of twelve months from the date of issue or renewal thereof and shall be effective throughout India as per the provisions under Rule-37. Rule-39 clearly speaks about use of trade registration mark and number shall not be used upon more than one vehicle at a time or upon any vehicle other than a vehicle *bona fide* in the possession of the dealer in course of his business or on any type of vehicle other than the one for which the trade certificate is issued. Rule-41 clearly provides that the holder of a trade certificate shall not use any vehicle in a public place under that certificate for any purpose other than the conditions to (a) to (h). The said conditions are in consonance with the provisions contained in proviso to Section 39 of the Motor Vehicles Act, 1988 read with Rule-33 of the Rules, 1989. Except the condition stipulated in clause (a) to (h) of Rule-41, the dealer cannot ply a vehicle in a public place under the trade certificate issued in his favour by the registering authority. Rule-42 states that no holder of a trade certificate shall deliver a motor vehicle to a purchaser without registration, whether temporary or permanent, as the case may be, and every dealer shall maintain a register of trade certificate under prescribed Form-19 under Rule-43 of the Rules, 1989. In the said Form-19, the dealer has to maintain register giving details of particulars of the vehicles and purpose for sale out or brought which should be in consonance with the conditions stipulated in sub-clause (a) to (h) of Rule-41 of Rules, 1989. The said trade certificate can be suspended or cancelled after giving opportunity of hearing under Rule-44, against which order appeal lies under Rule-45. Rule-46 and procedure has been envisaged under rule-46. Under chapter-III of sub-heading "Registration", Rule-47 states about the application for registration of motor vehicles in which an application for registration of a motor vehicle shall be made in Form-20 to the registering authority within a period of seven days from the date of taking delivery of such vehicle, excluding the period of journey, and shall be accompanied by sale certificate in Form-21 along with other documents, as enumerated under sub-clause (a) to (k) of Rule-47 of Rules, 1989.

14. The sale certificate issued on prescribed Form-21 clearly states that the same should be issued by the dealer along with the application for registration of the motor vehicle with an endorsement that the vehicle has

been delivered by the dealer to the buyer on the date specified therein. The dealer is obliged under Rule-36 of the Orissa Motor Vehicle Rules, 1993 to furnish to the registering authority, having jurisdiction in the locality, the information in Form-XIII and form-XIV in respect of the vehicles received in stock and sold by him during every month by fifteenth of the succeeding month. Further the dealer shall furnish a copy of the sale certificate in Form-21 prescribed under Rule-47 of the Central Motor Vehicles, Rules, 1989 to the registering authority of the concerned region where the vehicle intended to be registered. In Form-XIII, which was issued under Rule-36(1), the trade certificate holder has to furnish the information in respect of vehicle received in stock in category-wise, whereas he has to furnish all information in respect of vehicles sold in Form-XIV as per Rule 36(1) and also to give a certificate to the extent "this is to certify that the maximum number of vehicles covered under the trade certificate has never been exceeded at any point of time". After the vehicle is sold, the same has to be produced before the registering authority for registration.

15. The registration has to be made as per the provisions contained in Orissa Motor Vehicle Taxation Act, 1975. Section 3 deals with levy of tax and Section 3A deals with levy of additional tax. Section 4A thereof states about the levy and payment of one time tax and Section 4B deals with levy of payment of one time tax on good carriage. Section-5 thereof, which is relevant for the purpose of the case, envisages that notwithstanding the provisions contained in Sections 3, 3A, 4, 4A or 4B, tax at the annual rate specified thereunder shall be paid in advance by a dealer in motor vehicle in respect of vehicles in his possession in the course of his business under the authorization of trade certificate granted under the Rules, 1989. Therefore, Section-5 is a charging section in respect of a trade certificate holder which a dealer is liable to pay the tax in respect of vehicles in his possession in course of his business under the authorization of trade certificate granted under the Rules, 1989. Therefore there is no doubt that a dealer is liable to pay tax in advance in respect of vehicle in his possession in the course of his business under the authorization of trade certificate granted under the Rules, 1989. The quantum of tax has also been fixed to be paid by a dealer under the said provision. If any tax due is not paid as provided under this act, the same shall be recovered by way of penalty under Section 13 of the Orissa Motor Vehicles Taxation Act, 1975 and recovery can be made under Section 14 of the said Act. More so, the procedure for recovery of tax or penalty has been provided under Schedule-II as per the provisions contained in Sub-section (1) of Section 14 of the Orissa Motor Vehicles Taxation Act, 1975.

16. The Tax Recovery Officer may also seek assistance from the Officer-in-Charge of nearest police station for recovery of such tax and penalty in conformity with the provisions of law. The scheme of provisions discussed above clearly indicates that tax at annual rate shall be paid in advance by a dealer in motor vehicle in respect of vehicles in his possession in course of his business and as such under the authorization of trade certificate granted under the Rules, 1989. Admittedly, the dealers are paying the tax as per the trade certificate issued by the registering authority against the maximum number of vehicles possessed at a given point of time and the same has also been paid by way of advance tax.

17. It is no doubt true that the circular dated 29.03.2016 issued by opposite party no.2 to all the RTOs, which is the epicentre of the present controversy, is an inter-departmental correspondence. As to the object behind issuance of such circular, it has been clearly indicated therein that, while reviewing the motor vehicle collection of different RTOs, it was found that tax collected in advance from the dealers for the number of vehicles mentioned in their trade certificate was not in conformity with the total number of registration of vehicles made by the dealers and, as such, the RTOs were directed to collect the tax from the dealers on the basis of total number of vehicles possessed and registered during the entire year by the dealer.

18. The provisions contained in Section 5 of the Orissa Motor Vehicles Taxation Act, 1975 in clear and unambiguous term state that the tax at an annual rate specified therein shall be paid in advance by the dealer in motor vehicle in respect of vehicles in his possession in the course of his business under the authorization of trade certificate granted under the Rules, 1989. The provision is very clear that the dealer is liable to pay the tax in advance in respect of vehicles which he is in possession in course of his business under the authorization of trade certificate. Unless the vehicle is possessed by a dealer, the same cannot be sold. Unless the vehicle is sold, the same cannot be registered. Therefore, possession of a vehicle by a dealer in course of his business and sale thereof and consequential registration of vehicles are intrinsically connected to each other. For the purpose of possession of the vehicle in course of business, tax is being levied under Section 5 of the Orissa Motor Vehicles Taxation Act, 1975, but, when the vehicle is sold, the information is given by the dealer under Form-21 and basing upon which an application is made by the buyer in Form-20 so that the same can be registered by the registering authority.

19. For the purpose of registration, tax is levied under Section 3, 3A, of Orissa Motor Vehicles Taxation Act, 1975. But, payment thereof has to be made on the basis of Section 4A, 4B of the Motor Vehicles Taxation Act, 1975. The owner of the vehicle had to pay the tax levied and unless the same is complied with, no registration can be made to a vehicle purchased by him. So far as dealer is concerned, tax is levied under Section-5 of the Act for the vehicle in his possession in the course of his business under the authorization of the trade certificate.

20. Now, it is to be considered the expression "vehicle in possession in the course of his business" used in Section 5 of the Orissa Motor Vehicles Act, 1975.

21. In ***Gurucharan Singh v. Kamla Singh,*** (1976) 2 SCC 152, the apex Court held that "possession", correctly understood, means effective physical control or occupation. The word "possession" is sometimes used inaccurately as synonymous with the right of possess.

22. In ***Madan Lal v. State of Uttar Pradesh,*** (2003) 7 SCC 465, the apex Court held that the word "possession" means the legal right to possession. Possession need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

23. The apex Court, while considering the meaning "in course of" export of goods out of country within the meaning of Article 286 (1) (b) of Constitution of India in the case of ***State of Travancore-Cochin v. Bombay Company Ltd.,*** AIR 1952 SC 366, held that the series of transactions which necessarily precede export or import of goods will come within the purview of this clause.

24. In ***State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory***, AIR 1953 SC 333, the apex Court held as follows:

> "The expression "in the course of" not only implies a period of time during which the movement is in progress but postulates also a connected relation. A sale in the course of export out of the country should similarly be understood in the context of clause (1)(b) as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities."

25. In ***Commissioner of Gift Tax v. P. Gheevarghese, Travancore Timbers and Products***, AIR 1972 SC 23, while considering the provisions contained in Section 5(1) of the Gift Tax Act, the apex Court held as follows:

> "The expression "in the course of carrying on the business etc.," means that the gift should have some relationship with the carrying on of the business. If a donor makes a gift only while he is running the business that may not be sufficient to bring the gift within the first part of cl. (xiv) of s. 5(1) of the Gift Tax Act."

Meaning of Business:

26. In ***Words and Phrases-Permanent Edition*** Vol.5 at page 998, the word "business" is defined as meaning almost anything which is an occupation as distinguished from a pleasure- anything which is an occupation or duty which requires attention as a business.

27. In ***Bourier's Law Dictionary***, "business" means that which occupies the time, attention and labour of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. It embraces everything about which a person can be employed. It is a word of much indefinite import, and the legislature could not well have used a larger word.

28. In ***Chamber's Twentieth Century Dictionary***, "business" means (a) employment; (b) trade, profession or occupation; (c) a task or errand incumbent or undertaken; (d) matter requiring attention; (e) dealings, commercial activity, a commercial or industrial concern.

29. The word "business" in ***Oxford English Dictionary*** means: (a) A task appointed or undertaken; a person's official duty, part or province; function; occupation, (b) A person's official or professional duties as a whole; stated occupation, profession or trade, (c) A pursuit or occupation demanding time and attention; a serious employment as distinguished from a pastime, (d) A particular occupation; a trade or profession; commercial transactions or engagement.

30. In ***Narain Swadeshi Mills v. Commissioner of Excess Profits Tax***, AIR 1955 SC 176, the apex Court held that "business connotes some real, substantial and systematic or organized course of activity or conduct with a set purpose" includes amongst others, any trade, commerce or manufacture or any adventure in the nature of trade, commerce of manufacture.

31. In ***Board of Revenue v. A.M. Ansari***, (1976) 3 SCC 512 while considering Section 2 (bbb) of A.P. General Sales Tax Act, 1957, the apex Court held that "business" includes (i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues therefrom; and (ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

32. In ***Commissioner of Sales Tax v. Sai Publication Fund***, AIR 2002 SC 1582 while considering Section 2(5-A) of Bombay Sales Tax Act, 1959 the apex Court held that "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit accrues from such trade, commerce, manufacture, adventure or concern and any transaction in connection with, or incidental or ancillary to, the commencement or closure of such trade, commerce, manufacture, adventure or concern.

33. In ***Federal Bank Ltd. v. State of Kerala***, (2007) 4 SCC 188 while considering Section 2(vi) of Kerala General Sales Tax Act, 1963 the apex Court held that business includes (a) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce, or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern; and (b) any transaction in connection with, or incidental or ancillary to such trade, commerce, manufacture, adventure or concern.

34. In ***State of M.P. v. Mukesh***, (2006) 13 SCC 195, the apex Court held that the expression business implies continuity.

35. Importing various meaning held by the apex Court, as discussed above, the expression used in Section 5 of the Orissa Motor Vehicle Act, 1975 to the extent vehicle in his possession in course of business has its wide implication. In course of transaction, which necessarily precedes procurement, possession, sale and registration of the vehicle, is a continuity of business. Therefore, once the vehicle is in possession in course of the business of a dealer under the authorization of trade certificate, at the end of

twelve months, if it is ascertained that the dealer was in possession of vehicles in excess of the number indicated in the trade certificate for which no advance tax has been collected, in that case, the dealer is liable to pay the tax in consonance with the circular issued by the opposite parties. Needless to say that under a trade certificate, the dealer is obliged to retain the number of vehicles mentioned therein and not beyond that at a given point of time, but that ipso facto cannot disentitle him to pay tax in respect of the vehicles in his possession in course of business. In other words, if the dealer possesses vehicles in course of his business, he is liable to pay the tax in consonance with the circular issued by the authority concerned.

36. The expression "in course of" used in Section-5 of the Act indicates that the dealer is liable to pay the tax in respect of vehicles in his possession in course of his business under the authorization of trade certificate. Therefore, law is well settled that the vehicles in possession in course of his business which implies a period of time during which the movement was in progress, but postulates also an indicated relation under the authorization of trade certificate is liable for taxation under Section 5 of the Act itself.

37. In ***CCE v. Kisan Sahkari Chinni Mills***, AIR 2001 SC 3379, the apex Court held that Article 265 of the Constitution provides: "No tax shall be levied or collected except by authority of law". Article 366(28) of the Constitution which defines Taxation and Tax reads : "Taxation includes the imposition of any tax or impost whether general or local or special, and 'tax' shall be construed accordingly". Any compulsory exaction of money by Government amounts to imposition of tax which is not permissible except by or under the authority of a statutory provision.

38. In ***Tata Iron & Steel Co. Ltd. v. Collector Central Excise***, AIR 2003 SC 144, the apex Court held that statutory backing is essential for imposition of tax. Applying the same to the present context, Section-5 of the Orissa Motor Vehicle Taxation Act, 1975 gives right to the authority for collection of tax and, as such, this provision being a charging section, the same has to be construed strictly.

39. In ***Tripura Goods Transport Association v. Commr. Of Taxes,*** AIR 1999 SC 719, the apex Court held that every taxing statute has a charging section and provisions laying down the procedure to assess the tax and penalties and method of their collection and may also contain provisions to prevent pilferage of revenue.

40. In ***State of Kerala v. Alex George,*** (2005) 1 SCC 299, the apex Court held that there are three components of a taxing statute, viz., subject of the tax, person liable to pay the tax and the rate at which the tax is levied. If there be any real ambiguity in respect of any of these components which is not removable by reasonable construction, there would be no tax in law till the defect is removed by the legislature.

41. In ***Cape Brandy Syndicate v. IRC,*** (1921) 1 KB 64, p. 71, which has been referred in **Canadian Eagle Oil C. Ltd. V. R.,** (1945) 2 All ER 499 and also considered by the apex Court in **Gursahai v. CIT**, AIR 1963 SC 1062, wherein it was held that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

42. In ***Sales Tax Commissioner v. Modi Sugar Mills,*** AIR 1961 SC 1047, the apex Court held that in interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency.

43. Applying the above principles to the present context and looking at the provisions contained under Section-5 of the Orissa Motor Vehicles Taxation Act, 1975 and giving a strict interpretation to the same, it can be safely construed that tax at the annual rate specified shall be paid in advance by the dealer in motor vehicles in respect of the vehicles in his possession in course of his business under the authorization of trade certificate granted under the Rules, 1989. Admittedly, trade certificate issued on the basis of solemn declaration made by the dealers to keep in possession of number of vehicles at a given point of time and nowhere it has been indicated that without the possession of the vehicle, the same can be sold for the purpose of registration. Therefore, at the end of twelve months, if it is found that the dealer having remained in possession of number of vehicles even not exceeding the number of vehicles in possession at a given point of time as per the trade certificate issued, then he is liable to pay the tax as demanded by the authority concerned because such vehicles were in possession in course of his business.

44. At the end of the year, considering the number of vehicles possessed by a dealer in course of his business which have been sold for registration if the dealer has been called upon to pay the tax under Section 5 of the Act, in that case, the Taxing Authority has not committed any illegality or irregularity because on the basis of the declaration made in the trade certificate to possess the number of vehicles as declared by the dealer, advance tax has been received and ultimately on the basis of the possession in course of business, the same shall also be taxed. The number of vehicles at a given point of time on the basis of trade certificate for which tax has already been collected in advance, for balance vehicles which were in possession in course of business, the dealer is liable to pay the tax in consonance with the provisions contained under Section 5 of the Act itself. On the basis of the circular dated 29.03.2016, the members of the petitioner trust are liable to pay trade certificate tax prospectively not retrospectively.

45. As regards the reliance placed on ***Ram and Shyam Company v. State of Haryana and others,*** (1985) 3 SCC 267, with regard to availability of alternative remedy, there is no bar to entertain the writ petition, as that has been considered altogether in a different context. But in the case in hand, as the levy of tax done in consonance with the provisions of the Act itself, then construing strictly as the mechanism has been prescribed under the Act itself, the same has to be followed scrupulously. Though reliance has been placed on the judgment of the apex Court in **Commissioner of Police, Bombay v. Gordhandas Bhanji,** AIR 1952 SC 16, there is no iota of doubt with regard to the principles laid down in the said case, but, in the instant case, the RTO, who is the competent authority has exercised his power demanding the tax in consonance with the provisions under Section 5 of the Act.

46. Rule-177 of the Orissa Motor Vehicle Rules, 1993 clearly states that all officers of the Orissa Motor Vehicles Department shall be subordinate to the Commissioner and shall exercise the powers and perform the duties as assigned to them from time to time under the Act and rules and the notification issued thereunder. They shall carry out the instructions and orders issued by the Commissioner from time to time. In exercise of such power, since the order in Annexure-2 dated 29.03.2016 has been issued by the Commissioner to subordinate officers, namely, RTOs, it is well within his competence and no fault can be found with him for issuance of such instruction to his subordinate officers and on the basis of the instruction issued in consonance with the provisions contained in Rule-177, if the subordinate officers carries out the same to give effect the provisions

contained under Section 5 of the Orissa Motor Vehicles Taxation Act, 1975, this Court is of the considered view that the action of the authorities is well within their jurisdiction and the same does not warrant any interference.

47. In view of the foregoing discussions, the writ petition merits no consideration and the same is thus dismissed. No order to cost.

Writ petition dismissed.

2017 (II) ILR - CUT- 381

DR. B.R. SARANGI, J.

O.J.C. NO. 3515 OF 1994

DR. DINESH PRASAD MISHRA .....Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART. 226

Writ petition – Delay – Standard to measure – In order to invoke equitable extraordinary relief under Article 226 of the Constitution of India, the aggrieved party ought to approach the Court promptly i.e. at the reasonable possible opportunity.

In this case, the service of the petitioner has been validated w.e.f. 21.08.1978 i.e. from the date of his initial appointment and the said benefit has been extended w.e.f. 12.05.1981 on the basis of his regular appointment against direct payment post – Though the cause of action started from the date when the validation order was passed i.e. on 17.01.1985, the petitioner approached this Court on 06.05.1994 – No reason has been assigned for such delay – Held, relief sought in the writ petition suffers from delay and laches.

(Paras 9 to 12)

Case Laws Referred to :-

1. AIR 1972 SC 2060 : Kamini Kumar Das Choudhary -V- State of West Bengal

For Petitioner : Mr. J.K. Rath, Sr. Advocate,
M/s. R.N.Mishra & S.K.Das

For Opp.Parties : Mr. B.Senapati, Addl. Govt. Advocate

Date of hearing : 01.05.2017
Date of Judgment : 09.05.2017

JUDGMENT

DR. B.R. SARANGI, J

The petitioner after completing his M.Sc. Degree in Zoology applied for the post of Lecturer pursuant to advertisement issued by the Director, Higher Education published in Odia daily "The Samaj" on 01.05.1978. He, on being called upon, attended the interview and was selected for appointment as Lecturer as per the merit list prepared by the Director. He was issued with a letter of appointment in Annexure-3 dated 21.08.1978 in pursuance of which he joined on the very same day, i.e., 21.08.1978 at S.V.M. College, Jagatsinghpur against a leave vacancy of one L.K. Sinha. The joining report of the petitioner on being communicated by the Principal, S.V.M. College, Jagatsinghpur, was duly approved by the Director vide communication dated 02.12.1978. Before that term of approval could expire, the Principal, S.V.M. College, Jagatsinghpur made a request to the Director, who, by letter dated 16.03.1979, accorded approval for further continuance of the petitioner in S.V.M. College, Jagatsinghpur.

2. Then, consequent upon a fresh appointment letter in Annexure-5 dated 14.05.1980 issued by the Principal-cum-Secretary of P.N. College, Khurda, the petitioner was relieved from the S.V.M. College on 16.05.1980 and on the very same day joined in P.N. College, Khurda, where he continued till 05.05.1981, on which date he joined as Lecturer in Science College, Hinjilicut by virtue of the Office order dated 05.05.1981 in Annexure-6. While he was so continuing at Science College, Hinjilicut, in pursuance of Annexure-7 dated 28.01.1984, the pay of the petitioner was fixed in the scale of pay of Rs.525-1150/- at Rs.740 as on 16.05.1980 and at Rs.760/- as on 01.01.1981 with the next date of increment as 16.05.1981. Thereafter, pursuant to communication dated 05.12.1990 in Annexure-8, the petitioner was relieved from Science College, Hinjilicut on 26.12.1990 and joined in Aska College on 27.12.1990.

3. While continuing at Aska College, the petitioner's services were validated pursuant to Rule 3(b) of Orissa Aided Educational Institutions (Appointment of the Teachers Validation) Act, 1981 read with the Orissa Aided Educational Institutions (Appointment of the Teachers Validation) Amendment Act, 1983 with effect from the date of his initial appointment vide office order dated 17.08.1985 in Annexure-10. In the same, although it was specifically stated that the petitioner's services were deemed to have been validated w.e.f. 21.08.1978, i.e., the initial date of appointment, in effect

the said validation was made w.e.f. 12.05.1981, when the petitioner was serving at Science College, Hinjilcut 4th post (DP). Though several prayers have been made in the writ application, in course of hearing it is stated that the petitioner's services having been validated from the date of his initial appointment, i.e., 21.08.1978, he should not have been extended with the benefit w.e.f. 12.05.1981, hence he claims that the benefit should be extended with effect from his initial appointment.

4. Mr. J. K. Rath, learned Senior Counsel for the petitioner urged that since the petitioner's services had been validated from the date of his initial appointment, i.e., 21.08.1978, the benefit admissible to him should have been extended from that date, but effectively the benefit having been extended from a later date, i.e., 12.05.1981, he has been grossly aggrieved by that, hence approached this Court by filing the present writ application.

5. Mr. B. Senapati, leaned Addl. Government Advocate appearing for the State-opposite parties strenuously urged that the writ application suffers from gross suppression of facts as well as delay and laches, for which it is liable to be dismissed. Factually, it is urged that an ad hoc merit list was prepared for appointment of Lecturers in both Government Colleges and non-Government Colleges in the State. Accordingly, the petitioner's name was sponsored for appointment against leave vacancy post in SVM College, Jagatsinghpur on ad hoc basis, pursuant to which he joined on 21.08.1978 against leave vacancy post. Again, the petitioner's name was sponsored and he joined on 16.05.1980 at P.N. College, Khurda as Lecturer in Zoology on ad hoc basis against a teacher fellow vacancy of Sri S. Maharana. From there, his name was sponsored to Science College, Hinjilicut where he joined on 05.05.1981. While the petitioner was continuing at Science College, Hinjilicut vide communication dated 28.01.1984 his scale of pay of was fixed at Rs.525-1150/- w.e.f. 16.05.1980 and at Rs.525-1300/- w.e.f. 01.01.1981. The petitioner's service for the period from 21.08.1978 till 12.05.1981 in different scales was validated for adjustment against direct payment post without facing a fresh recruitment process. As the petitioner worked from 21.08.1978 to 15.05.1980 against leave vacancy and again adjusted against teacher fellow vacancy from 16.05.1980 to 11.05.1981, during that period which he was not getting his salary agaisnt direct payment post. Since he was adjusted against direct payment post only on 12.05.1981, his claim to be considered under the career advancement scheme from the date of initial appointment, i.e., 21.08.1978 does not merit any consideration under the prevailing government guideline. As the petitioner was appointed against a

leave vacancy, which is purely temporary and stop gap arrangement, the extension of service benefit of regular direct payment post from 21.08.1978 cannot sustain in the eye of law. As he was appointed permanently on 12.05.1981 against the direct payment post, from that date he is entitled to get all service benefits. Therefore, the prayer of the petitioner as confined by his counsel at the time of argument that benefit should be extended from the date of initial appointment, i.e., 21.08.1978 as per the validation order dated 17.08.1985, instead of 12.05.1981, the date when the petitioner was appointed permanently against direct payment post, is absolutely misconceived one and such prayer cannot sustain in the eye of law

6. This Court heard Mr. J.K. Rath, leaned Senior Counsel for the petitioner and Mr. B. Senapati, learned Addl. Government Advocate appearing for State-opposite parties, and perused the records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is disposed of finally at the stage of admission.

7. The undisputed fact being that the petitioner was appointed against a leave vacancy post w.e.f. 21.08.1978 on ad hoc basis at SVM College, Jagatsinghpur. Thereafter he was posted as against teacher fellow vacancy at P.N. College, Khurda and, subsequently, while he was posted at Science College, Hinjilcut, on 12.05.1981, he was regularized in the 4th post of direct payment.

8. As already stated, though several prayers were made in this writ application, in course of hearing Mr. J.K. Rath, learned Senior Counsel for the petitioner confined the same and stated that although the services of the petitioner have been validated w.e.f. 21.08.1978, the actual service benefits have been extended w.e.f. 12.05.1981 instead of 21.08.1978. In response to such contention, an affidavit has been filed by opposite party no.2. It is specifically stated therein that the service benefits cannot be extended to the petitioner w.e.f. 21.08.1978, because the petitioner was appointed as against a leave vacancy post held by a regular employee and the service benefits having been extended to a permanent regular employee, the same benefits cannot be extended to the petitioner, as against one sanctioned post continuance of two regular Lecturers under the direct payment scheme is not permissible. As the appointment of the petitioner was purely temporary and ad hoc against stop gap arrangement, the benefit claimed by the petitioner is not admissible w.e.f. 21.08.1978, i.e., from the date of initial appointment. When the petitioner was appointed against a regular vacancy and in a direct

payment post in Science College, Hinjilicut on 12.05.1981, the benefit has to be extended to him from that date. As such no illegality or irregularity has been committed by the opposite party in not extending such benefit.

9. It is further contended that the writ petition suffers from delay and laches. If the service of the petitioner has been validated w.e.f. 21.08.1978 from the date of his initial appointment, and the said benefit has been extended w.e.f 12.05.1981 on the basis of his regular appointment against direct payment post, the cause of action starts from that date when the validation order was passed on 17.01.1985. But the petitioner approached this Court by filing this writ petition on 06.05.1994, after long lapse of so many years and no reason has been assigned by the petitioner why he approached this Court at such a belated stage.

10. Delay in moving an application is also a relevant factor for which the Court may refuse to entertain the writ application for granting relief.

Ferris on Extraordinary Legal Remedies at Page 228 it has been observed :

> *"All seem to agree, regardless of the theory if the proceeding is not brought within a reasonable time after alleged default or neglect of duty and such delay is not satisfactorily explained, Court may in the exercise of its discretion refuse its issuance. This is particularly so, when to grant the writ after such a delay would work a prejudice to the party effecting their right."*

Right to the writ may, in accordance with equitable principles, be barred not only by laches, but by estoppels. There is no general rule as to what is reasonable time within which proceeding must be brought but it depends upon the fact in each case, it is the first importance that the aggrieved party move promptly.

11. In ***Kamini Kumar Das Choudhary v. State of West Bengal,*** AIR 1972 SC 2060, the apex Court held that

> *"it is imperative, if the petitioner wants to invoke extraordinary remedy available under Article 226 of the Constitution that he should come to the Court at the reasonable possible opportunity*."

12. Applying the above principles to the present case, the relief sought by the petitioner suffers from delay and laches. Therefore, the writ petition merits no consideration and the same is hereby dismissed.

Writ petition dismissed.

2017 (II) ILR - CUT-386

B.R. SARANGI, J.

W.P.(C) NO. 21648 OF 2015

DIPTI RANJAN MISHRA .....Petitioner

.Vrs.

STATE OF ODISHA & ORS. .....Opp. parties

ODISHA CIVIL SERVICE (REHABILITATION ASSISTANCE) Rules, 1990-Rule-11

Compassionate appointment – Petitioner was selected – However the Director Secondary Education made restrictions that appointment of candidates be made strictly as per their educational qualification, in the school from where the deceased employee died and incase vacancy did not exist in that school as per qualification, he would have to wait till a suitable vacancy arose – Hence the writ petition – Restrictions made by the Director is contrary to the provision contained in Rule 8 (1) (d) of the Rule, 1990, which can not sustain in the eye of law – Non-extention of benefit to the petitioner was in gross violation of the mandate of law – Held, since there is vacancy available in class – III post under the District education officer, Jagatsingpur, the case of the petitioner for compassionate appointment under the Rules, 1990 be considered favourably and he should be given employment to meet the hardship of his family. (Paras 14,15,16)

For Petitioner : M/s. S.R. Mohapatra & D.N. Mishra,

For opp. parties : Mr. A.K. Pandey, Standing Counsel, School & Mass Education Department

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Date of argument : 25.04.2017
Date of Judgment : 02.05.2017

JUDGMENT

DR. B.R. SARANGI, J.

The father of the petitioner, namely, Surendranath Mishra, while working as Assistant Teacher in Somanath Vidyapitha, Jahanpur, died prematurely on 31.10.1993. On obtaining death and legal heir certificates, as well as consent/no objection from other family members, the petitioner applied in the prescribed form for compassionate appointment under the provisions of Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 (hereinafter referred to as 'Rules, 1990'). As per the provisions contained in

Rule-11 of the Rules, 1990, which was amended by the G.A. Department, Government of Orissa vide resolution dated 14.10.1998 (published in the Orissa Gazette on 15.10.1998), wherein it has been clearly provided that the provisions laid down in Rules, 1990 as amended from time to time shall *mutatis mutandis* apply to the families of the employees of the teaching and non-teaching staff of the Aided Educational Institutions under the Education Department w.e.f. 24.09.1990, the petitioner's application was forwarded to the Collector for distress certificate. On receipt of distress certificate from the Collector, the case of the petitioner was processed, but due to ban imposed by the Finance Department in its letter dated 02.02.2000, the benefit of compassionate appointment could not be extended to the family of the deceased employee.

