SUPREME COURT OF INDIA

R. BANUMATHI, J. & A.M. KHANWILKAR, J.
CIVIL APPEAL NO. 3609 OF 2017

DEEPA E.V. .....Appellant (s)

.Vrs.

UNION OF INDIA & ORS. .....Respondent(s)

SERVICE LAW – Whether, the appellant, who exercised her option as an OBC candidate, availed age relaxation and attended the interview, can have any right to be appointed under the general category if she secures more marks than the last candidate in the general category ? Held, No

In this case, the appellant had applied for the post of Laboratory Assistant as an OBC candidate and attended the interview – Out of eleven OBC candidates she secured 82 marks but one Serena Joseph got appointed by securing 93 marks – In the other hand none of the general category candidates secured minimum cut off marks i.e. 70% - So she filed writ petition to be accommodated in the general category – Writ petition dismissed by the learned single Judge and confirmed in the intra Court appeal – Hence the present appeal – Held, the appeal has no merit, hence dismissed. (Paras 7 to 10)

Case Law Referred to :-

1. (2010) 3 SCC 119 : Jitendra Kumar Singh and Another v. State of Uttar Pradesh & Ors.

For Petitioner(s) : Ms. Liz Mathew
For Respondent(s) :

Date of Judgment : 06.04.2017

JUDGMENT

R. BANUMATHI, J.

1. This appeal arises out of the judgment of the Kerala High Court in Writ Appeal No.827 of 2015 dated 20.07.2015 whereby the Division Bench affirmed the order passed by the learned Single Judge.

2. The appellant applied for the post of Laboratory Assistant Grade II in Export Inspection Council of India functioning under the Ministry of Commerce and Industry, Government of India. The appellant belongs to Dheevara community which is one of the "Other Backward Class". Since the

appellant was aged 26 years, she got age relaxation, as was granted to OBC category candidates. The appellant was one of the eleven candidates from OBC who were called for interview. The appellant secured 82 marks (in the list of candidates from OBC category). One Ms. Serena Joseph (OBC), who secured 93 marks was selected and appointed.

3. Insofar as the general category is concerned, no candidate has secured the minimum cut off marks i.e. 70 marks. Stating that the appellant has to be accommodated in the general category, she filed a Writ Petition before the High Court, which the learned Single Judge dismissed by judgment dated 16.1.2015. Being aggrieved, the appellant challenged the same in Writ Appeal No.827 of 2015, which came to be dismissed, which is impugned in this appeal.

4. The appellant, who has applied under OBC Category by availing age relaxation and also attending the interview under the 'OBC Category' cannot claim right to be appointed under the General Category.

5. The recruitment by the Export Inspection Council of India which is functioning under the Ministry of Commerce, Government of India is governed by the Export Inspection Agency (Recruitment) Rules, 1980. As per Rule 9, the Rules regarding relaxation of age limits and other concessions are to be governed by the Rules and also the orders issued by the Central Government from time to time in this regard. Rule 9 reads as under:-

> "9. Saving:
>
> Nothing in these rules affect reservations, relaxation of age limit and other concessions required to be provided for the Scheduled Caste, Scheduled Tribes and other special categories of persons in accordance with the orders issued by the Central Government from time to time in this regard."

6. Department of Personnel and Training had issued proceedings O.M. No.36012/13/88-Estt. (SCT), dated 22.5.1989 and OM No.36011/1/98-Estt. (Res.), dated 1.7.1998 laying down stipulation to be followed by the various Ministries/Department for recruitment to various posts under the Central Government and the reservation for SC/ST/OBC candidates. The proceedings reads as under:-

> "G.I. Dept. of Per. & Trg., O.M. No. 36012/13/88-Estt. (SCT), dated 22.5.1989 and OM No.36011/1/98-Estt. (Res.), dated 1.7.1998.

"Subject:- Reserved vacancies to be filled up by candidates lower in merit or even by released standards candidates selected on their own merits not to be adjusted against reserved quota.

As part of measure to increase the representation of SC/ST in the services under the Central Government, the Government have reviewed the procedure for implementation the policy of reservation while filling up reserved share of vacancies for Scheduled Castes and Scheduled Tribes by direct recruitment. The practice presently being followed is to adjust SC/ST candidates selected for direct recruitment without relaxation of students against the reserved share of vacancies. The position of such SC and ST candidates in the final select list, however, was determined by their relative merit as assigned to them in the selection process. When sufficient number of suitable Scheduled Caste and Scheduled Tribe candidates were not available to fill up all the reserved share of vacancies, SC/ST candidates were selected by relaxed standards.

2. It has now been decided that in cases of direct recruitment to vacancies in posts under the Central Government, the SC and ST candidates who are selected on their own merit, without relaxed standards along with candidates belonging to the other communities, will not be adjusted against the reserved share of vacancies. The reserved vacancies will be filled up separately from amongst the eligible SC and ST candidates which will thus comprise SC and ST candidates who are lower in merit than the last candidate on the merit list but otherwise found suitable for appointment even by relaxed standards, if necessary.

3. All Ministries/Departments will immediately review the various Recruitment Rules/Examination Rules to ensure that if any provision is contrary to the decision contained in previous paragraph exist in such rules, they are immediately suitably modified or deleted.

4. These instructions shall take immediate effect in respect of direct recruitment made hereafter. These will also apply to selections where though the recruitment process has started, the result have not yet been announced unless in the Examination/Recruitment Rules or in the advertisement notified earlier there is a specific provision to the contrary and the manner in which the SC/ST vacancies could be filled has been indicated.

> Clarification:- The instructions contained in the above OM apply in all types of direct recruitment whether by written test alone or written test followed by the interview alone.
>
> 2. The above OM and the O.M. No.36012/2/96-Estt.(Res.), dated 2.7.1997 provide that in cases of direct recruitment, the SC/ST/OBC candidates who are selected on their own merit will not be adjusted against reserved vacancies. 3. In this connection, it is clarified that only such SC/ST/OBC candidates who are selected on the same standards as applied to general candidates shall not be adjusted against reserved vacancies. In other words, when a relaxed standard is applied in selecting an SC/ST/OBC candidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates, etc., the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies." (Underlining added)

7. On a combined reading of Rule 9 of the Export Inspection Agency (Recruitment) Rules, 1980 and also the proceedings dated 1.7.1998, we find that there is an express bar for the candidates belonging to SC/ST/OBC who have availed relaxation for being considered for General Category candidates.

8. Learned counsel for the appellant mainly relied upon the judgment of this Court in ***Jitendra Kumar Singh and Another v. State of Uttar Pradesh and Others, reported in (2010) 3 SCC 119***, which deals with the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and Government order dated 25.3.1994. On a perusal of the above judgment, we find that there is no express bar in the said U.P. Act for the candidates of SC/ST/OBC being considered for the posts under General Category. In such facts and circumstances of the said case, this Court has taken the view that the relaxation granted to the reserved category candidates will operate a a level playing field. In the light of the express bar provided under the proceedings dated 1.7.1998 the principle laid down in Jitendra Kumar Singh (supra) cannot be applied to the case in hand.

9. Learned senior counsel appearing for the respondents has also drawn our attention to paragraph Nos.65 and 72 in Jitendra Kumar Singh (supra) to contend that principle in Jitendra Kumar Singh (supra) are in the context of

interpretation of U.P. Act 1994 and in the particular factual situation of the said case. Paragraphs 65 and 72, read as under:-

> "65. In any event the entire issue in the present appeals need not be decided on the general principles of law laid down in various judgments as noticed above. In these matters, we are concerned with the interpretation of the 1994 Act, the Instructions dated 25.3.1994 and the G.O. dated 26.2.1999. The controversy herein centres around the limited issue as to whether an OBC who has applied exercising his option as a reserved category candidate, thus becoming eligible to be considered against a reserved vacancy, can also be considered against an unreserved vacancy if he/she secures more marks than the last candidate in the general category.
>
> 72. Soon after the enforcement of the 1994 Act the Government issued instructions dated 25.3.1994 on the subject of reservation for Scheduled Castes, Scheduled Tribes and other backward groups in the Uttar Pradesh Public Services. These instructions, inter alia, provide as under:-
>
> "4. If any person belonging to reserved categories is selected on the basis of merits in open competition along with general category candidates, then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be immaterial that he has availed any facility or relaxation (like relaxation in age limit) available to reserved category."
>
> From the above it becomes quite apparent that the relaxation in age limit is merely to enable the reserved category candidate to compete with the general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in the standard for selection, based on the merit of the candidate in the selection test i.e. Main Written Test followed by Interview. Therefore, such relaxations cannot deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive examination. Sub-section (2) of Section 8 further provides that Government Orders in force on the commencement of the Act in respect of the concessions and relaxations including relaxation in upper age limit which are not

inconsistent with the Act continue to be applicable till they are modified or revoked."

10. Having regard to the observations in paragraphs 65 and 72, in our view, the principles laid down in Jitendra Kumar Singh (supra) cannot be applied to the case in hand. As rightly pointed out by the High Court that judgment in Jitendra Kumar Singh (supra) was based on the statutory interpretation of the U.P. Act, 1994 and Government order dated 25.3.1994 which provides for entirely a different scheme.

11. Be it noted, in the instant case, the appellant has not challenged the constitutional validity of the proceedings dated 1.7.1998 read with Rule 9 of the Export Inspection Agency (Recruitment) Rules, 1980. On a perusal of the prayer made in the writ petition we find that the appellant has only sought for a declaration that Exhibit P5 (proceedings dated 1.7.1998) is not binding on the appellant. No argument was canvassed challenging the constitutional validity of the proceedings before the learned Single Judge or before the Division Bench of the High Court.

12. We do not find any merit in this appeal, which is, accordingly, dismissed.

13. Pending applications, if any, shall stand disposed of.

14. There shall be no orders as to costs.

Appeal dismissed.

2017 (I) ILR - CUT- 922

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

W.P.(C) . NO. 16897 OF 2016

NESTOR PHARMACEUTICALS LTD. & ANR. ……..Petitioners

.Vrs.

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

TENDER – Cancellation of bid – When – Bid can only be canceled for non-compliance of essential terms and conditions but not for ancillary or subsidiary conditions of the bid documents.

In this case O.P.No.2-Corporation invited e-tenders for supply of drugs and medical consumables – Petitioner submitted its bid – Bid rejected on the ground that "Original EMD instrument in the shape of Bank Guarantee not furnished" – Hence the writ petition – Corporation could have relaxed procedural conditions, which were not essential, especially where it would be financially beneficial for the corporation – Since the Bank Guarantee submitted by the petitioner-company was in the format, being a valid Bank Guarantee, deviation if any from the tender conditions could not be classified as an essential condition of the tender document but it can only be treated as merely ancillary or subsidiary defect – Held, the impugned order is quashed –The financial bid of the petitioner-company, for the items for which the petitioner had submitted its bid, shall be opened and dealt alongwith the financial bids of other bidders and in case the petitioner is found to be the lowest bidder for the items in question, the OPP. Party-corporation shall ensure that the contract be given to the petitioner-company.

(Paras 20 to 23)

Case Law Referred to :-

1. (1991) 3 SCC 273 : AIR 1991 SC 1579 : M/s. Poddar Steel Corporation vs. M/s. Ganesh Engineering Works & Ors.
2. 2013 (6) Supreme 521 : Rashmi Metaliks Ltd. vs. Kolkata Metropolitan Development Authority.
3. (2006) 11 SCC 548 : B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. &Ors.

For Petitioner : M/s. Ashok Mohanty, Sr. Adv.
M/s. B.Jena & A.Naik

For Opp. Party : M/s B.P. Tripathy, R. Achary,T.P. Brik, A.Pati & S.Hidayutulla & Mr. B.P. Pradhan, AGA.

Date of judgment : 12.04.2017

JUDGMENT

VINEET SARAN, CJ.

Opposite party-The Odisha State Medical Corporation Limited (for short, 'Corporation') published a notice on 27.05.2016 inviting e-tenders from the bidders for *"Supply of drugs and medical consumables (Group-I) for the year 2016-17 on rate contract basis"*. The last date for submission of tender was initially fixed for 11.07.2016, which was extended up to 29.07.2016. In terms of Paragraph-6.14 of the tender document, prior to the filing of the tenders, the prospective bidders were invited for a pre-bid

meeting, which was held on 04.06.2016. The petitioner-Company submitted its bid on 25.07.2016 for 31 items for supply of drugs and medical consumables. Then by order dated 15.09.2016 passed by the Tender Evaluation Committee, the bid document of the petitioner was rejected on the ground that *"original EMD instrument in shape of BG not furnished/uploaded"*. Then on 21.09.2016, the petitioner made a representation to opposite party no.2-Corporation, which was not considered, and on 22.09.2016, the financial bids of the other qualified bidders were opened. On the next very day, i.e. on 23.09.2016, the petitioner-Company filed this writ petition challenging the rejection of its bid document vide order dated 15.09.2016 passed by the Tender Evaluation Committee and for directing the opposite party no.2 to accept the bid of the petitioner with regard to 31 items, for which it had participated.

2. We have heard Shri Asok Mohanty, learned Senior Counsel appearing along with Shri A. Naik, learned counsel for the petitioner; as well as Shri B.P. Tripathy, learned counsel for the contesting opposite party no.2-Corporation and also Shri B.P. Pradhan, learned Addl. Govt. Advocate for the State-pro forma opposite party no.1. Pleadings between the contesting parties have been exchanged and with consent of learned counsel for the parties, we are disposing of the writ petition at the admission stage.

3. The undisputed facts of the case are that clause 6.5 of the tender document relating to *'Payment for e-tender'*, provided for the Bank Guarantee (BG) format for furnishing Earnest Money Deposit (EMD) which was to be submitted in the format provided under Annexure-IV to the document or else it was liable to be rejected.

4. The dispute in the present petition is with regard to the nature of the Bank Guarantee for an amount of Rs.96,84,000/- which was submitted by the petitioner, which was not in the format of Annexure-IV but was as per the Structured Financial Messaging System (SFMS).

5. It is not disputed that during the pre-bid meeting held on 04.06.2016, a clarification was sought by a prospective bidder, to which the Corporation gave a reply, because of which, learned counsel for the petitioner contends that the petitioner was required to, or could have submitted the Bank Guarantee through Structured Financial Messaging System (for short, 'SFMS'). Learned counsel for the petitioner submits that because of such clarification, the petitioner had actually submitted Bank Guarantee through SFMS, regarding which the details had been given in the clarification submitted by the Corporation.

6. The relevant query and the clarification given, being vital for the decision of this case, are reproduced herein below:

Queries raised by the prospective bidders	**Clarifications/amendments in response to the queries**
What will be minimum validity of the Bank Guarantee for EMD	**Clear Explanation**: EMD in shape of Bank Guarantee shall be valid up to 27.05.2017. Bank Guarantee from Structured Financial Messaging System (SFMS) enabled bank shall only be accepted. The Bank Details for generating Bank Guarantee is as follows: **IFS Code: UBIN0538086** **Branch Code: 538086**

7. The contention of the learned counsel for the petitioner is that besides responding to the query made, which was relating to the minimum validity of the Bank Guarantee to be furnished, the Corporation had further clarified that the Bank Guarantee was to be from SFMS enabled bank only and the bank details for generating such Bank Guarantee was also provided. The submission, thus, is that it would clearly mean that the SFMS mode of furnishing Bank Guarantee was an acceptable form.

8. Learned counsel has further relied on the instructions issued by the Ministry of Finance vide communication dated 17.07.2012 to all the Chief Executive Officers of the Public Sector Banks, which provided that no Public Sector Bank can issue any Letter of Credit (LC) or Bank Guarantee (BG) after 01.08.2012 except through SFMS. Learned counsel has thus submitted that in terms of the aforesaid instructions issued by the Ministry of Finance to all the Public Sector Banks, and also in terms of the aforementioned clarification issued by the Corporation in response to the query raised by the prospective bidder, the position stood clear that SFMS mode of providing Bank Guarantee was acceptable or rather required to be accepted.