2. However, the restriction imposed by the Finance Department was modified and the State Government in the School and Mass Education Department issued a circular on 21.06.2011 intimating that fact. Subsequent thereto, the State Government issued another circular on 11.04.2013 that prior to issuance of appointment order in respect of such type of applicants, the appointing authorities were required to obtain necessary approval of the concerned District Education Officers. Prior to issuance of circular dated 11.04.2013, the Director had forwarded the case of the petitioner, along with similarly situated applicants, for approval, as recommended by the District Education Officer, and the same was approved by the State Government vide order dated 04.02.2013, wherein the name of the petitioner was found place at sl.no.8. But, the Director, Secondary Education, Odisha, while forwarding the list approved by the State Government vide letter dated 20.05.2013, indicated that the appointment of the candidates would be made strictly as per their educational qualification, in the school, from where the deceased employee died, and in case vacancy did not exist in the school, as per the qualification, then he would have to wait till a suitable vacancy arose in the said school. Because of such stipulation in the letter dated 20.05.2013 of the Director, Secondary Education, Orissa, Bhubaneswar, the District Education Officer refused to appoint the petitioner.

3. Mr. S.R. Mohapatra, learned counsel for the petitioner urged that the stipulation made in the letter dated 20.05.2013 by the Director, Secondary Education, Orissa to the effect that the appointment would be made strictly as per the educational qualification, in the school, from where the deceased employee died, and in case vacancy did not exist in that school, as per the qualification, then he would have to wait till a suitable vacancy arose in the

said school; run contrary to the provisions contained in Rule-8(1)(d) of Rules, 1990. It is contended that when the vacancies are available under the jurisdiction of District Education Officer, the petitioner can be appointed either against Class-III and Class-IV post befitting his qualification, as the very objective of the said Rules, 1990 is to alleviate the hardship of the family of the deceased employee. It is further contended that even though the District Education Officer vide its letter dated 11.09.2013 sought for clarification from the Director, Secondary Education regarding appointment of the petitioner, no action has yet been taken by the authorities and, thereby, since the authorities are acting arbitrarily and unreasonably, interference of this Court is warranted.

4. Mr. A.K. Pandey, learned Standing Counsel for the School and Mass Education Department, in inviting attention of this Court to the counter affidavit filed by the District Education Officer, submitted that the petitioner was an applicant for compassionate appointment under Rules, 1990. The Director, Secondary Education, Orissa vide letter dated 20.05.2013 issued a select of list of seven eligible candidates to the District Education Officer, Jagatsinghpur for appointment under Rules, 1990 wherein the petitioner's name was found place at sl.no.1, but in view of the condition stipulated in paragraph-1 of the said letter that the appointment of the candidates would be made strictly as per the educational qualification, in the school, from where the deceased employee died and in case vacancy did not exist in that school, as per the qualification, then he would have to wait till a suitable vacancy arose in the said school. Because of the said condition, even though the petitioner's name had been recommended by the Director, the District Education Officer could not have issued any appointment letter in favour of the petitioner, as no vacancy was available in the school, where the father of the petitioner was rendering service at the time of death. But, subsequently, the District Education Officer sought for clarification on 11.09.2013 from the Deputy Director, so far as the appointment of the petitioner is concerned, vide letter dated 10.12.2015, on receipt of which, the Director, Secondary Education, Orissa, instructed to the District Education Officer to follow the prevailing Government circular dated 03.08.2015. Consequentially the District Education Officer issued a letter of request to the petitioner to attend his office for verification of certificates and further follow up action. Subsequently, on 22.12.2015 the District Education Officer received clarification from the Director, Secondary Education Orissa, wherein it was stated that the petitioner would be engaged against Class-IV post on

contractual basis in any aided High School as per the prevailing Rules following the instructions dated 31.12.2014 of the G.A. Department and letter dated 03.08.2015 of the School and Mass Education Department. But, the petitioner claimed for regular appointment against a Class-III post as per the prevailing Rules, as well as the instructions of the Director, Secondary Education, no steps could be taken for giving such appointment to the petitioner, though there was willingness to give contractual appointment to the petitioner against a Class-IV post.

5. Heard Mr. S.R. Mohapatra, learned counsel for the petitioner and Mr. A.K. Pandey, learned Standing Counsel for the School and Mass Education Department, and perused the records. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties, this writ petition is disposed of finally at the stage of admission.

6. The undisputed fact being that the petitioner submitted application in prescribed form for compassionate appointment as per Rules, 1990 due to premature death of his father while in employment. The application of the petitioner was considered, but the benefit of compassionate appointment could not be extended to him in view of the instruction issued by the Director, Secondary Education to the District Education Officer vide letter dated 20.05.2013 that the appointment of the petitioner would be made strictly as per the educational qualification, in the school, from where his father died and in case vacancy did not exist in that school, as per the qualification, then the petitioner would have to wait till a suitable vacancy arose in the said school. Due to non-availability of vacancy, correspondences were made and ultimately instruction was issued by the Director that the case of the petitioner would be considered as per the prevailing Government Rules. Accordingly, the case of the petitioner was taken up for consideration and he was called upon to join against a Class-IV post on contractual basis, which was not befitting to his qualification. As there was delay on the part of the authorities in giving regular appointment to the petitioner in consonance with Rules, 1990, finding no other way out, he approached this Court by filing the present petition.

7. No doubt, compassionate appointment is an exception to the general rule that appointment to public service should be on merits and through open invitation. In such cases, the appointment is given to a member of the family of the deceased employee by accommodating him in a suitable vacancy.

Compassionate appointment must be in consonance with the constitutional scheme of equality enshrined in Articles 14 and 16 of Constitution of India.

8. In ***Haryana State Electricity Board v. Hakim Singh***, (1997) 8 SCC 85, the apex Court explained the rationale of the rule relating to compassionate appointment, which is reproduced below:

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

Similar view has also been taken by the apex Court in ***State of U.P. v. Paras Nath,*** (1998) 2 SCC 412, and ***Commissioner of Public Instructions v. K.R. Vishwanath,*** (2005) 7 SCC 206.

9. In ***Sushma Gosain v. Union of India***, (1989) 4 SCC 468, the apex Court pointed out that the purpose of providing appointment on compassionate grounds is to mitigate the hardship due to death of the bread earner in the family and that such appointment should, therefore, be provided immediately to redeem the family in distress.

10. In ***Director of Education v. Pushpendra Kumar***, (1998) 5 SCC 192, the apex Court explained the purpose of compassionate appointment and pointed out its exceptional nature and the need to take care that its application did not interfere with the right of other persons who are eligible to seek employment.

11. In ***Balbir Kaur and another v. Steel Authority of India Ltd. and others,*** AIR 2000 SC 1596 it is categorically held that sudden jerk in the family by reason of the death of the bread earner can only be absorbed by some lump sum amount being made available to the family. This is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the bread earner and insecurity thereafter reigns and it is at that

juncture if some lump sum amount is made available with a compassionate appointment, the grief stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. This being the reasons assigned, compassionate appointment can be granted to a member of the deceased family.

12. In ***Umesh Kumar Nagpal v. State of Haryana***, (1994) 4 SCC 138, the apex Court laid down the principles relating to compassionate appointment in clear and emphatic language, which is reproduced below:-

> *"The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependents of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependents of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Class III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the*

object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule make in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

13. In ***Govind Prakash Verma v. LIC of India,*** (2005) 10 SCC 289, the apex Court held that compassionate appointment is recompense over and above whatever is admissible to the legal representatives of deceased employee as benefits of service which they get on death of the employee.

14. Keeping in view the law laid down by the apex Court, as discussed above, and applying the same to the present context, it can be said that non-extension of benefit to the petitioner was in gross violation of the mandate of law, and the conditions imposed that, unless the vacancy was available in the school where the father of the petitioner was rendering service, the benefit could not be extended, is absolutely misconceived restriction imposed by the authority concerned, which cannot sustain in the eye of law.

15. It is of relevance to note that vide order dated 15.03.2016 this Court directed the petitioner to file an affidavit indicating the vacancy available in Class-III post, which was befitting to his qualification. In compliance thereof, the petitioner on 18.03.2016 filed an affidavit, wherein it has been specifically indicated that there was vacancy of a Class-III post in Uttareswar High School at Podaruan in the district of Jagatsinghpur. Mr. A.K. Pandey, learned Standing Counsel for the School and Mass Education Department, on having obtained instruction, also produced letter no.2902 dated 16.03.2016 addressed to the Sr. Standing Counsel by the District Education Officer, wherein it has been specifically stated that one post of Class-III is lying vacant in Uttareswar High School at Podaruan, and two Class-IV posts are

lying vacant in HMT, Vidyapitha, Chikinia and Gopabandhu Utkalmani B.P. Naharana each. Thus, on the face of the above information, it cannot be said that there was no vacancy available under the District Education Officer, Jagatsinghpur.

16. In such view of the matter, since there is vacancy available in Class-III post in Uttareswar High School at Podaruan, there will be no impediment on the part of the authority concerned to consider the case of the petitioner for compassionate appointment as against such post, which will be befitting to the qualification of the petitioner. Therefore, this Court is of the considered view that against the vacancy available in Class-III post under the District Education Officer, Jagatsinghpur, the case of the petitioner for compassionate appointment under Rules, 1990, should be considered favourably and he should be given employment in order to meet the hardship of his family caused on account of death of the sole bread earner of the family. Such consideration and consequential appointment thereof shall be made within a period of three months from the date of communication of this judgment and order.

17. The writ petition is accordingly allowed to the extent indicated above. No order to cost.

Writ petition allowed.

2017 (II) ILR - CUT- 393

D. DASH, J.

R.S. A. NO. 365 OF 2016

BUDHIMAN BISWAL ……. ..Appellant

.Vrs.

STATE OF ORISSA & ANR. ……Respondents

CIVIL PROCEDURE CODE, 1908 – O- 41, R- 17 (1)

Appeal U/s 96 C.P.C. – Whether in the absence of the appellants and the respondents as well as their respective counsels, the learned appellate court is justified in deciding the appeal on merit ? Held, No.

The impugned judgment and decree is setaside – The appeal is remitted back to the first appellate court for fresh disposal after providing opportunity of hearing to the parties.

For Appellant : M/s. Arabinda Tripathy, A.K. Beura,
For Respondents : A.S.C.

Date of Hearing : 14.07.2017
Date of Judgment : 17.07.2017

JUDGMENT

D. DASH, J.

This second appeal has been filed challenging the judgment and decree passed by the learned Additional District Judge, Kamakhyanagar in R.F.A. No.49 of 2012 (28/2014). By the said judgment and decree, the lower appellate court has set aside the judgment and decree passed by the learned Civil Judge (Sr. Division), Kamakhyanagar in Civil Suit No.11 of 2008 decreeing the suit filed by the appellant as the plaintiff. The above noted first appeal had been filed by the defendants as the appellants, being aggrieved by the judgment and decree passed by the trial court in the said suit declaring the right, title and interest of the appellant-plaintiff over the suit land with confirmation of his possession. The lower appellate court by the impugned judgment and decree has dismissed the suit filed by the appellant-plaintiff.

2. The appeal has been admitted on the following substantial question of law:

> "Whether in the absence of appellant (plaintiff) as also the respondents (defendants) and the learned counsel representing them in the first appeal under section 96 of the Code, the course adopted by the first appellate court in proceeding to dispose of the appeal, on merit in finally allowing the same by setting aside the judgment and decree passed in the suit filed by the present appellant standing in his favour is permissible in the eye of law so as to have the legal sanction?"

3. Learned counsel for the appellant submits that the appeal was posted to 22.01.2016 for hearing and on that day the parties were not present and the learned counsel appearing on their behalf were also absent as the members of the local Bar Association were abstaining from the court work. In such situation, the lower appellate court without giving any further opportunity for hearing of the appeal has gone to peruse the case record and then has finally

delivered judgment on 05.02.2016 by allowing the appeal, in setting aside the findings of the trial court and dismissing the suit filed by the present appellant-plaintiff. According to him, the course adopted by the lower appellate court is not permissible under the provisions of Order-41 of the Code of Civil Procedure (in short, hereinafter called as 'the Code'). It is his submission that the lower appellate court in that situation even when was not inclined to adjourn the hearing of the appeal ought to have dismissed the said appeal in view of the absence of the parties. Thus, he submits that the substantial question of law as above has to receive its answer in the negative that the course adopted by the lower appellate court does not have the sanction of law.

4. Learned Additional Government Advocate does not dispute the factual position that on that date fixed for hearing of the appeal, the counsel for the respondent, i.e., State Counsel was not present in view of the call given by the members of the local Bar.

5. Sub-Rule-1 of, Rule-17 of Order-41 of the Code provides that where on the day fixed, or on any other day to which the hearing of the appeal may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Sub-Rule-2 of the said Rule provides that where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte.

Here in the instant case neither the appellants nor the respondent were present on the date fixed for hearing. The counsel appearing on their behalf were also not present to represent them. The first appeal had been filed questioning the judgment and decree passed by the trial court in decreeing the suit of the respondent granting the relief of declaration of right, title, interest and confirmation of possession. The last portion of paragraph-7.1 of the judgment of the lower appellate court which is relevant for the present reads as under:-

> "The findings of the learned lower Court are challenged in this Regular First Appeal. But when the appeal was posted for hearing the learned Advocate for the parties did not appear in Court for argument as the members of the local Bar Association abstained from Court work, hence this judgment on perusal of the materials on record."

The lower appellate court then has gone to render the judgment viewing the grounds taken in the memorandum of appeal and on going

through the pleadings of the parties as well as the evidence that they had placed. Having differed with the findings recorded by the trial court, those have been set aside and the appeal has been allowed which has led to the dismissal of the suit. That is how the present appellant has been adversely visited with by way of denial of the reliefs as prayed for which had been so granted by the trial court.

6. The lower appellate court was in seisin of the first appeal under section 96 of the Code. The procedures for such appeals from the original decrees have been provided in the Rules under Order-41 of the Code. The provisions of law do not empower the first appellate court that either in the absence of appellant, it can go to the merit in judging the substainability of the findings as well as the impugned judgment and decree and dismiss the appeal or in the absence of appellant, it can allow the appeal on merit or that in the absence of the parties it can dispose of the appeal either way on merit. When on the date fixed for hearing of the appeal, the appellant was absent, the course permissible is to dismiss the appeal for default of the appellant and where of course, the appellant is present and the respondent is absent, it is permissible to take up ex parte hearing of the appeal for its disposal accordingly. In the absence of the parties to the appeal, the first appellate court is not empowered to decide the appeal on merit either way which has been done in the instant case that the lower appellate court in that eventuality without hearing the parties, on its own by going through the materials available on record has judged the sustainability of the findings of the trial court and has finally allowed the appeal by setting aside the findings as well as the judgment and decree passed by the trial court in favour of the appellant granting the reliefs as prayed for.

In the wake of aforesaid, this Court is led to answer the above substantial question of law in the negative that the course adopted by the first appellate court has no legal sanction and as such the judgment and decree passed by it which are impugned in this appeal are held unsustainable.

Accordingly, this Court unhesitatingly sets aside the judgment and decree passed in R.F.A. No.49 of 2012(28/2014).

7. In the result, the second appeal is allowed and in the facts and circumstances without cost. The judgment and decree passed in R.F.A. No.49 of 2012(28/2014) being set aside, the said appeal is now remitted to the Court of the learned Additional District Judge, Kamakhyanagar for its disposal afresh in accordance with law after providing opportunity of hearing

to the parties. In order to save delay, in the process, the parties are directed to appear before the said court on 04.08.2017 to receive further instruction and to cooperate with the hearing of the appeal for its disposal as expeditiously as possible preferably within a period of three months.

Appeal allowed.

2017 (II) ILR - CUT- 397

SATRUGHANA PUJAHARI, J.

CRLA NO. 220 OF 2008

SUDAM MAJHI @ HEMBRAM & ORS. .....Appellants

.Vrs.

STATE OF ORISSA **.....**Respondent

(A) CRIMINAL PROCEDURE CODE, 1973 – S. 154

F.I.R. – Rape case – Delay of six months – Victim an illiterate rustic aboriginal – Delay in lodging F.I.R. can not be used as a ritualistic formula for doubting the prosecution case if it otherwise inspires confidence of the Court through material evidence.

In this case delay occurred for the community people of the appellants, which was explained satisfactorily – Held, since the evidence adduced on behalf of the victim is acceptable being reliable, mere delay in lodging F.I.R. cannot be a ground for throwing the entire prosecution case overboard. (Para 11)

(B) PENAL CODE, 1860 – S.376 (g)

Rape – Conviction challenged on the ground that the victim was habituated to sexual intercourse and the allegation of rape is not believable – There is nothing on record to infer that the victim was above the age of consent and she was a consenting party to the sexual assault made by a gang – Even if the victim had lost her virginity and accustomed to sexual behaviour earlier, it can not in law give licence to anybody and everybody to rape her – In this case, the evidence of the victim was corroborated by her father in all material particulars which is admissible in evidence and relevant U/s. 157 of the Evidence Act – Moreover section 114-A of the Evidence Act mandates that when a victim of gang rape deposes that she was subjected to sexual

intercourse without her consent, the Court has to presume the same to be without her consent – There is also no material to hold that this is a case of concoction and fabrication – Further a father would not ordinarily subscribe a false accusation of sexual assault involving her own daughter and thereby putting a stake on the reputation of the family and jeopardizing the future life of his daughter – Since the evidence of the victim does not suffer from any basic infirmity, there is no reason to insist on corroboration of medical evidence – Most important is that the version of the victim could not be demolished by the appellants inspite of a reasonable and fair opportunity given to them to discredit such version – Held, this Court finds no compelling reason to differ from the conviction of guilt recorded by the learned trial Court. (Paras 8 to 11)

Case Laws Referred to :-

1. AIR 2000 S.C. 1812 : State of Rajasthan vrs. N.K.
2. AIR 1981 S.C. 39 : Bishnudayal vrs. State of Bihar.

For Appellants : M/s. D.P.Dhal & Associates.
For Respondent : M/s. Manas Chand & Associates.
Mr. C.R. Swain, A.S.C.

Date of Judgment: 10.05.2017

JUDGMENT

S.PUJAHARI, J.

This appeal is directed against the judgment of conviction and order of sentence of the learned Sessions Judge, Keonjhar dated 20.03.2008 passed in S.T. No.215 of 2007, by which the appellants stood convicted under Section 376(2)(g) of the Indian Penal Code, 1860 (for short "the IPC"). The appellant nos.3 and 4 were sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.5000/-, in default, to undergo rigorous imprisonment for a further period of one year and other appellants were sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of Rs.2,000/-, in default, to undergo rigorous imprisonment for a further period of six months.

2. Prosecution version, as unfolded during trial, is as follows :-

On 21.05.2006 around 8 p.m. while the victim was enroute home having attended the marriage ceremony of Suna Kisku, the appellants appeared like a comet on the road, in erotic impulse they caught hold of her

and forcibly took her to an isolated place where appellant – Gulia Murmu followed by appellant – Gulu Majhi forcibly committed rape on her. The other accused persons caught hold of her to facilitate commission of lustful act of Gulia Murmu and Gulu Majhi. Thereafter, the appellants left the victim near her house. They had threatened to kill the victim as well as her father. Terribly frightened the victim did not dare to divulge such horrible act before her father. On the next day morning, the victim accompanied her father's sister to her village where she stayed for nearly a month. Apparently to avoid that horrible happening she escaped from village. In the meantime, the father of the victim ascertained the fact of rape committed by the appellants. The victim was called back and being confronted she divulged before her parents as to how on that fateful night she was subjected to rape by two of the appellants while other appellants prevented her from raising alarm and to resist the lustful act of those two appellants. In frustration and despair, the sagging father (P.W.5) communicated that horrendous occurrence before the head of their village (P.W.4) who conveyed a village meeting on 17.06.2006. The appellants having confessed their guilt, P.W.4 fixed 18.06.2006 to impose punishment on those culprits. However, on 18.06.2006 instead of imposing any punishment on the appellants, P.W.4 planted a 'KANIARI' branch in front of his house which is a symbol of excommunication, that is to say, P.W.5 was ostracized by their community for the act of the victim and a fine of Rs.7000/- was imposed on him. On that day, P.W.1 lodged a report before the Police Officer, but on the intervention of the villagers, the matter was subsided and he was exempted from paying any fine. Subsequently thereafter, the village community again reiterated their action of ostracizing P.W.5 and again imposed fine of Rs.7500/- for the aforesaid act. There being thus no respite, P.W.5 lodged F.I.R. (Ext.1) on 21.11.2006 alleging the lustful act committed by the appellants. Accordingly, investigation was taken up, the victim was sent for medical examination, incriminating materials were seized and on completion of investigation, charge-sheet was laid against the appellants under Section 376(2)(g) of IPC and appellants faced trial. They denied the accusations and pleaded false implication. It was pleaded that P.W.5 having animosity against them, this false accusation has been made. The trial court placed reliance on the evidence of the prosecution witnesses and convicted the appellants for the offence punishable under Section 376(2)(g) of IPC and sentenced them as aforesaid.

3. The learned counsel for the appellants contended that there being delay over six months in filing of the F.I.R. and there being no satisfactory

explanation offered by the prosecution, placing reliance on such evidence of the victim is contrary to law. The other contention of the learned counsel is that P.Ws.1 to 4 having not supported the prosecution case and when the medical evidence negatived the case of rape and particularly when the victim's family were ostracized by the society on some issue or other, holding the appellants guilty under Section 376(2)(g) of IPC is also unsustainable.

4. Per contra, the learned counsel representing the State supported the impugned judgment of the trial court, the delay in lodging the F.I.R. being self-explanatory, as evident from the First Information report (Ext.1) and when the victim was subjected to medical examination long after the date of occurrence, the conclusion of guilt recorded by the trial court is overboard and does not call for any second opinion.

5. The learned counsel for the appellant has attacked the judgment of the trial court primarily on four grounds, which according to him, has rendered the prosecution version vulnerable. Firstly, there was delay in lodging F.I.R; Secondly, the victim's evidence did not inspire confidence, she having not immediately divulged the fact of rape before her parents and her aunt; Thirdly, the medical evidence indicates that the victim was habituated to sexual intercourse and, therefore, her version that she was raped by two of the appellants is not believable. Fourthly, the "probabilities factor" is found to be out of tune.

6. Before adverting to all such contentions with reference to the evidence brought on record and surrounding circumstances, I would like to say that in case of sexual assaults the Court has to take note of the realities of life and should not enter into hyper technicalities. It is well settled law that delay in lodging the F.I.R. cannot be used as a ritualistic formula for doubting the prosecution case if it is otherwise inspire confidence and discarding the same solely on the ground of delay in lodging of the F.I.R. is not the rule of law. The delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in the prosecution version on account of such delay, the same would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the Court, the same cannot by itself be a ground for disbelieving and discarding the entire prosecution version as contended. The evidence of P.Ws.5 and 6 read with the averments indicated in the F.I.R. (Ext.1) clearly explained as to why the F.I.R. was

lodged almost after six months, evidence of the aforesaid witnesses coupled with inference drawn from Ext.1 clearly shows that P.W.5 when ostracized by the society on 18.06.2006 instead of punishing the appellants who it is said to have confessed their guilt before the community, aggrieved P.W.5 had lodged a report before the police. Soon thereafter, the village community deleted the fine imposed and lifted the order of excommunication and P.W.5 did not pursue the report lodged on the assurance of the village community. However, on 21.11.2006 when the community reimposed the penalty and again ostracized him, the information was lodged. This aspect has been clearly indicated in the F.I.R. (Ext.1) which is apparently lodged on 18.06.2006 as stated by P.W.5, it was not registered possibly for the settlement reached between the parties and was actually registered on 21.11.2006. This explanation of delay right from 21.05.2006 till 21.11.2006 clearly narrated in the F.I.R. was not confronted to P.W.5 nor any question asked to the Investigating Officer (P.W.9) as to why the case was not registered on 18.06.2006 since the Ext.1 appears to have been scribed on 18.06.2006. P.Ws.5 and 6 are subjected to very scanty cross-examination on the question of delay as well as on other aspects touching the core of the charge levelled against the appellants. Both of them stood firm in crossexamination so far the question of delay. In my opinion, the delay as such does not have any adverse impact on the prosecution case. [*See:- State of Rajasthan vrs. N.K.,* AIR 2000 S.C. 1812].

7. On 21.05.2006 the victim had attended the marriage ceremony of Suna Kisku is not disputed. Record further reveals that they being aboriginal, in their marriage both bachelor and spinsters danced together. The case of the prosecution is that while the victim enroute home, the incident occurred. Though she is an illiterate rustic, she has given a photographic narration of the events where appellant – Gulia Murmu followed by appellant – Gulu Majhi committed the sexual act one after the other in between them while other appellants gagged the mouth of the victim and caught hold of her by legs and hands to prevent her escape and raising alarm to facilitate commission of rape. However, by chance arrival of Panchu Majhi (P.W.3) and Hala Majhi (P.W.2), the appellants escaped and the victim narrated before them how she was subjected to rape. Her evidence further reveals that the appellants having threatened to kill her and her father if she dare to divulge the incident, she remained mum and on the next day morning having got an opportunity, she accompanied her aunt to her village. All such aspects remained unshaken in cross-examination. She has also stated that on her

arrival home from the village of her aunt, being asked by her parents, she divulged before them as to how she was sexually ravished on that fateful night, but out of fear she did not dare to divulge the incident then and there. The victim is an illiterate rustic aboriginal. In paragraph-3 of her cross-examination she has attributed individual act of all the six appellants vividly. Her evidence also revealed that she did not sustain much bleeding despite she was subjected to rape by two persons. P.Ws.1, 2, 3 and 4 did not support the prosecution case and turned hostile. P.W.4 is the village head before whom P.W.5 had narrated that event and who convened that village meeting, but ultimately ostracized the P.W.5. This witness was not cross-examined by the prosecution. P.Ws.2 and 3, however, cross-examined by the prosecution with permission of the Court where they denied the prosecution's suggestion that on their arrival near the spot, the appellants took to their heals where the victim narrated before them as to how she was sexually ravished. P.W.7 is the Gynecological Specialist, who on 22.11.2006 on police requisition, Ext.2/2 had examined the victim, had noticed that the vagina of the victim was capacious but he found one healed hymenl tear at 7 O' clock position which was around six months old. Simultaneously, he has deposed that he did not notice any sign and symptom of recent sexual intercourse the victim when examined on 22.11.2008. P.W.8 is the Radiologist who on 23.11.2006 had conducted ossification test of the victim vide X-ray Plate No.2230 dated 23.11.2006 (4 plates) and opined that the age of the victim was in between 14 to 16 years.

8. So far the age of the victim is concerned, no contemporaneous evidence is forthcoming in proof of her age. The victim being an illiterate rustic and having not been admitted to School, non-availability of such evidence is of no consequence. The father of the victim, who is most competent to depose about the age of the victim, though stated in the F.I.R. that her age was about 15 years on the date of the F.I.R., i.e., 21.11.2006, but did not depose anything in his evidence with regard to the age of the victim. The victim deposed that she was 14 years of age on the fateful day. As seen above, except the evidence of the doctor, i.e., the Radiologist, P.W.8 who on ossification test determined the age of the victim at lower side is 14 years and the higher side is 16 years on the date of his examination and the doctor, P.W.7 who examined the victim giving the aforesaid age to be the age of the victim on the date of her examination, i.e., on 23.11.2006, no other evidence is available. So, the only credible evidence, that is being available with age of the victim, is the evidence of the doctor based on ossification test wherein a

margin of 2 years has been taken care of. But, the victim was examined admittedly six months after the occurrence. In such premises, the age of the victim can safely be held to be below 16 years and, as such, she had not attained the age to consent for sexual intercourse. However, as it appears, the learned counsel for the appellants placing reliance on the evidence of the doctor, P.W.7 that vagina admits two fingers and as such the victim being accustomed to sexual intercourse, has submitted that the evidence of the victim that she was raped has to be taken with a pinch of salt. The same is a no ground to discard the evidence of the victim who is below 16 years of age. Even assuming for the sake of argument that the victim had attained the age of discretion on the date of occurrence and also accustomed to sexual intercourse, that is not a determinative question in a case of rape, more so in a case of "gang rape". The question which is required to be determined is; did the appellants commit gang rape on the victim on the occasion complained of ? Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to anybody and everybody to rape her. It is the appellants who are on trial and not the victim. Even if the victim in a given case has been promiscuous and is accustomed to sexual behaviour earlier, she has right to refuse to submit herself to sexual intercourse to anyone or everyone because she is not a vulnerable object or a prey for being sexually assaulted by anyone or everyone. It is well settled law that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice of the crime. She stands at a higher pedestal than an injured witness. In the latter case, there was injury on the physical form, while in a rape it is both physical as well as psychological and emotional. Otherwise also, the doctor has noticed a healed rupture of hymen at 7 O' clock position which was around six months old. Incidentally, the victim was examined by P.W.7 on 22.11.2006 which is apparently six months after the occurrence.

9. Coupled with the same, the victim stated that she was forcibly lifted by all the appellants and subjected to rape which indicates that it was without her consent. Section 114-A of the Indian Evidence Act mandates that when a victim of gang rape deposes that she was subjected to sexual intercourse without her consent, the Court has to presume the same to be without her consent. The learned trial court has discussed all such aspects thread bare. The victim and her parents had no axe to grind against the appellants at any time. There is no reason why the victim would come forward and testify in a serious offence like rape at the cost of her chastity, even if there was no such

occurrence at all. The statement of the father of the victim corroborates her in all material particulars and is admissible in evidence and relevant under Section 157 of the Indian Evidence Act. There was absolutely no material to hold a case of concoction and fabrication, the victim and her parents when had no previous enmity with the appellants. Only because P.Ws.2 and 3 turned hostile to the prosecution, one cannot jump to a conclusion that prosecution version is to be discarded outright. The trial court has found the victim and her parents are reliable witnesses. The father would not ordinarily subscribe a false accusation of sexual assault involving her own daughter and thereby putting a stake on the reputation of the family and jeopardizing the future life of his daughter. He was ostracized from the society by P.W.4 when he dares to allege against the appellants in their community. Despite that, P.W.5 lodged F.I.R. which itself suggests that the prosecution version is believable and there is a ring of truth around it. This Court finds the testimony of the victim's father reliable and lending absolute support to the narration of the incident by the victim. The medical evidence also lends assurance to the version of the victim. No reason has been ascribed nor even suggested with aplomb during cross-examination to them as to why the victim or her father would falsely implicate the appellants roping them in a false charge of rape leaving the whole World aside ? There is also nothing on record even to infer that the victim was above the age of consent and she was a consenting party to the sexual assault made by a gang. When a girl is below 16 years of age, her consent is immaterial as held in the case of ***Bishnudayal vrs. State of Bihar, AIR 1981 S.C. 39***. Once it is established that accused persons acted in concert and appeared in the scene together and carried the victim to an isolated place where the victim was raped, then a case of "gang rape" is established in terms of Explanation-1 to Clause (g) of Section 376(2) of IPC irrespective of whether she had been raped by one or more of them.

10. Upon evaluation of evidence brought on record, I am satisfied to hold that the victim is a witness of truth. Her testimony inspires confidence. Other evidence including the medical evidence available on record lends absolute assurance to her testimony. The trial court has rightly held that the sexual assault amounts to "gang rape" was committed to her by the appellants. Here, delay in lodging the F.I.R. is on account of community people of appellants which is otherwise satisfactorily explained. In the facts and circumstances, when the probabilities factor does not render it unworthy of credence, there is no reason to discard the prosecution version. Here, I would reiterate that the evidence of the victim does not suffer from any basic infirmity and there is

no reason to insist on corroboration of medical evidence. The medical evidence is also not supposed to come out at such a belated stage.

11. To sum up, the evidence of the victim when read as a whole in juxtaposed with the evidence of her father and the medical evidence, it inspires confidence of this Court. There is no missing link in the evidence, no embellishment and any circumstance to make it improbable that such an incident ever took place, more particularly when no self respective woman, particularly a spinster having no axe to grind against the appellants would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of gang rape on her. Tendency to conceal outrage of sexual aggression and the inherent bashfulness of the females carries with the victim. The plea of the appellants was the plea of despair needs no credence. Thus, the evidence adduced on behalf of the victim when accepted being reliable, the mere delay in lodging F.I.R. cannot be a ground for throwing the entire prosecution case overboard. Hence, I find no compelling reason to differ from the conviction of guilt recorded by the learned trial court as the victim's version of her being subjected to gang rape by the appellants, could not be demolished by the appellants in spite of a reasonable and fair opportunity given to them in the trial to discredit such version.

12. Now coming to the question of sentence, the appellants were involved in a gang rape which is serious in nature. There is also no mitigating circumstances to interfere with the sentence imposed by the trial court. The commission of heinous crime like "gang rape" does not call for any leniency. In view of the aforesaid, I am not inclined to modify the sentence imposed by the learned trial court.

13. Consequently, this criminal appeal fails and the same is accordingly dismissed. The impugned judgment of conviction and order of sentence are hereby confirmed. L.C.R. received be sent back forthwith along with a copy of this Judgment.

Appeal dismissed.

2017 (II) ILR - CUT- 406

S. PUJAHARI, J.

MISC.CASE NO. 1474 OF 2016
(Arising out of CRLA NO. 287 OF 2016)

PURNA CH. KISAN .....Appellant/Petitioner

.Vrs.

STATE OF ORISSA .....Respondent/ Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.389

Conviction U/s. 13(2) read with section 13(1) of the P.C. Act, 1988, challenged – Prayer for suspension of conviction and sentence – When to be granted – Only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences leading to injustice – However, loss of job and consequential suffering of the family is not sufficient ground to stay conviction.

In this case the presumption of innocence available in favour of the appellant during trial has been demolished upon his conviction by a judicial verdict – Held, there being no exceptional case made out, this Court is not inclined to stay/suspend the conviction against the petitioner. (Paras 8 to11)

Case Laws Referred to :-

1, (2012) 12 SCC 748 : N.K. Illiyas vrs. State of Kerala.
2. AIR 2014 SC 3388 : Ramaiah vrs. State of Karnataka.
3. AIR 2001 S.C. 332 : K.C. Sareen vrs. C.B.I., Chandigarh.
4. 2015 CRI.L.J. 250 : Shyam Narain Pandey vrs. State of U.P.
5. 2012 (12) SCC 384 : State of Maharashtra through C.B.I, Anti Corruption Branch, Mumbai vrs. Balakrishna Dattatrya Kumbhar.
6. (2007) 1 SCC 673 : Ravikant S. Patil vrs. Sarvabhabhouma S. Bagali
7. (2007) 2 SCC 574 : Navjot Singh Sidhu vrs. State of Punjab and another.

For Appellant/Petitioner : M/s. Soura Chandra Mohapatra
For Respondent/Opp. Party : M/s. Sanjay Kumar Das-1

Date of order : 17.05.17

ORDER

S. PUJAHARI, J.

I have heard the learned counsel for the petitioner-appellant and the learned Standing counsel appearing for the Vigilance Department.

2. This misc. case has been filed by the petitioner-appellant seeking suspension of conviction recorded against him under Section 13(2) read with 13(1) of the Prevention of Corruption Act, 1988 (for short "the Act") and Section 409 of the Indian Penal Code (for short "the IPC").

3. As it appears, the petitioner-appellant was convicted and sentenced to undergo R.I. for 3 years and to pay a fine of Rs.10,000/-, in default to undergo R.I. for a further period of one month under Section 13(2) read with Section 13(1)(c) of the Act and R.I. for 3 years and to pay a fine of Rs.10,000/-, in default, to undergo R.I. for a further period of one month under Section 409 of IPC, by the learned Special Judge (Vigilance), Sambalpur vide its judgment dated 13.05.2016 in C.T.R. Case No.21 of 2004.

4. It has been contended by the learned counsel for the petitioner-appellant that the petitioner-appellant has been convicted in the aforesaid case for commission of temporary misappropriation inasmuch as the allegation is that there was shortage of cash received M.V. Section of the Unified Check Gate, Lahurachati at the time of vigilance raid. The conviction is perverse inasmuch as the money was available in another almirah and was immediately deposited with the time permitted under the Orissa Treasury Code. In this regard, the learned counsel for the petitioner-appellant has taken this Court through the evidence on record to indicate that the petitioner-appellant has proved his case that there was no misappropriation. In this regard, the learned counsel for the petitioner-appellant has placed a reliance on a decision of the Apex Court in the case of ***N.K. Illiyas vrs. State of Kerala,*** (2012) 12 SCC 748. The prosecution case against the petitioner-appellant was also unsustainable in the eye of law due to delay in lodging of the report in view of the law laid down by the Apex Court in the case of ***Ramaiah vrs. State of Karnataka***, AIR 2014 SC 3388. The petitioner-appellant as such having proved his defence also by preponderance of probabilities, the judgment of conviction of the trial court was perverse. In such premises unless the suspension of conviction is not done, the petitioner-appellant shall be materially prejudiced as the authority may remove him from service for such stigma of conviction.

5. On the other hand, the learned Standing counsel appearing for the Vigilance Department has opposed the aforesaid contention of the learned counsel for the petitioner-appellant placing reliance on a decision of the Apex Court in the case of ***K.C. Sareen vrs. C.B.I., Chandigarh,*** AIR 2001 S.C. 3320 wherein the Apex Court have held that public servant has been

convicted on a corruption charge is not entitled to hold public office and suspension of order of conviction during pendency of appeal or revision is not permissible. Furthermore, it has also been submitted that temporary misappropriation also invites a charge under Section 409 of IPC and since the petitioner-appellant has been indicted in a charge under Section 409 of IPC and under the Act, staying of his conviction would sake public confidence in judiciary. He has placed reliance in this regard on a decision of the Apex Court in the case of ***Shyam Narain Pandey vrs. State of U.P.,*** 2015 CRI.L.J. 250 wherein the Apex Court have held that only in exceptional cases of irreparable injury coupled with irreversible consequences leading to injustice, stay of conviction can be granted and loss of job which is source of livelihood is a no ground to stay conviction.

6. Before addressing the contention of the learned counsel for the parties, it would be apposite to mention here that the appellate court is not bereft of jurisdiction to suspend or grant stay order of conviction, but the same can only be done in exceptional cases. Coming to the case in hand, it appears that the trial court on a scrutiny of the evidence on record held the petitioner-appellant guilty of the aforesaid charges. The petitioner-appellant being a public servant is guilty of temporary embezzlement of public fund which was unexpected from him.

7. It is the contention of the learned counsel for the petitioner-appellant that since the conviction is prima-facie illegal, unless the conviction is suspended, the petitioner-appellant shall suffer irreparable loss inasmuch as he shall lose his job and his family will suffer, which has been objected by the learned counsel for the State, is no ground for suspension of the conviction.

8. On perusal of the materials on record, it appears to this Court that the learned Special Judge (Vigilance), Sambalpur taking note of all defence contentions that there was no misappropriation vis-à-vis the evidence on record and the law, recorded the conviction. A presumption of innocence which was available in favour of the petitioner-appellant during the trial has been demolished on such conviction by a judicial verdict. Looking into the materials on record, it cannot be said that the conviction is *per se* illegal. The contention raised that since there was delay in lodging the report and also the petitioner-appellant deposited the amount soon after and there was no material to hold him guilty can only be adjudged on the re-appreciation of the evidence on record on hearing the parties on merit. Hence, prima facie, it can be said that conviction was illegal or perverse. The fact remains that the

petitioner-appellant is a public servant has since been convicted and his presumption of innocence which was available to him, has already been destroyed by the judicial verdict. The offence alleged against him is that he misusing the trust on him, committed serious offence.

9. The Apex Court in the case of ***Shyam Narain Pandey (supra)*** in paragraph-9 have held as follows :-

> "It may be noticed that even for the suspension of the sentence, the court has to record the reasons in writing under Section 389(1), Cr.P.C. Couple of provisos were added under Section 389(1), Cr.P.C. pursuant to the recommendations made by the Law Commission of India and observations of this Court in various judgments, as per Act 25 of 2005. It was regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate court is inclined to consider release of a convict of such offences, the public prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have serious impact on the public perception on the integrity institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice."

Reiterating the aforesaid, again the Apex Court in the case of ***State of Maharashtra through C.B.I, Anti Corruption Branch, Mumbai vrs. Balakrishna Dattatrya Kumbhar,*** 2012 (12) SCC 384, referring to two decisions in the case of ***Ravikant S. Patil vrs. Sarvabhabhouma S. Bagali,*** (2007) 1 SCC 673 and ***Navjot Singh Sidhu vrs. State of Punjab and another,*** (2007) 2 SCC 574, have held as follows :-

> "15……. the appellate court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of

which, the applicant must satisfy the court as regards the evil that is likely to befall him, if the said conviction is not suspended. The court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examine whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

10. No doubt, for the aforesaid stigma of conviction is likely to lead removal from the service if the employer so desired and in that event, he as well as his family members shall suffer. The injury that the petitioner-appellant is likely to suffer i.e. removal from service cannot be said to be irreparable injury coupled with irreversible consequences resulting in injustice. In the case of ***Shyam Narain Pandey (supra)*** , it has been held that lose of job is no ground to stay/suspend the conviction.

11. Therefore, the petitioner-appellant having not made out the exceptional case for stay/suspension of conviction, this Court is not inclined to stay/suspend such conviction and as such this Misc. Case being devoid of merit stands dismissed. Interim order dated 04.11.2016 stands vacated

Petition dismissed.

2017 (II) ILR - CUT- 410

SATRUGHANA PUJAHARI, J.

CRLA NO. 496 OF 2009

SIJO V.G. & ANR. ……..Appellants

.Vrs.

STATE OF ORISSA ……...Respondent

N.D.P.S. ACT, 1985 – S.55

Seizure of Ganja, more than the commercial quantity – Seizure made by P.W.6 the S.I. of Excise (District Mobile) – He retained seized articles and sample packets in his custody without producing the same at the nearest Police Station for the purpose of resealing by the Officer-in-Charge – No explanation offered as to why the seized articles were

not handed over to the OIC of the local Police Station – Possibility of tampering cannot be ruled out – Moreover the brass seal used in sealing the contraband articles was not produced before the Court – Record does not indicate that the seal affixed in the seized packets tallied with the specimen impression of brass seal affixed on the seizure list – Further the Malkhana register was not produced to establish safe custody of the sample packets – On re-appraisal of the evidence on record this Court is of the view that the trial Court grossly erred in appreciation of evidence on record – Prosecution has failed to establish the charge against the appellants beyond all reasonable doubt, so the appellants are entitled to the benefit of doubt – Held, the impugned judgment of conviction and order of sentence are set aside.

(Paras 14 to 16)

Case Laws Referred to :-

1. AIR 1973 S.C. 2783 : Nathusingh vrs. State of Madhya Pradesh.
2. (1990) 3 OCR 219 : Nilambar Sahu vrs. State of Orissa.
3. 1991 CRI.L.J. 1595 : Shyam Sunder Rout vrs. State of Orissa.
4. AIR 1995 SC 2339 : Megha Singh vrs. State of Haryana.
5. ILR (2009) 1 Cuttack 606 : State of Orissa v. Managobinda Sahoo.
6. (1974) 3 SCC 774 : Jamuna Chaudhary & Ors. v. State of Bihar.
7. 2015 (I) OLR 236 : Santosh Patra and others vrs. State of Orissa.
8. 2005 (1) Crimes 346 (SC) : State of Rajasthan vrs. Gurmail Singh.

For Appellants : Mr. S.K. Das
For Respondent : Mr. P.Pattnaik, A.G.A.

Date of Judgment:- 10.05.2017

JUDGMENT

S. PUJAHARI, J.

The appellants in this appeal call in question the judgment of conviction and order of sentence passed by the learned Addl. Sessions Judge-cum-Special Judge, Malkangiri in C.T. No.39 of 2007 holding the appellants guilty of charge under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act") and sentencing each of them to undergo R.I. for 10 years and to pay a fine of Rs.1,00,000/-, in default, to undergo R.I. for a further period of one year each.

2. The case of the prosecution is that on 16.01.2007, P.W.6, Ashok Kumar Seth, the S.I. of Excise (District Mobile) while patrolling near Spillway of Chitrakonda, Malkangiri received reliable information regarding

illegal cultivation and possession of 'Ganja' by some culprits. To verify the information, P.W.6 accompanied with Superintendent of Excise in-charge-cum-Tahasildar, Chitrakonda, Radhaballav Patnaik (P.W.5), Constable of Excise – Nilamadhab Choudhury (P.W.3) and with other staff rushed to the spot where they noticed from a distance the appellants attempting to conceal their respective bags. P.W.6 as such proceeded to the spot and detained the appellants. He also found "Hem plants" cultivated in a nearby area encircled by fence with a hut inside. On demand, the appellants could not produce any authority for possessing 'Ganja' in those two bags and also could not produce any authority or licence for such cultivation. P.W.6 also found a bag containing 'Ganja' staked in that hut. He uprooted and counted the plants which comes to 30 Kgs. P.W.6 took weighment of seized bags and found the bag possessed by the appellant no.1 contained 23 Kgs., bag possessed by the appellant no.2 contained 24 Kgs. and bag recovered from that hut contained 30 Kgs. of 'Ganja'. P.W.6 prepared seizure list in presence of Superintendent of Excise-in-charge-cum-Tahasildar, Malkangiri (P.W.5) and prepared seizure list (Ext.2). He also drew samples from each bags and sealed the sample packets and bulk 'Ganja' and "Hem plants" at the spot. Subsequently, the appellants and the seized articles were forwarded to the Court. P.W.6 also conducted investigation of the case and on completion thereof he placed prosecution report against the appellants for alleged commission of offence under Section 20(a)(i) and 20(b)(ii)(C) of the Act. The appellants being charged for the aforesaid offence and having pleaded not guilty, faced trial before the learned Addl. Sessions Judge-cum-Special Judge, Malkangiri where they examined one witness in support of their defence of false implication. On conclusion of the trial, placing absolute reliance on the evidence of the official witnesses, the trial court held the prosecution to have established the charge against the appellants and returned the judgment of conviction and order of sentence, as stated earlier.

3. It has been submitted by the learned counsel for the appellants that in this case since the version of the prosecution witnesses against the appellants was not corroborated by any independent witnesses to search and seizure who said to have witnessed the seizure and when there is nothing on record to show that what was seized from the possession of the appellants were actually examined by the chemical examiner, the judgment of conviction and order of sentence recorded on the evidence of official witnesses are indefensible.

4. Repelling such contention, the learned counsel for the State has defended the impugned judgment of the trial court to be just and proper inasmuch as there is no impediment in law to record conviction basing on the testimony of the official witnesses, particularly when the same suffers from infirmity. According to him, since in this case the evidence of the official witnesses are clear and cogent with regard to seizure of contraband articles from the possession of the appellants and when there was also no material brought on record to suggest that P.Ws.3, 5 and 6 had any reason to falsely implicate the appellants even if their version was not supported by independent witness like P.Ws.2 and 4, the impugned judgment of conviction and order of sentence returned by the trial court placing reliance on the testimony of the official witnesses, need no interference of this appellate court.

5. On perusal of the materials placed on record, it would go to show that the version of the official witnesses with regard to fact that the appellants were found carrying gunny bags containing 'Ganja' is not supported by the independent witnesses, viz. P.Ws.2 and 4 of that locality. However, it is settled law that the same can hardly be a ground to discard the evidence of the official witnesses to record an order of conviction, if the version of the official witnesses is otherwise trustworthy and inspire confidence to prove the guilt of the accused beyond all reasonable doubt. The aforesaid law has been well settled by a catena of decisions of the Apex Court and so also by this Court. One of such cases is the case of Nathusingh vrs. State of Madhya Pradesh, AIR 1973 S.C. 2783 wherein the Apex Court have held as under :-

> "The mere fact that the prosecution witnesses are police officers is not enough to discard their evidence, in the absence of evidence of their hostility to the accused."

A Division Bench of this Court in the case of Nilambar Sahu vrs. State of Orissa, (1990) 3 OCR 219 relating to Bihar and Orissa Excise Act have held as under :-

> "Even if the evidence of these two witnesses be not available to the prosecution to establish its case, the evidence of the three official witnesses cannot be brushed aside. Even a closure scrutiny of the evidence does not permit us to differ with the finding of fact reached by the two Courts below in this regard."

Similarly, in the case of Shyam Sunder Rout vrs. State of Orissa, 1991 CRI.L.J. 1595, this Court have held as follows :-

"xxxxxx xxxxxx xxxxx

> It is well settled in law that where seizure witnesses turn hostile, the evidence of the departmental witnesses can be relied upon to prove the fact of seizure unless there is intrinsically anything which appears to make their evidence non-trustworthy. Xxxx xxxxx"

Section 118 of the Evidence Act also does not make the official witnesses to be incompetent witnesses. Again Section 134 of the Evidence Act, 1872 speaks that no particular number of witnesses shall in any case be required for the proof of any fact. The said section also does not make any distinction with regard to version of official witnesses and other witnesses. Therefore, even if the version of the independent witness to seizure does not support the case of seizure, if the version of the official witnesses making the seizure is worthy of credence and suffers from no infirmity, there is no impediment in law to place reliance on such evidence to accept the seizure. The law with regard to appreciation of the version of official witnesses is that their testimonies are required to be scrutinized fairly and dispassionately like the other witnesses in order to find out whether the same inspire confidence and can be safely relied upon. On such scrutiny, if no infirmity is found in the version, there is no impediment to make the foundation of conviction and record a conviction on the same even if not corroborated by any other independent witness. In view of the aforesaid, contention advanced by the learned counsel for the appellant that since the version of the official witnesses are not supported the independent witness, such version of the official witnesses to incriminate the appellant requires outright rejection, is unacceptable.

6. Before adverting to the question raised, I would like to add that an Officer conducting search and seizure under the Act is bound to follow the procedure envisaged under the Act and cannot proceed in breach thereof. Here, P.W.6 is the Officer who claimed to have seen the appellants running away with two bags containing alleged 'Ganja' and it is he who also claimed to have recovered another bag containing 'Ganja' from a hut in that plantation area. He should not have investigated the case being a highly interested person since he conducted search and seizure of contraband articles.

7. The very Excise Officer who appears to have effected the seizure from the possession of the appellants, investigated the case. The practice of investigation being conducted by the same Officer who happens to be an

ocular eyewitness has been looked with disfavour by the Courts. When the same Officer who claims to have made the search and seizure also investigated the case, his evidence is required to be looked with great care and caution.

8. The Apex Court in the case of Megha Singh vrs. State of Haryana, AIR 1995 SC 2339, have held as follows :-

> "We have also noticed another disturbing feature in this case. P.W.3, Siri Chand, head Constable arrested the accused and on search being conducted by him a pistol and the catridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But, it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under S. 161, Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation."

So also, in the case of State of Orissa v. Managobinda Sahoo, ILR (2009) 1 Cuttack 606, this Court relying upon decision of the Supreme Court in Jamuna Chaudhary & Ors. v. State of Bihar, (1974) 3 SCC 774, have held that for the purpose of fair and impartial investigation, it must be ensured that the investigation is carried out by a person who is absolutely impartial, unbiased and unmotivated. The Rule of law makes it unthinkable to allow a witness to a crime to be the investigator into the said crime. In ***Nathiya and another v. State,*** 1992 (1) Crimes 537, Rajasthan High Court has deprecated the practice of investigation of a case under the Act by the selfsame person who made recovery of contraband.

9. In the backdrop of the aforesaid factual aspects and settled law on the subject, I would like to scan the evidence of P.Ws.3, 5 and 6 in order to ascertain whether any implicit reliance can be placed on the testimony of the official witnesses.

10. Gist of the evidence of P.W.6 revealed that on receipt of the information regarding possession and transportation of 'Ganja' when he along with P.W.3 and few other constable of Excise rushed to the spot they found both the appellants each holding a gunny bag attempting to conceal those bags. But, he caught them redhanded. His evidence also revealed that there was a hut nearby the "Hem plants" cultivation. However, P.W.1, R.I., Chitrakonda who had demarcated the case land, stated the spot was a

Government land, he did not notice any fence or hut and there was also no plantation over the said land. In cross-examination this witness has also stated that the spot was accessible to all. Incidentally, the appellants were not detained inside that hut or near the plantation. P.W.6 did not notice the appellants watering the hem plants or doing any other ancillary works relating to plants. No piece of evidence regarding ownership of that land and the alleged hut being found, the lower Court as such acquitted the appellants of the charge under Section 20(a)(i) of the Act. When P.W.1 did not notice any hut, the seizure of bag of 'Ganja' from inside the hut as deposed by P.W.6, is unworthy of credence. Even otherwise also, when the appellants were not found inside the hut and when no personal belonging of the appellants also found in that hut, their possession either physical or constructive cannot be attributed with the articles found in that hut. Law is well settled that 'possession' need not be physical possession but can be constructive, having power and control over the article in question. Constructive possession in law applies to a person having knowledge of an article plus the ability to control such object, even if he has no physical contact with it. Possession is not the same as ownership and there are distinctions between the two. An owner of an object may not always physically possess the object. Even though another person is having actual physical possession of articles but if the accused has the power or control over such articles and the other person having physical possession of the articles is merely acting as per the direction / instruction of the accused and has no independent choice of taking any decision in respect of disposal of such articles then also it can be said that the accused is having possession or control of the articles. Therefore, the term 'possession' may have different meanings in different contexts and it need not be actual, physical or personal possession but it includes physical control over the articles in question.

11. This being the factual aspect, the evidence of official witnesses adduced to connect the appellants with a bag found from a hut at the spot is not convincing and cannot be accepted. There being no nexus between the articles found and any hut and much less knowledge of the appellants, they have neither exclusive nor conscious possession over any 'Ganja' found in a bag said to have been recovered from a hut. Mere presence of the appellants near about the vicinity of bag or the so-called hut does not establish their possession. So, prosecution failed to establish possession of contraband articles seized from a hut and connect the appellants with the same.

12. So far recovery of two other bags containing alleged 'Ganja' from the possession of the appellants, the evidence regarding search and seizure is hopelessly short of acceptance. The evidence of P.W.5, the then Superintendent of Excise-cum-Tahasildar, Chitrakonda reveals that on 16.01.2007 at 1 p.m. Excise personnel produced before him two suspects and three bags containing contraband 'Ganja'. He signed the seizure lists, Exts.2/13, 2/14, 2/15 and 2/16. In cross-examination, this witness has conceded that he had no direct knowledge about search and seizure of any contraband articles. He has further stated that at the time of search and seizure, he was in a boat and cannot say from whose possession such gunny bags containing contraband articles were seized. However, this witness was subsequently recalled by the prosecution where he deposed to have witnessed search and seizure. But, in cross-examination he again stated that "what he had deposed earlier on 02.07.2002 was correct as he admitting the fact". Selecting P.W.5 as the Gazetted Officer, P.W.6 conducted search and seizure. But, this witness having given two different version before the Court on two different dates no implicit reliance can be placed on his testimony which does not inspire confidence. It is fragile piece of evidence and no implicit reliance can be placed on such testimony in a case of this nature. Leaving aside the evidence of P.W.5, prosecution left with the evidence of P.Ws.3 and 6. Here, P.W.6 is himself conducted search and seizure and also conducted investigation and submitted prosecution report. So, his evidence needs careful scrutiny before acceptance. As stated earlier, his evidence on seizure of 'Ganja' in bag in a hut near the spot was found to be unacceptable. His evidence on search and seizure was also not corroborated by the evidence of P.W.5. Hence, his evidence on seizure of 'Ganja' in two bags, one each from the possession of the each appellant are also required to be taken with a pinch of salt. The same is more so, as it appears from his evidence that the articles were seized on 16.01.2007 around 1 p.m., but the articles were never forwarded to the Court along with the appellants on the same day. In that night he kept the seized articles and sample packets in his Malkhana which is under his custody he being the S.I. of Excise, District Mobile, Malkanagiri though law enjoins upon him to keep the articles with the Officer-in-Charge of nearest Police Station. He also detained the appellants in his custody.

13. On 17.01.2007 he produced the appellants along with seized articles and sample packets before the Special Judge, Koraput-Jeypore. On the direction of the Special Judge, he produced the sample packets before the SDJM, Malkanagiri for onward transmission to SFSL, Bhubaneswar and

deposited the 3 bulk packets and 3 other sample packets in Court malkhana. However, on the next day, i.e., on 18.01.2007 he despatched the sample packets along with the forwarding letter of the SDJM, Malkangiri (Ext.9) to the SDTRL, Berhampur. On the night on 17.01.2007 P.W.6 also kept the sample packets in his custody. He has not whispered what precautionary measures taken on 16.01.2007 till removal of sample packets and production before the Court and what precautionary measures taken when he received back the sample packets with forwarding reports of the Court of the SDJM, Malkangiri for onward transmission. However, the sample packets were not despatched on 17.01.2007, but P.W.6 retained the sample packets again in his custody. No Malkhana register showing deposit of sample packets in Malkhana on 16.01.2007, removal on 17.01.2007, again re-deposited on 17.01.2007 and further removal on 18.01.2007 produced and proved to establish safe custody of the sample packets. Incidentally, neither the seized articles and sample packets produced before the nearest Police Station for its safe custody nor signature of the Officer-in-charge of the Police Station also obtained. Record also reveals the brass seal of P.W.6 by which he sealed 3 packets containing bulks seized 'Ganja' and six sample packets were kept in his custody. Bana Khilla (P.W.2) having not deposed to have received any such brass seal in his custody, the zimmanama, Ext.3 neither confronted nor his signature to show that after seizure and sealing of seized articles and sample packets, the brass seal was released in his zima. That brass seal was also not produced. When there is no evidence on record that sample packets were kept in safe custody, Malkhana register not produced and proved in support of such material evidence and when brass seal also not produced and apparently retained by P.W.6, there is no convincing evidence with regard to safe custody of the articles seized. That apart, the evidence of P.W.6 does not disclose the reasons for non-drawl of sample for chemical examination by the expert in presence of the seizure witnesses as well as the appellants on the very date of seizure. There is thus virtually no explanation with regard to the safe custody of the articles seized from the possession of the appellants after the seizure and what actuated the Investigating Officer (P.W.6) not to produce the articles seized before the Magistrate along with the appellants on the date of seizure. He was the custodian of the Malkhana, he himself retained the key and Malkhana register with him. The whereabout of the brass seal is also not known. That apart, the evidence of P.W.6 revealed that before arrival of P.W.5 he opened the bags and removed some sample representative for his subjective satisfaction that what was kept in the bags was nothing but 'Ganja'. There is no convincing evidence with regard to the

safe custody of 3 packets of bulk 'Ganja' seized before drawl of samples for chemical examination by the SFSL, Bhubaneswar. Even for the sake of argument, the evidence of the Investigating-cum-Detecting Officer is accepted that he had seized three bags of alleged 'Ganja' (not produced during trial) from the possession of the appellants, till then there being no convincing material to show that any representative samples drawn therefrom were examined by the chemical examiner, the evidence of P.W.6 and the chemical examination report (Ext.10) is of no assistance to the prosecution to prove that the articles found in the possession of the appellants was nothing but 'Ganja'.

14. This Court in the case of Santosh Patra and others vrs. State of Orissa, 2015 (I) OLR 236, has held as follows :-

> "Section 55 of the Act provides that Police shall take incharge of the articles seized till delivery. An officer-in-charge of a police station shall 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 that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. This section provides that if any contraband is seized then the same shall be delivered to the Officer-in-charge of a nearest Police Station for safe custody pending orders of the Magistrate. The Officer-in-charge shall allow any Officer who may accompany such articles to the Police Station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. So two conditions were required to be fulfilled. An Officer may accompany the seized articles shall be allowed by the Officer-in-charge of the Police Station to affix his seal to such articles and take samples thereof. It is further required that all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. This provision has been violated in this case as it is not proved in the case that the sample packets, which are drawn by P.W.1, were also sealed with the seal of the O.I.C. of the Police Station in whose interim custody the articles were kept after detection of the seizure. It is further apparent from the record that the

> brass seal, which was used to seal the articles and sample packets, has not been produced in the Court. The prosecution witness P.W.4, namely, Tikiswar Sahu, has denied that the brass seal was kept in his zima on execution of a zimmanama. So all these material aspects taken together create doubt in the mind of the court regarding the compliance of Sections 52 and 55 of the Act."

The aforesaid requirement of the Act as seen from the evidence on record has been violated by P.W.6. He has no reason to retain the seized articles and sample packets in his custody without producing them at the nearest Police Station, for which the seized articles could not be resealed by the Officer-in-charge to avoid tampering of the articles. So, there is apparent violation of Section 55 of the Act. Moreover, the brass seal used for sealing the contraband articles was not produced before the Court. Record does not indicate that the seal affixed in the seized packets tallied with the specimen impression of brass seal affixed on the seizure list. No explanation also offered as to why the seized articles were not handed over to the Officer-in-charge of the local Police Station for safe custody. When Malkhana register and brass seal also withheld, it is held that prosecution failed to establish the safe custody of the very articles before its production for chemical investigation. In this connection, a decision in the case of State of Rajasthan vrs. Gurmail Singh, 2005 (1) Crimes 346 (SC) may be seen.