9. Learned counsel for the petitioners has further submitted that the Bank Guarantee furnished by the petitioner, having been so submitted in a mode which was duly acceptable in banking terms, and also so directed by the Ministry of Finance vide its communication dated 17.07.2012, ought not to have been rejected as there is no evidence to the effect that such Bank Guarantee so furnished by the petitioner was not an acceptable or valid guarantee.

10. Shri Mohanty, learned Senior Counsel has also relied upon the communication of the Corporation dated 12.09.2016 whereby the

Corporation has itself sought clarification from the Assistant General Manager of Union Bank of India as to whether such Bank Guarantee through SFMS, as furnished by the petitioner, would be acceptable or not. According to the petitioner, the very fact that such clarification was sought by the Corporation would mean that after having issued the clarification in this regard in the pre-bid meeting, the Corporation had prima facie been of the view that SFMS mode of providing Bank Guarantee was in fact acceptable, or else they would have outright rejected the same.

11. In support of his submission that the Corporation could have relaxed the procedural conditions, which were not essential conditions of the bid documents, especially where it would be financially beneficial for the Corporation, learned counsel for the petitioner has relied on the following decisions:

(i) M/s. Poddar Steel Corporation vs. M/s. Ganesh Engineering Works and others, (1991) 3 SCC 273;

(ii) Rashmi Metaliks Ltd. & Anr. Vs. Kolkata Metropolitan Development Authority & Ors. 2013 (6) Supreme 521;

(iii) B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and others (2006) 11 SCC 548;

12. *Per contra,* Shri B.P. Tripathy, learned counsel appearing for the opposite party-Corporation has contended that clause 6.5 clearly provides that "*Bank Guarantee submitted in format other than Annexure-IV will be liable for rejection*". It is contended that such being the condition, coupled with the fact that unless there was proper amendment in the technical specifications as well as terms and conditions of the tender made after the pre-bid meeting, the Bank Guarantee submitted in any form other than Annexure-IV, could not have been accepted. As regards pre-bid clarification given to the query made, which has been reproduced herein above, learned counsel has contended that though after answering the query relating to the minimum validity period of the Bank Guarantee, further clarification was not required to be given. However, even the further clarification which was given, only provided that Bank Guarantee from SFMS enabled bank was to be accepted, which, according to him, would mean that the normal Bank Guarantee, as provided under Annexure-IV, was to be given only from a bank which was SFMS enabled. He has, however, not been able to explain as to why the bank details for generating Bank Guarantee were also given in the clarification provided by the Corporation.

13. Shri Tripathy has, however, submitted that in response to the query made by the Corporation from the bank vide communication dated 12.09.2016, the bank had responded on 14.09.2016 stating that the original Bank Guarantee would be required for invoking the Bank Guarantee, and thus relying on the said communication the Corporation rejected the tender of the petitioner.

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

15. What is to be considered by this Court is whether the petitioner-Company was genuinely misguided by the clarification issued by the Corporation in its pre-bid meeting held on 04.06.2016.

16. By having specifically stated that the Bank Guarantees from SFMS enabled bank were to be accepted and thereafter also giving bank details for generating such Bank Guarantee, what we find is that the Corporation was open to accept the Bank Guarantees furnished in the SFMS formant also. If the same was not so, the Corporation would not have sought for clarification from the bank vide its communication dated 12.09.2016. Even otherwise, the Bank Guarantee in SFMS format is an acceptable mode, as even the Ministry of Finance had directed all the Public Sector Banks not to issue Bank Guarantees after 01.08.2012 except through SFMS. It may be true that even after 01.08.2012, banks may be issuing Bank Guarantees in formats other than SFMS format, but the very fact that the Ministry of Finance has issued specific instructions with regard to Bank Guarantee to be issued in SFMS format would necessarily make it an acceptable mode, coupled with the fact that while giving its clarification, the Corporation had given the bank details for issuing Bank Guarantee in SFMS format. Thus, the Bank Guarantee, in SFMS format as submitted by the petitioner cannot be faulted and be a reason for rejection of the bid of the petitioner on such ground.

17. The Apex Court, in the case of ***M/s. Poddar Steel Corporation vs. M/s. Ganesh Engineering Works and others****, (1991) 3 SCC 273 : AIR 1991 SC 1579,* has held that in a tender notice, the requirements can be classified into two categories, namely, 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 that which may be only procedural.

While considering the case of ***M/s. Poddar Steel Corporation*** *(supra),* the Apex Court, in paragraph-6 of the said judgment, has held as under:

> "*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 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."*

18. Further, the Apex Court in the case of ***Rashmi Metaliks Ltd. vs. Kolkata Metropolitan Development Authority,*** *2013 (6) Supreme 521,* while dealing with a case where the requirement of the tender document was that the tenderer should file the latest Income Tax Return which had not been filed, 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 Apex Court observed that such a clause is not an essential element or ingredient or concomitant of the subject NIT. In such facts, it was held that -

> *"....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 appreciable different...."*

19. Further, the Apex Court in the case of ***B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and others*** *(2006) 11 SCC 548* has held that while rejecting a tender for reasons of non-compliance of terms which are not

essential terms of contract, then where huge public money is involved, public sector undertakings may keep the principles of good corporate governance in mind and accept such tender which is economically beneficial to it. The relevant paragraph-69 of the said judgment is reproduced hereinbelow:

> *"69. While saying so, however, we would like to observe that having regard to the fact that huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it. It may be true that essential terms of contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. ....."*

20. In the present case, learned counsel for the petitioners has submitted that the financial bids of all other bidders are known and according to learned counsel, the bid of the petitioner-Company, which has yet not been opened, is substantially lower than the lowest bid submitted by other bidders for at least 6 to 8 of the items for which the petitioner-Company has submitted its bid, and if the bid of the petitioner is allowed to be rejected, the opposite party-Corporation would suffer a loss of nearly Rs.2.00 crores.

21. Applying the aforesaid principles of law as laid down by the Apex Court to the facts of the present case, we are of the opinion that so long as the Bank Guarantee submitted by the petitioner-Company was in the format, which was an acceptable one, as per the clarification issued by the Corporation itself in the pre-bid meeting held on 04.06.2016 and also as per the instructions of the Ministry of Finance issued on 17.07.2102, the deviation, if any, from the tender conditions could not be classified as that of an essential condition of the tender document, and is only to be treated as merely ancillary or subsidiary with the main object to be achieved by the condition.

22. We are, thus, of the opinion that in the present case, the condition for providing the Bank Guarantee in a particular format was not essential, so long as the Bank Guarantee so furnished was a valid Bank Guarantee, and furnished in terms of the clarification issued by the Corporation in the pre-bid

meeting, and the same was also in terms of the instructions issued by the Ministry of Finance dated 17.07.2012. As such, we are of the opinion that the impugned order dated 15.09.2016 passed by the Tender Evaluation Committee, rejecting the tender of the petitioner, is liable to be quashed.

23. Accordingly, for the foregoing reasons, the writ petition stands allowed, the order dated 15.09.2016 passed by the Tender Evaluation Committee of the opposite party-Corporation is quashed. The financial bid of the petitioner-Company, for the items for which the petitioner-Company had submitted its bid, shall be opened and dealt along with the financial bids of other bidders for such items. In case the petitioner-Company is found to be the lowest bidder for the items in question, the opposite party-Corporation shall ensure that the contract for supply of such drugs and medical consumables, henceforth, be given to the petitioner-Company.

It is further clarified that in case certain supplies, for the items for which the petitioner-Company is found to be the lowest bidder, have already been made by any other party, the same shall be treated as proper supply but no further orders shall be given to such other party for the items for which the petitioner-company is found to be the lowest bidder and the contract for the remaining period for supply of such items shall be given in favour of the petitioner-Company. No order as to costs.

Writ petition allowed.

2017 (I) ILR - CUT-930

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

W.A. NO. 324 OF 2016

ABDULRAB I. SOUDAGAR .....Appellant

.Vrs.

UNION OF INDIA & ORS. .....Respondents

SERVICE LAW – Transfer of the appellant, a constable in CISF – Order challenged on the ground of Malafide exercise of power – "Malafide" must be specifically pleaded and proved by the person who makes it – The Court cannot read into the intention of the person alleging malafide, to give an interpretation in absence of specific pleading to that effect.

In this case the petitioner being a CISF personnel should always be alert and treated to be on duty and may require his transfer for operational exigency – The respondents in their counter explained the exigency and required the appellant to be transferred with regard to his doubtful activities, as the place where the appellant was posted, there have been some mishaps due to security lapses – Though sufficient joining time was not given to the appellant, that itself is not sufficient to mean that the order of transfer is bad or with malafide intention – Held, transfer order in case of the petitioner has been passed in accordance with law and for sufficient reasons – Order passed by the writ Court warrants no interference by this Bench.

(Paras 9,10,11)

Case Laws Referred to :-

1. AIR 2009 SC 1399 : Somesh Tiwari Vs. Union of India and others
2. 2013 (II) ILR-CUT-377: Manasi Mishra Vs. Union of India & Ors.

For Appellant : Dr.Ashok Ku. Mohapatra, Sr. Advocate
M/s A.K.Mohapatra, B.Panda, S.Samal, S.Kar, S.P.Mangaraj & T.Dash

For Respondents: Mr. Bimbisar Dash, Central Government Counsel

Date of hearing :11.04.2017
Date of judgment :11.04.2017

JUDGMENT

VINEET SARAN, CJ.

Heard Dr. Ashok Kumar Mohapatra, learned Senior Advocate appearing on behalf of the appellant and Sri Bimbisar Dash, learned Central Government Counsel for the respondents.

2. The appellant is a Constable in the Central Industrial Security Force (CISF). Being aggrieved by the order of his transfer dated 14.06.2016 from CISF Unit, Damanjodi, Koraput, Odisha to CISF Unit, BLSM, Bhawanathpur, the appellant filed writ petition bearing W.P.(C). No.10602 of 2016, which was dismissed by order dated 23.06.2016 holding that the transfer is an incidence of service and in absence of any *mala fide* exercise of power, the writ Court would not interfere with the order of transfer. Challenging the same, this writ appeal has been filed on 29.06.2016 and on 01.07.2016 an interim order staying the order of transfer dated 14.06.2016 was granted, which was extended from time to time.

3. A counter affidavit has been filed by the respondents, copy of which was served on learned counsel for the appellant on 04.10.2016 and despite time having been granted, no rejoinder affidavit has been filed.

4. Submission of learned counsel for the appellant is that the appellant was posted in CISF Unit, Damanjodi, Koraput, Odisha in April, 2015 and after a little over one year, he has been transferred to a place in Jharkhand and that too without being given the benefit of joining time. Thus, it is contended by the learned counsel for the appellant that such act of the respondents not permitting the appellant to avail joining time would amount to illegal and inhumane action, which would in effect amount to *mala fide* action of the respondents.

5. During course of argument, Dr. Mohapatra, learned Senior Advocate appearing for the appellant submitted that on 7th October, 2015 a punishment order of 'censure' was awarded, which is under challenge in W.P.(C) No.10602 of 2016, and during pendency of the writ petition, impugned order of transfer was passed. It is, thus submitted on behalf of the appellant that the transfer order has been passed with *mala fide* and illegal intention, which deserves to be quashed. In support of his submission, reliance has been placed upon the decisions in the case of ***Somesh Tiwari Vs. Union of India and others,*** AIR 2009 SC 1399 and ***Manasi Mishra Vs. Union of India & Ors***., 2013 (II) ILR-CUT-377

6. Per contra, Sri Dash, learned Central Government Counsel appearing for the respondents has submitted that the appellant being in security service, is liable to be transferred to any place within India or even outside, depending upon the operational exigencies and requirements at different places. It is also submitted that the place where the appellant was posted, there have been some mishaps due to security lapses. Specific averments have been made in the counter affidavit with regard to doubtful activities of the appellant in connivance with one ex-CISF Constable, namely, Md. Jaleel, who was residing in the CISF campus on the strength of interim order of this Court, even after his dismissal from service, to which no reply has been filed by the appellant.

It is submitted that there was a special report that the appellant, along with said ex-Constable was creating indiscipline in the campus and there was security risk of leakage of information about movement of the security personnel through said ex-Constable because of his close association with the

appellant. Such special report has been filed along with the counter affidavit, to which also no reply has been filed by the appellant.

7. Admittedly, the appellant is in the disciplined force and he has to abide by the order passed by the superior officers. The reason for the transfer is not to be disclosed to the employee. However, in the counter affidavit, the respondents have explained the exigency and requirement of the appellant to be transferred, regarding which we are satisfied. No doubt, some joining time could have been given; but that by itself would not be sufficient to mean that the order of transfer is bad or had been passed with *mala fide* intention.

8. It is further argued on behalf of the appellant that the order of transfer has been passed by the authority, who was not competent to pass such order and he has placed reliance on Rule-74 of the CISF Rules, 2001 and also certain circulars.

However, learned counsel for the respondents raised objection with regard to reliance placed on Rule-74 and circulars issued, as in such regard no such specific ground has been taken, either in the writ petition or in the writ appeal. On being questioned, learned counsel for the appellant has pointed out certain grounds, more particularly averments made in paragraph-34 of the writ appeal, which is quoted hereunder:

> "34. That, the Appellant has already completed the HARD AREAS in North East and hypersensitive unit of LWE (Left Wing Extremism) Areaa, and therefore, should not be posted in Bhawanathpur, which also comes under LWE Are. The Appellant has been transferred (sic) beyond the after 31st March, which is contrary to the CIRCULAR and as a punishment."

However, in our opinion, the above ground is not specific with regard to the point argued by the appellant. We are testing the correctness of the order passed by learned Single Judge and when such a ground was not raised before the learned Single Judge, the same cannot be entertained in the writ appeal. Further, the grounds to be argued, are required to be specifically pleaded, either in the writ petition or in the writ appeal, so that respondents could also know as to on what grounds the challenge has been made. In absence of the same, we are not inclined to entertain such submission of learned counsel for the appellant, as no specific pleadings are there in that regard.

9. In the case of *Somesh Tiwari (supra),* the appellant was an Officer of Indian Revenue Service. While continuing as Deputy Commissioner of Central Excise, Bhopal, the respondents therein, who were apprehending disciplinary action as well as criminal proceedings to be initiated by the appellant, made anonymous complaint against him. Although the complaint made against the appellant therein was found to be false, recommendation was made to transfer the appellant on administrative exigency. Thus, the appellant was transferred to Shillong. Such an action was deprecated by the Hon'ble Supreme Court.

In the case law of *Manasi Mishra (supra),* this Court has only reiterated the principles decided in *Somesh Tiwari's case (supra).* The facts involved in the aforesaid cases are not akin to the present case. Hence, the ratio laid down in the said decisions would not be applicable to the case at hand.

10. '*Mala fide*' alleged must be specifically pleaded and proved by the person who makes it. The impugned order of transfer does not appear to be *mala fide* on the face of it. The Court cannot read into the intention of the person alleging mala fide, to give an interpretation in absence of specific pleading to that effect. The CISF personnel should always be alert and treated to be on duty when on deployment as situation may require for their movement/transfer for operational exigency. On perusal of record, we find no specific allegation has been made, which would constitute *mala fide* against the appellant.

11. Considering the averments made in the counter affidavit, which are to be taken as true, as no rejoinder affidavit has been filed even though time was granted, we are of the opinion that the transfer order in case of the petitioner has been passed in accordance with law and for sufficient reasons. Thus, no interference is called for with the order passed by the writ Court, which is perfectly justified. Accordingly, the writ appeal is dismissed.

Writ appeal dismissed.

2017 (I) ILR - CUT-935

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

W.P.(C) . NO. 5158 OF 2017

KYAL PAPER PRODUCTS PVT. LTD. …….Petitioner

.Vrs.

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

TENDER – Tender call notice issued for printing and supply of report cards – Petitioner alongwith five other bidders participated – His bid was the third lowest – Bids which were the lowest and 2nd lowest were rejected on the grounds of overwriting in the rates quoted – Petitioner's bid was rejected as he was a defaulter in the previous year – Hence the writ petition – Report cards are to be provided to the students within a stipulated time – Since the petitioner is admittedly a defaulter in the previous year even within the extended time, this Court is not inclined to exercise its equity jurisdiction in his favour under article 226 of the Constitution of India – Held, petitioner is not entitled to any relief. (Paras 11,12)

For Petitioner : M.s.Goutam Ku. Acharya (Sr. Adv.)
M/s. Arun Ku. Acharya.

For Opp. Party : Mr. S.K. Samal.
(S.C., Shool & Mass Education Department)

Date of hearing : 05.04.2017
Date of judgment: 05.04.2017

JUDGMENT

VINEET SARAN, CJ.

Heard Mr.Goutam Acharya, learned Senior Advocate for the petitioner and Mr. S.K.Samal, learned Standing Counsel for the School and Mass Education Department.

2. The petitioner is aggrieved by the cancellation of the bid submitted by it for supply of report cards for the year, 2016-17.

3. Brief facts are that in response to the tender call notice dated 17.3.2017 issued by the Chairman, Sarbasikshya Abhiyan, Mayurbhanj-opposite party No.2 for printing and supply of report cards, the petitioner along with five other bidders had participated. The case of the petitioner is that though its bid was the lowest, yet the same was cancelled. According to the petitioner, no order of cancellation was communicated to the petitioner,

but it was informed that the petitioner was a defaulter in the previous year's contract for supply of report cards in which it had not only delayed in supplying the report cards but had also defaulted in making full supplies. Challenging the said action of the opposite parties, this writ petition has been filed.

4. Counter affidavit has been filed on behalf of opposite parties in Court today, which is taken on record. Learned counsel for the petitioner has made a statement that the petitioner does not wish to file rejoinder affidavit.

5. From the chart giving details of the rates quoted by the six bidders, it is clear that the bid of the petitioner was the third lowest. The bids which were the lowest and 2nd lowest were rejected on the ground of there being over writing in the rates quoted. The bid of the petitioner (3rd lowest) has been rejected due to the petitioner being a defaulter in the previous year.

6. It is the admitted position that in the previous year, the petitioner was given the contract for supplying printed report cards by 13.04.2016, which was in respect of 26 Blocks, but it could not supply the report cards within such time, which was then extended to 30.04.2016. Subsequently, the said date for supply was further extended on 21.06.2016 up to 30.07.2016. The petitioner admittedly could not make the supply of all the printed report cards within the extended time also.

7. Learned counsel for the petitioner accepts that out of 26 Blocks, the report cards were supplied by the petitioner up to the extended time of 30.07.2016 in respect of 19 Blocks only, and for the remaining 7 Blocks, the supply could not be made.

8. In such view of the matter, the petitioner does not dispute the fact that it had defaulted in supply of report cards as per terms of the contract in the previous year. The nature of the supply, which is of report cards for the students, is sensitive, in the sense that report cards are to be provided to the students within a stipulated time, for which the supply in the previous year was to be made by 13.4.2016. Admittedly, the petitioner could not make the supply of the reports cards even within the extended time, which was up to 30.07.2016. According to his own case, the petitioner has made partial supply for 19 out of 26 blocks within the extended time and thereafter, the petitioner raised a dispute before the Collector, Mayurbhanj, which is pending consideration. As such, the rejection of case of the petitioner on the ground that it had defaulted in the previous year is perfectly justified.

9. Learned counsel for the petitioner submits that under the terms of the tender call notice, there was no condition that the tenders of defaulters would not be accepted. In the counter affidavit, it has been stated that besides the fact that the petitioner was a defaulter in the previous year, there was overwriting in the rates quoted by the petitioner in the tender for the present year, and for that reason also, the tender of the petitioner was to be rejected. Such ground of over writing has not been mentioned in the order cancelling the tender of the petitioner and is an additional reason given in the counter affidavit which may not be strictly acceptable.

10. Be that as it may, it is noteworthy that considering the nature of the job work which was to be carried out, time is the essence, as report cards are to be provided to the students within the stipulated time. In the counter affidavit, it has been specifically stated that because of the past conduct of the petitioner it has been treated as black listed. It is noteworthy that the averments made in the counter affidavit with regard to overwriting in the rates quoted by the petitioner in the tender papers, as well as the averments made relating to black listing of the petitioner-firm have not been controverted by filing a rejoinder affidavit.

11. Learned counsel for the petitioner has, during the course of argument, contended that there was no overwriting or black-listing order passed. However, considering the fact that the petitioner has chosen not to controvert such averments made in the counter affidavit by filing rejoinder affidavit, the statements made in the counter affidavit are taken as true. Even otherwise, since the petitioner is admittedly a defaulter in the previous year, we would not be inclined to exercise our equity jurisdiction under Article 226 of the Constitution of India in favour of such a defaulter.

12. In view of the aforesaid fact of this case, we are of the opinion that the petitioner would not entitle to grant of any relief, and accordingly, the writ petition is dismissed.

Writ petition dismissed.

2017 (I) ILR - CUT-938

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

O.J.C. NO. 82 OF 1998

BOLANI ORES MINES, RAW MATERIALS, DIVISION (SAIL), BARBIL ……Petitioner

.Vrs.

GOVT. OF INDIA, MINISTRY OF LABOUR, NEW DELHI & ORS. …….Opp. Parties

INDUSTRIAL DISPUTES ACT, 1947 – S.10

R/w Section 10(1) of CLRA Act, 1970

Reference made by Government of India to the Industrial Tribunal for regularization of contract labourers engaged through transport contractors by the petitioner-management – Maintainability of the reference questioned – The appropriate Government has to apply its mind to find out as to whether there exists a prima facie case with regard to existence or apprehension of industrial dispute – A mechanism has been provided U/s 10 (1) of the CLRA Act, 1970 for prohibition of contract labour in an establishment in order to protect the interest of the contract labourers and for that purpose, the appropriate Government has to make a notification in the official Gazette for prohibition of contract labour in that particular establishment – Only after such notification is made U/s 10 (1) of the CLRA Act, the contract labourers can be clothed with a right to be regularized and in case they are not regularized then only an industrial dispute may arise for their regularization – In the present case, there being no such notification, no industrial dispute within the meaning of section 2 (k) of the Act, 1947 can be said to be either existing or apprehended giving rise a situation to make a reference – Held, in the absence of any notification U/s 10 (1) of the CLRA Act, the Industrial Tribunal lacks jurisdiction to adjudicate the impugned reference – Impugned order passed by the Government of India as well as the notice issued by the learned Industrial Tribunal are quashed.

(Paras 7 to 12)

Case Laws Referred to :-

1. 1999 (2) CLR 226 (SC) : Jahangir Ali and others -v- Calcutta Port Trust &Ors.
2. 1972 SC 1942 : Vegoils (P) Ltd. Vs. The Workmen.
3. AIR 2006 SC 3229 : Steel Authority of India Ltd –v- Union of India & Ors.
4. AIR 2001 SC 3527 : Steel Authority of India Ltd. and others –v- National Union Water Front Workers & Ors.

5. 2014 (141) FLR 253: Gopal Das Agrawal –v- Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court & Ors.
6. AIR 1984 SC 153 : D.P. Maheshwari –v- Delhi Administration & Ors.

For Petitioner : Mr. Jagannath Pattnaik, Senior Advocate
M/s. B.Mohanty, T.K.Pattnayak, A.Patnaik, S.Patnaik, R.P.Ray & B.S. Ray

For Opp. Parties : Addl. Government Advocate
M/s. Y.S.N. Murty & P.N. Mishra

Date of Hearing : 25. 04.2017
Date of Judgmen : 25.04.2017

JUDGMENT

K.R. MOHAPATRA, J.

This writ petition has been filed by the Management of Bolani Ores Mines, Raw Materials Division (SAIL), Barbil assailing the order dated 30.10.1996 (Annexure-5) passed by the Ministry of Labour, Government of India in making a reference to the Industrial Tribunal, Bhubaneswar for adjudication, which is quoted here under:

> "Whether the contractors' workers engaged through M/s Allied Transport & M/s. Ores India should be regularized by the management of Bolani Ores Mines, RMD/SAIL, Bolani in line with clause 3.5.1.2 of the NJCS agreement dated 18.5.1995? If not, what relief the workmen are entitled to?"

2. The genesis, in a nut shell, that gives rise to this writ petition is that the Management of Bolani Ores Mines is an establishment of the Steel Authority of India Limited (for short 'SAIL') at Bolani in the District of Keonjhar, Odisha. It extracts Iron Ores from its captive mines and supplies the same to different industrial undertaking of SAIL through out India. The Raw Materials Division of Bolani Ores Mines (for short 'the Management') engages different transporters for extraction and transportation of Ores from its captive mines. The Labour Contractors also supply contract labourers for carrying out different jobs of the Management at different points of time. While the matter stood thus, opposite party no.2, namely, Barbil Workers Union through its General Secretary gave a strike notice under Section 22 (1)(b) of the Industrial Disputes Act, 1947 (for short, 'the I.D. Act') raising a demand to regularize the contract labourers being engaged through contractors. Subsequently, the matter was taken up by the Assistant Labour Commissioner (Central), Rourkelaopposite party No. 4, who vide letter dated

12.11.1995 had sent a notice to the Management-petitioner to attend the conciliation proceeding in the matter of prohibition/abolition of contract labour system and regularization of contract labourers under the Management-petitioner. Pursuant to the said notice, the representatives of both the petitioner and opposite party no.2-Barbil Workers Union appeared before the Assistant Labour Commissioner (Central), Rourkela-opposite party no.4. Conciliation being failed, the Assistant Labour Commissioner communicated the failure report to the Ministry of Labour, Government of India-opposite party no.1. The Government of India in Ministry of Labour, in turn, referred the matter to the Industrial Tribunal, Bhubaneswar, Odisha for adjudication of the aforesaid reference. Consequently, the Presiding Officer, Industrial Tribunal, Bhubaneswar initiated I.D. Case No. 42 of 1996 (C) on his file and sent notices to the parties concerned including the Management-petitioner to appear and file written statement along with relevant documents vide his notice dated 21.07.1997 (Annexure-6). The petitioner being aggrieved by the action of opposite party no.1 in referring the matter to the Industrial Tribunal for adjudication of the reference under Annexure-5 as well as consequential notice (Annexure-6) issued by the Industrial Tribunal to the petitioner to appear and file written statement for adjudication of the reference, has filed this writ petition.

3. Learned counsel for the petitioner vehemently argued that the reference made by the Government of India– opposite party no.1 is not maintainable and the same is an outcome of total non- application of mind. Neither any industrial dispute exists nor apprehended, which warrants the impugned reference for adjudication. The opposite party no.2- Union had raised a demand for regularization of contract labourers under the Management-petitioner, who were engaged trough different contractors to carry out transportation contracts. He further submitted that the question of regularization of contract labour only arises, when the appropriate Government prohibits engagement of contract labour in an establishment by a notification in the official gazette under Section 10 (1) of the Contract Labour (Regulation and Abolition), Act, 1970 (for short, 'CLRA Act'). There being no such notification published in the official gazette, the reference made by the Government of India is without jurisdiction and not maintainable. The Clause 3.5.1.2 of the NJCS agreement is relevant to take a decision about perennial nature of work in an establishment. The same has no application to the instant case as there is no notification under Section 10(1) of CLRA Act. On the contrary, the Ministry of Labour, Government of India in its letter

dated 19.05.1995 (Annexure-4) had communicated the General Secretary of Indian National Mines Worker Federation, Dhanbad regarding decision with regard to prohibition of Contract Labour System in Iron Ore Mines, which indicates that in pursuance of the recommendation of Central Advisory Contract Labour Board of Ministry of Steel, the appropriate Government has decided not to prohibit employment of contract labour in the Iron Ore Mines in the country. In that view of the matter, the reference made by opposite party no.1 in exercise of power under Section 10 read with 12(5) of the I.D. Act is an outcome of total nonapplication of mind and is not maintainable. Making a reference is not an empty formality. The appropriate Government has to apply its mind to find out as to whether there exists a prima facie case with regard to existence or apprehension of industrial dispute. Further, the reference does not contain the list of names of the workers sought to be regularized. As such, the reference is also vague and non-specific. Hence, he prayed for setting aside the order under Annexure-5 making a reference to the Industrial Tribunal, Bhubaneswar for adjudication as well as for a mandamus to direct the Industrial Tribunal not to proceed with I.D. Case No. 42 of 1996 (C).

4. Learned Central Government Counsel appearing for opposite party no.1 submits that the question of maintainability of the reference can only be challenged before learned Tribunal and not in a petition under Article 226 of the Constitution of India. The Management petitioner without filing any written statement has approached this Court assailing the same. As such, the writ petition is premature. Further, on receipt of the failure report from the Conciliation Officer-opposite party no.4, the Government of India in the Ministry of labour, after due application of mind exercised its jurisdiction by referring the matter to the Industrial Tribunal, Bhubaneswar for adjudication of the reference. The petitioner without participating in the said proceeding has approached this Court assailing the maintainability of the reference on the ground that the opposite party no.1 had no jurisdiction to make such reference. Hence, the writ petition merits no consideration and the petitioner-Management should be relegated to the Industrial Tribunal to raise the issue of maintainability along with others, which can be efficaciously adjudicated by the industrial adjudicator on assessment of the evidence to be adduced by the parties. Hence, he prays for dismissal of the writ petition.

5. We have heard learned counsel for the parties and perused the case record. None appears on behalf of Workers' Union- opposite party no.2 in spite of valid service of notice.

6. In order to delve into the question of maintainability of the reference, it is profitable to go through the provisions of Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970, which reads as follows:

> "10.Prohibition of employment of contract labour.
>
> (1) Notwithstanding anything contained in this Act, the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.
>
> (2) Before issuing any notification under subsection (1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as-
>
> (a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment;
>
> (b) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation that is carried on in that establishment;
>
> (c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto;
>
> (d) whether it is sufficient to employ considerable number of whole-time workmen.
>
> Explanation.—If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final."

7. On a plain reading of the aforesaid provision, it is crystal clear that a mechanism has been provided under the CLRA Act for prohibition of contract labour in an establishment in order to protect the interest of the contract labourers. For that purpose, the appropriate Government has to make a notification in the official gazette for prohibition of contract labour in that particular establishment. Only after such notification is made under Section 10(1) of the CLRA Act, the contract labourers can be clothed with a right to be regularized. In case they are not regularized, then only an industrial dispute may arise for their regularization. Several factors as enumerated in sub-Section (2) of Section 10 of CLRA Act, have to be considered by the

Board before making a recommendation for prohibition/abolition of contract labour. In the instant case, there being no such notification, no industrial dispute within the meaning of Section 2(k) of the I.D. Act can be said to be either existing or apprehended, which would give rise to a situation to make a reference under the provisions of the I.D. Act. To add to it, the Government of India in the Ministry of Labour vide its letter dated 19.05.1995 (Annexure-4) has categorically communicated the General Secretary, Indian National Mines Worker Federation, Dhanbad that the Central Advisory Contract Labour Board has recommended the Ministry of Steel, Government of India not to prohibit employment of contract labour in Iron Ore Mines in the country. As such, the contract labour engaged through M/s Allied Transport and M/s Ores India have no statutory right to be regularized under the management-petitioner, in absence of a notification under Section 10(1) of the CLRA Act.