15. To sum up, the evidence adduced by the official witnesses with regard to search and seizure of 'Ganja' from the personal possession of each of the individual appellants as well as from a hut near the spot being not free from blemish, so also there being no evidence with regard to safe custody of the so-called 'Ganja' stated to have been seized from the possession of the appellants to rule out the possibility of meddling of the articles seized before drawal of representative samples for chemical examination, the appellants could not have been made liable for possession of 'Ganja' of more than the commercial quantity violating the provisions of Section 8(c) of the Act punishable under Section 20(b)(ii)(C) of the Act. Therefore, on reappraisal of the evidence on record, this Court is of the view that the trial court grossly erred in appreciation of the evidence on record to come to a conclusion that the appellants were found to be possessing the 'Ganja' of such quantity violating the provisions of Section 8(c) of the Act.

16. For the reasons aforesaid, the prosecution is found to have failed to establish the charge against the appellants beyond all reasonable doubt. The

appellants are entitled to the benefit of doubt thereof. Accordingly, this criminal appeal is allowed and the impugned judgment of conviction and order of sentence are set-aside. Consequently, the appellants are acquitted of the charge and they be set at liberty forthwith, if in custody, unless their detention is required otherwise. L.C.R. received be sent back forthwith along with a copy of this Judgment.

Appeal allowed.

2017 (II) ILR - CUT- 421

BISWANATH RATH, J.

MISC. CASE NO. 4 OF 2017
(ARISING OUT OF E.P. NO. 1 OF 2016)

BHUJABAL MAJHI …….Petitioner

Vrs

NEKKANTI BHASKAR RAO ……..Opp. party

REPRESENTATION OF THE PEOPLE ACT, 1951 – Ss. 81, 86

Election Petition – Detection of discrepancies in the Court copy and the summon copy served on the respondent – Corrections inserted by the election petitioner in page 6 of the election petition by hand which changed the nature of the election case was not carried out in the summon copies – Hence this Misc. Case.

Non-service of true copy of the election petition on the respondent – Violation of the mandatory provisions U/s. 81(3) of the Act, inviting dismissal of the election petition U/s. 86(1) of the Act – Held, this Court while dismissing election petition No. 1 of 2016 as not maintainable imposed cost of Rs. 15,000/- on the election petitioner to be paid to the respondent for wasting the time of the Court and towards harassment faced by the respondent for participating in the proceeding. (Paras 10 to 14)

Case Laws Referred to :-

1. 1970 (2) SCC 411 : Jagat Kishore Prasad Narain Singh v. Rajendra Kumar Poddar & ors.
2. AIR 1964 Supreme Court 1545 : Murarka Radhey Shyam Ram Kumar v. I Roop Singh Rathore & ors.
3. (1984) 3 SCC 339 : Rajendra Singh v. Smt. Usha Rani & Ors.

For Petitioner :M/s. Gopal Agrawal
For Opp. Parties: ….

Date of order : 26.04.2017

ORDER

BISWANATH RATH, J.

This is an application at the instance of the respondent in the Election Petition No.1 of 2016 for dismissing the election case being hit by Section 81(3) read with Section 86 (1) of the Representation of the People Act, 1951.

2. Shortly stated the fact at the instance of the respondent is that upon receipt of the notice in the election dispute, the respondent filed two Misc. Cases i.e. Misc. Case No.45 of 2016 to defer filing the written statement till disposal of Misc. Case No.46 of 2016 being filed under Order 6, Rule 16 read with Order 7, Rule 11 of the Code of Civil Procedure along with Sections 81, 82,86 and 87 of the Representation of Peoples Act, 1951 for striking out the pleadings and for the rejection of the election petition for want of cause of action.

3. During course of hearing of Misc. Case No.46 of 2016 on detection of discrepancies in the Court copy and the summon copy served on the respondent, some handwritten insertions inserted in page-6 of the election petition changing the entire gamut involving election case, the respondent claimed that he was compelled to file Misc. Case No.4 of 2017 requesting the Court for dismissal of the election petition for being hit by Section 81(3) and Section 86(1) of the Representation of Peoples Act, 1951 particularly on the premises of non-service of true copy of the election petition filed in this Court on the respondent. Filing the summon copies both ways, through Court process and Registered post, learned counsel for the petitioner attempted to satisfy that there is clear violation of provisions at Section 81(3) of the Representation of People Act, 1951.

4. In response to service of copy of the petition in Misc. Case No.4 of 2017, election petitioner filed objection seriously disputing the truthness in the copy of the election petition filed by the respondent in this Court to establish his allegation involving in Misc. Case. Filing the objection, the objector i.e. the election petitioner alleged that there is tampering in the election petition served on the respondent to make it suffering for non-compliance of the provision under Section 81(3) of the Representation of People Act, 1951 thereby inviting dismissal under Section 86(1) of the

Representation of People Act. It is also alleged that the respondent even has gone to the extent of utilizing skill through computer to manufacture a different set of election petition to make a makeshift demonstration of the election petition to defeat the election petitioner.

5. For the dismissal of Misc. Case No.8 of 2017 by an independent order, this Court now proceeds to decide Misc. Case No.4 of 2017. Deciding Misc. Case No.4 of 2017 taking into consideration the observation of this Court in Misc. Case No.8 of 2017 that there is a great level of discrepancy in between the original and the summon copies particularly keeping in view that the insertion in handwritings made at page 6 of the Election Petition not being carried out in the summon copies both through Court and the postal way.

6. Considering the allegation contained in the Misc. Case No.4 of 2017 and looking to the nature of incorporations in the election petition for its absence in the summon copies, it makes a huge difference which remain incurable. Perusal of the original along with the summon copies presented by the respondent, it becomes manifest that the copies served is not the parallel and true copy of the Election Petition required under law to be served on the respondent, this is a case clearly establishing violation of provision contained in Section 81(3) of the Representation of People Act.

7. Since an allegation is made by the respondent that the copies served on the respondent are not true copies of the election petition, for the provision contained in the Representation of People Act, it becomes the duty of the Election Petitioner to establish the allegation as false. This Court finds in spite of sufficient opportunity, the election petitioner failed in establishing the allegation as false. Further, this Court considering the maintainability of election petition on the ground of discrepancy between the original petition and the copies served, first takes up the Provision of Law in this regard and proceeds as follows:

> Section 81 and Section 86 of the Representation of the People Act, 1951 reads as follows:
>
> "***Section 81***. **Presentation of petitions:-** (1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section 1 of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned

candidate at the election and dates of their election are different, the later of those two dates.

81 (3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

86. Trial of election petitions.—(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80-A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months

from the date on which the election petition is presented to the High Court for trial."

8. From the reading of both the above Provisions this Court finds Section 81 of the Representation of People Act. mandates filing of as many copies thereof as there are respondents not only attested under his own signature but should also be the true copy of the petition filed. Further, Section 86 of the Act makes provision for dismissal of election petition, if it violates the provisions at Sections 81, 82 or 117 of the Act. In disposal of the Misc. Case No.8 of 2017, this Court has already observed that there exist violation of Section 81(3) for non filing of true copy of the Election Petition for the purpose of summon to the respondent.

9. The history of the judgment of the Hon'ble Apex Court in such situation is as follows:

In the case of ***Jagat Kishore Prasad Narain Singh v. Rajendra Kumar Poddar and others***, *1970 (2) Supreme Court cases 411* in paragraph-7, the Hon'ble Apex Court observed as follows:

"The law requires that a true copy of the election petition should be served on the respondents. That requirement has not been either fully or substantially complied with. Therefore we have no doubt in our mind that the election petition is liable to be dismissed under Section 86 of the Act."

In the case of ***Murarka Radhey Shyam Ram Kumar v. I Roop Singh Rathore and others***, *AIR 1964 Supreme Court 1545*, defining the word 'copy' involving a proceeding under the representation of People Act, the Hon'ble Apex Court in paragraph-11 held as follows:

"11 We agree with the High Court and the Election Tribunal that the first defect is not a defect at all. When every page of the copy served on the appellant was attested to be a true copy under the signature of the petitioner, a fresh signature below the word "petitioner" was not necessary. Sub-section. (3) of S. 81 requires that the copy shall be attested by the petitioner under his own signature and this was done. As to the second defect the question really turns on the true scope and effect of the word "copy" occurring in sub-sec. (3) of S. 81. On behalf of the appellant the argument is that sub-s. (3) of S. 81 being mandatory in nature all the requirements of the sub-section must be strictly complied with and the word "copy" must be

taken to be an absolutely exact transcript of the original. On behalf of the respondents the contention is that the word "copy" means that which comes so near to the original as to give to every person seeing it the idea created by the original. Alternatively, the argument is that the last part of sub-s. (3) dealing with a copy is merely directive, and for this reliance is placed on the decision of this court in Kamaraja Nadar v. Kunju Thevar, 1959 SCR 583: (AIR 1958 SC 687) We are of the view that the word "copy" in sub-s. (3) of S. 81 does not mean an absolutely exact copy, but means that the copy shall be so true that nobody can by any possibility misunderstand it (see Stroud's judicial Dictionary, third edition, volume 4, page 3098). In this view of the matter it is unnecessary to go into the further question whether any part of sub-s. (3) of S. 81 is merely directory. Several English decisions were cited at the Bar The earlier decision cited to us is the decision in Pocock v. Mason, (1834) 131 ER 1111 where it was held that the omission of the words "the" and "by" in the copy of the writ of capias prescribed by the schedule 2 W. 4, c. 39 did not invalidate an arrest. The reason given was thus expressed:

"To ascertain whether or not an unfaithful copy produces any alteration in the meaning, supposes an exertion of intellect which it may be inconvenient to require at the hands of those who serve the copy. It was to obviate this inconvenience, that the legislature has given a form, and required that it should be pursued. Nothing but ordinary care is necessary for taking the copy.

In a later decision Sutton v. Mary and Burgess, (1835) 149 ER 1291 the copy of the writ served on the defendant omitted the letter "s" in the word "she" It was held that the omission was immaterial as it could not mislead anybody. **In Morris v. Smith,** *(1835) 150 ER 51,* there was a motion to set aside the service of the writ of summons for irregularity, on the ground that the defendant being an attorney, he was only described as of Paper Buildings in the Inner Temple, London and the addition of "gentleman" was not given. It was held that the form in the statute 2 Will 4, C. 39 S. 1 did not require the addition of the defendant to be inserted in the Writ and it was sufficient to state his residence. The writ of summons was therefore valid. In another case in the same volume Cooke v. Vaughan, (1938) 150 ER 1346 it was held that where a writ of capias described the defendant by the addition of "gentleman", but that addition was

omitted in the copy served, the copy was not a copy of the writ, in compliance with the stat. 2 Will. 4, c. 39, S. 4. On behalf of the respondents a number of decision under the Bills of Sale Act, 1878 and the Amendment Act, 1882 (45 and 46 Vict. c. 43) were cited. The question in those cases was whether the bill was "in accordance with the form in the schedule to this Act annexed" as required by S. 9 of the Bills of Sale Act 1878, and Amendment Act 1882. In In re Hewer Ex parte Kahen, (1882) 21 Ch D 871 it was held that a "true copy" of a bill of sale within the Bills of Sale Act, 1878, S. 10, sub-s. (2), must not necessarily be an exact copy, so long as any errors or omissions in the copy filed are merely clerical and of such a nature that no one would be thereby misled. The same view was expressed in several other decisions and it is unnecessary to refer to them all. Having regard to the provisions of Part VI of the Act, we are of the view that the word "copy" does not mean an absolutely exact copy. It means a copy so true that nobody can by any possibility misunderstand it. The test whether the copy is a true one is whether any variation from the original is calculated to mislead an ordinary person. Applying that test we have come to the conclusion that the defects complained of with regard to Election Petition No. 269 of 1962 were not such as to mislead the appellant, therefore there was no failure to comply with the last part of sub-s. (3) of S. 81. In that view of the matter sub-s. (3) of S. 90 was not attracted and there was no question of dismissing the election petition under that sub-section by reason of any failure to comply with the provisions of S. 81. This disposes of the second preliminary objection raised before us."

In the case of ***Rajendra Singh v. Smt. Usha Rani and others***, *(1984) 3 Supreme Court Cases 339*, the Hon'ble Apex Court in paragraph-8 held as follows:

"**8.**This being the position, it is manifest that the appellant did not receive the correct copies as contemplated by Section 81 (3) of the Act. The respondent has also not been able to prove that the copies served on the appellant were out of the 10 corrected copies which she had signed and filed. It appears that in view of a large number of the copies of the petition having been filed, there was an utter confusion as to which one was correct and which was not. It is obvious that if an election-petitioner files a number of copies, some of which may be correct and some may be incorrect, it is his duty to see that the copy

served on the respondent is a correct one. A perusal of Sections 81 (3) and 86 of the Act gives the impression that they do not contemplate filing of incorrect copies at all and if an election-petitioner disregards the mandate contained in Section 81 (3) by filing incorrect copies, he takes the risk of the petition being dismissed in limine under Section 86. It is no part of the duty of the respondent to wade through the entire record in order to find out which is the correct copy. If out of the copies filed, the respondent's copy is found to be an incorrect one, it amounts to non-compliance of the provisions of Section 81 (3) which is sufficient to entail a dismissal of the election petition at the behest.

10. From perusal of both the election petition as well as summon copy served on the respondent, this Court observes for not inserting the handwritten manuscript in the summon copy served on the respondent both ways, there is no service of true copy of the election petition on the respondent and under the circumstance, this Court observes the omissions in the summon copy is incurable ultimately making the election petition defective. For the settled principle of law, as laid down by the Hon'ble Apex Court referred to hereinabove and the observations made hereinabove, the election petition is not maintainable for being contrary to the provisions of Section 81 (3) and hence liable to be dismissed following the provisions contained in Section 86 of the Representation of People Act.

11. Further, for the mandatory provision contained in Section 81(3) of the Representation of People Act requiring signature of the election petitioner even on the summon copies served on the respondent, since the Election Petition was originally a typed one and the handwriting insertion is made subsequent to preparation of Election Petition in absence of the signature of election petitioner in the summon copies, particularly, at the incorporation of handwritten materials at page 6 of the original Election Petition, the Election Petition is otherwise also not maintainable being clearly hit by Section 81 (3) of the Representation of People Act.

12. For the variations in between the original election petition and the summon copy, it appears the defect has the effect to misleading the return candidate. Law is also well settled that the right of an elected representative should not be lightly disturbed in the level of differences/omission. Hon'ble Apex Court has even gone to the extent of holding that right of an elected representative cannot be infringed on the basis of defective election petition clearly attempting to mislead the return candidate.

13. This Court has taken into account the decision cited by Sri Goapl Agrawal, learned counsel appearing for the election petitioner and finds the decision since stand on different footing and for the findings therein that the defects did not mislead the elected candidate, the decisions cited on behalf of the petitioner has no relevancy in the present case.

14. As a result, this Court while allowing the Misc. Case No. 4 of 2017 declares the Election Petition No.1 of 2016 as not maintainable and thus while dismissing the Election Petition, for election petitioner wasting the time of Court and also dragging the respondent to face a wholly not maintainable Election Petition, this Court imposes a cost of Rs.15,000/- (Rupees fifteen thousand) on the election petitioner to be paid to the respondent as compensation towards harassment faced by him in participating in the proceeding all through.

Petition allowed.

2017 (II) ILR - CUT- 429

S.K. SAHOO, J.

CRIMINAL REVISION NO. 758 OF 2003

DR. SUBAS CHANDRA DASH .....Petitioner

.Vrs.

STATE OF ORISSA .....Opp. Party

PENAL CODE, 1860 – Ss. 304-Part II, 304-A

Medical negligence – Death of mother and unborn baby – Complaint case – Cognizance taken against the petitioner-Doctor U/s. 304 Part-II I.P.C – Order taking cognizance challenged.

Although only normal delivery facilities available in the Nursing Home of the petitioner, he attempted a forceps delivery causing rupture of uterus and profuse bleeding from the vagina of the deceased – Petitioner has not exercised the skill with reasonable competence and did not adopt the practice acceptable to the medical profession – Petitioner did a high degree of negligence while dealing with the case of the deceased.

In order to attract the ingredients of offence U/s. 304 Part-II of I.P.C., there must be commission of culpable homicide not amounting to murder i.e. the death of the person must have been caused, such death must have been caused by the act of the accused by causing Death must have been caused by the act of the accused by

causing bodily injury and there must be knowledge on the part of the accused, but without any intention that the bodily injury is such that it is likely to cause death – However applicability of section 304-A I.P.C. is limited to rash or negligent acts which cause death but fall short of culpable homicide amounting to murder or culpable homicide not amounting to murder.

In this case knowledge can not be attributed to the petitioner that his act might cause such bodily injuries which may, in ordinary course of nature, be sufficient to cause death – So prima facie there are no material for commission of an offence U/s. 304 Part-II of I.P.C rather there are sufficient materials against the petitioner U/s. 304-A I.P.C as due to his rash or negligent acts, death of the deceased was caused which falls short of culpable homicide not amounting to murder – Held, impugned order of taking cognizance against the petitioner U/s. 304 part II is quashed – Direction issued to the Magistrate to proceed against the petitioner U/s. 304-A I.P.C. (Paras 13,14,15)

Case Law Referred to :-

1. (2005) 32 OCR (SC) 175 : Jacob Mathew -Vrs.- State of Punjab.
2. (2004) 29 OCR (SC) 38 : Dr. Suresh Gupta -Vrs.- N.C.T. of Delhi.
3. (2008) 41 OCR (SC) 825 : Mahadev Prasad Kaushik -Vrs.- State of U.P.
4. (2013) 56 OCR (SC) 789 : A.S.V Narayanan Rao -Vrs.- Ratnamala & Anr.
5. A.I.R. 2010 S.C. 1050: Kusum Sharma -Vrs.- Batra Hospital and Medical Research Centre.
6. (2005) 32 OCR (SC) 175 : Jacob Mathew -Vrs.- State of Punjab.
7. Dr. (2004) 29 OCR (SC) 38 : Suresh Gupta –Vrs.- N.C.T. of Delhi.
8. (2008) 41 OCR (SC) 825 : Mahadev Prasad Kaushik -Vrs.- State of U.P.
9. (2013) 56 OCR SC) 789 : A.S.V. Narayanan Rao -Vrs.- Ratnamala & Anr.
10. A.I.R. 2010 S.C. 1050 : Kusum Sharma -Vrs.- Batra Hospital and Medical Research Centre,
11. (2012) 2 SCC 648 : Alister Anthony Pareira -Vrs.- State of Maharashtra.

For Petitioner : Mr. Trilochan Nanda & K.Dash

For Opp. Party : Mr. Deepak Kumar, Addl. Standing Counsel

Date of Hearing : 19.12.2016
Date of Judgment: 27.02.2017

JUDGMENT

S. K. SAHOO, J.

"We have not lost faith, but we have transferred it from God to medical profession."

- George Bernard Shaw

A common man treats the doctor as 'Dhanvantari'. He has tremendous amount of confidence on the doctor. The comforting and reassuring words of the doctor are very powerful and sometimes it creates miracle for the patients and strengthen them to fight from within. That is why the doctors should shoulder their responsibility with all care and caution, rise to the occasion, believe in hard work and discipline and behave with all sensibility not thinking only of their Everestian interest of amassing huge wealth burying larger collective interest of common men which would strengthen the patient-doctor relationship.

The petitioner Dr. Subas Chandra Dash has filed this revision petition challenging the impugned order dated 23.02.2013 passed by the learned S.D.J.M., Bolangir in G.R. Case No. 447 of 2013 arising out of Bolagir Town P.S. Case No.170 of 2012 in taking cognizance of offence under section 304 Part-II of the Indian Penal Code and issuance of process against him.

2. One Susanta Kumar Thakur filed a complaint petition before the learned S.D.J.M., Bolangir on 11.05.2012 against the petitioner and another Dr. Narayan Thanapati, on the basis of which I.C.C. Case No.34 of 2012 was registered.

The prosecution case as per the complaint petition is that the complainant admitted his wife Rajeswari Thakur (hereafter 'the deceased') for delivery in Women's Care Nursing Home, Manoharpur on 24.03.2012 at about 8.00 a.m. which belonged to the petitioner who after check up of the deceased told that she was in normal condition. The petitioner placed one tablet inside the vagina of the deceased as a result of which there was heavy vaginal watery discharge and she also felt severe pain. After some time, the petitioner gave one saline and injection and told that the deceased would be alright within fifteen minutes. Then the petitioner used hand gloves and though forceps tried to pull out the baby from the womb of the deceased, as a result of which there was profuse bleeding due to rupture of uterus. After sometime, the petitioner referred the deceased in a serious condition to District Headquarters Hospital, Bolangir by arranging one vehicle. It is the further case of the complainant that the health condition of the deceased deteriorated when she was admitted in the District Headquarters Hospital, Bolangir. The referral slip issued by the petitioner was produced by the complainant before Dr. Narayan Thanapati who was the gynaecologist in the said hospital. It is further stated that even at the Government Hospital, the deceased was not treated properly by Dr. Thanapati till 10.00 p.m. and for the negligent treatment of the petitioner and Dr. Thanapati, the deceased as well as the baby in the unborn condition died. Dr. Thanapati asked the complainant to take the dead body of the deceased immediately from the hospital. The mental condition of the complainant was not good for which he took the dead body of his wife from the hospital to Sundargarh and with the help of the in-laws' family members of the complainant, the dead body was cremated.

3. The matter was reported in Town Police Station, Bolangir on 27.03.2012 but no action was taken for which the complaint petition was filed. The learned S.D.J.M., Bolangir sent the complaint petition to the Inspector in Charge, Town Police Station, Bolangir under section 156(3) of Cr.P.C. to treat it as F.I.R. and to investigate the case. Accordingly, Bolangir Town P.S. Case No.170 of 2012 was registered on 22.06.2012 under sections 304 and 201 of the Indian Penal Code against the petitioner and Dr. Narayan Tahanapati.

During course of investigation, the Investigating Officer examined the complainant, seized the original treatment papers of the deceased in the Nursing Home of the petitioner on different dates so also the sonography test report on the production by the complainant. The bed head ticket of the deceased regarding her admission at D.H.H., Bolangir and her treatment papers at D.H.H., Bolangir were also seized. The investigating officer examined the witnesses and visited the Women's Care Nursing Home.

During examination of the witnesses, he found that the deceased Rajeswari Thakur was admitted in Women's Care Nursing Home of the petitioner on 24.03.2012 at 8.00 a.m. and then she was admitted at D.H.H., Bolangir on the same day at 7.30 p.m. in a critical condition with profuse bleeding due to rupture of uterus. The investigating officer sent requisition to the CDMO, D.H.H, Bolangir to form a team of doctors and to enquire regarding the alleged negligence in the treatment by the petitioner as well as Dr. Narayan Thanapati of D.H.H., Bolangir. The investigating officer seized the original certificate of registration under section 19(1) of PNDT Act,1994, renewal of registration to establish/maintain a clinical establishment valid from 28.04.2009 to 27.04.2011 in original, application for renewal of Women's Care Nursing Home, Manoharpur in original dated 17.02.2012, degree of M.D. (O & G), registration of M.B.B.S. and M.D. in original on production by the petitioner which were left in the zima of the petitioner under proper zimanama after keeping the xerox copy of the documents. The investigating officer received the enquiry report of CDMO, D.H.H., Bolangir wherein it is indicated Dr. Thanapati applied adequate professional scheme and timely intervention in managing the patient and in spite of all possible treatment given by Dr. Thanapati, the deceased expired. However the team of doctors could not give any definite opinion regarding the role played by the petitioner in the treatment of the deceased and suggested for further investigation.

During course of investigation, after examining the witnesses and also verifying the documents, the investigating officer came to the conclusion that the deceased died due to the act of the petitioner who was the owner of Women's Care Nursing Home who though had no intention of causing death of the deceased but had sufficient knowledge that such bodily injury i.e. rupture of uterus caused due to pulling out the unborn baby forcefully by means of forceps was enough to accelerate the death and cause death in ordinary course of nature. It was further

concluded that the petitioner was responsible for the death of the baby in the womb of the deceased since no proper remedies and treatment was given to pull out the baby from the mother's womb while alive. The investigating officer sent a query to CDMO, Bolangir regarding inquiry to be conducted by team of doctors as to whether there was adequate facility and infrastructure available for the treatment of such type of cases as the deceased suffered. The query report was received which indicated that only normal delivery can be performed in the Women's Care Nursing Home. The investigating officer was of the opinion that the petitioner knowingly kept the deceased in the Nursing Home with assurance to the complainant for normal delivery. Despite repeated approach of the complainant, the petitioner did not advise him to take the deceased to D.H.H., Bolangir rather he pulled the unborn baby by means of forceps forcibly causing rupture of her uterus, as a result of which there was profuse bleeding and the condition of the deceased became serious and at the last moment, when the petitioner failed to make successful delivery, he arranged a vehicle and sent the deceased to D.H.H., Bolangir and such omission and commission of the petitioner in the treatment of the deceased resulted in her death along with the unborn baby.

After receipt of the order of the Superintendent of Police, Bolangir, charge sheet was submitted against the petitioner on 31.02.2013 under section 304 of the Indian Penal Code.

4. The learned Magistrate on a perusal of the chargesheet, case diary and other connected papers being prima facie satisfied regarding the commission of offence under section 304 Part-II of the Indian Penal Code, took cognizance of such offence and issued process against the petitioner which is impugned in the case.

5. Mr. Trilochan Nanda, learned counsel for the petitioner contended that the impugned order is illegal, unjust and improper and has been passed in a mechanical manner without application of mind. According to Mr. Nanda, on a bare perusal of the First Information Report, charge sheet, statements of the witnesses recorded under section 161 of Cr.P.C., inquiry report submitted by the CDMO, Bolangir and other materials available on record, no case under section 304 Part-II of the Indian Penal Code is made out and therefore, the impugned order of cognizance is not sustainable in the eye of law. It is further contended that the petitioner has been charge sheeted with an ulterior motive while another doctor i.e., Dr. Thanapati has been exonerated by the police. He further emphasized that when no post mortem has been conducted on the dead body of the deceased to ascertain the truth of the accusation, the prosecution case that the deceased suffered from internal injury and rupture of uterus at Women's Care Nursing Home cannot be accepted. He further contended that the CDMO, Bolangir along with a team of doctors enquired about the alleged negligence and treatment by the petitioner which was conducted on the request of the Investigating Officer and the inquiry report revealed that the deceased

was not admitted as an indoor patient in Women's Care Nursing Home rather the OPD register of the said Nursing Home revealed the name of the deceased in sl. No.477 dated 24.03.2012. It is contended that when the deceased was brought to the Nursing Home, she was diagnosed as a case of Abruptio Placentae causing concealed hemorrhage and the condition of the deceased was very low for which one vial of ceftriaxone injection was administered intravenously and she was referred to D.H.H., Bolangir. It is contended that unless this Court exercises its revisional jurisdiction and quash the impugned order, there would be miscarriage of justice. The learned counsel for the petitioner in support of his contention that there was no medical negligence, placed reliance in the cases of **Jacob Mathew -Vrs.- State of Punjab reported in (2005) 32 Orissa Criminal Reports (SC) 175**, **Dr. Suresh Gupta -Vrs.- N.C.T. of Delhi reported in (2004) 29 Orissa Criminal Reports (SC) 38**, **Mahadev Prasad Kaushik -Vrs.- State of U.P. reported in (2008) 41 Orissa Criminal Reports (SC) 825**, **A.S.V Narayanan Rao -Vrs.- Ratnamala and another reported in (2013) 56 Orissa Criminal Reports (SC) 789** and **Kusum Sharma -Vrs.- Batra Hospital and Medical Research Centre reported in A.I.R. 2010 S.C. 1050**.

6. Mr. Deepak Kumar Pani, learned Addl. Standing counsel on the other hand placed the 161 Cr.P.C. statements of the complainant Susanta Kumar Thakur and other witnessees so also of Dr. Narayan Thanapati. The learned counsel for the State further placed the enquiry report which indicates that the cause of death was shock and bleeding due to rupture of uterus. He placed the report of the CDMO, Bolangir which indicates that only normal delivery could have been performed in the Nursing Home of the petitioner. It is contended by the learned counsel that the statements of the complainant, Dr. Narayan Thanapati and other witnesses and the surrounding circumstances clearly indicates that there was an attempt to pull out the unborn baby from the womb of the deceased by using forceps for which there was rupture of uterus and heavy bleeding as reasonable care was not taken. The learned counsel for the State further submitted that the manner in which everything was done by the petitioner in his private Nursing Home clearly makes out the ingredients of offence and the points raised by the learned counsel for the petitioner can be taken note of during course of trial but not at this stage and therefore, the revision petition should be dismissed.

7. There are certain undisputed facts which are as follows:-

(i) the petitioner was having degree of M.D. (Obstetrics and Gynecology).

(ii) Director of Medical Education and Training, Odisha, Bhubaneswar issued certificate of renewal of registration of the Nursing Home of the petitioner for a period of two years from 28.04.2011 to 27.04.2013 under the Odisha Clinical Establishments (Control and Regulation) Act, 1990 and Odisha Clinical Establishments (Control and Regulation) Rules, 1994 and Orissa Clinical Establishment (Control and Regulation) Amendment Rules, 2006.

(iii) the report of the Chief District Medical Officer, Bolangir dated 07.11.2012 indicates that only normal delivery can be performed in the Women's Care Nursing Home which was having only two beds.

(iv) the enquiry report of a team of doctors which was submitted by the CDMO, Bolangir before the Inspector in Charge, Town Police Station, Bolangir indicates that so far as the petitioner is concerned, there are contradictory statements of the witnesses relating to time of attending the clinic and whether the patient was admitted as indoor patient or not, mode of treatment and nature of intervention given, times spent in the Nursing Home, type of bleeding (concealed or visible) and identification of the driver and vehicle used for transportation of patient and therefore, it was indicated that no definite opinion can be given regarding the role of the petitioner in the treatment of the deceased.