The Hon'ble Apex Court in the case of *Sheikh* ***Jahangir Ali and others –v- Calcutta Port Trust and others***, reported in 1999 (2) CLR 226 (SC) has categorically held as follows:

> "27. Considering the provisions of Section 10 of the above Act and the various decisions cited on behalf of the parties, the ratio which emerges is that consequent upon abolition of contract labour in a particular establishment by publication of a notification under Section 10(1) of the said Act, the workmen concerned acquire a right to be absorbed in the regular establishment, and such right could be enforced in the writ jurisdiction of the Hon'ble Supreme Court and the High Courts.
>
> 28. In the present case, no such notification has been published as far as "vulcanisers" employed as contract labour under the Calcutta Port Trust are concerned and until such a notification is published, the petitioners in my view, cannot straightaway claim absorption in the regular establishment."

Viewed it from another angle, the industrial adjudicator, in order to answer a reference to regularize the contract labour in an establishment, has to initially take a decision to abolish/prohibit the contract labour system in the said establishment. In view of the clear provisions of Section 10(1) of the CLRA Act, the appropriate Government is only competent to take such a decision by issuing a notification in the official gazette under the said provisions. The Labour Court or Industrial Tribunal cannot assume

jurisdiction to adjudicate the same. The Hon'ble Supreme Court in ***Vegoils (P) Ltd. Vs. The Workmen,*** reported in 1972 SC 1942, held as follows:

> "….Therefore it is reasonable to conclude that the jurisdiction to decide about the abolition of contract labour or to put it differently to prohibit the employment of contract labour is now to be done in accordance with Sec.10. Therefore it is proper that the question whether the contract labour regarding loading and unloading in the industry of the appellant is to be abolished or not is left to be dealt with by the appropriate Government under the Act, if it becomes necessary. On this ground, we are of the opinion that the direction of the Industrial Tribunal in this regard will have to be set aside….
>
> 46. The legality of the direction given by the Industrial Tribunal abolishing contract labour in respect of loading and unloading from May 1, 1971 can also be considered from another point of view. The Central Act, as mentioned earlier, had come into force on February 10, 1971. Under Section 10 of the said Act the jurisdiction to decide matters connected with prohibition of contract labour is now vested in the appropriate Government. Therefore, with effect from February 10, 1971, it is only the appropriate Government that can prohibit contract labour by following the procedure and in accordance with the provisions of the Central Act. The Industrial Tribunal in the circumstances will have no Jurisdiction though its award is dated November 29,1970 to give a direction in that respect which becomes enforceable after the date of the coming into force of the Central Act. In any event such a direction contained in the award cannot be enforced from a date when abolition of contract labour can only be done by the appropriate Government in accordance with the provisions of the Central Act. In this view also it must be held that the direction of the Industrial Tribunal abolishing contract labour with effect from May 1, 1971 regarding loading and unloading cannot be sustained."

Similar view is taken in the case of ***Steel Authority of India Ltd –v- Union of India & Ors.,*** reported in AIR 2006 SC 3229, which is as follows:

> "20. We may reiterate that neither the Labour Court nor the writ court could determine the question as to whether the contract labour should be abolished or not, the same being within the exclusive domain of the Appropriate Government.

> 21. A decision in the behalf undoubtedly is required to be taken upon following the procedure laid down in sub-section (1) of Section 10 of the 1947 Act. A notification can be issued by an Appropriate Government prohibiting employment of contract labour if the factors enumerated in sub-section (2) of Section 10 of the 1970 Act are satisfied."

In that view of the matter, we have no hesitation to hold that in absence of any notification under Section 10(1) of the CLRA Act, the Industrial Tribunal lacks jurisdiction to adjudicate the impugned reference.

8. In order to contemplate an industrial dispute under Section 2(k) of the I.D. Act for regularization of contract labour, in addition to the requirements discussed above, there must be a master and servant relationship between the Management and the Contract Labour engaged under it, who seek regularization. It needs no elaborate discussion in view of the ratio decided in the case of ***Steel Authority of India Ltd. and others –v- National Union Water Front Workers and others***, reported in AIR 2001 SC 3527, wherein the Hon'ble Supreme Court at paragraph-117 held as follows:

> "117. We have also perused all the Rules and Forms prescribed thereunder. It is clear that at various stages there is involvement of the principal employer. On exhaustive consideration of the provisions of the CLRA Act we have held above that neither they contemplate creation of direct relationship of master and servant between the principal employer and the contract labour nor can such relationship be implied upon the provisions of the Act on issuing notification under S.10(1) of the CLRA Act, a fortiorari much less can such a relationship be found to exist from the Rules and the Forms made thereunder."

9. Making a reference under Section 10 read with 12(5) of the I.D. Act is not an empty formality. The appropriate Government has to apply its mind to the conciliation failure report and other attending as well as ancillary facts, circumstance as well as materials available, to come to a conclusion that there exists an industrial dispute between the management and its workmen or such a dispute is apprehended. In the instant case, it appears that the appropriate government has not at all applied its mind before making the impugned reference. As discussed earlier, a contract labour can claim for regularization only when a notification under Section 10(1) of the CLRA Act is published in the official gazette. In absence of such a right of contract labour to claim for

regularization, it cannot be said that there existed and apprehended any industrial dispute within the meaning of Section 2(k) of the I.D. Act.

In **AIR *2006 SC 3229* (supra)**, the Hon'ble Apex Court held as follows:

> "35. There is another aspect of the matter which should also not be lost sight of. For the purpose of exercising jurisdiction under Section 10 of the 1970 Act, the appropriate Government is required to apply its mind. Its order may be an administrative one but the same would not be beyond the pale of judicial review. It must, therefore, apply its mind before making a reference on the basis of the materials placed before it by the workmen and/or management, as the case may be, While doing so, it may be inappropriate for the same authority on the basis of the materials that a notification under Section 10(1)(d) of the 1947 Act be issued, although it stands judicially determined that the workmen were employed by the contractor. The State exercises administrative power both in relation to abolition of contract labour in terms of Section 10 of the 1970 Act as also in relation to making a reference for industrial adjudication to a Labour Court or a Tribunal under Section 10(1)(d) of the 1947 Act. While issuing a notification under the 1970 Act, the State would have to proceed on the basis that the principal employer had appointed contractors and such appointments are valid in law, but while referring a dispute for industrial adjudication, validity of appointment of the contractor would itself be an issue as the State must prima facie satisfy itself that there exists a dispute as to whether the workmen are in fact not employed by the contractor but by the management. We are, therefore, with respect, unable to agree with the opinion of the High Court."

10. Learned counsel for the petitioner has contended that the reference is vague and non-specific as the reference does not contain the list of the names of the workers sought to be regularized. Hence, the reference is incapable of being adjudicated by the industrial adjudicator. In support of his case, learned counsel for the petitioner relied upon the decision of this Court in the case of ***Gopal Das Agrawal –v- Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court and others***, reported in 2014 (141) FLR 253, wherein at paragraph-11, it has been held as follows:

> "11. On a holistic approach to the facts of the case, this Court is of the considered view that the reference made by the Central Government is vague due to lack of the list of workmen. Though the Central Government, after due application of mind, referred the dispute for adjudication without a verified list of workmen received from the Central Government along with the reference, the dispute was adjudicable, for which reasons, the reference is required to be returned. Further, in absence of details of 885 workmen, the reference cannot be answered by the learned Tribunal by adjudicating the same and it will be a futile exercise. If the reference will be adjudicated on merit pending identification, in effect, no specific case of any workman can be decided by the learned Tribunal. Till date, no genuine list of workmen having been made available to the learned Tribunal, this Court finds that the dispute referred to by the Central Government cannot be adjudicated. In view of the above, the impugned order dated 8.9.2006 cannot be sustained, which is accordingly quashed.

11. True it is that, the maintainability of a reference can be adjudicated by the Industrial Tribunal by framing an issue to that effect. But, the parties have to wait till adjudication of reference, to get an answer on the question of maintainability, in view of the ratio decided in ***D.P. Maheshwari –v- Delhi Administration and others*****, reported in AIR 1984 SC 153**, wherein it has been held as follows:

> "We think it is better that tribunals, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardise industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues. Nor should High Courts in the exercise of their jurisdiction under Art. 226 of the Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Art. 226 of the Constitution nor the jurisdiction of this Court under Art. 136 may be allowed to be exploited by those who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Art. 226 and Art. 136 are not meant to be used to break the resistance of workmen in this fashion. Tribunals and Courts who are requested to decide preliminary questions must

> therefore ask themselves whether such threshold partadjudication is really necessary and whether it will not lead to other woeful consequences. After all tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections journeyings up and down. It is also worth while remembering that the nature of the jurisdiction under Art. 226 is supervisory and not appellate while that under Art. 136 is primarily supervisory but the Court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues."

But, in the instance case more particularly, in absence of a notification under Section 10(1) of the CLRA Act, the parties should not be relegated to the industrial adjudicator to participate in the proceeding for adjudication of a reference, which, in law, is not maintainable. In such a situation this Court has ample jurisdiction to exercise is extra ordinary power under Article 226 of Constitution to prevent abuse of process of Court.

Law is no more *res integra* that the question of jurisdiction as well as maintainability can be gone into in a writ jurisdiction under Article 226 of the Constitution, even if an alternative remedy is available, provided that there exists no disputed question of fact.

As such, the writ application is maintainable.

12. In the facts and circumstances of the case and discussions made above, we have no hesitation to hold that the order under Annexure-5 passed by the Ministry of Labour, Government of India, is not sustainable in law. Accordingly, we quash the order under Annexure-5 and also consequential notice issued under Annexure-6 by the learned Industrial Tribunal. Since in the meantime more than two decades have already elapsed and learned counsel for the parties are not in a position to appraise the latest position in the matter, we dispose of the writ application with a direction to the appropriate Government to look into the matter afresh and take a decision by taking into consideration the facts and circumstances of the case, as well as discussions made above.

13. The writ petition is, accordingly, allowed. No order as to costs. LCR be sent back immediately.

Writ petition allowed.

2017 (I) ILR - CUT-949

INDRAJIT MAHANTY, J. & BISWAJIT MOHANTY, J.

W.P.(C) NO. 24421 OF 2012

M/S. SARADA MINES PVT. LTD. .....Petitioner

.Vrs.

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

ODISHA VAT ACT, 2004 – S. 43

Escaped assessment – Re-assessment order passed against the petitioner imposing tax and penalty as well as consequential demand – Writ filed – Maintainability of writ petition questioned as statutory remedy of appeal is available – Petitioner produces "Run of Mines" (ROM) which is unprocessed raw ores and sells to "JSPL" in an abysmal low price, who after crushing of ROM obtained Calibrated Lump Ore (CLO) – Allegation of tax evasion against the petitioner that he has sold high prices CLO instead of ROM as selling of ROM at low price is an unusual business practice – No legal evidence that the petitioner sold CLO in the guise of ROM or has received any undisclosed amount or suppressed the quantum of sale during self assessment, audit assessment or has concealed the turnover – Non supply of tax evasion report to the petitioner – Violation of principles of natural justice – No scientific data with O.P.No 3 to show that 100% out put of CLO and fines from a given quality of ROM is not possible – Tax authorities also lack jurisdiction to suggest business module – Held, the writ petition is maintainable – The impugned allegation of under assessment is based on mere change of opinion – The impugned orders as well as the demand notice are quashed.

(Paras 15,16)

Case Laws Referred to :-

1. (2005) 6 SCC 499 : State of H.P. & ors. vrs- Gujarat Ambuja Cement Ltd.
2. (AIR 1999 SC 22) : Whirlpool Corporation vrs- Registrar of Trade Marks, Mumbai & ors.
3. (AIR 1958 SC 86) : The State of Uttar Pradesh –vrs- Mohammad Nooh.
4. (2007) 15 SCC 435 : Binani Industries Ltd., Kerala –vrs- Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore & ors.
5. (2010) 2 SCC 723 : Commissioner of Income Tax, Delhi –vrs- Kelvinator of India Limited.
6. (1979) 4 SCC 248 : Indian and Eastern Newspaper Society, New Delhi – vrs- Commissioner of Income Tax, New Delhi.
7. (2010) 31 VST 319 : (Orissa) : Naba Bharat Ferro Alloys Ltd., and another –vrs- State of Orissa & ors.

8. (1997 SCC Online (All) 1383) : Hemraj Udyog –vrs- Commissioner of Trade Tax U.P. Lucknow.
9. (2011) 334 ITR 293 (Cal.) : Commissioner of Income Tax –vrs- Oberoi Hotels (P) Ltd.,
10.1995 SCC Online (All) 1169): Commissioner, Sales Tax –vrs- Saurashtra Chemicals.
11. (1997 SCC Online (All) 1383): Hemraj Udyog –vrs- Commissioner of Trade Tax U.P. Lucknow.
12. (2011) 334 ITR 293 (Cal.) : Commissioner of Income Tax –vrs- Oberoi Hotels (P) Ltd.,
13. 1995 SCC Online (All) 1169):Commissioner, Sales Tax –vrs- Saurashtra Chemicals,
14. (2004) 6 SCC 281 : National Mineral Development Corporation Ltd., -vrs- State of M.P. and another
15. (1976) 3 SCC 701 : Girdhari Lal Nannelal –vrs- The Sales Tax Commissioner M.P.
16. (1981) 4 SCC 173 : K.P. Varghese –vrs- Income Tax Officer, Ernakulam & anr.

For Petitioners : Mr. Gopal Jain (Senior Advocate), Mr. Satyajit Mohanty, Mr.S. Patnaik & Mr.D.K. Mohanty.

For Opp.Parties : Sr. Standing Counsel (C.T.)

Date of Judgment: 20.04.2017

JUDGMENT

BISWAJIT MOHANTY, J.

The petitioner, who happens to be a Private Limited Company, has filed the present writ application praying for quashing of notice dated 17.5.2012 issued by opposite party no.3 under Annexure-7 initiating the reassessment proceeding for the period 1.4.2008 to 31.3.2011 under Section - 43 of the Orissa Value Added Tax Act, 2004, for short "OVAT Act" and consequent reassessment order dated 26.11.2012 under Annexure-11 passed for the above noted period imposing tax to the tune of Rs.132,37,45,137/-and penalty to the tune of Rs.264,74,90,274/- as well as consequential Demand Notice dated 26.11.2012.

2. The case of the petitioner is that initially the Mining Lease Deed dated 14.8.2001 for operation of Thakurani Block-B, Iron Ore Mines comprising M.L. area over 947.046 hectares was executed in favour of

Sunder Lal Sarda and Mohan Lal Sarda. Initially, the mining activities were undertaken by the lessee and the "Run of Mines" for short, "ROM", which is otherwise called as mother earth of Iron Ore consisting of raw unprocessed ores in its natural state obtained after blasting or digging was excavated and handed over to M/s. Jindal Steel & Power Limited, for short, "JSPL". Thereafter, "JSPL", which has installed crusher plant inside the leasehold area used to crush and downsize the excavated ores/ROM consisting of large boulders, fragments and fines along with other contaminants/impurities. According to Mr. Gopal Jain, learned Senior Advocate for the petitioner after crushing of ROM in the crusher and sizing in the screen, Calibrated Lump Ore (CLO) is obtained. Size of CLO varies from 5 mm to 18 mm or 10 mm to 40 mm containing higher grade of iron. Another by-product of such crushing and screening is known as Fines containing granule materials like alumina, silica, dusts, spoils and other impurities. According to Mr. Jain, learned Senior Advocate, these Fines require further processing by way of washing and beneficiation so as to produce usable Fines and slime material. Earlier, excavated ores/ROM were crushed, sized and screened by "JSPL" and were given back to the lessee – Sunder Lal Sarda and Mohan Lal Sarda for sale to prospective buyers and "JSPL" was paid for job work charges for undertaking crushing, sizing and screening of ROM. While undertaking crushing, sizing, screening of the excavated ROM, huge quantity of residuary mixed with low grade Fines is generated, which are more than the quantity of CLO. It is the case of the petitioner that out of the excavated ore, after crushing and sizing on an average 25% to 30% CLO was produced and the rest 70% to 75% represented low grade fines. For such low grade fines, there was no market at all. This resulted in piling of huge stock of residuary mixed with low grade Fines covering the mining lease area. Since such business module described above was not viable/workable and not cost effective, as a prudent business decision, in the year 2004, the then the lessee decided to sell ROM on as is where is basis. "JSPL" which had installed the crusher unit inside the leasehold area of the lessee, agreed for lifting of entire excavated ROM on payment basis. In such background, the lessee vide letter dated 25.2.2004, requested the Deputy Director of Mines, Joda, Keonjhar to allow it to sell ROM from their Thakurani Iron Ore Mines to "JSPL" on ex-mines basis. On 4.3.2004, the Deputy Director of Mines, Joda vide letter No.11479 (Annexure-1/Annexure-A) wrote to the Director of Mines, Orissa inviting his attention to letter dated 25.2.2004 of the lessee for according approval for sale of ROM from their Thakurani Iron Mines. Pursuant to this, vide Letter No.MV(a)-39/2002 2853/DM. dated 27.3.2004, the Director of Mines, Orissa

wrote back to the Deputy Director of Mines, Joda, Keonjhar intimating that Sunder Lal Sarda and Mohan Lal Sarda be allowed to supply ROM on ex-mines basis within leasehold area to "JSPL" in accordance with the provision of T.P. Regulations & O.M. (PTS & OUA) Act, 1989 & Rules 1990 subject to certain conditions. Accordingly, the Deputy Director of Mines, Joda, Keonjhar informed Sunder Lal Sarda and Mohan Lal Sarda vide Annexure-2 dated 5.4.2004 conveying approval of the Director of Mines for supply of ROM on ex-mines basis indicating five conditions therein. One such condition was that the lessee should pay highest rate of royalty prescribed for the lumpy iron ore containing 65% Fe and above for the entire quantity of ROM mineral supplied to "JSPL" for crushing and sizing. While such was the position, the mining lease granted in favour of Sunder Lal Sarda and Mohan Lal Sarda was transferred in the name of the petitioner Company vide proceeding No.8762/SM dated 9.7.2006. According to Mr. Jain, learned Senior Advocate, the petitioner continued with the practice of mining ROM from the leasehold area and selling the entire quantity of ROM to "JSPL". In the year 2008, the petitioner entered into a long-term agreement with "JSPL" for supply of ROM for a period of 10 years. It was agreed between the parties to supply the ROM at agreed rate of Rs.400/- per Metric Ton initially with a stipulation that the rate and quantity of ROM, which was to be supplied would be reviewed from time to time, which would be mutually decided by both the parties to the agreement. Thus, the petitioner Company has been selling ROM excavated from the mines to "JSPL" on "as is where is basis" and paying highest rate of royalty prescribed for CLO containing 65 % Fe and above for the entire quantity of ROM so sold to "JSPL". It is the further case of the petitioner that prior to sell of ROM, the mining officials inspect the quality and quantity of the ores and only after that ROM is weighed and removed from the mines to the crusher plant of "JSPL" situated within the leasehold area. At the crusher plant of "JSPL", the ROM is crushed, sized and screened to CLO along with residue containing impurities and Fines. The petitioner showed the figures of ROM, CLO and Fines in its Return filed under the Mines and Minerals (Development and Regulation) Act, 1957. The petitioner has/had obtained Transit Passes and permits from the Mining Authorities for transporting ROM from mines to the crusher plant of "JSPL" under Annexure-12. The petitioner also filed various statutory Returns before the appropriate authorities under various statues such as Central Sales Tax (Orissa) Rules, 1957, Orissa Entry Tax Act, 1999, Orissa State Tax on Profession, Trades, Callings and Employment Act, 2000, Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining and Regulation of

Possession, Storage, Trading and Transportation) Rules, 2005 and also under "OVAT Act". According to the petitioner, the excavation of ROM by the petitioner was/is controlled and regulated by the Indian Bureau of Mines and the Director of Mines, Government of Odisha. The movement of ROM is done with the prior approval/inspection and after issue of transit permit/passes by the jurisdictional Mining Officer. Production, consumption and stock of such minerals are reported monthly to the Jurisdictional Mining Authorities. During the period 2008-09, 2009-10 & 2010-11, the petitioner has regularly filed Annual Return in Form-H1 with the Controller General, Indian Bureau of Miens, Nagpur, the Controller of Mines, Nagpur Zone, the Regional Controller of Mines, Bhubaeswar Region and the Director of Mines, Bhubaneswar. In the Form-H1, the petitioner disclosed the quantum of ROM excavated and sold during the concerned period. All such Returns have been filed as Annexure-4 Series.

During course of hearing, Mr. Jain, learned Senior Advocate appearing for the petitioner drew the attention of this Court to the table indicated in the writ application itself reflecting quantity of ROM sold during the year 2008-09, 2009-10 and 2010-11 with the rate of ROM and royalty paid. The table in Paragraph-16 of the writ application at Page-13 reflects quantum of VAT paid, royalty paid and Entry Tax paid. According to the petitioner, the petitioner had filed Returns under Section-33 of "OVAT Act" for the above mentioned three years and paid applicable VAT and the Entry Tax thereon. However, for the period 2008-09, audit assessment under Section-42 of "OVAT Act" was completed accepting the books of account. Copy of that assessment order has been filed as Annexure-6 to the writ application. Similarly for the period 2009-10 and 2010-11, Returns were accepted under Section-39 of "OVAT Act" as self-assessed. In Annexure-6, the authorities accepted the business module of the petitioner regarding sale of ROM as it is and held that the petitioner is engaged in mining activity, i.e., extracting, digging out iron ore lumps/ROM and that extraction of such iron ore does not come under purview of manufacturing as no new different article having distinct name, character comes out. Thus, the petitioner cannot avail Input Tax credit on the same. Thus, according to Mr. Jain, learned Senior Advocate vide Annnexure-6, the authorities accepted the business module of the petitioner Company regarding digging out of Iron Ore/ROM without engaging in any manufacturing activities.

While such was the position, vide notice dated 17.5.2012 (Annexure-7), the petitioner was noticed by opposite party no.3 to appear in person or

through its authorised agent and to produce accounts and documents relating to its business in order to satisfy him that the Return for the tax periods, i.e., 2008-09, 2009-10 and 2010-11 were correct and complete since it appeared to him that the whole/part of the turnover of sales/purchase has (a) escaped assessment, (b) been under assessed. In other words, notice for re opening of the assessment was issued vide Annexure-7. Pursuant to such notice, the petitioner appeared before opposite party no.3 on 2.7.2012 with relevant documents and books of account and prayed for intimating/communicating the reasons for reopening of completed assessment for the above noted periods. On the said date, i.e., 2.7.2012, the statement of the authorised representative, namely, Raghunath Panda was recorded. Further, on the same date, opposite party no.3 informed the petitioner Company that based on the information contained in tax evasion report No.58 dated 29.2.2012 (Annexure-9/Annexure-C) received from the Assistant Commissioner of Sales Tax, Enforcement Wing, Bhubaneswar alleging gross under invoicing of sale price of ROM sold by the petitioner, the completed assessment has been reopened. According to the petitioner, though the petitioner Company requested for supplying of copy of tax evasion report as well as documents relied thereon, however, the same were not provided to it. However, the authorised representative of the petitioner was permitted only to note down the contents/gist of the said report, without allowing to take note of the contents of the documents annexed thereto, which was voluminous in nature. The tax evasion report dated 29.2.2012 under Annexure-9/Annexure-C was supplied to the petitioner only on 1.12.2012 after the impugned reassessment order dated 26.11.2012 was passed vide Annexure-11/Annexure-D. Mr. Jain, learned Senior Advocate for the petitioner strenuously submitted that in the report under Annexure-9/Annexure-C, it has been admitted that the petitioner produces ROM and sells the same to "JSPL" and that the petitioner does not undertake further processing of ROM. Further processing of ROM is done by "JSPL". However, according to the Assistant Commissioner of Sales Tax, Enforcement Wing, Bhubaneswar, selling of ROM instead of selling CLO after processing it, was unusual as the cost of processing ROM so as to convert it to CLO was not very high. Further, according to him, the entire production of ROM was sold at an abysmally low price. Basing on these two assumptions, an artificial formula was invented by him by which he came to a conclusion that the quantum of under invoicing to be about Rs.1961 Crores and accordingly the tax evasion report was prepared. Mr. Jain submitted that though a request was made for supply of a copy of the tax evasion report the same was not provided to the petitioner.

On 16.8.2012, the petitioner submitted its written note of submission. Further, on 30.8.2012, another statement was recorded from Surendra Panda, who was the authorised representative of the petitioner Company. On 17.10.2012 and 22.11.2012, the petitioner submitted its further written notes of submission inter alia stating that in absence of fresh material in possession, the notice issued under Section 43(1) of "OVAT Act" alleging escaped reassessment/under assessment was without jurisdiction. The entire tax evasion report has been passed on the basis of presumption, conjecture and surmises. Though the said report accepted sale and sale price of ROM by the petitioner to "JSPL", reopening of assessment on the basis of such report was illegal as the same reflected non-application of mind. According to Mr. Jain, the petitioner also took a specific stand that comparison of sale price of ROM with CLO was not permissible as CLO is a totally different product vis-à-vis ROM. Further, there was nothing to show on records that the dealer/petitioner had received an amount in excess, shown and charged in the sale invoices of ROM. In such background, he contended that initiation of proceeding for reopening of assessment was liable to be quashed.

The dealer/petitioner also took the plea that neither under "OVAT Act" nor under the Rules made under the "OVAT Act", the authorities have any jurisdiction to suggest about the business module to a business man. He also submitted that while filing its written notes of submission on 17.10.2012 and 22.11.2012, the petitioner Company had asked for tax evasion report under Annexure-9/Annexure-C, which was never supplied to it and ultimately, the impugned order dated 26.11.2012 under Annexure-11/Annexure-D has been passed directing the petitioner to pay tax amounting to Rs.132,37,45,137/- and penalty amounting to Rs.264,74,90,274/-. Also, on the same date, notice of demand has been issued for making payment of the above amount. The notice of demand forms part of Annexure-11. Challenging the notice under Annexure-7 for reopening the assessment for the period 2008 – 2011 and reassessment order as well as the demand notice dated 26.11.2012 under Annexure-11, the present writ application has been filed.

3. A detailed counter-affidavit has been filed on behalf of the opposite parties. At the outset, they have taken a stand that the order of assessment under Annexure-11 can be challenged before the statutory appellate authority before whom the question of law and fact can be very well agitated. They have also submitted that the present writ application raises various questions of fact, which can be very well considered by the appellate authority not by a

writ Court. Their further stand is that the petitioner has been manipulating its accounts and affairs only with a view to defraud the State of the legitimate tax dues and was only paying a minimal tax by devising an ingenious method, which was unearthed by the Enforcement Wing of the Commercial Tax Department for which assessment was reopened. However, they admitted that the price of ROM is not statutorily decided by the Indian Bureau of mines. While defending, the impugned notice under Annexure-7 and the impugned reassessment order and Demand under Annexure-11, the stand of the opposite parties is that the petitioner was selling ROM at an abnormal price to its preferred buyer though paying royalty pertaining to the highest grade of CLO which indicated that it was not selling ROM, but was selling CLO. Further, according to them, the prevarication of the dealer-petitioner was caught red-handed when it was found that aggregates of CLO and Fines at the hand of "JSPL" equalled to the quantum of ROM transferred by the petitioner to "JSPL". Therefore, the claim of the dealer/petitioner that it was selling impure ROM only after paying royalty of the highest grade of CLO was found to be arithmetically impossible. Further, it is the stand of the opposite parties that the agreement under Annexure-3 is a post dated agreement of an ante dated activity regarding sale of CLO at the value of ROM, while paying royalty at the value of CLO but paying VAT at value of ROM, which is abysmally low. According to them, "OVAT Act" explicitly provides agreement or contract of such nature as void ab initio. In this context, the opposite parties have relied on Section 101-A of "OVAT Act". For all these reasons, on 29.8.2011 vide Annexure-B, the Sales Tax Officer, Investigation Unit, Barbil called upon the petitioner to produce purchase, production and dispatch of iron ore, sized iron ore and iron ore fines (grade wise and size wise), sale figure of iron ore, sized iron ore and iron ore Fines both in terms of quantity and value, copies of Returns filed for the period 1.4.2008 to 31.4.2011 under "OVAT Act", Orissa Entry Tax Act, Central Sales Act, and Audited Balance Sheet. Thereupon, the Assistant Commissioner of Sales Tax submitted the fraud case report under Annexure-C. On perusal of the said report, the Assessing Authority considered the same and by an order dated 17.5.2012 decided to reopen the assessment for the period from 1.4.2008 to 31.3.2011 by issuing notice to the petitioner under Annexure-7. In response to the notice, the petitioner took adjournment and appeared on 2.7.2012 on which date its authorised representative filed a petition with prayer to communicate the reasons of reopening of assessment. The Assessing Authority communicated the reasons for reopening of the assessment and the materials forming the basis of report were also explained

to the representative, who took extract from the documents forming basis of the report. This fact was recorded in the order sheet dated 2.7.2012 signed by Raghunath Panda, authorised representative of the dealer/petitioner. Further, the petitioner filed written notes of submission on 16.8.2012, 17.10.2012 and 22.11.2012 and thereafter, the impugned assessment order under Annexure-11 was passed on 26.11.2012. In such background, the stand of the opposite parties is that all throughout principles of natural justice have been followed and there is no reason as to why a writ application should be entertained directly when the impugned order can very well be challenged before the 1st appellate authority. From the documents submitted along with the fraud report and figures submitted along with the fraud report and further from the figures in Form-H1, it was seen that while ROM was billed @ Rs.400/- per M.T., the processing charge for processing of ROM into CLO was around Rs.203 per M.T. and the price of lump ore was around Rs.2000/- to Rs.4000/-. Thus, the Assessing Authority recorded the finding that there was huge under invoicing and resulting in escapement of turnover. In the counter-affidavit, their further stand is that as indicated earlier the agreement under Annexure-3 was/is in contravention of provisions of Mines & Minerals (Development & Regulation) Act, 1957, Sale of Goods Act, Odisha, Entry Tax Act and "OVAT Act".

Further, the opposite parties have asserted that the owner of mining lessee does not acquire any title i.e. any saleable right on the minerals upon mere raising from the ground. The lessee does not acquire a saleable right in its raw from or in its processed form until removed from the mining area upon payment of royalty. So, the claim of the petitioner that it was selling ROM to "JSPL" is contrary to the conditions of the lease and various statutory provisions.

Further, the opposite parties have asserted that by virtue of the agreement under Annexure-3, there has been an illegal shifting of point of sale from ex-leasehold area to ex-mine point. On this account, also the agreement under Annexure-3 is ab initio, null and void. They have also stated that the Pollution Control Authorities have permitted the petitioner to beneficiate ROM by way of installation of primary iron ore crusher of the capacity of 300 TPH, secondary iron ore crusher of 400 TPH (3 nos.), tertiary iron ore crusher of the capacity 350 TPH (3 nos.) to produce sized iron ores, i.e., CLO. Therefore, the claim that ROM has been sold by the petitioner is factually incorrect. Further, the stand of the opposite parties is that since administrative charges are being borne by the petitioner, thus, the petitioner is

vitally and legally interested in goods/ROM even after alleged ex-mine sale. Therefore, according to the opposite parties, no sale had taken place in terms of Sale of Goods Act read with "OVAT Act" on ex-mine basis. They have also relied on various clauses of lease deed dated 14.8.2001 to show that the petitioner has violated many such conditions. One further stand of the opposite parties is that the lease agreement between the lesser and lessee does not permit sub-leasing/assignment of the leased property. The petitioner by introducing "JSPL" has been sub-leasing and assigning the property in reality. Thereby, it has violated the lease conditions.