8. The learned counsel for the petitioner contended that the deceased was brought to the Nursing Home in the evening hours around 6.00 p.m. on 24.03.2012 and she was never treated as an indoor patient that would be clear from the OPD register and after one vial of ceftriaxone injection was administered intravenously, she was referred to D.H.H., Bolangir. The statements of the complainant Susanta Kumar Thakur and other witnesses on the other hand indicate that the deceased was in the hospital since morning at about 8.00 a.m. on 24.03.2012 and petitioner placed one tablet inside the vagina of the deceased at about 3.00 p.m. as a result of which there was heavy vaginal watery discharge and she also felt severe pain and at about 4.30 p.m., the petitioner gave one saline and injection to the deceased but the pain subsisted. It further reveals that at about 6.45 p.m. again the petitioner checked the deceased using gloves and told that the deceased would be alright within fifteen minutes and at about 7.00 p.m. when the pain became unbearable, the petitioner told the complainant that he would pull out the baby by using forceps. Ten minutes thereafter, the deceased was taken to the labour room and inside the labour room, the petitioner forcibly tried to pull out the baby by forceps as a result of which there was severe bleeding and then the petitioner called a vehicle and asked the complainant to immediately shift the deceased to D.H.H., Bolangir.

Even though there is no documentary evidence relating to the indoor admission of the deceased in the Nursing Home and the O.P.D. register of the Nursing Home indicates that the deceased was diagnosed as G3P2 in labour with antepartum haemorrhage but in view of the consistent statements of the witnesses relating to the admission of the deceased since morning on 24.03.2012 and time to time treatment given in the Nursing Home till in the evening when he was referred to D.H.H., Bolangir, at this stage, basing on the documentary evidence, such statements cannot be discarded. Needless to say, the Trial Court has to appreciate the evidence at appropriate stage without getting influenced by the observations of this Court, as they are prima facie.

It is the prosecution case that even though only normal delivery facility was available in the Women's Care Nursing Home and patient was diagnosed as G3P2 in labour with antepartum haemorrhage, the conduct of the petitioner in detaining such patient from the morning till evening and attempting for a forceps delivery is nothing but reflects a case of gross medical negligence on the part of the petitioner which ultimately took away the life of the deceased and the unborn child. The hazard taken by the petitioner, according to the prosecution was of such a nature that the death which resulted was most likely imminent. Though it is the contention of the learned counsel for the petitioner that there was no such attempt of forceps delivery in the Nursing Home but it is too early to accept such contentions at this stage in view of the available materials on record.

9. Let me first discuss the cases cited at the Bar on medical negligence by the learned counsel for the petitioner. In the case of **Jacob Mathew -Vrs.- State of Punjab reported in (2005) 32 Orissa Criminal Reports (SC) 175,** it is held as follows:-

> "49. We sum up our conclusions as under:-
>
> (1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.
>
> (2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the

alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in **Bolam's case** (1957) 1 W.L.R. 582 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304-A of IPC, yet it is settled that in criminal law, negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304-A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. *Res ipsa loquitur* has, if at all, a limited application in trial on a charge of criminal negligence.

xx xx xx xx

53. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying **Bolam's test** to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been leveled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

In the case of **Dr. Suresh Gupta –Vrs.- N.C.T. of Delhi, reported in (2004) 29 Orissa Criminal Reports (SC) 38,** it is held as follows:-

"20. For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness". It is not merely lack of necessary care, attention and skill. The decision of the House of Lords in **R. V. Adomako (Supra)** relied upon on behalf of the doctor elucidates the said legal position and contains following observations:-

"Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State."

21. Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as 'criminal'. It can be termed 'criminal' only when the medical men exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.

22. This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being exposed to civil liability, may not unreasonably extend to criminal liability and expose them to risk of landing themselves in prison for alleged criminal negligence.

23. For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.

24. No doubt in the present case, the patient was a young man with no history of any heart ailment. The operation to be performed for nasal deformity was not so complicated or serious. He was not accompanied even by his own wife during the operation. From the medical opinions produced by the prosecution, the cause of death is stated to be 'not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage'. This act attributed to the doctor, even if accepted to be true, can be described as negligent act as there was lack of due care and precaution. For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable."

In the case of **Mahadev Prasad Kaushik -Vrs.- State of U.P. reported in (2008) 41 Orissa Criminal Reports (SC) 825,** it is held as follows:-

"23. Plain reading of the above section makes it clear that it is in two parts. The first part of the section is generally referred to as "Section 304, Part I", whereas the second part as "Section 304, Part II". The first part applies where the accused causes bodily injury to the victim with intention to cause death; or with intention to cause such bodily injury as is likely to cause death. Part II, on the other hand, comes into play when death is caused by doing an act with knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

xx xx xx xx

26. Before Section 304 can be invoked, the following ingredients must be satisfied;

(i) the death of the person must have been caused;

(ii) such death must have been caused by the act of the accused by causing bodily injury;

(iii) there must be an intention on the part of the accused
(a) to cause death; or

(b) to cause such bodily injury which is likely to cause death; (Part I) or

(iv) there must be knowledge on the part of the accused that the bodily injury is such that it is likely to cause death (Part II).

27. Section 304-A was inserted by the Indian Penal Code (Amendment) Act, 1870 (Act XXVII of 1870) and reads thus;

304-A. Causing death by negligence

Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

28. The section deals with homicidal death by rash or negligent act. It does not create a new offence. It is directed against the offences outside the range of Sections 299 and 300, IPC and covers those cases where death has been caused without `intention' or `knowledge'. The words "not amounting to culpable homicide" in the provision are significant and clearly convey that the section seeks to embrace those cases where there is neither intention to cause death, nor knowledge that the act done will in all probability result into death. It applies to acts which are rash or negligent and are directly the cause of death of another person.

29. There is thus distinction between Section 304 and Section 304-A. Section 304-A carves out cases where death is caused by doing a rash or negligent act which does not amount to culpable homicide not amounting to murder within the meaning of Section 299 or culpable homicide amounting to murder under Section 300, IPC. In other words, Section 304- A excludes all the ingredients of Section 299 as also of Section 300. Where intention or knowledge is the `motivating force' of the act complained of, Section 304-A will have to make room for the graver and more serious charge of culpable homicide not amounting to murder or amounting to murder as the facts disclose. The section has application to those cases where there is neither intention to cause death nor knowledge that the act in all probability will cause death."

xx xx xx xx

46. On the facts of the case, ailment of Buddha Ram *prima facie* could not be said to be of such a serious nature which would result in death during his treatment. The allegation of the complainant which has been corroborated by statements of other eye-witnesses is that immediately after administration of three injections, the colour of the body of Buddha Ram turned into blue and within half an hour he died. If in the light of the above facts and circumstances, proceedings have been initiated against the appellant for an offence punishable under Section 304-A, IPC (though not under Section 304, IPC), it cannot be said that no such action could be taken. We are, therefore, of the view that submission on behalf of the learned Counsel for the complainant deserves to be accepted to the above extent."

In the case of **A.S.V. Narayanan Rao -Vrs.- Ratnamala and another, reported in (2013) 56 Orissa Criminal Reports (SC) 789,** it is held as follows:-

"12. From the final report submitted by the police in the instant case, it can be gathered that the records pertaining to the treatment given to the deceased were forwarded to the Andhra Pradesh Medical Council and also the Medical Council of India which opined that the "doctors seem to have made an attempt to do their best as per records".

13. However, the High Court thought it fit to continue the prosecution of the Appellant for two reasons (1) that the Appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hours in conducting by-pass after the angioplasty failed; and (2) that the Appellant did not consult a Cardio Anesthesian before conducting an angioplasty. According to the High Court, both the above-mentioned 'lapses' on the part of the Appellant "clearly show the negligence" of the Appellant.

14. The basis for such conclusion though not apparent from the judgment, we are told by the learned Counsel for the first Respondent, is to be found in the evidence of Dr. Surajit Dan given before the A.P. State Consumer Redressal Commission in C.D. No. 38 of 2004. It may also be mentioned here that apart from initiating criminal proceedings against the Appellant and Ors., the first Respondent also raised a consumer dispute against the Appellant and others. It is in the said proceedings, the above-mentioned Dr. Dan's evidence was recorded wherein Dr. Dan in his cross-examination stated as follows:

"...Whenever Cardiologist performs an angioplasty, he requests for the surgical team to be ready as standby. I was not put on standby in the instant case...."

He further stated;

"...The failure of angioplasty put the heart in a compromised position of poor coronary perfusion that increases the risk of the emergency surgery after that. In a planned coronary surgery, the risk is less than in an emergency surgery...."

However, the same doctor also stated;

"...The time gap between the angioplasty failure and the surgery is not THE FACTOR for the death of the patient. The time gap may or may not be a factor for the enhancement of the risk."

15. Unfortunately, the last of the above extracted statements of Dr. Surajit Dan is not taken into account by the High Court which statement according to us is most crucial in the context of criminal prosecution of the Appellant.

16. The High Court unfortunately overlooked this factor. We, therefore, are of the opinion that the prosecution of the Appellant is uncalled for as pointed out by this Court in **Jacob Mathew case** (supra) that the negligence, if any, on the part of the Appellant cannot be said to be "gross". We, therefore, set aside the judgment under appeal and also the proceedings of the trial court dated 11.12.2006."

In the case of **Kusum Sharma -Vrs.- Batra Hospital and Medical Research Centre, reported in A.I.R. 2010 S.C. 1050,** it is held as follows:-

"91. To prosecute a medical professional for negligence under criminal law, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

xx xx xx xx

94. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:-

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment, there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

> IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.
>
> X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.
>
> XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.
>
> 95. In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind."

10. The expression "cognizance" indicates the point when a Magistrate or a Court takes judicial notice of an offence. It is the condition precedent for the initiation of proceeding by the Magistrate. At the stage of taking cognizance, adequacy of evidence for supporting the conviction shall not be seen by the Court. The Magistrate should not enter into meticulous examination and shifting of evidence as a Trial Court. At this stage, Magistrate is not required to consider the defence version nor is he required to evaluate the merits of the materials or evidence of the prosecution. If the Magistrate is prima facie satisfied that an offence has been committed, he has to pass necessary orders in consonance with section 190 of Cr.P.C. At the stage of taking cognizance and issuing summons, the allegations contained in the charge sheet are assumed to be true unless the allegations are patently absurd and inherently improbable.

11. The petitioner was having degree of M.D. (Obstetrics and Gynaecology) and therefore, it can be presumed that there was no lack of competence to handle the case of the deceased. The records indicate that Director of Medical Education and Training, Odisha, Bhubaneswar has issued certificate of renewal of registration of the Women's Care Nursing Home which was valid at the time of occurrence. The report of the C.D.M.O., Bolangir indicates that Odisha Pollution Control Board had issued the certificate to keep four beds in the Nursing Home of the petitioner where there were only two beds. The report further indicates that normal delivery can be

performed in the Nursing Home. The OPD register of the Nursing Home indicates that patient was diagnosed as G3P2 in labour with ‘antepartum haemorrhage’.

What is G3P2 in labour? In medical science, gravidity is defined as the number of times that a woman has been pregnant and parity is defined as the number of times that she has given birth to a fetus with a gestational age of 24 weeks or more, regardless of whether the child was born alive or was stillborn. For example, a woman who is described as 'gravida 2 para 2’ (sometimes abbreviated to G2P2) has had two pregnancies and two deliveries after 24 weeks, and a woman who is described as 'gravida 2 para 0' (G2P0) has had two pregnancies, neither of which survived to a gestational age of 24 weeks. If they are both currently pregnant again, these women would have the obstetric resume of G3P2 and G3P0 respectively.

According to medical science, ‘antepartum haemorrhage’ is defined as bleeding from genital tract after 20 weeks of pregnancy and before completion of second stage of labour. It is a major cause of maternal morbidity, mortality and perinatal loss. Clinical presentation varies depending on the severity of blood loss and cause of bleeding. In mild haemorrhage, there may be no maternal or foetal compromise, while massive haemorrhage can lead to hypovolemic shock, coagulation failure, renal failure, foetal distress and may result in maternal and foetal death. All the patients of antepartum haemorrhage should be hospitalised in a well equipped centre with facilities for blood transfusion, emergency caesarean section and neonatal care unit.

If the placenta is introduced in the normal position in the superior part of the uterus, bleeding caused by premature separation is called accidental haemorrhage that can happen from pregnancy induced hypertension (high blood pressure) or appear for no apparent reason. If bleeding is moderate, there is no danger to the mother, but even a little amount can decrease the supply of oxygen and nutrients to the foetus.

An antepartum haemorrhage may precipitate into one of three main categories. Placenta praevia is a condition in which the placenta, alternatively of being linked to the upper part of the uterus, is touched to the lower part in the region of the lesser uterine segment or the cervix.

Accidental antepartum haemorrhage (abruption placentae) is a comparatively infrequent condition in which the placenta is commonly implanted in the upper part of the uterus but separate from it prematurely and generally results in vaginal bleeding.

Placental abruption (abruptio placentae) is an uncommon yet serious complication of pregnancy. The placenta is a structure that develops in the uterus during pregnancy to nourish the growing baby. If the placenta peels away from the inner wall of the uterus before delivery either partially or completely, it is known as

placental abruption. Placental abruption can deprive the baby of oxygen and nutrients and cause heavy bleeding in the mother. Placental abruption often happens suddenly. Left untreated, placental abruption puts both mother and baby in jeopardy.

Treatment depends on the severity of the separation, location of the separation and the age of the pregnancy. There can be a partial separation or a complete (also called a total) separation that occurs. There can also be different degrees of each of these which will impact the type of treatment recommended. In the case of a partial separation, bed rest and close monitoring may be prescribed if the pregnancy has not reached maturity. In some cases, transfusions and other emergency treatment may be needed as well. In a case with total or complete separation, delivery is often the safest course of action. If the fetus is stable, vaginal delivery may be an option. If the fetus is in distress or the mom is experiencing severe bleeding, then a caesarean delivery would be necessary. There is no treatment that can stop the placenta from detaching and there is no way to reattach it. Any type of placental abruption can lead to premature birth and low birth weight. In cases where severe placental abruption occurs, approximately 15% will end in fetal death.

Incidental antepartum haemorrhage is a haemorrhage which appears from the venereal tract but not from the site of the placenta or its implantation. Such haemorrhage may produce from injury, infection, ulcers on the neck of the womb, polyps or, most normally, the onset of labour.

12. It is the prosecution case, even though only facility for normal delivery was available in the Nursing Home, the petitioner attempted a forceps delivery.

According to the medical science, a forceps delivery is a type of assisted vaginal delivery. It is sometimes needed in the course of vaginal childbirth. An assisted birth is necessary when the baby needs help to be born with instruments that attach to his head. It is also called an instrumental or operative vaginal birth. Assisted births are often needed when labour has been long and tiring. If the doctor thinks that an assisted birth is possible, but could be difficult, the patient will be moved to the operating theatre. This is in a case where caesarean is needed. Assisted birth is less likely to be successful if the body mass index (BMI) of the patient is over 30 or the baby is large or the baby is lying back to back or the baby's head is not low down in the birth canal. A forceps delivery might be considered if the labour meets certain criteria i.e. the cervix is fully dilated, the membranes have ruptured and the baby has descended into the birth canal head first, but the patient is not able to push the baby out. Prerequisites for forceps delivery include that the clinical assessment of pelvic capacity should be performed. No disproportion should be suspected between the size of the head and the size of pelvic inlet and mid pelvis. The patient must have adequate analgesia. Adequate facilities and supportive elements should be available. The operator should be competent in the use of the instruments and recognition and management of potential complications. Forceps

delivery has some benefits for a fetus. It can be used to quickly deliver a baby in distress, often preventing potential asphyxiation and brain damage, although both may still occur. Negative fetal effects from forceps use include possible facial bruising, lacerations, intracranial haemorrhage and skull fracture. In rare cases, death of the fetus can occur. Temporary facial nerve paralysis, with drooping noted on one side of the face, usually resolves within a few weeks. Use of forceps can cause cervical and vaginal lacerations and may extend an episiotomy or tear into the anus and rectum. If the bladder is not emptied with a catheter, damage to the bladder may also occur. Infection, haemorrhage requiring transfusions, uterine lacerations and injury to the pelvic nerve are also possible complications. A forceps delivery is only appropriate in a birthing centre or hospital where a caesarean section can be done, if needed.

13. The enquiry report reveals that if the statements of the complainant and witnesses produced by him are to be believed then there was visible bleeding when the patient was referred from the Nursing Home to the D.H.H., Bolangir and therefore, the possibility of rupture of uterus of the deceased at the Nursing Home cannot be ruled out. The statements of Saroj Mohanty and Dillip Thakur who accompanied the complainant and the deceased to the Nursing Home indicate about severe bleeding from the vagina of the deceased after the attempt of forceps delivery by the petitioner. The statements of Rintu @ Rashmin Thakur who arrived at the Nursing Home at about 5 p.m. on the date of occurrence and Sadananda Gahir, the driver of the Bolero vehicle also indicate about such severe bleeding. The statement of Dr. Narayan Thanapati who treated the deceased at D.H.H., Bolangir also indicate there was rupture of uterus of the deceased when she was brought from the Nursing Home of the petitioner and there was risk to the lives of the deceased and unborn baby. The statement of Chanchala Sahu who also delivered a child on that day in the Nursing Home indicates about the admission of the deceased in the Nursing Home at about 8 a.m. The enquiry report further indicates that the only option available to control the bleeding was laparotomy (surgical opening of abdomen) and repair of rupture/ subtotal hysterectomy which is a major surgical procedure and could not be undertaken even at D.H.H., Bolangir due to critically low condition of the patient.

It prima facie appears as per the report of CDMO, Bolangir that only normal delivery facilities were available in the Women's Care Nursing Home. The deceased was diagnosed as G3P2 in labour with 'antepartum haemorrhage'. According to medical science, patient of 'antepartum haemorrhage' should be hospitalised in a well equipped centre with facilities for blood transfusion, emergency caesarean section and neonatal care unit. Being a gynaecologist, the petitioner must be aware about nature of treatment to be provided to such patient and the consequence likely to follow if the safeguards are not properly taken. Even if no such facilities to deal with such patient was available in the Nursing Home, the petitioner did not advise the complainant to take the deceased to D.H.H., Bolangir rather assured the

complainant that the deceased was in normal condition. When there was heavy vaginal watery discharge after the petitioner inserted one tablet inside the vagina of the deceased and she felt severe pain, the petitioner gave one saline and injection and told the complainant that the deceased would be alright within fifteen minutes. Thus prima facie materials are available on record to show that the petitioner knowingly kept the deceased in the Nursing Home with assurance to the complainant for normal delivery even though he was aware that it was a critical case and there are no such facilities in the Nursing Home to deal with such case. The attempt of forceps delivery appears to have caused rupture of her uterus, as a result of which there was profuse bleeding and the condition of the deceased became serious. The forceps delivery was not appropriate in a birthing centre like the Nursing Home of the petitioner where a caesarean section could not have been done, if needed. It was not an unforeseen injurious occurrence which could not be reasonably anticipated but creation of a substantial and unjustifiable risk of harm to the deceased by a conscious disregard for that risk. Therefore, it is prima facie apparent that the petitioner did such a high degree of negligence while dealing with the case of the deceased which in the facts and circumstances no medical professional in his ordinary senses and prudence would have done. The hazard taken by the petitioner was of such a nature that the rupture of the uterus and severe bleeding and risk to the lives of the mother and the unborn baby was most likely imminent. The petitioner prima facie appears to have not exercised the skill with reasonable competence and did not adopt the practice acceptable to the medical profession of that day. As a doctor, it was the duty of the petitioner to explain the deceased or at least the complainant, chances of success and the risk of failure of the suggested treatment and inform them about the foreseeable risks and possible negative effects of the treatment keeping in mind the patient's specific condition. The independent and competent medical opinion given by the team of doctors, the statements of the witnesses and the other surrounding circumstances raise accusing fingers at the petitioner which is not at all healthy sign for medical profession.

In order to attract the ingredients of offence under section 304 Part II of the Indian Penal Code, there must be commission of culpable homicide not amounting to murder i.e. the death of the person must have been caused, such death must have been caused by the act of the accused by causing bodily injury and there must be knowledge on the part of the accused, but without any intention that the bodily injury is such that it is likely to cause death. To constitute the offence of ‘culpable homicide’ as defined in section 299 of the Indian Penal Code, the death must be caused by doing an act: (a) with the intention of causing death, or (b) with the intention of causing such bodily injury as is likely to cause death, or (c) with the knowledge that the doer is likely by such act to cause death.

Section 304-A of the Indian Penal Code on the other hand carves out a specific offence where death is caused by doing a rash or negligent act and that act

does not amount to culpable homicide under section 299 Indian Penal Code or murder under section 300 Indian Penal Code. Where the intention to kill a person or knowledge that doing of an act was likely to cause a person's death are there, section 304-A of the Indian Penal Code has to make room for the graver and more serious charge of culpable homicide. Negligence and rashness are essential elements under section 304-A of the Indian Penal Code. In other words, the applicability of section 304-A of the Indian Penal Code is limited to rash or negligent acts which cause death but fall short of culpable homicide amounting to murder or culpable homicide not amounting to murder.

In case of **Alister Anthony Pareira -Vrs.- State of Maharashtra reported in (2012) 2 Supreme Court Cases 648**, it is held as follows:-

> "47. Each case obviously has to be decided on its own facts. In a case where negligence or rashness is the cause of death and nothing more, Section 304-A may be attracted but where the rash or negligent act is preceded with the knowledge that such act is likely to cause death, Section 304 Part II IPC may be attracted and if such a rash and negligent act is preceded by real intention on the part of the wrongdoer to cause death, offence may be punishable under Section 302 IPC."

14. Thus, looking to the matter from all angles, I have no doubt in my mind that knowledge cannot be attributed to petitioner that his act might cause such bodily injuries which may, in ordinary course of nature, be sufficient to cause death Thus, in my opinion, there are no prima facie materials for commission of an offence under section 304 Part II of the Indian Penal Code. However, there are sufficient materials to proceed against the petitioner under section 304-A of the Indian Penal Code as due to his rash or negligent acts, death of the deceased was caused which falls short of culpable homicide not amounting to murder.

15. Accordingly, the impugned order of taking cognizance of offence under section 304 Part-II of the Indian Penal Code by the learned S.D.J.M., Bolangir in G.R. Case No. 447 of 2013 stands quashed, instead the learned S.D.J.M., Bolangir is directed to proceed against the petitioner under section 304-A of the Indian Penal Code.

It is made clear that the observation of this Court that there are sufficient materials to proceed against the petitioner under section 304-A of the Indian Penal Code is confined to the stage of cognizance. The learned Trial Court is however free to assess the evidence which would come on record during trial and decide the guilt or otherwise of the petitioner of such charge while pronouncing the judgment. With the aforesaid observations and directions, the criminal revision petition is disposed of.

Revision disposed of.

2017 (II) ILR - CUT- 450

S. K. SAHOO, J.

CRLMC NO. 2084 OF 2007

PREETY MANJAREE DEVI …….Petitioner

.Vrs.

STATE OF ORISSA ……..Opp. Party

(A) **PENAL CODE, 1860 – S.498-A**

Whether a girl friend or a concubine can be considered as a "relative" of the husband within the meaning of section 498-A I.P.C. ? – Held, No.

(B) CRIMINAL PROCEDURE CODE, 1973 – S.482

Quashing of cognizance – Offence U/ss 498-A/306 I.P.C. – Petitioner prayed that she being, not a relative of the husband, taking cognizance against her for the above offences is illegal – Held, since the petitioner is not a relative of the husband taking cognizance and issuance of process U/s 498 A I.P.C. is quashed – However, even if section 113-A of the Evidence Act is not attracted as the petitioner is not a relative of the husband of the deceased but since materials on record primafacie indicate that she had abetted the commission of suicide of the deceased submission of charge sheet U/s 306 I.P.C. and consequential order of taking cognizance of such offence against her can not be faulted with – Held, the order taking cognizance and issuance of process U/s 306 I.P.C. against the petitioner stands confirmed.

Case Law Relied on :-

1. (2009) 43 OCR (SC) 512 : U. Suvetha -Vrs.- State by Inspector of Police .

Case Laws Referred to :-

1. (2011) 48 OCR (SC) 961 : M. Mohan -Vrs.- State represented by the Deputy Superintendent of Police
2. (2012) 51 OCR 329 : Siddharth Arora -Vrs.- State of Orissa
3. (2012) 51 OCR 329 : Siddharth Arora -Vrs.- State of Orissa.
4. 1995 S.C.C. (Criminal) 943 : Swamy Prahaladdas -Vrs.- State of M.P.
5. (2010) 47 OCR (SC) 376 : S.S. Chheena -Vrs.- Vijay Kumar Mahajan

For Petitioners : Mr. Anirudh Das

For Opp.Parties : Mr. Chitta Ranjan Swain (Addl. Standing Counsel)

Date of Hearing : 27.04.2017
Date of Judgment: 27.04.2017

JUDGMENT

S. K. SAHOO, J.

Heard Mr. Anirudha Das, learned counsel for the petitioner and Mr. Chitta Ranjan Swain, learned Addl. Standing Counsel for the State.

The petitioner has challenged the impugned order dated 02.01.2007 passed by the learned S.D.J.M., Bhubaneswar in G.R. Case No.3433 of 2006 in taking cognizance of the offences under sections 498-A/ 306/34 of the Indian Penal Code and issuance of process against her. The said case arises out of Khurda Mahila P.S. Case No. 143 of 2006.

The prosecution case, as per the first information report lodged by one Smt. Shantilata Mohanty before the Inspector in charge, Mahila Police Station, Bhubaneswar on 29.08.2006 is that her youngest daughter Anima Mohanty (hereinafter 'the deceased') married to one Bidhu Bhusan Mohanty in accordance with Hindu rites and customs on 14.07.2001. At the time of marriage, as per the demand of the bridegroom side, cash of Rs.3,00,000/- (rupees three lakhs only), gold ornaments and other household articles were given as dowry. One year after the marriage, the deceased gave birth to a male child namely Aryaman. Few months after the marriage, the informant came to know from the deceased that her in-laws family members were torturing her physically and mentally. The deceased used to call her elder sister Purnima over telephone and used to convey her sorrow before her and she had also written letters in that connection. The deceased was also assaulted by her in-laws in connection with demand of dowry. It is further stated in the first information report that coming to know about such demand, the informant had given a sum of Rs.20,000/- (rupees twenty thousand only) and amicable settlement was arrived at between the parties and the husband of the deceased assured to behave with the deceased properly but in spite of such assurance, the deceased was continued to be tortured more and more by her in-laws family members.

It is further stated that in the first information report that the informant came to know that the husband of the deceased had kept illicit relationship with the petitioner and the petitioner used to visit the in-laws house of the deceased with the husband of the deceased. When the deceased protested about the conduct of her husband and the petitioner, she was assaulted not only by her husband but also by the petitioner on several occasions either by katari or by chappal. The deceased used to convey about her torture to the informant but the informant was not reporting the matter before police being afraid that they would be blamed in the society.

It is further stated in the first information report that on the Rakhi Purnima day of the year 2006 (09.08.2006), in the midnight at about 2 o'clock, the petitioner and her mother came to the house of the deceased, assaulted her by means of chappal, twisted her fingers and threatened her with dire consequences. Three days

thereafter, again the petitioner assaulted the deceased when the husband of the deceased was holding her. Subsequently the husband of the deceased again assaulted her for which she sustained bleeding injury on her lips. It is further stated that on 27.08.2006 when Ganesh Puja was being celebrated, the husband of the deceased had been to the office of the petitioner to celebrate her birthday. When the deceased protested, her husband threatened her with dire consequences. The informant came to know on 29.08.2006 in the evening hours about the death of the deceased and came to the rented house of the deceased and found the deceased lying dead that the husband of the deceased was not present and the son of the deceased was telling frequently that his father had strangulated the deceased and thereafter, hanged her dead body. The informant suspected the death of the deceased to be a preplanned murder which was committed by her husband, in-laws family members and the petitioner.

On the basis of such first information report, Khurda Mahila P.S. Case No.143 of 2006 was registered under sections 498-A/304-B/302/34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act against the petitioner and other in-laws of the deceased including her husband Bidhu Bhusan Mohanty.

During course of investigation, the dead body was sent for post mortem examination and the doctor opined the cause of death to be asphyxia as a result of hanging. The investigating officer visited the spot, utilized the services of the scientific team, seized the incriminating materials, sent the viscera to SFSL and also seized the dowry articles, personal diary of the deceased etc. and on completion of investigation, finding prima facie case against the petitioner as well as the husband of the deceased namely Bidhu Bhusan Mohanty under sections 498-A/306/34 of the Indian Penal Code, charge sheet was submitted on 27.12.2006 showing the petitioner as an absconder.

Mr. Anirudha Das, learned counsel appearing for the petitioner contended that the order of taking cognizance suffers from non-application of mind and there is no prima facie material to attract the ingredients of such offences. It is further contended that since the petitioner is no way related to the husband of the deceased, even if it is accepted for the sake of argument that the husband of the deceased had illicit relationship with the petitioner, the petitioner cannot be prosecuted for an offence under section 498-A of the Indian Penal Code. He further contended that there is no proximate link between the conduct of the petitioner and with the commission of suicide by the deceased rather the materials available on record indicate that there was some quarrel on the date of occurrence between the deceased and her husband which led to the commission of suicide of the deceased and therefore, the submission of charge sheet by the investigating officer under section 306 of the Indian Penal Code was not proper and justified. Learned counsel for the petitioner relied upon the decision of the Hon'ble Supreme Court in case of **U. Suvetha -Vrs.- State by Inspector of Police reported in (2009) 43 Orissa**

Criminal Reports (SC) 512, M. Mohan -Vrs.- State represented by the Deputy Superintendent of Police reported in (2011) 48 Orissa Criminal Reports (SC) 961 and **Siddharth Arora -Vrs.- State of Orissa reported in (2012) 51 Orissa Criminal Reports 329**.