The opposite parties term the agreement under Annexure-3 to be a puzzling agreement between the petitioner and "JSPL" contravening the provisions of "OVAT Act", Orissa Entry Tax Act, Mines and Minerals (Development and Regulation) Act, 1957 and Sale of Goods Act, 1930 in order to deny the State its due. Therefore, according to them, this Court may lift the corporate veil to expose the wrong doing by the party.

4. The petitioner has filed a rejoinder to the counter-affidavit filed by the opposite parties. According to the petitioner, sale of ROM is not a thing prohibited under law. Rather removal of ROM has been duly recognised by Rule 64-B of the Mineral Concession Rules, 1960. Annexure-2 records approval of the Director of Mines for supply of ROM on ex-mine basis within the leasehold area to "JSPL" and the petitioner has duly complied the terms and conditions of the permission granted under Annexure-2. Though the present fact situation is covered under Rule-64B(1) of the Mineral Concession Rules, 1960 and though the royalty is chargable only on the processed minerals, however in obedience to the approval order under Annexure-2, all along, the petitioner has paid royalty at the highest rate applicable to the highest grade of ore. Further, the petitioner reiterated that the entire demand under Annexure-11 is based on erroneous comparison of prices of altogether two different commodities, namely, price of ROM sold by the petitioner to "JSPL" with that of CLO. Further, it is the case of the petitioner that since the impugned orders are ex-facie perverse, arbitrary and wholly illegal and unsustainable being without jurisdiction, therefore, existence of alternative remedy is no bar to maintainability of the writ application. With regard to attack on the agreement, the stand of the petitioner is that much after permission was granted under Annexure-2 for supply of ROM, such agreement under Annexure-3 was entered into. Therefore, no mala fide can be read into the same. With regard to establishment of processing plants by the petitioner as alleged by the opposite

parties in Paragraphs-9 and 33(d) of the counter-affidavit, the stand of the petitioner is that they have not established any such processing plant within the leasehold area. The said plant has been established by the "JSPL" in terms of permission granted by the competent authority of the State Government. Further, the arrangement to supply of ROM has been approved by the Director of Mines under Annexure-2. Further, the stand of the petitioner is that there exists no case for reassessment and the same has been done merely on the basis of change of opinion. In such background, opposite party no.3 by issuing the impugned notice under Annexure-7 and impugned orders under Annexure-11 has acted without jurisdiction. The petitioner specifically denies that it is selling CLO instead of ROM. It also reiterates that there has been violation of principles of natural justice because the documents which form the basis of opinion for reopening the petitioner's case, copies of the report and annexures, etc. were not provided to the petitioner. With regard to the averment made in Paragraph-22 to the counter affidavit, the case of the petitioner is that no new fact has been collected by the reporting officer and it specifically denies that the Judicial Commission set up by the Hon'ble Supreme Court of India has given any particular finding against the petitioner regarding allegation of under invoicing and assuming that any such finding has been recorded by any commission without giving notice and opportunity of hearing to the petitioner, all such findings by such commission are wholly arbitrary, illegal and void ab-initio being directly contrary to the provisions of Sections 8B and 8C of the Commissioner of Inquiry Act, 1952. Further, it has denied that the agreement under Annexure-3 is contrary to any provisions of MMDR Act or Sale of Goods Act or "OVAT Act" or Odisha Entry Tax Act or any other provision of law. It reiterates that the sale of ROM on ex-mines basis has been duly approved by the competent authorities of the State and accordingly the petitioner sold ROM. It denies the allegation relating to legal manipulation and takes a stand that in any case, mining authorities have never disputed the factum of transaction/sale of ROM between the petitioner and "JSPL".

5. The above noted Paragraphs delineate the respective case of the petitioner and opposite parties. In such background, Mr. Jain, learned Senior Advocate for the petitioner submitted that under the facts and circumstances, there was no occasion for issuing the notice under Annexure-7. He submitted that since the notice under Annexure-7 has been issued merely on account of change of opinion, such notice is totally without jurisdiction and liable to be set aside. Additionally, he submitted that the notice under Annexure-7 is

legally vulnerable as it contained no reason. He submitted that though pursuant to notice under Annexure-7, the petitioner has participated in the proceeding however in its written submission dated 17.10.2012, the petitioner has made it clear that it reserved its right to challenge the notice. Secondly, he submitted that since there has been infraction of principles of natural justice as copy of the report under Annexure-9 was not supplied to the petitioner despite repeated requests, the impugned order under Annexure-11 is legally vulnerable and the same is liable to be set aside. He also submitted that the Annexures to the said report, which are copies of various documents which run up to 180 pages having not been supplied to the petitioner, there has been gross violation of principles of natural justice. Merely, permitting the authorised representative of the petitioner to take note of the gist of the report was wholly inadequate so as to enable the petitioner to comprehend the allegations made in the report particularly, when the report ran to more than 180 pages. Further, the information/data/ records obtained by opposite party no.3 from their Orissa Mining Corporation and Indian Bureau of Mines in respect of price of iron ore prevailing from time to time were never disclosed to the petitioner, thus it was not afforded with any opportunity to rebut them. Mr. Jain, learned Senior Advocate further submitted that foundation of the tax evasion report/fraud report under Annexure-9 was also not supplied to the petitioner thereby occasioning gross violation of principles of natural justice. In such background, he prayed that the impugned order under Annexure-11 ought to be quashed. Thirdly, he reiterated that both the notice under Annexure-7 initiating the reassessment proceeding and the impugned order under Annexure-11 are legally vulnerable as the decision to open of the assessment was done on account of mere change of opinion. Thus, the initiation of the entire proceeding is without jurisdiction. According to Mr. Jain, learned Senior Advocate for the petitioner, the re-assessment proceeding is without jurisdiction because there exists no information/material which can give rise to the opinion as required for exercise of power under Section-43 of "OVAT Act". According to him, the jurisdictional facts required for initiation of reassessment proceedings are completely absent in the present case and from the facts, it is clear that such initiation of reassessment proceeding was/is based on mere change of opinion. In fact, no new facts/no new materials existed/exists for initiation of such reassessment proceeding. Elaborating the argument, he further submitted that as per settled principles of law, material information for formation of opinion must come from outside the departmental sources not from inside the departmental sources as has been done in the present case.

Otherwise it would be possible for the authorities to reopen an assessment on the basis of change of opinion in which case finality of complete assessment would lose all sanctity. Here, the entire initiation of reassessment proceeding is based on the tax evasion report prepared by the Assistant Commissioner, Sales Tax, Enforcement Range, Bhubaneswar. Further, according to Mr. Jain, learned Senior Advocate a proceeding under Section - 43 of "OVAT Act" can be initiated only when materials/informations are available with the Assessing Authority on the basis of which he can form an opinion that whole/any part of the turnover of a dealer in respect of a particular tax period has escaped assessment or has been under assessed. In other words only if these conditions are satisfied then the assessing authority gets jurisdiction to reopen the assessment. According to him, here the tax evasion reports refers to quantum production, dispatch and sale value of ROM as disclosed by the petitioner in its Returns for the period April, 2008 to March, 2011. Therefore, apparently there was no fresh materials/fresh information in order to come to the conclusion regarding under invoicing/escaped assessment or under assessment. According to him, it is well settled that with regard to reopening of assessment, the information means (1) the information must be authentic and capable of giving rise to inference regarding escapement, (2) the information should be definite and there must be necessity of live link between the material and believe (3) there should be new information dehors the assessment record thereby giving rise to evasion of tax and (4) the materials should be relevant and should not be a matter of guess work. Here, since no new information was there in the hands of opposite party no.3, the impugned reassessment order is a clear case of change of opinion and therefore, is liable to be set aside. According to Mr. Jain, learned Senior Advocate, reassessment has been done on the basis of change of opinion as the authority has assumed without any legal evidence that the petitioner has sold high priced CLO instead of ROM as selling of ROM at low price is an unusual business practice. In other words, the reassessment order has been passed presuming existence of a better business module and doubting rationale of petitioner selling ROM instead of CLO. In this context, he submitted that the Authorities under OVAT Act has no jurisdiction to suggest business module. The impugned order under Annexure-11 like that of Annexure-9 has also been influenced by an assumed low sale price of ROM without bringing on record any evidence relating to high prevailing market price of ROM. Further, though the tax evasion report under Annexure-9 admits sale of ROM, but the impugned order under Annexure-11 has gone one step further as while relying on the tax evasion report under

Annexure-9, it has come to a finding that the dealer/petitioner had sold CLO in the guise of ROM by under invoicing the price as the quantum of ROM fed into processing plant equals quantum of CLO and fines after processing. Since the output is equal to input, the opposite party No.3 has reached a conclusion that the material fed into processing plant was not ROM but CLO. In this context, Mr. Jain, learned Senior Advocate strenuously submitted that there exists no iota of evidence on record to show that the petitioner has sold CLO in the guise of ROM and merely because the output quantum of CLO and fines equalled the input quantum of ROM, it could not be said that the petitioner had sold CLO. Such presumption of opposite party No.3 is not backed by any scientific study. Further, the mining authorities have never raised a finger on this. Thus, the opposite party No.3 has passed reassessment order based on conjectures, surmises assuming that output quantum cannot be same as input quantum, when such assumption is not backed by any scientific study, though there existed no dispute as to quantum of sale and no evidence that while selling such quantum, the petitioner had received anything more. In this context, he also submitted that the VAT authorities failed to appreciate that Fines contained huge quantity of waste and impurities and for making the same usable further washing and beneficiation is required. Further, he submitted that even a bare look at the tables given in Annexure-11 relating to details of quantity of ROM sold and quantum of CLO transferred by "JSPL" does not show that quantity of ROM is equal to quantity of CLO. Moreover all these figures have never been disputed by the mining authorities. Rather, the Mining Authorities have granted transit permits some of which have been filed under Annexure-12 accepting selling of ROM by the petitioner to "JSPL". Once mining authorities are not disputing the nature of minerals sold and price of minerals, Revenue authorities cannot go into those matter to come to a conclusion that since the quantity of CLO and Fines equals the quantity of ROM so it must be taken that the petitioner has sold CLO not ROM. According to him the Revenue Authorities are not the experts under the law to arrive at such a conclusion. Thus by coming to such a conclusion, the opposite party no.3 under Annexure-11 has also acted without jurisdiction. In such background, he submitted that erroneously the reassessment has been done though no factual basis exists for treating that the petitioner sold CLO instead of ROM. Even otherwise as per the decision of this Court in W.P.(C) No.12119 of 2014, it is not disputed that the petitioner sells ROM to "JSPL", who processes the same for producing CLO and Fines. Thus, it is a strange case while the Mining Department allows sale of ROM, the Finance

Department is saying that the petitioner is selling CLO not ROM. Such stand is also impermissible in law. He reiterated that since there has been violation of principles of natural justice in course of proceeding and since reassessment proceeding has been undertaken merely on change of opinion thus being without jurisdiction, the writ application is maintainable as per settled principles of law. He also submitted that there is no allegation to the effect that the petitioner suppressed the quantum of sale or has received any undisclosed amount or any other consideration in lieu of alleged under invoice sale. Thus, the finding relating to under invoicing is on account of change of opinion and nothing else, which is not permissible in law.

6. In the written submission, the petitioner relied on following decisions. On the point of maintainability of the writ application, the petitioner relied on the following decisions: **State of H.P. and others** –vrs- **Gujarat Ambuja Cement Ltd.**, **[(2005) 6 SCC 499]**, **Whirlpool Corporation** –vrs- **Registrar of Trade Marks**, **Mumbai and others**, (**AIR 1999 SC 22)** , **The State of Uttar Pradesh** –vrs- **Mohammad Nooh**, (**AIR 1958 SC 86)**. For our purpose, it would be enough to refer to law laid down by Hon'ble Supreme Court in Whirlpool Corporation (supra). There the Hon'ble Supreme Court has made it clear that the alternative remedy would not operate as bar in exercising writ jurisdiction, where the writ petition has been filed for enforcement of Fundamental Rights or where there has been violation of principles of natural justice or where the order or proceedings are wholly without jurisdiction or where vires of an act is challenged. Here according to Mr. Jain, since there has been violation of principles of natural justice as indicated earlier and since the reassessment proceeding was undertaken merely on change of opinion thus being without jurisdiction, present writ application is maintainable.

On the point of reopening of assessment not being permissible on mere change of opinion, the petitioner relied on the following decisions: **Binani Industries Ltd., Kerala** –vrs- **Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and others** [**(2007) 15 SCC 435]**, **Commissioner of Income Tax, Delhi** –vrs- **Kelvinator of India Limited** [**(2010) 2 SCC 723]**, **Indian and Eastern Newspaper Society, New Delhi** –vrs- **Commissioner of Income Tax, New Delhi** [**(1979) 4 SCC 248]**, **Naba Bharat Ferro Alloys Ltd., and another** –vrs- **State of Orissa and others** [**(2010) 31 VST 319 (Orissa)].** In **Binani Industries Ltd.,** (supra) the Hon'ble Supreme Court has made it clear that re-opening the assessment by mere change of opinion is entirely impermissible. Merely

because the assessing authority changes his view or opinion, it cannot review its earlier decision. In **Kelvinator of India Limited** (supra), the Hon'ble Supreme Court has made it clear that change of opinion cannot be a reason to reopen the assessment as that would amount to review. In case of **M/s. Indian and Eastern Newspaper Society, New Delhi** (supra), it has been laid down that an error discovered by assessing authority on a reconsideration of same material does not justify reassessment. Here Mr. Jain, learned Sr. Advocate submitted that no fresh material/fact was/is there in the present case. Here on selfsame facts, some new, artificial and presumptive parameters have been used without backing of any evidence/scientific data for re-opening assessment. Thus, such reassessment is on account of change of opinion, which makes the entire proceeding without jurisdiction and thus liable to be quashed. In **Naba Bharat Ferro Alloys Ltd., and another** (supra), this Court has reiterated that reassessment is impermissible on mere change of opinion particularly when no fresh material is there with the Assessing Officer to go ahead with the reassessment. According to Mr. Jain, learned Sr.Advocate, in the present case there is nothing to show that the petitioner has concealed some materials from the Assessing Officer relating to turnover of sales. What the Assessing Officer has done is that he has gone for review by changing his opinion relying on certain artificial parameters which are not backed by factual/scientific evidence. Since the Assessing Officer has acted without jurisdiction the impugned notice under Annexure-7 and reassessment order under Annexure-11 are liable to be quashed.

On the point that the Revenue Authorities/Taxing Authorities not having the power to dictate as to what would be the appropriate business module/method to be adopted, he relied on the following decisions: **Hemraj Udyog –vrs- Commissioner of Trade Tax U.P. Lucknow. (1997 SCC Online (All) 1383)**, **Commissioner of Income Tax –vrs- Oberoi Hotels (P) Ltd., [(2011) 334 ITR 293 (Cal.)] and Commissioner, Sales Tax –vrs- Saurashtra Chemicals, [1995 SCC Online (All) 1169)**. For our purpose it would be enough to refer to the decision of Allahabad High Court in **Hemraj Udyog** (supra), **Saurashtra Chemicals** (supra). These decisions lay down that it is not the business of a taxing officer to guide the businessman about the manner in which later should conduct his business. A businessman is not expected to earn more so as to be able to pay higher tax nor can the Assessing Officer force a dealer to sale his goods at a particular price. It is essentially for the assessee to manage his business affairs according to his

wisdom. The taxing authority cannot dictate as to how a dealer/assessee would conduct his business. Accordingly, Mr. Jain, learned Sr. Advocate submitted that the authorities have gone wrong in initiating reassessment proceeding thinking that business module adopted by the petitioner of selling ROM at a particular price was unusual particularly when there is nothing to show that such a business practice was prohibited by law. Accordingly, he contended that opposite party No.3 exceeded his jurisdiction in issuing notice of reassessment under Annexure-7 and in passing the impugned order under Annexure-11/Annexure-D.