Mr. Chitta Ranjan Swain, learned Addl. Standing Counsel for the State on the other hand contended that the materials available on record clearly indicate that the petitioner aided the commission of suicide by her conduct and she was not only participating in the assault of the deceased on a number of occasions but her conduct in keeping illicit relationship in the presence of the deceased had created so much of mental torture on the deceased that she was compelled to take extreme step to end her life and therefore, the ingredients of offence under section 306 of the Indian Penal Code is clearly attracted against the petitioner.

Considering the submissions made by the learned counsels for the respective parties and coming first to the ingredients of the offence under section 498-A of the Indian Penal Code which deals with the cruelty by the husband or the relatives of the husband of the woman, it is the requirement of law that (i) the prosecution must prove that the woman was subjected to cruelty or harassment; (ii) such cruelty or harassment was shown either by the husband of the woman or by the relative of her husband; (iii) such cruelty was with a view to drive her to commit suicide; or to cause grave injury or danger to her life, limb or health, whether mental or physical; or (iv) such harassment was with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security; or on account of failure by such woman or any person related to her to meet such unlawful demand.

The Hon'ble Supreme Court in case of **U. Suvetha -Vrs.- State by Inspector of Police reported in (2009) 43 Orissa Criminal Reports (SC) 512**, while considering the point whether the term "relative of a husband of a woman" within the meaning of section 498-A of the Indian Penal Code should be given an extended meaning, held as follows:-

> "18. By no stretch of imagination a girl friend or even a concubine in an etymological sense would be a 'relative'. The word 'relative' brings within its purview a status. Such a status must be conferred either by blood or marriage or adoption. If no marriage has taken place, the question of one being relative of another would not arise."

In view of the observation of the Hon'ble Supreme Court, even if it is accepted that the petitioner was a mistress of the husband of the deceased, she would not come within the definition of 'relative'. Therefore, the ingredients of offence under section 498-A of the Indian Penal Code would not be attracted against her.

Therefore, I am of the view that the submission of charge sheet against the petitioner under section 498-A of the Indian Penal Code and consequential taking of

cognizance and issuance of process against the petitioner was not proper and justified.

Now, coming to the offence under section 306 of the Indian Penal Code, law is well settled that an offence under section 306 of the Indian Penal Code would stand only if there is an abetment of commission of the crime. Section 107 of the Indian Penal Code states that a person can be stated to have abetted the doing of a thing, if he instigates any person to do that thing or engages with one or 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 such conspiracy, or the person intentionally aids, by any act or illegal omission, the doing of that thing. The abetment of suicide involves a mental process of instigating or intentionally aiding a person in doing of a thing. There should be clear mens rea to commit the offence under section 306 of the Indian Penal Code. Merely because a married woman committed suicide within seven years of her marriage does not ipso facto result in the presumption of abetment of suicide by her husband or his relatives. Since the petitioner is not a relative, in view of the decision of the Hon'ble Supreme Court in case of **U. Suvetha (supra)**, presumption under section 113-A of the Evidence Act will not be attracted in the case inasmuch as such presumption is raised only against the husband or relative of the husband of a woman.

In case of **M. Mohan -Vrs.- State represented by the Deputy Superintendent of Police reported in (2011) 48 Orissa Criminal Reports (SC) 961**, held as follows:-

> "45. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.
>
> 46. The intention of the Legislature and the ratio of the cases decided by this Court are clear that in order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide.
>
> xxx xxx xxx xxx
>
> 49. In the instant case, what to talk of instances of instigation, there are even no allegations against the appellants. There is also no proximate link between the incident of 14.01.2005 when the deceased was denied permission to use the Qualis car with the factum of suicide which had taken place on 18.01.2005.

> 50. Undoubtedly, the deceased had died because of hanging. The deceased was undoubtedly hyper-sensitive to ordinary petulance, discord and differences which happen in our day-to-day life. In a joint family, instances of this kind are not very uncommon. Human sensitivity of each individual differs from person to person. Each individual has his own idea of self-esteem and self-respect. Different people behave differently in the same situation. It is unfortunate that such an episode of suicide had taken place in the family. But the question remains to be answered is whether the appellants can be connected with that unfortunate incident in any manner?"

In case of **Siddharth Arora -Vrs.- State of Orissa reported in (2012) 51 Orissa Criminal Reports 329**, this Court while relying upon the decision of the Hon'ble Supreme Court in case of **M. Mohan (supra)**, **Swamy Prahaladdas -Vrs.- State of M.P. reported in 1995 S.C.C. (Criminal) 943** and **S.S. Chheena -Vrs.- Vijay Kumar Mahajan reported in (2010) 47 Orissa Criminal Reports (SC) 376**, held that there is absolutely no prima facie material to show that the petitioner abetted the suicidal death of the deceased in any manner and therefore, the offence under section 306 of the Indian Penal Code are not attracted.

In the present case, apart from the first information report, the statement of one Biswa Ranjan Mohanty who is the nephew of the husband of the deceased is also relevant and he has stated that on the Rakhi Purnima day at about 2 o'clock in the night, the petitioner along with her mother had come to the house of the deceased and quarrelled with her and on that occasion also the deceased was assaulted and on some occasion, the husband of the deceased used to come with the petitioner and they used to sleep in the bedroom of the deceased for which the deceased was very much upset. He further stated that on many occasions, there used to be quarrel between the deceased and her husband relating to the petitioner and the husband of the deceased had given in writing that she would not keep illicit relationship with anybody. The statement of one Purnima @ Tiki Mohanty who is the elder sister of the deceased also indicates that the husband of the deceased was sleeping in her bedroom with the petitioner and the petitioner was also assaulting the deceased on some occasion. Though it is the contention of learned counsel for the petitioner that there was no proximately link between the conduct of the petitioner with the commission of suicide by the deceased but on perusal of the materials available on record, I find that there is prima facie material that not only the petitioner kept illicit relationship with the husband of the deceased to the knowledge of the deceased but also regularly visiting the house of the in-laws of the deceased and on some occasions, she had assaulted the deceased and she was even sleeping in the bedroom of the deceased with her husband. All these materials prima facie indicate that by such act, the petitioner intentionally aided the commission of suicide by the deceased. Therefore, even if section 113-A of the Evidence Act is not attracted as the petitioner is not a relative of the husband of the deceased but since

otherwise there are materials on record that she had abetted the commission of suicide of the deceased by her conduct, I am of the view that the submission of charge sheet against the petitioner under section 306 of the Indian Penal Code and consequential order of taking cognizance of such offence cannot be faulted with. Accordingly, the CRLMC application is allowed in part and order of taking cognizance and issuance of process under section 498-A of the Indian Penal Code stands quashed. The order of taking cognizance and issuance of process under section 306 of the Indian Penal Code against the petitioner stands confirmed.

Application allowed in part.

2017 (II) ILR - CUT- 456

S. K. SAHOO, J.

CRLREV NO. 478 OF 2016

SMT. NANDITA SETHI @ BEHERA .....Petitioner

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 – S. 173 (8)

Whether the Magistrate after taking cognizance of offences on the basis of chargesheet submitted by police, can direct further investigation of the case at the instance of a de facto complainant ? Held, No.

Even though after taking cognizance of the offence by the Magistrate upon the charge sheet submitted by police, the right of the police to further investigate the case is not exhausted after seeking formal permission of the Magistrate, such Magistrate can not direct further investigation of the case at the instance of a de facto complainant after taking cognizance of offences on the basis of charge sheet submitted by police – So in this case learned Magistrate has exceeded his jurisdiction and acted beyond his Jurisdictional competence by directing further investigation of the case at the instance of O.P.No 2 after taking of cognizance of offences and issuance of process – Held, the impugned order directing further investigation of the case is setaside – Direction issued to the Magistrate not to consider the further investigation report submitted by the police and shall proceed with the case on the basis of the chargesheet on which he has taken cognizance of the offences under sections 468 and 471 I.P.C. (Para 7)

Case Laws Referred to :-

1. (2013) 5 SCC 762 : Vinay Tyagi -Vrs.- Irshad Ali @ Deepak.
2. (2009) 9 SCC 129 : Rita Nag -Vrs.- State of West Bengal.
3. (1997) 1 SCC 361 : Randhir Singh Rana -Vrs.- State.
4. 2011(2) Gauhati Law Times 610 : Sri Rana Sinha @ Sujit Sinha – Vrs.- The State of Tripura.

For Petitioner : Mr. Satyabrata Pradhan, M.R. Padhi
For State of Orissa : Mr. Deepak Kumar, Addl. Standing Counsel
For Opp. Party no.2 : Mr. Dharanidhar Nayak, Senior Advocate

Date of Hearing : 18.10.2016
Date of Judgment: 19.01.2017

JUDGMENT

S. K. SAHOO, J.

An important and interesting question that arises for decision in this case is as follows:-

> "*Whether the Magistrate after taking cognizance of offences on the basis of chargesheet submitted by police can direct further investigation of the case at the instance of a de facto complainant*?"

The petitioner Smt. Nandita Sethi @ Behera who is the wife of opposite party no.2 Sadananda Behera is an accused in Bhadrak Rural P.S. Case No.367 of 2013 in which charge sheet was submitted against her for commission of offences punishable under sections 468 and 471 of the Indian Penal Code which corresponds to G.R. Case No.1917 of 2013 pending in the Court of learned S.D.J.M., Bhadrak.

The petitioner has challenged the impugned order dated 04.05.2016 passed by the learned S.D.J.M., Bhadrak in allowing the petition filed by the opposite party no.2 Sadananda Behera for further investigation of the case under section 173(8) of Cr.P.C.

2. On 25.09.2013 on the First Information Report submitted by one Brajakishore Das, ASI of Police, Bhadrak Rural Police Station before the Inspector in Charge, Bhadrak Rural Police Station, the case was instituted. It is stated in the F.I.R. that while inquiring into the petition filed by the opposite party no.2 as per the order of the Inspector in Charge, the informant visited Anchalika Sahajoga Sanskrit Mahavidyalaya, Palli, Radhakanta Behera +3 Degree College, Arnapal and Bental G.P. Office. During inquiry, it was ascertained that the petitioner was admitted to Radhakanta Behera +3 Degree College, Arnapal on 02.07.2007 as per the admission register of the College and she passed +3 degree examination in the

year 2010 and left the College on 07.07.2010. During verification of the admission register of Anchalika Sahajoga Sanskrit Mahavidhyalaya, Palli, it was learnt that the petitioner was admitted in +3 degree class (Sastri) in the college on 20.08.2007 and during the final examination in the year 2010, the petitioner was detected in adopting malpractice for which she was not issued with College leaving certificate. It was ascertained during inquiry that the petitioner served as Grama Rozgar Sevak in Bental G.P. Office on production of +3 pass certificate from Radhakanta Behera +3 Degree College, Arnapal which has been procured by her by forged means. The petitioner was subsequently terminated from the post of Gram Rozgar Sevak.

On such First Information Report, Bhadrak Rural P.S. Case No.367 of 2013 was registered on 25.09.2013 under sections 468 and 471 of the Indian Penal Code and the Inspector in Charge, Bhadrak Rural Police Station directed Sri G.Ch. Nayak, A.S.I. of Police of Gujidarada Outpost to investigate the case. Subsequently the investigation was taken over by Chitta Ranjan Das, A.S.I. of Police, Gujidarada Outpost who examined the witnesses and it was found during investigation that in the year 2007, the petitioner got admission in Radhakanta Behera +3 Degree College, Arnapal producing +2 pass certificate from Maa Basanti Durga Anchalik Sanskrit Mahavidhyalaya, Tentulidihi, Chandbali. The petitioner also got admission in the year 2007 in Anchalik Sahajog Sanskrit Mahavidhyalaya, Palli but during final examination, she was detected adopting malpractice. It was found out during investigation that the petitioner got admission in Radhakanta Behera +3 Degree College arranging pass certificate for the purpose of cheating. The petitioner was also selected as Gram Rozgar Sevak of Bental Gram Panchayat, Bhadrak but after verification, she was terminated from the post by the DRDA, Bhadrak. All the material documents were seized and as clinching evidence against the petitioner for commission of offences under sections 468 and 471 of the Indian Penal Code was found, charge sheet dated 07.06.2014 was submitted and accordingly, cognizance of offences under sections 468 and 471 of the Indian Penal Code was taken on 17.06.2014.

The petitioner approached this Court under section 438 Cr.P.C. in BLAPL No.26329 of 2013 and she was directed to be released on bail in the event of arrest vide order dated 19.02.2014. In pursuance of such order, the petitioner furnished bail bonds before the Investigating Officer and was released on bail on 19.05.2014.

3. The opposite party no.2 on whose petition the inquiry was conducted initially by Brajakishore Das, A.S.I. of Police, Bhadrak Rural Police Station filed a petition under section 173(8) of Cr.P.C. before the learned S.D.J.M., Bhadrak on 20.10.2014 through his advocate for further investigation of the case under section 173(8) of Cr.P.C. on the ground that investigation has been conducted in a perfunctory manner. It is stated that the petitioner was prosecuting +2 Science course in BNMA College, Palia Bindha, Bhadrak and +2 Arts Upa Sastri in Sanskrit Maa Basanti Durga Anchalika Sanskrit Mahavidyalaya, Tentulidihi, Chandbali,

Bhadrak. It was indicated in the petition that the statement of the opposite party no.2 has not been recorded and in order to ascertain the date of admission of the petitioner in the course, certificate furnished at the time of admission, date of publication of examination result, result of examination and date of leaving of the petitioner from the College are required to be investigated.

The petitioner entered appearance in the case on 21.04.2015 through her advocates.

The learned Assistant Public Prosecutor filed objection to the petition filed by the opposite party no.2 and contended that the opposite party no.2 has no locus standi to file such petition and when charge sheet has already submitted and cognizance of offences has been taken, such petition should not be entertained.

The learned Magistrate while considering such petition for further investigation held vide impugned order dated 04.05.2016 that further investigation on the points raised by the opposite party no.2 is necessary and accordingly directed the Inspector in Charge of Bhadrak Rural Police Station to conduct further investigation, which is impugned in this revision petition.

4. On receipt of the direction from the learned Magistrate, further investigation of the case was entrusted to A.S.I. of Police namely C.R. Das who examined the opposite party no.2 who stated about the admission of the petitioner in BNMA College, Palia Bindha, Bhadrak where she appeared in +2 Science examination and failed after which College Leaving Certificate was issued on 24.07.2001 and the petitioner took admission in Maa Basanti Durga Anchalika Sanskrit Mahavidyalaya, Tentulidihi, Chandbali, Bhadrak from 05.08.2005 to May 2007. The Investigating Officer seized documents from both the institutions. It was found that the petitioner had married the opposite party no.2 but due to difference of opinion, the opposite party no.2 and his family members drove her out from their house and in that connection Bhadrak Rural P.S. Case No.239 dated 05.07.2012 was registered under sections 498-A, 294, 506, 313 read with section 34 of the Indian Penal Code and section 4 of Dowry Prohibition Act and the opposite party no.2 was charge sheeted for such offences.

5. Mr. Satyabrata Pradhan, learned counsel for the petitioner while challenging the impugned order dated 04.05.2016 contended that at the instance of a *de facto* complainant like opposite party no.2, further investigation cannot be ordered by the Magistrate after submission of charge sheet and taking cognizance of offences. It was highlighted that further investigation of the case was not necessary and lacuna in the prosecution case cannot be allowed to be filled up by way of further investigation. It is further contended that the opposite party no.2 is not an aggrieved person and direction of further investigation amounts to the reviewing of the earlier order passed by the learned Magistrate in taking cognizance which is not permissible in the eye of law and if such applications are entertained by the Court

directing further investigation after submission of charge sheet and taking of cognizance of offences by the Court then it would open floodgate for the mischievous persons in filing such applications which would seriously hamper the progress of a criminal trial and cause serious prejudice to the accused. It is stated that even though the order of cognizance was taken on 17.06.2014 but after a long delay i.e. on 20.10.2014, a petition was filed under section 173(8) of Cr.P.C. by the opposite party no.2 for further investigation. The learned counsel further contended that even though the learned Assistant Public Prosecutor objected to such prayer, the learned Magistrate has allowed the petition illegally. According to him, since the impugned order is without jurisdiction, the same should be set aside and whatever materials were collected during course of further investigation should not be taken into consideration by the Magistrate during trial.

Mr. Dharanidhar Nayak, Senior Advocate appearing for the opposite party no.2 on the other hand contended that it was on the petition of the opposite party no.2, enquiry was conducted and accordingly F.I.R. was lodged by Brajakishore Das, A.S.I. of Police, Bhadrak Rural Police Station and since there was perfunctory investigation, the opposite party no.2 who is an aggrieved party filed a petition for further investigation. The learned Magistrate being satisfied that on some material aspects, investigation has not been conducted passed the impugned order. It is further contended that the opposite party no.2 was not aware about the submission of charge sheet and therefore, there was delay in filing petition for further investigation and delay cannot be a ground to discard such petition.

Mr. Deepak Kumar, learned counsel for the State submitted that the further investigation report indicates that many material documents have been collected and statement of the material witness like the opposite party no.2 was also recorded. He further submitted that this Court should not interfere with the impugned order at this stage particularly when the petitioner as an accused will get sufficient opportunity during trial to rebut such evidence collected during course of further investigation.

6. Section 173(8) of Cr.P.C. reads as follows:-

> "8. Nothing in this section shall be deemed to preclude *further investigation* in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

In case of **Vinay Tyagi -Vrs.- Irshad Ali @ Deepak reported in (2013) 5 Supreme Court Cases 762**, it is held as follows:-

> "15. 'Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173. This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a 'further investigation'. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as 'supplementary report'. 'Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a 'reinvestigation', 'fresh' or 'de novo' investigation."

While answering to the question as to whether the Magistrate has jurisdiction under section 173(8) of Cr.P.C. to direct further investigation, it was held in the case of **Vinay Tyagi** (supra) as follows:-

> "28. However, having given our considered thought to the principles stated in these judgments, we are of the view that the Magistrate before whom a report under Section 173(2) of the Code is filed, is empowered in law to direct 'further investigation' and require the police to submit a further or a supplementary report. A three Judge Bench of this Court in the case of **Bhagwant Singh : (1985) 2 Supreme Court Cases 537** has, in no uncertain terms, stated that principle, as afore-noticed."

The Hon'ble Court further held in the case of **Vinay Tyagi** (supra) that the power of the Magistrate to direct 'further investigation' is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the Court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the Court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173 of the Code. It was further held that both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents

annexed thereto to which the Court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence.

The factual scenario in **Vinay Tyagi** (supra) was completely different than the present case inasmuch as in that case there was no direction for further investigation by the Magistrate after submission of charge sheet and taking of cognizance of the offences. The question which is posed in this case was also not raised and discussed in that case.

In the case of **Rita Nag -Vrs.- State of West Bengal reported in (2009) 9 Supreme Court Cases 129**, the point came for adjudication was that whether after charge sheet has been filed by the investigating agency under section 173(2) of Cr.P.C. and charge has been framed against some of the accused on the basis thereof and the other co-accused have been discharged, the Magistrate can direct the investigating authorities to conduct a re-investigation or even further investigation under sub-section (8) of section 173 of Cr.P.C. while considering an application filed by the *de facto* complainant. The Hon'ble Court held as follows:-

> **"**19. What emerges from the above-mentioned decisions of this Court is that once a charge-sheet is filed under section 173(2) Cr.P.C. and either charge is framed or the accused are discharged, the Magistrate may, on the basis of a protest petition, take cognizance of the offence complained of or on the application made by the investigating authorities permit further investigation under section 173(8). The Magistrate cannot suo moto direct a further investigation under section 173(8) Cr.P.C. or direct a re-investigation into a case on account of the bar of section 167(2) of the Code.
>
> 20. In the instant case, the investigating authorities did not apply for further investigation and it was only upon the application filed by the *de facto* complainant under section 173(8), was a direction given by the learned Magistrate to re-investigate the matter. As we have already indicated above, such a course of action was beyond the jurisdictional competence of the Magistrate. Not only was the Magistrate wrong in directing a re-investigation on the application made by the *de facto* complainant, but he also exceeded his jurisdiction in entertaining the said application filed by the *de facto* complainant."

In case of **Randhir Singh Rana -Vrs.- State reported in (1997) 1 Supreme Court Cases 361** where a question was raised whether a Judicial Magistrate, after taking cognizance of an offence on the basis of a police report and after appearance of the accused in pursuance of the process issued, can order of his own further investigation in the case, it was held as follows:-

"9. Shri Walia, who worked hard to assist the Court, referred us to the relevant part of the 41st Report of the Law Commission of India pursuant to whose recommendation sub-section (8) of section 173 was inserted in the new Code. But that also does not throw light on the question with which we are seized. Further, the learned Counsel brought to our notice the statement of objects and reasons, so also the notes on the clauses of the new Code; but there also we find no light. Of the decisions cited by Shri Walia, the one nearest to the point is of a learned Judge of Calcutta High Court in **State - Vrs.- Sankar Halder : 1976 Criminal Law Journal 1361**, in which it was held that a Court is not debarred from making any order for further investigation under the provisions of section 173(8) of the Code. But then, that was not a case where cognizance had been taken and accused had appeared in pursuant to the process issued. Thus, the decision does not assist us to answer the question under examination.

10. The decision of this Court in **State of Rajasthan -Vrs.- Aruna Devi : (1995) 1 Supreme Court Cases 1**, to which our attention was invited by Shri Datta, learned Senior Counsel appearing for the State, also is not helpful, because in that case the power of the police to make further investigation after cognizance was taken by the Magistrate had come up for examination. The point involved in present appeal, however, is relatable not to the power of the police to make further investigation but of the Magistrate to order for such investigation.

11. The aforesaid being the legal position as discernible from the various decisions of this Court and some of the High Courts, we would agree, as presently advised, with Shri Vasdev that within the grey area to which we have referred the Magistrate on his own cannot order for further investigation. As in the present case the learned Magistrate had done so, we set aside his order and direct him to dispose of the case either by framing the charge or discharge the accused on the basis of materials already on record. This will be subject to the caveat that even if the order be of discharge, further investigation by the police on its own would be permissible, which could even end in submission of either fresh chargesheet."

In case of **Sri Rana Sinha @ Sujit Sinha -Vrs.- The State of Tripura reported in 2011(2) Gauhati Law Times 610**, a Division Bench of Gauhati High Court (Agartala Bench) held as follows:-

*"**Whether a subordinate Court can direct further investigation to arrive at a just decision of a case?***

155. In the light of what has been observed above, one can have no option but to conclude and, in fact, it is not even disputed that Ranbir Singh Rana

(supra) lays down that a Magistrate cannot, of his own, direct further investigation to be conducted by the police if cognizance has already taken and the accused has entered appearance. Ranbir Singh Rana (supra) also clearly lays down that a Magistrate cannot, in the name of advancing the cause of justice, or to arrive at a just decision of the case, direct further investigation to be conducted by the police if he does not, otherwise, have the power to direct such further investigation meaning thereby that since a Magistrate does not have the power to direct, on his own, further investigation after cognizance has already been taken and the accused has entered appearance, he cannot direct such further investigation of his own for the purpose of advancing the cause of justice or even to arrive at a just decision of the case.

156. No way, therefore, a Magistrate can direct further investigation of his own and if he cannot direct further investigation of his own, it is not possible to hold that he can direct such an investigation on the basis of any petition filed by the informant, *de facto* complainant, aggrieved person or the victim.

157. We have already pointed out above, that in the decisions, which have been rendered subsequent to Randhir Singh Rana's case (supra), the Supreme Court has not deviated from the position of law laid down in Randhir Singh Rana's case (supra), namely, that a Magistrate cannot, of his own, order 'further investigation' after cognizance has been taken and the accused has appeared. So long as Randhir Singh Rana (supra) holds the field, as it does, indeed, even today, we are of the view that there can be no escape from the conclusion that a Magistrate cannot, on his own, direct 'further investigation' on a defect or deficiency having come to his notice. Naturally, therefore, the mere fact that such a defect or deficiency has been brought to the notice of the Magistrate by the informant, or the *de facto* complainant, or the aggrieved person, or the victim, would not, and cannot, clothe the Magistrate with the power to order 'further investigation' so as to advance the cause of justice or to prevent miscarriage of justice or to arrive at a just decision of the case. The remedy, in such a case, lies in making appropriate application under section 482 of the Code inasmuch as section 482 preserves the inherent power of the High Court. It is in this context that the following observations were made in **Rosendra Chandra Das -Vrs.- State of Assam : 2008 (4) Gauhati Law Times 155**, which we fully agree with:

"46. What surfaces from the discussion, held as a whole, is that in a case, where an accused appears, pursuant to process issued by the Court upon taking cognizance of offences, following submission of 'police report' under

section 172(3)(i), neither the Court, on its own, direct 'further investigation' nor has the informant or aggrieved party any right to obtain a direction for 'further investigation', for, the prosecution agency, in such a case, remains the State and if any 'further investigation' has to be conducted, it has to be at the instance of the State and, in fact, in an appropriate case, even the State must seek formal permission from the Court to re-start investigation if the investigation, conducted earlier, was improper or perfunctory. The remedy of the informant, therefore, lies in making application, under section 482 Code of Criminal Procedure, to the High Court seeking appropriate direction in the matter. What, indeed, a Court can do, when a petition, as in the present case, is made seeking proper or 'further investigation' after the accused has already entered appearance, is that the Court can and, in a befitting case, must, direct the State, i.e., the Public Prosecutor, to look into the grievances of the informant or the aggrieved party, as the case may be, and do the needful in accordance with law. If, in such a case, the Public Prosecutor, on a dispassionate and legally permissible examination, takes the view that the matter needs to be further investigated, the State can commence 'further investigation'; but, ordinarily, it would be in the fitness of the things if the State obtains formal permission from the Court, where the trial is being conducted."

158. Coupled with the above, one must also bear in mind that the High Court, in an appropriate case, may invoke its extra-ordinary jurisdiction under Article 226 of the Constitution of India to direct either 'further investigation' or 're-investigation' in a case. (See **State of Haryana -Vrs- Bhajanlal and Ors. reported in 1992 Supp (1) SCC 335**)

Summary on the concept of further investigation

159. The position of law may, in the light of the discussions held above, be summarized thus: Under the Code 'investigation' consists, generally, of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence, which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the 'investigation' and to be produced at the trial, and (5) information of the opinion as to whether, on the material collected, there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by the filing of charge-sheet under section 173 (**See H. N. Rishbad -Vrs.- The State of Delhi : A.I.R. 1955 S.C. 196**).

160. 'Further investigation' is nothing, but continuation of an earlier investigation. In 'further investigation', thus, the investigation, which might have been conducted in the past, would be resumed and conducted further.

161. As against 'further investigation', a 're-investigation' is an investigation, which is a new and fresh investigation wiping out the earlier investigation and 're-investigation' is conducted by an agency, which is not only different from the earlier investigating agency, but also must be one, which falls under the control, supervision or jurisdiction of an authority not only different from, but also independent of, the authority, which had the control, supervision or jurisdiction over the earlier investigating agency. In this sense, an investigation conducted by an investigating agency, such as, Criminal Investigation Department of a State, is not different from the ordinary police machinery of the State concerned, because both of them are under the jurisdiction of the same State; whereas Central Bureau of Investigation (C.B.I) is an authority, which is different from the normal police investigation of the State or its Criminal Investigation Department. As has been pointed out in clear terms, in **State of Andhra Pradesh -Vrs.- A.S. Peter : (2008) 2 SCC 383**, what section 173(8) permits is a 'further investigation' and not a 're-investigation'. What is, however, extremely important to bear in mind is that a reinvestigation being prohibited by law, it would not, ordinarily, be ordered by a superior Court. It, thus, becomes clear that a 'reinvestigation' would be ordered in the situations, which are extra-ordinary, rare and cannot be met by a 'further investigation'. (**See Kishan Lal -Vrs.- Dharmendra Bafna : AIR 2009 SC 2932**).

162. Section 173(8) can give rise to, broadly speaking, four distinct situations, where the question of 'further investigation' may arise. The police report, which does not suggest prosecution of an accused and which is, ordinarily, called 'final report', may not be accepted by the Court on its own examination or, if, upon notice received, the informant, or *de facto* complainant, or the aggrieved person, or the victim, raises objection, or points out some omission, deliberate or otherwise, defect or deficiency in the investigation. In a case, therefore, either of his own, on noticing a defect or deficiency in an investigation, or when such a defect or deficiency is brought to the notice of the Magistrate by the informant, *de facto* complainant, aggrieved person or victim, the Magistrate can direct further investigation if he has not already taken cognizance and if the defect, deficiency or omission warrants 'further investigation'. One must, of course, bear in mind, that in both the cases aforementioned, a direction for 'further investigation' is given without really taking cognizance of any offence.

163. A situation may arise, where the police submit a 'police report', in the form of a charge-sheet, suggesting prosecution of an accused, but the same may not be accepted by the Court either on its own or on the protest raised by the informant, *de facto* complainant, aggrieved person or victim. The case of Rosendra Das (supra) is a case, which falls in this category, because what had happened in Rosendra's case (supra) was that the informant had made allegation of assault against four persons, who were named by the informant in the First Information Report (FIR), but the police, on completion of investigation, laid charge-sheet against one person only out of the four persons named in the FIR. In such a situation, as has been held in Rosendra's case (supra), which we fully agree, the Magistrate ought not to have accepted the charge-sheet in its entirety without giving notice to the informant. On receiving the notice, if the informant had raised objection, the Magistrate was bound to consider if it was appropriate and justified, on the part of the police, to submit charge-sheet against only one of the four accused persons named in the FIR. If the Magistrate would have formed the opinion, sustainable in law, that further investigation was necessary, there was no impediment, on the part of the Magistrate, to order 'further investigation'. The directions for such a further investigation would, once again, be without taking cognizance of any offence.

164. There is, of course, a distinction between the two situations described hereinbefore. While in the former case, the 'further investigation' was directed by not accepting a final report, the latter direction for 'further investigation' was given despite the fact that there was a charge-sheet filed by the police on completing their investigation, but the charge-sheet is not accepted by the Magistrate for reasons, such as, the reason that the police report does not disclose as to why all the persons, named by the informant in his FIR, have not been made accused in the case. The common threat, however, running between the two situations aforementioned is the fact that in both the situations aforementioned, no cognizance was taken by the Magistrate.

165. As against the situation, which we have visualized above, relating to 'pre-cognizance' stage, we may, now, turn to the 'third' situation, where 'further investigation', at the 'post-cognizance' stage, may be needed. After a Court takes cognizance, a defect or deficiency in the investigation may come to the notice of the Court, or such a defect or deficiency may be brought to the notice of the Court by an informant, *de facto* complainant, aggrieved person or the victim. In neither case, in the face of the clearly laid down position of law, in Randhir Singh Rana's case (supra), that a Court cannot, on its own, direct 'further investigation', when the trial has commenced, it becomes clear that even on the request of an informant, *de*

facto complainant, or the aggrieved person, the Court would have no power to direct 'further investigation'.

166. In fact, it is difficult to conceive of a situation, where the Court, on noticing a defect or deficiency, on its own, cannot, in the name of advancing cause of justice or to arrive at a 'just decision' of a case or to prevent miscarriage of justice, direct 'further investigation', but it can, at the same time and on the same defect or deficiency being brought to its notice by the informant, or the de facto complainant, or the aggrieved person, or the victim, would have the power to direct 'further investigation'.

167. Necessary, therefore, one has to hold that so long as the law, laid down in Randhir Singh Rana (supra), is not overruled, neither on its own nor on the request of the informant, or the *de facto* complainant, or the aggrieved person, or the victim, a Court can direct 'further investigation', when the accused has already entered appearance and the stage for framing of charge has been reached.

168. The 'fourth' situation can be a situation, when the police seeks permission of the Court to conduct 'further investigation', or a situation, when the Court finds that there is a defect or deficiency in the investigation, which warrants 'further investigation'. In such a situation, there can be legal impediment, on the part of the Court, to direct the Public Prosecutor to decide, as a State, as to what it shall do. In such a situation, the State, having assumed the responsibility of conducting the prosecution, cannot leave the prosecution half-done or defective. The State would have, in such a situation, no justification for not conducting 'further investigation'. For instance, there may be a case, where a weapon has been relied upon by the prosecution as the weapon of offence, but the weapon, having not been serologically examined, may require confirmation by a serological examination. Such a defect or deficiency, in investigation, may be noticed by the Court on its own, or may be brought to its notice by the informant, or by the victim, or by the Public Prosecutor himself. In such a case, when the Public Prosecutor makes application seeking 'further-investigation', such a request would be treated to be a request made by the investigating agency, because it is the Public Prosecutor, who represents a State in the trial in a Court.

169. Though the Public Prosecutor does not form part of the investigating agency, he does speak for the State, which assumes the responsibility, in the criminal trial, to prosecute an accused, particularly, in a case of murder and, that is why, none other than a Public Prosecutor can conduct a sessions trial and the Court has no power to allow, as in the case of **Shiv Kumar -Vrs- Hukam Chand and Anr. reported in (1999) 7 SCC 467**, a private

> counsel to conduct prosecution in a sessions case even if the Public Prosecutor agrees to allow an informant's or a victim's counsel to conduct the prosecution. When the request comes, in such a case, from the Public Prosecutor for granting permission for 'further investigation', it would be very difficult for a Court to not to permit 'further investigation'. At any rate, the Court will not have the power to refuse permission for 'further investigation' merely on the ground that the application has been made seeking 'further investigation' by the Public Prosecutor or by the Additional Public Prosecutor in charge of the case and not by the police if the permission, sought for, is, otherwise, necessary."

7. In the present case, the investigating officer has not thought it proper to pray for further investigation. Even the learned Asst. Public Prosecutor filed objection to the petition filed by the opposite party no.2 for further investigation and opposed the prayer. Even though the petitioner had already entered appearance through her advocates but the learned Magistrate neither asked the learned counsel for the opposite party no.2 to serve a copy of such petition on her advocates nor heard them before passing the impugned order. In the factual scenario, I am of the view that the opposite party no.2 is not at all an aggrieved person and it appears that since the petitioner has instituted a case on 05.07.2012 under sections 498-A, 294, 506, 313 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act against the opposite party no.2 in which he has been charge sheeted, a petition was filed before the Inspector in charge, Bhadrak Rural Police Station initially and then a petition under section 173(8) of Cr.P.C. was filed by him seeking for further investigation.

Conduct of impartial and unbiased investigation is the hall mark of any criminal investigation. If it is unfair, improper and one-sided and important materials are not collected or ignored deliberately which will have a far reaching consequence in proving the guilt or otherwise of the accused, it would amount to defective investigation. Such investigation will not be in the interest of justice and it would be against the public confidence on the investigating agency. Even though after taking cognizance of the offence by the Magistrate upon the chargesheet or final report submitted by police, the right of the police to further investigate the case is not exhausted after seeking formal permission from the Magistrate but a Magistrate cannot direct further investigation of the case at the instance of a *de facto* complainant after taking cognizance of offences on the basis of chargesheet submitted by police.

Therefore, in view of the ratio laid down in the above decisions, I am of the view that the learned Magistrate has exceeded his jurisdiction and acted beyond his jurisdictional competence in directing further investigation of the case at the instance of the opposite party no.2 after taking of cognizance of offences and issuance of process. The impugned order suffers from perversity, illegality and

impropriety and therefore, in exercise of the revisional jurisdiction, I am inclined to quash the same.

In the result, the revision petition is allowed. The impugned order dated 04.05.2016 passed by the learned S.D.J.M., Bhadrak in directing further investigation of the case is hereby set aside. The learned Magistrate is directed not to consider the *further investigation report* submitted by police and he shall proceed with the case on the basis of the chargesheet on which he has taken cognizance of offences under sections 468 and 471 of the Indian Penal Code. Since the case is of the year 2013, the learned Magistrate shall do well to expedite the trial and conclude the same preferably within six months from the date of receipt of this order.

Revision allowed.

2017 (II) ILR - CUT- 470

S. K. SAHOO, J.

CRLMC NO. 1795 OF 2004

DEBADUTTA MOHAPATRA .....Petitioner

.Vrs.

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

(A) CRIMINAL PROCEDURE CODE, 1973 – S.195 (i) (a)
R/w sections 183,186 I.P.C.

In order to prosecute an accused for the offence punishable under sections 183,186 I.P.C, it is mandatory to follow the procedure prescribed U/s 195 Cr.P.C. and complaint in writing has to be made by the concerned public servant or some other public servant to whom he is administratively subordinate.

In this case FIR was submitted by the OIC of Daspalla Police Station and charge sheet was filed by the ASI of Daspalla Police Station for the offences under sections 183 and 186 I.P.C. and the learned Magistrate has taken cognizance of such offences – Held, order taking cognizance U/ss 183 and 186 I.P.C. being illegal is setaside.

(B) ODISHA POLICE RULES – Rule 144 (b)
R/w section 332 I.P.C.

When a police officer is hurt, assaulted or obstructed while executing his duty he must lodge an F.I.R at the police station or file a

complaint – If he lodges F.I.R. U/ss 332,333 or 353 I.P.C. the same shall be instituted and investigated in the ordinary way but a charge sheet shall not be submitted except under the written order of the Superintendent of Police.

In this case, the informant himself was hurt while executing his duty but the ASI of Police Daspalla P.S. investigated the matter being supervised by the Circle Inspector, Khandapada who directed the ASI of police to submit charge sheet U/s 332 I.P.C. without the written order of the Superintendent of Police as required under Rule 144 (b) of the Odisha Police Rules – Held, the impugned chargesheet U/s 332 I.P.C. being illegal is setaside.

Case Laws Referred to :-

1. Vol.48 (1979) Cuttack Law Times 625 : Surajmani Srimali -Vrs.- State of Orissa.
2. Vol.61 (1986) CLT 405 : State of Orissa -Vrs.- Gopinath Das.
3. (2017) 66 Orissa Criminal Reports 718 : Saloni Arora -Vrs.- State of NCT of Delhi.
4. A.I.R. 1962 S.C. 1206 : Daulat Ram -Vrs.- State of Punjab.

For Petitioners : Mr. Ashok Kumar Swain
For Opp.Parties : Mr. Chitta Ranjan Swain (Addl. Standing Counsel)

Date of Hearing : 24.04.2017
Date of Judgment: 24.04.2017

JUDGMENT

S. K. SAHOO, J.

This application under section 482 of the Criminal Procedure Code has been filed by the petitioner Debadutta Mohapatra with a prayer to quash the chargesheet dated 07.12.2002 filed by the A.S.I. of Police, Daspalla Police station in Daspalla P.S. Case No. 101 of 2002 against him under sections 332/ 294/ 183/ 186/ 506 of the Indian Penal Code and also the impugned order dated 10.12.2002 passed by the learned J.M.F.C., Daspalla in G.R. Case No. 132 of 2002 (arising out of Daspalla P.S. Case No. 101 of 2002) in taking cognizance of the offences under sections 332/ 294/ 183/ 186/ 506 of the Indian Penal Code and issuance of process against him.

The prosecution case, in short, is that on 31.10.2002 at about 9.45 p.m. S.I. Sri S.Mohanty, officer in charge of Daspalla Police station drew up the plain paper F.I.R. at village Jagadevpatna to the effect that in connection with the investigation of Daspalla P.S. Case No. 97 of 2002, he visited the house of Rabindra Kumar Prusty along with Circle Inspector, Khandapada, A.S.I. A. Sahoo, C/259 R.Ch.Rath, WC.252 B. Sethi, local witnesses Gouri Sankar Nanda & Sanjukta Dasgupta and

accused Suresh Rout who confessed to have given the looted gold ornaments of his share to Rabindra Kumar Prusty. During conversation, accused Rabindra Kumar Prusty admitted to have received the gold and silver ornaments from accused Suresh Rout and melted the same. He also produced the melted gold and silver ornaments for seizure. During seizure, the petitioner suddenly arrived there and challenged the informant as to under what authority he got the right of seizure of the melted gold. When the informant tried to explain the petitioner about the legal position and requested him not to interfere in the investigation of the case being an outsider, the petitioner suddenly became furious and started arguing with the informant using unparliamentarily language and in intimidating terms. When the informant warned the petitioner that he can arrest him for intimidating and obstructing a police officer during due discharge of his duty, he shouted more loudly and used obscene language like "Sala Magiha Police" and threatened to take out his stars. The petitioner also threatened to harass the informant by filing a complaint case against him and suddenly he gave a strong push on the neck of the informant. However due to intervention of public, the informant was saved from further assault. Due to suspected fracture injury on his right hand wrist, the informant was unable to defend him. The staff accompanying him came to his rescue and when they tried to apprehend the petitioner, he ran away from the spot.

After registration of the case, the case was investigated by A.S.I. of Daspalla Police station who examined the informant and witnesses. The petitioner surrendered before the learned J.M.F.C., Daspalla and was released on bail. Circle Inspector, Khandapada supervised the case and directed the Investigating Officer to submit charge sheet and accordingly, charge sheet was submitted under sections 332/ 294/ 183/ 186/ 506 of the Indian Penal Code against the petitioner.

While challenging the charge sheet as well as the impugned order of cognizance dated 10.12.2002, it was contended by Mr. Ashok Kumar Swain, learned counsel for the petitioner that submission of chargesheet against the petitioner under section 332 of the Indian Penal Code without the written order of the District Superintendent of Police is not proper and justified in view of Rule 144(b) of the Orissa Police Rules. He further submitted that submission of charge sheet and consequential order of taking cognizance of offences under sections 183 and 186 of the Indian Penal Code on the first information report submitted by the officer in charge of Daspalla Police station is also not justified in view of the provision under section 195(1)(a) of Cr.P.C.

Mr. Chitta Ranjan Swain, learned Addl. Standing Counsel for the State on the other hand supported the impugned order of taking cognizance and submitted that prima facie case under the offences under which the charge sheet has been submitted are clearly attracted and therefore, the application under section 482 Cr.P.C. should be dismissed.

Adverting the contentions raised by the learned counsels for the respective parties relating to taking of cognizance of offences under sections 183 & 186 of the Indian Penal Code, it is seen that as per section 195(1)(a) of Cr.P.C., for taking cognizance of the offences punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code, or of any abetment of, or attempt to commit, such offence, or of any criminal conspiracy to commit such offence, *complaint in writing* has to be made by the concerned public servant or of some other public servant to whom he is administratively subordinate.

Sections 183 and 186 of the Indian Penal Code appear in chapter-X of the Indian Penal Code which deals with the contempts of the lawful authority of public servants. Public servants have been entrusted with performance of sacrosanct duties under different statutes. These provisions are aimed at providing smooth performance of their duties and whosoever makes any attempt to create any kind of hindrance to the same, he will be punished by Court of law provided that the complaint is made by the concerned public servant or his administrative superior.

The words "complaint in writing" is the "complaint" as defined in section 2(d) of the Code which means any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. However, if a report made by a police officer in a case which discloses, after investigation, the commission of non-cognizable offence, it shall be deemed to be a complaint, and the concerned police officer by whom such report is made shall be deemed to be the complainant as per the explanation to section 2(d) of the Code. "Police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173 of the Code as defined in section 2(r) of the Code. Therefore, in case of commission of offence under sections 183 and 186 of the Indian Penal Code, complaint petition is only maintainable but if an F.I.R. is lodged for commission of such offences and after investigation, charge sheet is filed only for such offences which are non-cognizable then as per the explanation under section 2(d) of the Code, such charge sheet shall be deemed to be a complaint and the police officer submitting such charge sheet shall be deemed to be the complainant.

In case of **Surajmani Srimali -Vrs.- State of Orissa reported in Vol.48 (1979) Cuttack Law Times 625,** it is held that charge sheet submitted by the police in respect of a cognizable offence cannot be held to be a complaint as defined in the Code. In this case, charge sheet was submitted, inter alia, for offence under section 332 of the Indian Penal Code which is a cognizable offence.

Mr. Swain drew my attention to the decision of the Hon'ble Supreme Court in the case **Saloni Arora -Vrs.- State of NCT of Delhi reported in (2017) 66 Orissa Criminal Reports 718** wherein the Hon'ble Supreme Court relying upon the decision of **Daulat Ram -Vrs.- State of Punjab reported in A.I.R. 1962 S.C. 1206**

has held that in order to prosecute an accused for an offence punishable under section 182 of the Indian Penal Code, it is mandatory to follow the procedure prescribed under section 195 of the Code or else such action is rendered void ab initio. It was further held that it is not in dispute that the prosecution while initiating the action against the appellant did not take recourse to the procedure prescribed under section 195 of the Code and therefore, the action taken by the prosecution against the appellant insofar as it relates to the offence under section 182 of the Indian Penal Code is concerned, is rendered void ab initio being against the law. In case of **State of Orissa -Vrs.- Gopinath Das reported in Vol.61 (1986) CLT 405,** the State of Orissa challenged the acquittal of the respondent under section 182 of the Indian Penal Code by the Appellate Court and the ground of acquittal was that a complaint by public servant was not filed under section 195(1)(a) of the Code and so cognizance of the offence under section 182 of the Indian Penal Code was not in accordance with law. This Court held that it is a fact that a public servant did not file a complaint before the Magistrate in accordance with the provisions of section 195(1)(a) of the Code making allegations of commission of an offence under section 182 of the Indian Penal Code. The respondent submitted a report making allegations of robbery which after investigation was found to be false and the offence under section 182 of the Indian Penal Code was included in the charge sheet for the offence under section 409 of the Indian Penal Code. Considering the ratio of **Surajmani Srimali** case (supra), it was held that in absence of regular complaint petition by a public servant, cognizance of offence under section 182 of the Indian Penal Code was not in accordance with law as the provision under section 195(1)(a) of the Code was not strictly complied with and accordingly, the acquittal order passed under section 182 of the Indian Penal Code was confirmed.

In the present case, F.I.R. was submitted by the officer in charge of Daspalla Police station and charge sheet was filed by the A.S.I. of Daspalla police station for offences, inter alia, under sections 183 and 186 of the Indian Penal Code and the learned Magistrate has taken cognizance of such offences on the basis of the charge sheet. I am of the view that the order of taking cognizance of offences under sections 183 and 186 of the Indian Penal Code is illegal in view of the provision under section 195(1)(a) of the Cr.P.C. Therefore, the order of taking cognizance of offences under sections 183 and 186 of the Indian Penal Code cannot be sustained in the eye of law and accordingly, the same is hereby set aside.

So far as the cognizance of offence under section 332 of the Indian Penal Code is concerned, Rule 144(b) of the Orissa Police Rules reads as follows:-

> "**144(b) Assaults or obstruction of police officers :-** If a police officer is hurt, assaulted or obstructed in the execution of duty, he must lodge a first information at the police station or file a complaint. If he lodges a first information, a case under section 332, 333 or 353 of the Indian Penal Code

> shall be instituted and investigated in the ordinary way but a chargesheet shall not be submitted except under the written order of the Superintendent, if he files a complaint and it is referred to the police for enquiry, the report shall in all cases be submitted through the Superintendent."

However, as per the note under Rule 144(b), this order does not apply to cases instituted on the information of other public servants. In such cases, charge sheets may be submitted after investigation without reference to the Superintendent.

In this case, the informant himself is stated to have been hurt and obstructed while in execution of his duty. A.S.I. of Police, Daspalla Police station investigated the matter which was supervised by the Circle Inspector, Khandapada who directed the A.S.I. of Police to submit charge sheet for offences, inter alia, under section 332 of the Indian Penal Code. The Superintendent means a District Superintendent of Police as per Rule 10(a) of Orissa Police Rules. Therefore, while submitting chargesheet, the provision under Rule 144(b) of Orissa Police Rules has not been followed inasmuch as written order of the District Superintendent of Police has not been obtained. Moreover, one of the basic ingredients of the offence under section 332 of the Indian Penal Code is that the accused must have voluntarily caused hurt to the public servant in the discharge of his duty. Section 321 of the Indian Penal Code describes 'voluntarily causing hurt'. There is no clinching material for submission of chargesheet under section 332 of the Indian Penal Code and therefore, the order of taking cognizance for such offence is not sustainable in the eye of law and accordingly, the same is hereby set aside.

So far as the offences under sections 294 and 506 of the Indian Penal Code, on a plain reading of the first information report, it indicates that the petitioner used obscene languages like " Sala Maghia Police" and threatened the informant to take his stars. He also threatened to file a complaint case. The available materials on record prima facie makes out the offences under sections 294 and 506 of the Indian Penal Code and therefore, I am not inclined to interfere with the order of taking cognizance under sections 294 and 506 of the Indian Penal Code.

Accordingly, the CRLMC application partly succeeds. The impugned order of taking cognizance of offences under sections 183, 186 and 332 of the Indian Penal Code stands quashed. The order of taking cognizance of the offences under sections 294 and 506 of the Indian Penal Code stands confirmed.

It is a case of the year 2002. The learned J.M.F.C., Daspalla shall do well to expedite the trial and dispose of the case in accordance with law as expeditiously as possible preferably within a period of six months from the date of receipt of this judgment. It is made clear that this Court has not expressed any opinion on the merits of the case. The learned Trial Court is free to assess the evidence which would come on record and decide the guilt or otherwise of the petitioner while pronouncing the judgment.

Application allowed in part.

2017 (II) ILR - CUT- 476

S. K. SAHOO, J.

CRLMC NO. 2131 OF 2005

SASANKA SEKHAR SAMANTA & ORS. ……..Petitioners

.Vrs.

STATE OF ORISSA & ANR. ……Opp. Parties

CRIMINAL PROCEDURE CODE, 1973 – S.197

Sanction – When necessary – Duty of the Court to find out whether, the act done by the public servant and the official duly are so inter-connected/inter-related that one can postulate reasonably that it was done by the accused in performance of the official duty.

In this case, the petitioners and other police officials, on getting information that the husband of the complainant deals with sale of foreign liquor without any authority, proceeded to his house and when seized liquor bottles there was disturbance – So the act complained of due to which the offence is stated to have been committed appears to have been committed by the petitioners while acting or purporting to act in discharge of their official duty – Even though the allegations are of commission of excesses, the petitioners cannot be prosecuted without sanction U/s. 197 Cr.P.C. from the competent authority – Held, the impugned order taking cognizance against the petitioners, without sanction, is set aside.

Case Laws Referred to :-

1. (2017) 66 O.C.R.635 : Sudarsan Dash –V- Smt. Sarojini Mohapatra

For Petitioners : Mr. B.S.Dasparida

For Opp.Parties : Mr. Chitta Ranjan Swain, A.S.C.
Mr. Gouranga Behari Jena

Date of Hearing : 15.05.2017
Date of Judgment: 15.05.2017

JUDGMENT

S. K. SAHOO, J.

The petitioner no.1 Sasanka Sekhar Samanta who was the Inspector, DCRB –cum- Inspector-in-charge, Special Squad, Bolangir, petitioner no.2 Anand Kumar Khuas who was the Lance Naik, Headquarters Bolangir and petitioner no.3 Sheikh Nabi who was the Driver, Reserve Police, Bolangir have filed this application under section 482 of the Criminal Procedure Code challenging the impugned order dated

22.08.2005 passed by the learned Sub-divisional Judicial Magistrate, Patnagarh in I.C.C. Case No. 66 of 2004 in taking cognizance of offence under sections 394/34 of the Indian Penal Code and issuance of process against them.

The petitioner no.1 lodged the first information report before the officer in charge of Khaprakhol police station, on the basis of which Khaparkhol P.S. Case No.74 of 2003 was registered on 05.12.2003 under sections 143/ 147/ 294/ 506/ 379/ 353/ 149 of the Indian Penal Code and section 47(a) of the Bihar and Orissa Excise Act against seven persons including Smt. Nandini Sahu, opposite party no.2. It is stated in the first information report that while the petitioners and other police officials proceeded towards village Dhandamunda getting reliable information about the sale of foreign liquor, they found one person was selling foreign liquor in a temporary shed in front of his house. The police officials entered into the shed and found that person was in possession of foreign liquor bottles and selling the same to the public. On being asked, he gave his identity as Goura Chandra Sahu and confessed to be selling foreign liquor without any license or authority. On search, number of liquor bottles was found from the possession of that person which was seized in presence of the local witnesses. When the seizure list was prepared, the said Goura Chandra Sahu and others did not sign the seizure list rather they challenged the police party in a loud voice and hearing their hullah, other villagers came there and joined them and they gheraoed the police and abused them in filthy language and snatched away the seized articles from the possession of the police. Since the said Goura Chandra Sahu and his wife Nandini Sahu (opposite party no.2) were in possession of foreign liquor without any licence or authority and selling the same to the public and they along with others formed an unlawful assembly and created obstruction in the due discharge of the police officials, the FIR was lodged.

On completion of investigation, charge sheet was submitted in Khaprakhol P.S. Case No.74 of 2003 on 27.12.2003 under sections 143/ 147/ 294/ 506/ 379/ 353/ 149 of the Indian Penal Code and section 47(a) of the Bihar and Orissa Excise Act against the opposite party no.2 Smt. Nandini Sahu and others.

A complaint petition was filed by the opp. Party no.2 Smt. Nandini Sahu on 10.12.2003 before the Sub-divisional Judicial Magistrate, Patnagarh against the petitioners and others for which the I.C.C. Case No.78 of 2003 was registered. It is the case of the complainant-opposite party no.2 that on 05.12.2003 night at about 1.30 p.m., the petitioners and other accused persons came together, entered inside her house and demanded to give liquor on the plea that they wanted to go Harishankar for picnic. The complainant denied having any liquor for which there was exchange of words between them and petitioner no.3 Sheikh Nabi gave a push to the complainant on the back for which she fell down on the ground. Then the petitioners threatened her to kill, confined her in her house and forcibly opened the almirah of the complainant and took away Rs.3,320/- despite her protest. When the

husband of the complainant raised protest and other witnesses intervened, the petitioners and other accused persons left the spot.

The learned S.D.J.M., Patnagarh sent the complaint petition to the officer in charge, Khaprakhol police station, on the basis of which Khaparkhol P.S. Case No. 06 of 2004 was registered on 06.01.2004 under sections 354/395 of the Indian Penal Code. After completion of investigation, on 22.08.2004 final report was submitted by the Investigating Officer indicating therein that such a case was instituted by the complainant to harass the police officials. On receipt of such final report, the learned S.D.J.M., Patnagarh issued notice to the opposite party no.2 who filed a protest petition. On receipt of such protest petition, the learned Magistrate recorded the statement of the complainant under section 200 Cr.P.C., conducted inquiry under section 202 of Cr.P.C. during course of which, witnesses were examined by the opposite party no.2. On perusal of the complaint petition, statement of the complainant, statements of the witnesses and the records of the G.R. Case No.11 of 2004 and G.R. Case No.312 of 2003, the learned Magistrate on 24.06.2005 came to hold that the petitioner no.1 as per the direction of the Superintendent of Police, Bolangir was performing the official duty along with police constables and the complainant–opposite party no.2 alleged against them showing indecent conduct of outraging her modesty and looting her money. It was further held that as per the settled principle of law, sanction under section 197 of Cr.P.C. is required to take cognizance against a public servant and the complainant has not brought the matter to the notice of the S.P., Bolangir nor moved the competent authority for sanction of prosecution against the petitioners. It was further held that in absence of any sanction from the competent authority, cognizance cannot be taken against the accused persons as the petitioner no.1 was working as Inspector of Police under S.P., Bolangir and a public servant at the time of alleged occurrence. Accordingly, the learned S.D.J.M. directed the complainant-opposite party no.2 to produce the sanction order from the competent authority to prosecute her case against the accused persons. While the matter was pending like that and the advocate for the complainant sought for time to obtain the sanction order, a different Presiding Officer joined and passed the impugned order dated 22.08.2005, inter alia, holding that there is no proof that the accused persons were discharging their public duties at the relevant time and the complainant may file the sanction order at a later stage of hearing, if it is proved that the accused persons had gone to the house of the complainant as public servant for excise raid. Accordingly, the learned S.D.J.M., Patnagarh took cognizance of offence under sections 394/34 of the Indian Penal Code and issued process against the petitioners and dismissed the complaint case so far as other accused persons are concerned.

Mr. B.S. Dasparida, learned counsel appearing for the petitioners contended that the impugned order suffers from non-application of mind and the petitioners are the police officials and on the date of occurrence, they were performing their official

duties during course of which they detected the commission of offence under section 47(a) of the Bihar and Orissa Excise Act and when they seized the liquor bottles, there was protest by the complainant-opp. Party no.2 and others for which an F.I.R. was lodged by the petitioner no.1 and just as a counterblast to the said F.I.R., the opposite party no.2 filed the complaint petition. He further contended that when the learned Magistrate after perusing the complaint petition, the initial statement of the complainant and the statements of the witnesses recorded under section 202 Cr.P.C. and the records of G.R. Case No.11 of 2004 and G.R. Case No.312 of 2003 came to hold that the petitioners were performing their official duty along with other police constables and sanction of the competent authority to prosecute them is necessary, by passing the impugned order the learned Court has reviewed its own order which is not permissible in the eye of law. It is further contended that since the alleged offences have been committed in due discharge of the official duties, the petitioners are entitled to protection as envisaged under section 197 of Cr.P.C. The sanction for prosecution being mandatory in nature and the same having not been taken, the impugned order of taking cognizance is not sustainable in the eye of law and therefore, it should be set aside.

Learned counsel for the State Mr. Chitta Ranjan Swain, learned Additional Standing Counsel on the other hand supported the impugned order of cognizance passed by the learned S.D.J.M., Patnagarh.

Mr. Gouranga Behari Jena, learned counsel appearing for the opposite party no.2 submitted that the matter has been amicably settled between the parties in the meantime.

Considering the submissions made by the learned counsels for the respective parties and looking at the materials available on record and the documents filed by the learned counsel for the petitioners, it prima facie appears that the petitioners and other police officials had been to the house of opposite party no.2–complainant on the relevant day where they detected that the husband of the complainant was dealing with sale of foreign liquor without any authority and accordingly they seized the same. It also appears that when the seizure list was prepared, the opposite party no.2, her husband and others created disturbance and abused the police officials in filthy language and prevented them from due discharge of their lawful duty for which a first information report was lodged on 05.12.2003 by the petitioner no.1 before the officer in charge of Khaprakhol police station against the complainant and others. Five days after the lodging of the first information report, the opposite party no.2 came up with a complaint petition alleging that the petitioners and others entered inside her house and forcibly took away Rs.3,320/- after assaulting her when she denied to give them liquor bottles. It also prima facie appears that when the complaint case was forwarded for registration of the F.I.R., it was duly investigated and after completion of investigation, it was found to be a false case which was filed just to harass the police officials and accordingly final report was submitted.

It appears that when the notice was issued to the complainant after receipt of the final report, the complainant filed a protest petition and after recording the statement of the complainant and conducting the inquiry under section 202 of Cr.P.C. and after perusing all the relevant records including the G.R. Case records, the learned S.D.J.M. was of the view that the petitioners were performing their official duty on the relevant day and sanction for prosecution from the competent authority is necessary.

Protection of sanction as envisaged under section 197 of Cr.P.C. serves a very salutary purpose, viz., it protects the honest and sincere officer in the performance of their official duty and prevents demoralization of such officer against threat of frivolous and malicious prosecution leading to harassment. "Official duty" implies that the act or omission should have been done in discharge of the duty. Once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction. Existence of reasonable connection between the act complained of and the discharge of official duty is necessary. Law is well settled that the protection given under section 197 of Cr.P.C. is not a cloak for doing the objectionable act. The excesses committed by the public servant during the performance of official duty are also protected under section 197 of Cr.P.C. It is the duty of the Court to find out whether the act done by the public servant and the official duty are so inter-connected/inter-related that one can postulate reasonably that it was done by the accused in performance of the official duty, though possibly in excess of the needs and requirements of the situation. (**Ref:- Sudarsan Dash -Vrs.- Smt. Sarojini Mohapatra reported in (2017) 66 Orissa Criminal Reports 635**).

In this case when the learned S.D.J.M., Patnagarh on 24.06.2005 came to hold that at the relevant time the petitioner no.1 along with the police constables were performing their official duties as per the direction of S.P. and a Special Squad was formed to conduct raid in the house of the complainant to unearth illegal possession of foreign liquor and in absence of the sanction from the competent authority, cognizance cannot be taken and therefore directed the complainant–opposite party no.2 to produce the sanction order from the competent authority to prosecute her case against the petitioners and other police officials, he should not have passed the impugned order dated 22.08.2005 giving a complete somersault to the earlier order dated 24.06.2005. The learned counsel for the petitioners is right in his submission that the impugned order dated 22.08.2005 amounts to review of the earlier order dated 24.06.2005 passed by the learned S.D.J.M., Patnagarh which is not permissioble in the eye of law.