7. With regard to definition of ROM as unprocessed/uncrushed raw material as obtained after digging and blasting, the petitioner relied on the decisions of **National Mineral Development Corporation Ltd., -vrs- State of M.P. and another [(2004) 6 SCC 281]**. There it has been made clear that in Iron Ore production the run of mine (ROM) is in a very crude form and its existence has been recognised in Rule-64B of the Minining Concession Rules,1960.

On the question of onus of proof lying on the Revenue Authority to prove that the assessee has received an undisclosed sum from sale, the petitioner relied on the following decisions in the cases of **Girdhari Lal Nannelal –vrs- The Sales Tax Commissioner M.P. [(1976) 3 SCC 701]** and **K.P. Varghese –vrs- Income Tax Officer, Ernakulam and another, [(1981) 4 SCC 173**. In both the above cases, the Hon'ble Supreme Court has made it clear that burden of proving understatement or concealment is on Revenue. This burden can be discharged by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee had not correctly declared/disclosed the consideration received by him. According to Mr. Jain, learned Sr. Advocate in the present case, no such thing has been proved by the petitioner or that the petitioner has concealed the turnover of sales. Thus, the Revenue has not discharged its burden. In such background, merely by introducing new and artificial parameters based on conjectures and surmises to reconsider the same set of facts, the Assessing Officer has acted merely on the basis of change of opinion and thus beyond jurisdiction.

8. The petitioner has relied on the decisions in the cases of **Vinod Trading Company –vrs- State of Assam and others [(2006) 144 STC 573] (Gauhati), Delux Wines –vrs- State of Andhra Pradesh [(1990) 77 STC 373 (A.P.)]** to drive home the point that even where the assessment has been

sought to be re-opened on the ground of variation between prices charged by the assessee/dealer and the alleged prevailing market price, the same has not been allowed by the Courts. Here according to Mr. G. Jain, learned Sr. Advocate the facts of the present case are still better as in the instant case except saying that the petitioner has sold ROM at an abysmally low price, there exists no evidence to show high prevailing market price of ROM in order to come to a conclusion for re-opening assessment.

9. Learned Standing Counsel appearing for the Revenue at the outset, pointed out that the impugned order being an appeallable order and when statutory remedy of appeal is available, the writ application should not be entertained by this Court. He defended the notice under Annexure-7 and the impugned orders under Annexure-11 saying that those have been issued and passed in accordance with law particularly when the Returns filed before the Indian Bureau of Mines showed that the weight of ROM sold by the petitioner is equal to the weight of the CLO and Fines, which came out after processing of ROM. Thus, according to him the goods sold did not contain any waste material. Further, since the authorities have permitted the petitioner to beneficiate ROM by installing primary, secondary and tertiary iron crusher units, i.e., processing units, the claim of the petitioner that it has sold ROM cannot be accepted to be factually correct. He also attacked the agreement under Annexure-3 saying that the same is void because of violation of the terms of mining lease and provisions of Mines and Minerals (Development and Regulation) Act 1957 and Sale of Goods Act. He also submitted that in the present case, there has been no change of opinion. According to him, the allegations contained in tax evasion report under Annexure-9 were never considered or dealt by the Assessing Authority either in the assessment proceeding under Section - 42 of "OVAT Act" or while accepting Returns under Section 39 of "OVAT Act". Therefore, the initiation of proceeding under Section-43 of "OVAT Act" cannot be said to be on the basis of change of opinion. With regard to proceeding under Section-43 of "OVAT Act" being without jurisdiction, he submitted that the notice for assessment under Section-43 of "OVAT Act" was issued on the basis of information in possession of the Assessing Authority after receipt of the tax evasion report under Annexure-9/Annexure-C. On the basis of said tax evasion report, the Assessing Authority formed his opinion about escapement assessment/under assessment. Therefore, it cannot be said that the Assessing Authority was acted without jurisdiction warranting interference by the writ Court. With regard to violation of principles of natural justice, he submitted

that the assessment record would indicate that during course of proceeding, the Revenue has furnished the reasons for assessment. He further submitted that during course of assessment proceeding, the Assessing Officer afforded sufficient and reasonable opportunity to produce documents and evidence to support the figures disclosed in the books of account. The petitioner was confronted with the allegation contained in the tax evasion report and was granted adequate and sufficient opportunity to place its evidence. A perusal of the case records would show that on 2.7.2012, Raghunath Panda, the authorized representative of the petitioner, was explained the reasons for reopening of assessment based on information contained in tax evasion report under Annexure-9. The contents of the said report were explained to him in detail. He was allowed to take extracts of the materials. He was shown the sale prices of different rates of CLO and iron fines of Orissa Mining Corporation Ltd., during the years 2008-2009, 2009-2010 and 2010-2011, which were utilized for arriving at a conclusion of under invoicing. He was allowed to go through the calculation sheet prepared by the authorities. Further, Sri Panda was allowed to take extract of calculation sheet, OMC rate, agreement No.13 between OMC Limited and J & S Minerals and Construction Company Ltd., Nelore. He also went through Annexure-9 and accordingly, the petitioner filed its written notes of submission on 16.8.2012, 17.10.2012 and 22.11.2012 under Annexure-10 series. Learned Standing Counsel submitted that the written note of submission filed on 17.10.2012 was an exhaustive one running up to 28 pages. Along with the written submission, a number of documents were filed as Annexures. The said written notes of submission also referred to a number of judicial pronouncements. Thus, according to him, a perusal of the same would show that adequate opportunity was given to the petitioner in the matter. Therefore, the petitioner cannot say that the principles of natural justice have been violated. With regard to contention of the petitioner relating to absence of fresh material/new material to reopen an assessment proceeding, he submitted that the same is not a sine qua non for initiation of proceeding for reassessment of the proceeding under Section-43 of "OVAT Act". According to him, Section-43 of "OVAT Act" covers both the case of escaped assessment and under assessment and there is a distinction between the two. In case of under assessment, there is no scope for estimate because turn over would remain the same, while a low rate has been applied on the earlier occasion, the appropriate rate is only to be applied. But case of escaped assessment stands on a different basis. Though, he had filed two written notes of submission dated 25.8.2016 and 1.11.2016, however, in view of the order

passed on 1.11.2016, we will only take into account the last written note of submission filed by the opposite parties on 1.11.2016. It may be noted here that while in Index portion of written submission dated 25.8.2016, the Revenue relied on 10 judgments; in written submission dated 1.11.2016 as per the Index portion, they have relied on only 6 judgments. In the written notes of submission dated 1.11.2016, learned Standing Counsel relied on the judgment of this Court rendered in W.P.(C) No.12119 of 2014 in **M/s. Jindal Steel and Power Limited and another –vrs- State of Orissa** and on **Mideast Integrated Steel Ltd., -vrs- State of Odisha, [2016 (I) ILR-CUT 208], Bhusan Power and Steel Ltd., -vrs- State of Odisha, [2012 (I) ILR-CUT 421], Bharat Petroleum Corporation Ltd., -vrs- Sales Tax Officer, [2012 (II) ILR-CUT 218], Commissioner of Income-tax –vrs- Chhabil Dass Agarwal, [(2014) 1 SCC 603] and State of Odisha –vrs- Durgadutt Moda, [(1973) 32 STC 98 (Ori)]**. He also filed a note of submission to the queries raised by this Court on hearing held on 7.2.2017.

Perused the case records. The undisputed facts of this case are as follows:-

10. The State Government executed a mining lease granting lease of iron ore in favour of Sunder Lal Sarda and Mohan Lal Sarda for operation of Thakurani Iron Mines. On 25.2.2004, the lessee filed application before Deputy Director, Mines, Joda in the district of Keonjhar requesting him to accord approval for sale of Lumpy Ore (ROM) to "JSPL", which they would process in their crusher for their own use. This letter dated 25.2.2004 was filed as Annexure-1 to the note of submission by the petitioner to the queries raised by this Court on its hearing dated 7.2.2017. On 4.3.2004, the Deputy Director, Mines, Joda vide Annexure-1 enclosed to the writ application wrote to the Director of Mines intimating the request made by Sunder Lal Sarda and Mohan Lal Sarda in their letter dated 25.2.2004 for according approval for sale of (lumpy ore) ROM to "JSPL". In the self-same letter, it was made clear that "JSPL" has installed iron ore crushing unit within the mining lease area and they requested Sunder Lal Sarda and Mohan Lal Sarda for supply of iron ore (ROM) from their aforesaid mines <u>for processing</u> in their crusher for consumption in their own steel plants and sell of Fines. He also indicated therein that presently "JSPL" received iron ore from the lessee and crushed those to different sizes at there steel plant on job work basis. On 27.3.2004, the Director, Mines wrote back to Deputy Director, Mines, Joda with reference to his letter under Annexure-1 indicating therein that Sunder Lal Sarda and Mohan Lal Sarda be allowed to supply ROM mineral (iron ore) on

ex-mines basis within leasehold area to "JSPL" in accordance with the provision of T.P. Regulations and O.M.(P.T.S.) OUA Act, 1989 & 1990 Rules thereunder subject to certain conditions. This letter dated 27.3.2004 was filed by the petitioner on 1.3.2017, along with a memo with copy served on opposite parties after the matter was reserved for judgment on 27.2.2017 after further hearing. In tune with letter dated 27.3.2004, on 5.4.2004 vide Annexure-2 the Deputy Director, Mines, Joda, Keonjhar intimated the lessees about such approval of Director of Mines for supply of ROM (iron ore) on ex-mines basis within the leasehold area to "JSPL" with a number of conditions. One such condition was the lessees have to pay the highest rate of royalty prescribed for lumpy iron ores containing 65% Fe and above for the entire quantity of ROM supplied to "JSPL" for crushing and sizing. On 22.6.2006, Sunder Lal Sarda and Mohan Lal Sarda transferred the mines in favour of the petitioner after the State Government granted permission for such transfer. "JSPL" continued to purchase ROM from the petitioner. On 31.3.2008, the petitioner entered into an agreement with "JSPL" for sale of ROM under Annexure-3. Though, the learned Standing Counsel appearing for the Revenue relying on counter attacked such agreement as ab initio, void, however, we will ignore such argument as no appropriate form has declared the same to be void and further, the impugned order does not say anything about its legality. Here, we should not forget that the Hon'ble Supreme Court in **Commissioner of Police, Bombay –vrs- Gordhandas Bhanji, (AIR 1952 S.C. 16)**, has made it clear that where a statutory functionary makes an order based on certain ground, its validity must be judged by the reasons mentioned in the order and the same cannot be supplemented by fresh reasons incorporated in the affidavit filed in the Court. The Hon'ble Supreme Court made it clear that "public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanation subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself". The same principle was reiterated by the Hon'ble Supreme Court in the case of **Mohinder Singh Gill and another -vrs- The Chief Election Commissioner, New Delhi & others (AIR 1978 S.C. 851)**. Further, in **Union of India –vrs- G.T.C. Industries Limited, (AIR 2003 S.C. 1383)**, it was made clear that it is well settled that a quasi judicial order has to be judged on this basis of reasoning contained therein and not on the basis of

pleas put forward by the person seeking to sustain the order in its counter-affidavit or oral argument before the Court. Therefore, we refuse to take cognizance of the arguments of learned Standing Counsel for the Revenue on the illegality of Anneure-3, which has not been discussed by opposite party no.3 in the impugned order under Annexure-11. Further, in tune with the above noted decisions, we will confine our examination to the language of impugned orders under Annexures-7 and 11 and reasoning given therein only and we will not take into account the new points raised by Revenue in its counter or in the written submission.

Further, it is not disputed that for the year 2008-09, audit assessment was conducted under Section-42 of "OVAT Act" and the order passed in the same proceeding has been filed as Annexure-6 to the writ application. In Annexure-6 the authorities have accepted that the petitioner is engaged in digging and extraction of iron ore lumps and ROM and such process does not involve any manufacturing activity. With regard to years 2009-2010, 2010-2011, the self assessments made by the petitioner under Section-39 of "OVAT Act" were accepted by the authorities. For the years 2008-2009, 2009-2010 & 2010-2011, the petitioner had filed annual returns in Form-H1 before the authorities of Indian Bureau of Mines disclosing the quantity of ROM excavated and sold during the concerned periods. These documents have been filed as Annexure-4 Series. While such was the position on 29.8.2011 (Annexure-B), the Sales Tax Officer, Investigation Unit, Barbil issued notice to the petitioner for producing several documents for the tax period 1.4.2008 to 31.4.2011. Vide self-same notice, the petitioner was asked to produce documents/registers relating to purchase, production and dispatch of iron ore, sized iron ore and iron ore Fines so also the sale figures of iron ore, sized iron ore and iron ore Fines both in term of quantity and value grade-wise and size-wise. The petitioner was also asked to submit copies of Returns filed for the above mentioned period under "OVAT Act", Orissa Entry Tax Act and Central Sales Tax Act and the audited balance sheets. Though, the averment relating to Annexure-B has been made at Paragraph-18 of the counter-affidavit filed by the opposite parties, however, in Paragraph-20 of the rejoinder, the petitioner has denied issuance of receipt of the same by it. However, a perusal of LCR shows that Raghunath Panda, Authorized Signatory, on 7.9.2011, produced the document as required under Annexure-B without prejudice.

Ultimately, the tax evasion report under Annexure-9 was prepared by Sales Tax Officer, Investigation Unit, Barbil alleging that the petitioner has

sold ROM at low price. In coming to such a conclusion the Sales Tax Officer relied on a formula invented by him taking into account actual sale price of ROM, cost involved in converting ROM into CLO and market rate of CLO as he thought that selling of ROM at a low price was an unusual business practice. It may be noted here that in the report under Annexure-9, there exists no reference to any prevailing market price of ROM. However, one thing is clear from the report that it admits sale of ROM though under priced. It is extremely important to note here that in the counter affidavit, the opposite parties at Paragraph-13 have admitted that the price of ROM is not decided by the Indian Bureau of Mines. On the basis of the said report under Annexure-9/Annexure-C, on 17.5.2012, the impugned notice under Annexure-7 was issued under Form VAT 307 for the assessment period 1.4.2008 to 31.3.2011 for reopening the assessment on the ground of escaped assessment and under assessment. On receipt of notice as would be appear from the L.C.R. the petitioner took time on 28.5.2012, 18.6.2012 and on 2.7.2012, the authorized representative of the petitioner filed his Hazira and prayed to inform/communicate the reasons for reopening the completed assessment so as to enable the petitioner to participate in assessment proceeding. On the said date, L.C.R. shows authorized representative was communicated with the reasons for reopening the assessment based on information contained in the tax evasion report under Annexure-9/Annexure-C received from the Assistant Commissioner, Sales Tax, Enforcement Range, Bhubaneswar. The materials sought to be utilized in the assessment was shown to Sri Panda, the authorised representative, who took extract thereform. Further, a statement was recorded from Sri Panda. The said statement finds place at Page-209 of the L.C.R. and the same is quoted hereunder:

"In response to notice no.2913 dt.17/05/2012 and no.2914 dt.17/05/2012, I, being authorized by M/s Sarda Mines P. Ltd appeared today i.e. 02/07/12 before the Deputy Commissioner of Sales Tax, Barbil Circle, Barbil and filed Hazira. M/s. Sarda Mines Pvt. Ltd. is the lessee of Thakurani Iron Ore Mines, Block B spread over an area of 947.046 hectares. M/s. Sarda Mines Pvt. Ltd sells the entire production of ROM (Rum of Mines) to M/s. Jindal Steel & Power Ltd. It does not sell outside the State nor export iron ore fines.