On the materials available on record, I am satisfied that the petitioners were performing their official duty on the relevant day and the act complained of due to which the offence is stated to have been committed appears to have been committed

by the petitioners while acting or purporting to act in the discharge of their official duty. Even though the allegations are of commission of excesses by the petitioners, in my humble view, the petitioners cannot be prosecuted without sanction from the competent authority. Sanction for prosecution under section 197 Cr.P.C. by the appropriate authority was necessary pre-requisite in the case before taking cognizance of the offence. Resultantly, the impugned order suffers from non-application of mind and is hereby set aside. Accordingly, the CRLMC application is allowed.

Application allowed.

2017 (II) ILR - CUT- 481

J.P. DAS, J.

CRLMC NO. 2904 OF 2016

DR. RAJESH KUMAR AGRAWAL ……..Petitioner

.Vrs.

STATE OF ODISHA ……...Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.482

Quashing of order taking cognizance against the petitioner U/ss 23 and 25 of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of sex Selection) Act, 1994 – Order challenged on the ground that the officer conducted investigation was not authorized under law – Law is well settled that when a statute lays down a particular thing to be done in a particular manner, it has to be done in that particular manner only.

In this case Additional Tahasildar-cum-Executive Magistrate conducted raid of the petitioner's clinic being delegated by the Sub-Divisional Magistrate (Sub-Collector), although the Sub-Collector has no such authority or power to delegate as per the statutory provision – Held, since the inspection and subsequent proceeding have not been conducted according to the provisions of the statute, the impugned proceeding initiated against the petitioner and cognizance taken there in are quashed. (Paras 7,8,11)

Case Laws Referred to :-

1. (Civil) No. 18033 of 2013 : Assistant Municipal Commissioner, Nanded Waghala City v. Kalpana & Ors
2. (2015) 60 OCR (SC) 301 :(Union of India etc. Rep. through Superintendent of Police v. T.Nathamuni)

For Petitioner : M/s. A.A. Dash, B.K.Parida, A.N.Pattanayak & M.Panda
For Opp. Parties : Addl. Standing Counsel

Date of Judgment : 02.05.2017

JUDGMENT

J.P.DAS, J .

Heard learned counsel for the petitioner and learned counsel for the State.

2. This is an application under Section 482,Cr.P.C. to quash the order of taking cognizance dated 16.01.2016 and the proceeding in 2(C) C.C. Case No.01 of 2016 on the file of learned S.D.J.M., Bhadrak alleging the offences punishable under Sections 23 and 25 of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (in short "the Act, 1994") for violating the provisions of Section 5 and 29(2) of the Act, 1994 and Rules 9, 11 and 18 of the P.C & P.N.D.T Rule.

3. The proceeding was initiated and cognizance was taken on Prosecution Report filed by the Assistant District Medical Officer,(F.W & Imm) office of the C.D.M.O., Bhadrak alleging that on 23.11.2015 the Additional Tahasildar, Bhadrak being authorized by the Sub-Collector-cum-Sub District Appropriate Authority, Bhadrak by Order No.1492 dated 23.11.2015 inspected the clinic of the present petitioner and found out certain anomalies and discrepancies in relation to the affairs of the Ultrasound Unit run by the present petitioner besides not being registered under the Odisha Clinical Establishment (Control and Regulation) Act, 1990. The Unit of the present petitioner was sealed and after completion of enquiry the Prosecution Report was filed before the learned S.D.J.M., Bhadrak who by the impugned order dated 16.01.2016 took cognizance of the offences punishable under Sections 23 and 25 of the Act, 1994 directing to issue summons against the present accused-petitioner.

4. It was submitted by the learned counsel for the petitioner that the petitioner being a registered practitioner of the Odisha Medical Council of Registration started his own Diagnostic Centre and Ultra Sound Clinic at Bhadrak in the year 2012 in the name and style of New Omm Shanti Diagnostic Centre which was duly registered with the Collector and the Chairman of the P.C and P.N.D.T., Bhadrak and validity of such registration was till 30.05.2017. It was further submitted that the petitioner received a

communication from the C.D.M.O-cum-Member Secretary, P.C and P.N.D.T. Act, Bhadrak dated 7th November, 2011 that he must make an application for registration of his Unit under the Odisha Clinical Establishment (Control and Regulation Act, 1990) and it was directed to make an application in the enclosed proforma by 31st December, 2015. It was submitted that all of a sudden on 23.11.2015 around 2 P.M. the Additional Tahasildar, Bhadrak being accompanied by other officials conducted a raid on the clinic of the petitioner and seized some documents and also sealed the Unit. The sealing of the Unit was challenged by the petitioner before this Court in W.P.(C) No.22434 of 2016 and by order dated 17.02.2016 concerned authorities were directed to hand over the clinic to the petitioner. It was submitted that due to some ulterior motive the Prosecution Report was filed against the petitioner on 16.01.2016 and on the same day the learned S.D.J.M., took cognizance as aforesaid. It was submitted by the learned counsel for the petitioner that the entire proceeding was vitiated for having not been conducted according to the statutory provision.

5. The only contention that has been raised is that as per the office memorandum dated 27.07.2007 of the Government of Odisha in Health and Family Welfare Department, the District Magistrate of each district has been appointed as the District Appropriate Authority for the district under the Act,1994 and he may nominate an Executive Magistrate of the district as nominee to assist him in monitoring the implementation of the said Act as deemed necessary. In the said notification, the Sub-Divisional Magistrate (Sub-Collector) of each Sub-Division has been appointed as the appropriate authority for the Sub-district (Subdivision) for smooth implementation of the provision under the Act,1994. The Sub-Divisional Magistrate has not been authorized to nominate any other persons as has been permitted to the District Magistrate. Placing the said notification, it was submitted on behalf of the petitioner that in the instant case, the Sub-Collector and S.D.M. Bhadrak, who had no authority to nominate any other person authorized the Additional Tahasildar, Bhadrak by Order No. 1492 dt.23.11.2015 to inspect the clinic of the present petitioner and to take an action as per the Act, 1994. Thus, it was contended that as per the settled position of law, the actions of the authority having not been taken in accordance with the provisions of the notification were illegal and hence, the present proceeding against the petitioner is not sustainable in law.

6. Relying on a decision of the Hon'ble Apex Court in the case of ***Assistant Municipal Commissioner, Nanded Waghala City v. Kalpana and***

others in ***Special Leave to appeal (Civil) No.18033 of 2013*** it was submitted that when a statute lays down a particular thing to be done in a particular manner, it has to be done in that particular manner only. Thus, it was submitted that in the instant case the concerned Sub-Divisional Magistrate being the Appropriate Authority under the notification of the State Government could not have authorized Additional Tahasildar to exercise the jurisdiction under the Act, 1994. It was also submitted that in some earlier cases before this court it has also been held that such actions of the Authority are illegal and not sustainable in law.

7. It was submitted by the learned counsel for the State relying on a decision reported in ***(2015) 60 OCR (SC) 301 (Union of India etc. Rep. through Superintendent of Police v. T.Nathamuni)*** that unless any prejudice is caused to the accused, mere irregularity in conducting the investigation, would not vitiate the entire proceeding. But, with due respect to the said observation of the Hon'ble Apex Court, it may be noted that the facts and circumstances in the cited case were absolutely different since in the said case the Investigating Officer was changed after obtaining due permission from the trial court, and validity of the proceeding was assailed only after its termination. Hence, the Hon'ble Apex Court observed that since the Investigating Officer was changed after obtaining due permission of the learned trial court, there was no illegality committed nor any prejudice was caused to the accused so as to quash the entire proceeding. It has also been observed in the aforesaid decision that

> "The question raised by the respondent is well answered by this Court in a number of decision rendered in a different perspective. The matter of investigation by an officer not authorized by law has been held to be irregular."

But in the instant case, the Sub Divisional Magistrate having no authority to delegate his power, has authorized one Additional Tahasildar-cum-Executive Magistrate to conduct the raid and inspection, as remained admitted in the Prosecution Report itself, a copy of which has been filed in the case.

8. It was further submitted that in the instant case not only the investigation was conducted by an officer not authorized by law but the said officer was authorized by the Sub-Collector who had no authority to delegate his power or nominate any other officer as per said statutory provision.

9. It was also submitted on behalf of the petitioner that the petitioner was asked to submit an application by 31st December 2015, but prior to that the raid was conducted and allegations have been made regarding non-registration in the month of November, 2015 and since it was challenged before this Court and an order was obtained the prosecution report was filed with an ulterior motive.

10. In view of the aforesaid position, the order issued by the Sub-Divisional Magistrate, Bhadrak on 23.11.2015 authorizing the Additional Tahasildar to exercise the power under the Act, 1994 was illegal and without jurisdiction. Thus, the inspection and the proceeding following thereto having not been conducted according to the provisions of the statute are unsustainable in law.

11. Accordingly, the criminal proceeding initiated against the present petitioner vide 2(C)C.C. Case No.1 of 2016 on the file of learned S.D.J.M., Bhadrak and the cognizance taken therein for the offences by order dated 16.01.2016 are hereby quashed. The CRLMC is accordingly disposed of.

Application disposed of.

2017 (II) ILR - CUT- 485

DR. D.P. CHOUDHURY, J.

W.P.(C) NO. 6697 OF 2016

TRUPTILATA SAMAL ……..Petitioner

.Vrs.

O.S.R.T.C. ……Opp. Party

SERVICE LAW – Unauthorized absence from service – Departmental proceeding initiated against the husband of the petitioner four months after his retirement – Enquiry report shows that the enquiry held exparte, without giving opportunity to the delinquent to defend his case – When punishment imposed without any valid service of notice and without hearing the delinquent, there is serious violation of the principles of natural justice – Held, the impugned punishment is quashed – Husband of the petitioner is entitled to re-fixation of pay by counting his service period up to 28.02.2006 as qualifying service – Direction issued to re-fix the pension of the husband of the petitioner from 28.02.2006 and also re-fix the family pension of the petitioner from 20. 05. 2008. (Para 20)

For Petitioner : M/s. B.S. Tripathy- 1
For Opp. Party : Mr. Hrushikesh Tripathy

Date of hearing : 02.03.2017
Date of Judgment: 23.03.2017

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge has been made to the order of punishment, the consequential inaction of opposite party for not fixing pension and release of arrear dues of the late husband of the petitioner along with family pension of the present petitioner.

FACTS

2. The unfolded story of the petitioner is that the husband of the petitioner was working as Junior Stenographer, Grade-III in the office of the opposite party since 1.1.1972. After establishment of Orissa State Road Transport Corporation (hereinafter called 'the OSRTC') in the year 1974 by the State Government, the service of the husband of the petitioner was transferred to the office of the General Manager, OSRTC, Cuttack and thereafter he was transferred to different offices of the OSRTC and finally retired from service on attaining the age of superannuation with effect from 28.2.2006. It is alleged, inter alia, that after the superannuation, the late husband of the petitioner was proceeded Departmentally for his unauthorized absence from 31.3.2004 to 1.4.2004, 3.4.2004 to 14.4.2004 and from 16.4.2004 till the date of his superannuation as his said conduct was allegedly in violation of Regulations 136 (18) and 110 (1)(2)(3) of the Orissa State Road Transport Corporation Employees (Classification, Recruitment and Condition of Service) Regulations, 1978. The petitioner was purportedly issued notice to explain about the allegation of unauthorized absence but that notice being not served sufficient, the Enquiring Officer proceeded with the enquiry and closed the enquiry by holding the husband of the petitioner guilty. After perusal of the enquiry report, the opposite party imposed punishment vide order dated 22.9.2007 by treating the period of unauthorized absence as "no work no pay" and calculated the pension as per the last pay drawn on 16.4.2004 but not from the date of his superannuation.

3. Be it stated that the petitioner was granted EOL for his absence from 12.9.1989 to 5.10.1989 and from 7.10.1989 to 29.10.1989 with a stipulation that the said period would not count for his future increment. Similarly, EOL

for the period from 15.6.1992 to 11.8.1993 of the husband of the petitioner was granted with the stipulation that the same would not count towards his future increment. It is further stated that on 12.12.2011 the Administrative Department, i.e., Commerce & Transport Department of the State Government issued letter to the Accountant General, Odisha certifying that there has been no outstanding dues against the late husband of the petitioner towards House Building Advance/Motor Cycle Advance but there is outstanding of Rs.26,265/- to be adjusted against the gratuity. According to the petitioner when two letters of the Government showing no unauthorized absence and directed for regular pension and gratuity after deducting some outstanding balance, the petitioner's claim should not stand on the way in reducing pension and family pension proportionately.

4. It is the further case of the petitioner that the Departmental proceeding being initiated after the retirement of her husband is illegal. The husband of the petitioner was not served with any notice in the enquiry and the Departmental Proceeding has been conducted ex parte by not affording natural justice to the husband of the petitioner. On the other hand, the punishment awarded in the Departmental proceeding after the retirement and the manner it was proceeded, same is illegal, improper and cannot stand on the way to award full pension to the husband of the petitioner in accordance with Orissa Civil Services (Pension) Rules. Be it stated that the petitioner purportedly made representation to the opposite party to recall the order of punishment and grant pension, gratuity in accordance with law but the opposite party is sitting tight over the matter since 11.2.2015 when petitioner made further representation to the opposite party. Hence, this writ petition.

5. Per contra, the opposite party filed counter refuting all the allegations made against the petitioner. It is the case of the opposite party that the husband of the petitioner has remained unauthorizedly absent from 12.9.1989 to 5.10.1989, 7.10.1989 to 29.10.1989, 23.8.2002 to 31.8.2002, 1.10.2002 to 28.1.2003, 29.1.2003 to 1.6.2003, 31.3.2004 to 1.4.2004, 3.4.2004 to 14.4.2004 and from 16.4.2004 to 28.2.2006. Out of said unauthorized absence, the period except 31.3.2004 to 1.4.2004, 3.4.2004 to 14.4.2004 and for the period from 16.4.2004 to 28.2.2006 were regularized but the said period as mentioned above were not regularised because a proceeding No.10969 dated 6.7.2006 was initiated against the husband of the petitioner. Under the Orissa Civil Services (Pension) Rules, 1992 (hereinafter called "the OCS (Pension) Rules") which is applicable to the husband of the

petitioner, Departmental Proceeding was drawn within four years as per Section 7 (2)(c) of the OCS (Pension) Rules. Petitioner's husband did neither attend the enquiry nor challenged the punishment during his life time and finally expired on 19.5.2008. Since it was not challenged, challenge of the same by the petitioner at a belated stage is lack of propriety. As the proceeding was started for unauthorized absence and her husband was found guilty, the same cannot be counted towards his qualifying service to enhance the pension. Since the proceeding against the husband of the petitioner has been finalized and his arrears have also been released in favour of the petitioner, at this stage the petitioner should not challenge the same. So, it is prayed to dismiss the writ petition.

6. The petitioner filed rejoinder to the counter reiterating the averments made in the petition but added that under no provision of OCS (Pension) Rules, the Departmental proceeding can be initiated against the husband of the petitioner after his retirement as per Rule 7 (2)(b) of the OCS (Pension) Rules. It is further stated that the opposite party has tried to misguide the Court by quoting above Rule 7(2)(c) which is meant for judicial proceedings but not for Departmental proceeding. It is stated that since the proceeding has been started after the retirement and without affording reasonable opportunity being heard to the husband of the petitioner, the punishment is uncalled for and consequently the husband of the petitioner is entitled to pension, gratuity according to number of years served till the date of his superannuation.

SUBMISSIONS

7. Learned counsel for the petitioner submitted that the husband of the petitioner admittedly when superannuated on 28.2.2006, the question of withholding the pension for the due period without having valid Departmental proceeding started to treat the period of absence as unauthorized, the action of the opposite party is illegal. It is surprised to find out that four months after retirement of the late husband of the petitioner, the Departmental proceeding was initiated but not during the continuous service by the husband of the petitioner, it is forbidden under law to initiate such proceeding. He further submitted that when the Commerce and Transport Department in the Government of Orissa being Administrative Department of the husband of the petitioner has forwarded letter for pension vide Annexure-8 with certain amount to be adjusted against gratuity, the action of the OSRTC by not counting the period of absence for retirement benefits is highly deplorable. Not only this but also the husband of the petitioner has

been also granted Pension Payment Order vide Annexure-9. The opposite party has erred in law by not treating the period of unauthorized absence for the purpose of qualifying service to award pension with proper persepective and illegally withholding the same on the pretext of departmental enquiry which also resulted in violation of the principles of natural justice. Hence, he submitted that the impugned order dated 22.9.2007 vide Annexure-4 and the consequent orders dated 17.8.2010 under Annexures-5, 6 and 7 should be quashed and direction should be issued to the Corporation to treat the period of absence as duty and calculated the retirement dues of the husband of the petitioner and the consequential Family Pension with release of arrear benefits as per law.

8. Learned Additional Government Advocate submitted that the Departmental proceeding has been started for the unauthorized absence of the husband of the petitioner occurred within preceding four years from the date of retirement under Rule 7 of the OCS (Pension) Rules. According to him, the notice was duly issued and it has received by one Baidhar Samal but the husband of the petitioner did not cooperate the enquiry for which the enquiry proceeded imposing the penalty of treating the period of absence as unauthorized for which the said period has been rightly not calculated towards retirement benefits. He further submitted that according to Rule 7-(c) of the OCS (Pension) Rules, the husband of the petitioner has been rightly proceeded. He asserts that vide Annexure-8 the letter of the Administrative Department does not speak about Departmental proceeding and as usual letter has been sent to the Accountant General, Orissa to sanction the pension. According to him, the service period either EOL or EL or Half pay Leave have been all sanctioned and that have been treated as qualifying service except the period of absence under Departmental proceeding which has been started justifiably. There is no bar under the law to award the punishment in absence of the delinquent when the delinquent does not cooperate the Departmental proceeding. Since the husband of the petitioner did not attend in spite of notice issued, rightly the Enquiring Officer found him guilty on enquiry and the opposite party-Disciplinary Authority also has imposed punishment vide Annexure-4 by not disagreeing with the view of the Enquiring Officer. Hence, he submitted to dismiss the writ petition.

9. **The main points for consideration:-**

(i) Whether the Departmental proceeding and the consequent punishment awarded thereon are legal and proper ?

(ii) Whether the husband of the petitioner is entitled to re-fixation of his pension from the date of his retirement, i.e., 28.2.2006 and the petitioner is entitled to consequent enhancement of the Family Pension with release of arrear dues and the retirement dues of her late husband ?

DISCUSSIONS
POINT NO.(i) :

10. It is admitted fact that the husband of the petitioner was the employee of OSRTC and his date of retirement is 28.2.2006. It is further admitted by the opposite party in its counter that the husband of the petitioner retired on being superannuated on 20.2.2006. It is not in dispute that the husband of the petitioner expired on 19.5.2008. It is also admitted fact that the Departmental proceeding was initiated on 6.7.2006 which is four months after retirement of the husband of the petitioner.

11. It is admitted fact that the Orissa Civil Services (Pension) Rules is applicable to Rabindra Nath Samal, the late husband of the petitioner.

12. Rule 7 of OCS (Pension) Rules is reproduced below for better appreciation:

> "**7. Right of Government to withhold or withdraw pension** – (1) The Government reserve to themselves the right of withholding a pension or gratuity, or both either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on re-employment after retirement: Provided that the Orissa Public Service Commission shall be consulted before the final orders are passed :
>
> Provided further that when a part of pension is withheld/withdrawn, the amount of such pension shall not be reduced below the amount of minimum limit.
>
> (2) (a) Such departmental proceedings referred to in Sub-rule (1), if instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be a proceeding under this rule and shall be continued and concluded by

the authority by which they were commenced in the same manner as if the Government servant had continued in service:

Provided that when the departmental proceedings are instituted by an authority, subordinate to Government that authority shall submit a report recording its finding to the Government.

(b) Such departmental proceedings as referred to in Sub-rule (1) if not instituted while the Government servant was in service, whether before his retirement or during his re-employment –

(i) shall not be instituted save with the sanction of Government:

(ii) shall not be in respect of any event which took place more than four years before such instruction; and

(iii) shall be conducted by such authority and in such place as the Government may, direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

(C) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.

(d) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under Clauses (a) and (b), a provisional pension as provided in Rule 66 shall be sanctioned.

(e) Where the Government decided not to withhold or withdraw pension but order recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

Explanation – For the purpose of this rule –

(a) Departmental proceedings shall be deemed to be instituted on the date on which the statement of charges are issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from the date of his suspension; and

(b) Judicial proceedings shall be deemed to be instituted –

(i) in the case of criminal proceedings, in the date on which the complaint or report of a police officer, of which the Magistrate takes cognizance, is made; and

(ii) in the case of Civil proceedings, on the date of presentation of the plaint in the Court."

13. From the aforesaid provisions, it is clear that the regular pension or gratuity, or both either in full or in part can be withheld by the Government if the employee is found guilty in the Departmental proceeding or Judicial proceeding for grave misconduct or negligence in duty during the period of his service including the service rendered in re-employment after retirement. Further the Departmental proceeding as stated in Sub-Rule (2) of Rule 7 should be instituted while Government servant was in service, whether before his retirement or during his re-employment but after the final retirement of the Government servant, same be deemed to be a proceeding pending under this Rule. Moreover, in case of Departmental proceeding if not instituted the Government servant while in service whether before his retirement or during his re-employment, shall be instituted with the sanction of the Government and shall not in respect of an event which took place more than four years before such institution. Thus, the Departmental proceeding after the Government servant retires is remotely possible but with certain riders even if the Departmental proceeding is started after retirement of the Government servant, the procedure applicable to Departmental proceeding where major penalty is inflicted must be followed.

14. In the instant case, the Departmental Proceeding against late Rabindranath Samal was started four months after his retirement of course with respect to his unauthorized absence for the period from 12.9.1989 to 5.10.1989, 7.10.1989 to 29.10.1989, 23.8.2002 to 31.8.2002, 1.10.2002 to 28.1.2003, 29.1.2003 to 1.6.2003, 31.3.2004 to 1.4.2004, 3.4.2004 to 14.4.2004 and from 16.4.2004 to 28.2.2006. But in the counter the opposite party has not admitted about sanction of the State Government obtained to start such Departmental proceeding. When the sanction of the Government is not obtained, such Departmental proceeding sans merit.

15. For conducting the Departmental proceeding there is clear instruction in Rule 7 (2)(b)(iii) of the OCS (Pension) Rules to follow the normal procedure as required for imposing major penalty or minor penalty. The

enquiry was neither proceeded in accordance with OCS (CCA) Rules nor under the OSRTC Employees (CR&CS) Regulations because as it appears from Annexure-3, notice was not served on the petitioner. In para-2 of the enquiry report vide Annexure-3, it is clearly stated that the notice was issued to late Rabindranath Samal while he was alive but it was received by one Baidhar Samal. On the other hand, the notice was not served on the delinquent late Rabindranath. If there was notice served on someone else other than the delinquent, the notice could have been sent again to be served on the person concerned. Apart from it, the enquiry report shows that the enquiry went ex parte without giving opportunity to the delinquent Rabindranath Samal to defend his case. When there is no valid notice served and the delinquent was not heard, there is serious violation of the principles of natural justice to late Rabindranath Samal. Even Annexure-4 shows that the opposite party being the disciplinary authority has not issued any notice to the delinquent complying Rule 15 (10) of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 read with Regulations 136 (18), 138, 141, 144 and 110 (1)(2)(3) of the OSRTC Employees (CR&CS) Regulations, 1978 as it appears from the following order:

> "ODISHA STATE ROAD TRANSPORT CORPORATION: BHUBANESWAR
> No.16116/OSRTC, Dt.22.09.2007
>
> OFFICE ORDER
>
> Sri Rabindra Nath Samal, Jr. Stenographer, OSRTC, (now retired) was proceeded against vide D.D.P.No.10960 dt.6.7.2006, for the charge of gross misconduct/dereliction in duty and for remaining absent unauthorisedly from duty for the period from 31.3.04 to 1.4.04, 3.4.04 to 14.4.04 and 16.4.04 till the date of his retirement i.e. 20.2.2006.
>
> Sri Samal, failed to submit his defence explanation, though the proceeding was received by him. The charges were enquired into by the DTM (A), OSRTC, Samablpur who hold him guilty of the charges.
>
> After careful consideration of the facts in issue and perusal of records, it is hereby ordered that the period of absence is treated as no pay and his superannuation dues calculated @ pay drawn as on 16.4.2004.

The proceeding is disposed of accordingly.

Sd/- B.K. Behera,
Managing Director,
OSRTC"

Hence, the initiation of Departmental proceeding being de hors to the Rule 7 of the OCS (Pension) Rules read with the OCS (CCA) Rules and the OSRTC Employees (CR&CS) Regulations, 1978, same collapsed to face the test the provisions of law.

16. In the counter at clause-(ii) of paragraph-3 the opposite party admitted that the following periods of absence were regularized:

(a) 12.09.89 to 05.10.89, 07.10.89 to 29.10.89 & 23.08.02 to 31.08.02 – Leave without pay,

(b) 01.10.02 to 28.01.03 – Earned Leave,
© 29.01.03 to 01.06.04 – Half Pay Leave

On going through Annexure-5, it appears that the period from 12.9.89 to 05.10.89 and 07.10.89 to 29.10.89 (strike period) was treated as extraordinary leave but same was not allowed to be counted towards his future increment. Similarly, vide Annexure-7 the OSRTC has granted EOL to late Rabindranath Samal as follows:

(1)	E.O.L. for a period of	= 4 days	from 15.6.92 to 18.6.92
(2)	-do-	= 18 -do-	14.7.92 to 31.7.92
(3)	-do-	= 30 -do-	01.08.92 to 19.10.92
(4)	-do-	= 169 -do-	01.01.93 to 18.06.93
(5)	-do-	= 03 -do-	02.08.93 to 04.08.93
(6)	-do-	= 01 day on	11.08.93

It is also revealed from Annexure-7 that the above period of EOL will not count towards his future increment as per Rule 78 (ii) of OSRTC (CR&CS) Regulation-78. When in the counter opposite party admitted that these periods have been regularized for the pension purpose, the question of not counting towards increment for those periods remained nip in the bud. On the other hand, these periods must be counted towards qualifying service to receive pension. It is needless to say that vide Annexure-6, the period of leave has been also regularized and there is no any order to refuse future increment for such period as mentioned in Annexure-6.

17. Annexure-8 is the letter of the Administrative Department of the OSRTC in the Government of Orissa and they, except outstanding dues of Rs.26,265/-, allow all other pensionary benefits of late husband of the petitioner, for which the Government sent letter to A.G., Orissa to sanction the pension as per law with effect from 28.2.2006. When the State Government being the superior authority having not taken the punishment for unauthorized absence into consideration and recommended for availing regular pension on 12.12.2011, the punishment awarded for unauthorized absence or any order of disciplinary authority otherwise have no leg to stand. There is clear order available from Pension Payment Order that the family pension would be commenced from 20.5.2008 just on the next day of death of late Rabidnranath, the husband of the petitioner.

18. In terms of the above discussion, there is irresistible conclusion reached out that the Departmental proceeding being illegal, punishment imposed on late delinquent Rabindranath is illegal, improper and de hors to the provisions of law and principles of natural justice. Point No.(i) is answered accordingly.

POINT NO.(ii)

19. It is the case of the petitioner that due to Departmental proceeding for unauthorized absence and punishment thereon, the amount of pension could not be refixed because the opposite party vide order dated 22.9.2007 fixed up the pension as pay drawn on 16.4.2004 but not on 28.2.2006. Not only this but also the opposite party treated the period of absence on which Departmental proceeding was started "as no work no pay". So, when the pension on the last pay drawn is calculated minusing those days, the pension becomes much less, similarly family pension also becomes meager. On the other hand, the opposite party claims that the pension has been rightly paid as per Regulation of the said organization. Since the petitioner's husband did not perform any duty for the said period, these period cannot be counted towards qualifying service. Of course, this plea in para-6 of the counter is contrary to para-2 of the counter because for the period of absence in duty for which Departmental proceeding was started is understood to have not regularized but for other period the absent period has been regularized as per Para-3(iii) of the counter. However, it has been already held in the aforesaid para that the Departmental proceeding for the period of absence is illegal and against the principles of natural justice. Consequently the period of absence cannot be said to be unauthorised and they must be counted for qualifying

service for the purpose of retirement benefits particularly when in Annexure-8 Government has treated late Rabindranath to have superannuated on 28.2.2006, his pension must be calculated basing on the pay refixed as on 28.2.2006 as the pay on that date would be treated of the pay drawn by late Rabindranath. It cannot be 16.4.2004 as ordered by opposite party in Annexure-4. Be that as it may, the fact remains that late Rabindranath's pension must be re-fixed after counting the period of absence which was not proved to be unauthorized under the Departmental Proceeding as qualifying service and accordingly the family pension of the petitioner would require revisit to re-fix the same. Point No.(ii) is answered accordingly.

CONCLUSION

20. It has been already held that the Departmental Proceeding being initiated without sanction of law and punishment awarded thereby being violative of principles of natural justice and de hors to the provisions of law, Annexure-4 is liable to be quashed and the Court do so. Similarly, Annexures-5 and 7 being not passed without affording reasonable opportunity to late Rabindranath of being heard, same are liable to be quashed and accordingly they are quashed. It has been already observed above that the husband of the petitioner is entitled to re-fixation of pay by counting his service period up to 28.2.2006 as qualifying service and accordingly re-fixation of the pension of late Rabindranath and family pension of the petitioner being imperative, it is hereby directed that the opposite party would re-fix the pension of late Rabindranath from 28.2.2006 and also re-fix the family pension of the petitioner from 20.5.2008 within a period of two months from the date of this order. Opposite party is further directed to pay the differential amount of arrear pension of late Rabindranath to petitioner within two months from the date of re-fixation of pension and also pay the arrear family pension as well as current family pension after re-fixation of the same within same period of two months, failing which opposite party has to pay same with interest at the rate of 18% per annum from the date of this order till the actual payment. The writ petition is disposed of accordingly.

Writ petition disposed of.