On my appearance, I sought to know the reasons of reopening of assessment for the period 01/04/2008 to 31/03/2011. The Assessing Authority (Deputy Commissioner of Sales Tax, Barbil Circle, Barbil)

explained me the reasons of reopening of assessment based on information contained in a tax evasion report no.58 dt.29/02/2012 submitted by the Asst. Commissioner of Sales Tax, Enforcement Range, Bhubaneswar. The contents of the report were explained to me in detail. The allegations relate to under invoicing of sale price of ROM during the period 01/04/2008 to 31/03/2011. The basis of the allegation of under invoicing was explained to me. It is alleged in the report that selling of ROM by a mine owner is unusual and any mines owner instead of selling ROM will sale calibrated lump ore (CLO) and the resultant of iron ore fines after processing of ROM so as to achieve the real market value of the ore mined. It is also alleged that the entire production of ROM has been sold at abysmally low price to one single customer. To prove under invoicing the reporting authority has taken resort to the figures submitted by us in Form 'H1' (Annual Return) to IBM for the year 2008-09, 09-10 & 10-11, the normal processing charges i.e. Rs.203/- per MT to process ROM and sale price of similar products sold by M/s Orissa Mining Corporation Ltd. The basis on which the processing charges of Rs.203/- has been arrived was also explained to me. I was shown the sale prices of different grades of CLO and iron ore fines of Orissa Mining Corporation Ltd. during the year 2008-09, 09-10 & 10-11 of Barbil sector which has been utilized for arriving at under invoicing. I was allowed to go through the calculation sheets prepared by the reporting authority showing the amount of under invoicing during 2008-09, 09-10 & 10-11. During the year 2008-09, 09-10 & 10-11, the amount of under invoicing has been calculated at Rs.9,74,46,81,384/-, Rs.5,53,78,10,838/- & Rs.4,33,20,45,178/- respectively. I was also allowed to take extract of the documents i.e. calculation sheet, OMC rate, agreement no.13 between OMC Ltd and J & S Minerals & Construction Co. Ltd., Nelore sought to be utilized in the assessment. I also went through the report submitted by the Asst. Commissioner of Sales Tax, Enforcement Range, Bhubaneswar. On the basis of the above information contained in the tax evasion report, I am told that the assessing authority has formed an opinion that the turnover of the dealer M/s Sarda Mines Pvt. Ltd for the period -1/04/2008 to 31/03/2011 has been under assessed for which notice in Form VAT-307 has been served. I was also communicated that the assessment for the year 2008-09 has been completed under Section 42 of the OVAT Act and assessment for the period 01/04/2009 to 31/03/2010 and 01/04/2010 to 31/03/2011 has been completed under Section 39 of the OVAT Act.

To rebut the allegations of under invoicing, I may be allowed twenty days time. I shall submit a written note of submission. Considering my prayer, the assessing authority fixed the next date of hearing to dt. 20/07/2012 at 11 A.M.

Recorded to my dictation,
Read over, explained and
Admitted to be true and
correct.
Sd/2.7.2012
Deputy Commissioner of Sales Tax,
Barbil Circle, Barbil."

Raghunath Panda
02/07/2012
(Authorised Representative)
M/s. Sarda Mines (P) Ltd.

11. The above noted statement shows that the contents of the report under Annexure-9/Annexure-C were explained to the authorized representative of the petitioner in detail. The basis of allegation of under invoicing was also explained to him. The basis on the processing charge of Rs.230/- has been arrived at was also explained to him. He was shown the sale prices of different grades of CLO and iron Fines of Orissa Mining Corporation Ltd. for the years, 2008-2009, 2009-2010, 2010-2011 of Barbil Sector, which was utilized for arriving at the conclusion of under invoicing. Shri Panda was allowed to go through the calculation sheets prepared by the reporting authority showing the amount under invoicing. Further, he was allowed to take extract of the documents, calculation sheet, OMC rate agreement No.13 between OMC Limited and J & S Mineral Construction Company, Nelore. He also went though Annexure-9/Annexure-C. A perusal of LCR reveals that on 2.7.2012, the authorised representative never asked for copy of Tax Evasion Report and other materials. On 16.8.2012, the authorized representative on behalf of the petitioner filed a memo of appearance along with documents and made certain submissions as would be clear from Annexure-10 series. On that day, the statement of Surendra Panda, the Authorized Officer of the petitioner was recorded. On that day also there was no prayer from the side of the petitioner for supply of Tax Evasion Report. Thereafter, the matter was adjourned to 30.8.2012. On 30.8.2012, the matter was adjourned to 18.9.2012 and again the matter was adjourned on 18.9.2012 to 29.9.2012. On 29.9.2012 the matter was adjourned to 17.10.2012 when the petitioner filed exhaustive and detailed written notes of submission with a number of Annexures. However, in the said written note of submission, the petitioner has made it clear it reserved its right to challenge the notice under

Annexure-7 at appropriate time before the appropriate forum. The submission filed on 17.10.2012 also contained reference to various judgments covering various points raised by the petitioner and to the tax evasion report. However, in the said written submission in a round about way the petitioner indicated that in absence of full fledged "text of tax evasion report", the submission made are subject to alteration, modification on being provided with copy of the "tax evasion report". It is important to note here that the "text of tax evasion report" under Annexure-9 consisted of only 5 pages and as indicated earlier, Raghunath Panda, the Authorised Representative has gone through the same on 2.7.2012. On 22.11.2012, the petitioner filed its submission with regard to certain queries under Annexure-10 Series and requested to provide "sketchy tax evasion report" confronted to dealer. In such background, without supplying the sketchy tax evasion report, the impugned order under Annexure-11 was passed on 26.11.2012.

12. Since the opposite parties have raised issue of maintainability of the writ application on the ground of availability of the provision of this appeal, we will address the said issue first. As per well settled principles of law relating to maintainability of writ application in the face of availability of alternative remedy as has been made clear in **Whirlpool Corporation –vrs- Registrar of Trade Marks, Mumbai and others**, (*supra*), **The State of H.P. and others v. Gujurat Ambuja Cement Ltd.** (*supra*) and **The State of Uttar Pradesh –vrs- Mohammad Nooh**, (*supra*), a writ application is maintainable when the impugned order(s) has/have been passed without jurisdiction or in violation of principles of natural justice. Therefore, we have to examine whether in the present case there has been any violation of principles of natural justice or whether the impugned orders have been passed without jurisdiction. First, we will examine the contentions relation to violation of principles of natural justice. The tax evasion report under Annexure-9/Annexure-C runs only to 5 pages. The authorised representative of the petitioner, Mr. Raghunath Panda went through the same on 2.7.2012 and the contents of the report were also explained to him in detail as per his own statement quoted earlier. The basis of allegation of under invoicing was explained to him. In his statement he has stated that allegation in the report pertained to unusual practice of selling of ROM at abysmally low price. On that day, he never asked for copy of Tax Evasion Report. Even on 16.8.2012, the petitioner never asked for a copy of Tax Evasion Report. The petitioner only asked for tax evasion report on 17.10.2012 in a round about way while filing an exhaustive and detailed response. There the petitioner has admitted

that it has been permitted to note down the contents (gist) of the report. It may once again be indicated that the Tax Evasion Report runs only to 5 pages and the written submission dated 17.10.2012 contains several attacks on the Tax Evasion Report and how the said report has been issued without jurisdiction. Only on 22.11.2012 the petitioner asked for the "sketchy" tax evasion report after filing exhaustive report on 17.10.2012. In such background, we cannot come to a finding that there has been violation of principles of natural justice. In such background, merely for non-supply of tax evasion report, the petitioner cannot be said to have suffered any prejudice. For all these reasons, we refuse to accept the submission of Mr. Gopal Jain, learned Sr. Advocate that there has occurred violation of principles of natural justice in the present case.

13. With regard to the next submission of Mr. Gopal Jain, learned Senior Advocate to the effect that since in the present case the entire reassessment proceeding has been initiated on account of mere change of opinion and thus the same is clearly without jurisdiction; we are inclined to accept the same in the facts and circumstances of the case. As has been laid down in **Binani Industries Ltd., Kerala** (supra), **Kelvinator of India Limited** (supra), **Indian and Eastern Society, New Delhi** (supra) and **Naba Bharat Ferro Alloys Ltd.,** (supra), reopening of assessment by mere change of opinion is entirely impermissible. Further, an error discovered by the Assessing Authority on a reconsideration of same material does not justify reassessment in absence of new material/information.

14. In the present case, it is not disputed that the notice under Annexure-7 was issued on the basis of information contained in tax evasion report under Annexure-9. The said tax evasion report does not dispute sale of ROM to "JSPL". It also does not say that the petitioner has/had suppressed the quantum of sale/turnover or has received any undisclosed amount. It has simply proceeded on the basis of an assumption that business module of selling ROM at a low price instead of selling CLO is an unusual thing as ordinarily mine owner sells CLO after processing of ROM spending a miniscule amount in order to achieve real market value. In this context, law is well settled that the Taxing Authorities do not have the power to dictate as to what business module or method should be adopted by a businessman. It is upto him to manage his business affair according to his wisdom as has been rightly held by Allahabad High Court in **Hemraj Udyog** (supra) and **Saurashtra Chemicals** (supra). Secondly, the Assistant Commissioner, Sales Tax, Enforcement Wing, Bhubaneswar while preparing the tax evasion

report has been swayed by assumed low price of sale of ROM without indicating anywhere in the tax evasion report as to how the said price is low. It also does not refer to prevalent market price of the relevant period. In this context, it is important to note here that the opposite parties in their counter affidavit at Paragraph-13 have admitted that the price of ROM is not decided by the Indian Bureau of Mines. In such background, the assumption that ROM is being sold at abysmally low price has no legs to stand. Moreover, there is nothing to show that there is any legal bar for selling of ROM. In such background, the tax evasion report, which is based on conjectures, surmises and on certain artificial and presumptive parameters by taking into account a newly invented artificial formula,while the factual background remains the same, cannot constitute new/fresh information under Section-43(1) of "OVAT Act"for initiating a proceeding for reassessment by taking into account the price of an altogether different commercial commodity i.e. CLO. In this context, we refuse to accept the contention of Revenue that no new/fresh material is required to initiate a reassessment proceeding under Section-43 of the "OVAT Act". If such a contention is accepted then there would be no finality to assessment proceeding and every assessment order may remain at an unsettled stage and assessee will remain at the mercy of tax authorities, who may abuse such power at any time they like. It may further be noted here that the sale of ROM has been made in tune with the permission granted under Annexure-2 by the Director of Mines at the highest rate of royalty. The Assistant Commissioner Sales Tax, Enforcement Range, Bhubaneswar nowhere says/disputes quantum of turnover for the period 2008 to 2011. Only on the basis of his opinion that the sale of ROM is being done at abysmally low price without any evidence to back such claim and such sale of ROM instead of selling of CLO after converting the ROM being an unusual business practice and taking into account the price of CLO, he has invented an artificial formula to arrive at the conclusion of under invoicing under Annexure-9. Since the Annexure-9 is a product of change of opinion vis-à-vis the same factual background, the proceeding initiated under Annexure-7 on the said basis becomes without jurisdiction. However, with regard to the contention of Mr. Jain, that the entire proceeding is vitiated as notice under Annexure-7 gives no reason for initiation of reassessment proceeding we will say that it is well settled that reasons for reassessment is not required to be given in the notice. In this context, we rely on a decision of this Court in **Suburban Industries Kalinga Pvt. Ltd., and another** –vrs- **Sales Tax Officer, Bhubaneswar and another (1993) 90 STC (Orissa) 280)**. Though the petitioner has participated in the proceeding pursuant to

Annexure-7, however while filing its voluminous written submission on 17.10.2012 it has made it clear that it is participating without prejudice to its right to challenge the notice. In such background, we have no hesitation in holding that the notice under Annexure-7 was itself issued without jurisdiction and is liable to be quashed.

15. Though quashing of Annexure-7 would result in automatic quashing of the entire proceeding pursuant to such notice, however for the sake of completeness, we will discuss how the end result under Annexure-11 is even otherwise illegal. We make it clear that we will scan the reassessment order under Annexure-11 keeping in mind the law laid down by the Hon'ble Supreme Court in the decision of **Gobardhan Das Bhanji** (supra). In passing the impugned reassessment order under Annexure-11 while accepting the reasoning given in the tax evasion report under Annexure-9/Annexure-C based upon so-called unusual business practice of sale of ROM at low price, the opposite party No.3 has travelled beyond the same by coming to a conclusion that the petitioner is selling CLO and not ROM as the output of CLO and fines after processing equals that of ROM, for a given quantity. Thus, though the material facts remain same, the opposite party No.3 is of the opinion that as input and output ratio is 100%, the petitioner is selling CLO. Such a conclusion runs contrary to Tax Evasion Report under Annexure-9 which does not dispute sale of ROM but at a lesser price resulting in under invoicing. In any case, merely because the input quantum of ROM equals the output quantum of CLO and Fines, it cannot be said that the dealer has been selling CLO not ROM. Had that been the case than after processing, there would not have been any Fines. The very presence of Fines containing impurities show JSPL has only processed ROM. Further, such opinion of opposite party No.3 is not backed by any scientific study that after processing of a given quantity of ROM it cannot produce same quantity of CLO and Fines. The opposite party No.3 is not an expert to give opinion on this. Thus, in absence of authentic scientific study that input and output cannot be same, the opinion of opposite party no.3 was that what was fed during processing was CLO not ROM has no legs to stand. In fact opposite party no.3 is no expert in these matters. Either he should have relied on some expert's opinion on the subject or on any Notification of Indian Bureau of Mines. In absence of this, to assume that since output and input is same, the material fed in the processing plant was CLO and not ROM is fallacious. Further, the fallacy of such an opinion can also be clear from the fact that the total quantity of ROM does not correspond to total quantity of CLO

produced, which is much less. Rather, this shows ROM was really processed by "JSPL". Further, under Annexure-6, the Revenue authorities themselves were satisfied that the petitioner is only engaged in digging/extracting ROM and not in any manufacturing activity. In any case neither the Mining Authorities of the State Government nor the Authorities of Indian Bureau of Mines have ever objected to such figures. Therefore, such assumption by opposite party no.3 is also arbitrary and without jurisdiction. It again clearly reflects a change of opinion on the basis of certain presumptions, which are not backed by scientific study. Like the report under Annexure-9/Annexure-C, there does not exist any dispute relating to quantum of turnover/quantity of sell of ROM. The opposite party No.3 has also referred to the conduct, which is required of a prudent business man. As indicated earlier the Taxing Authorities lack jurisdiction to suggest business module. He also refers to abysmally low price paid by the petitioner while selling ROM without indicating how such a conclusion has been arrived at. The opposite party No.3 also refers to attempt by Assistant Commissioner, Sales Tax, Enforcement Range, Bhubaneswar under Annexure-9 to find "factual anomaly". However a perusal of Annexure-9 nowhere reflects the same. Even there exists no discussion on factual anomalies in the impugned order under Annexure-11. Neither in the Tax Evasion Report nor under Annexure-11 there exists any allegation anywhere about suppressing of figures of turnover of sales of ROM. Rather, relying on certain presumptive parameters and an artificial formula which takes in to account price of another commodity i.e. CLO, the reassessment proceeding has been initiated and concluded. Thus, such a reassessment proceeding is clearly based on change of opinion. Further, though opposite party No.3 treats the report under Annexure-9 as a new material containing a new formula, however as discussed earlier, it contains no new background facts relating to quantum of turnover for the relevant period. As indicated earlier, it only uses new and presumptive artificial parameters, which only reflect a change of opinion. A new artificial formula under the facts and circumstances as invented by the authorities cannot form a new material to open the assessment proceeding when factually there exists no evidence relating to under assessment/escaped assessment. Most importantly, so far as opposite party No.3 is concerned, there exists no legal evidence/a scrap of paper to show that the petitioner has actually sold CLO and not ROM for the years 2008-2011. To our mind power under Section-43 of the "OVAT Act" cannot be exercised for reassessment unless facts relating to suppression/escapement are discovered. It cannot be exercised by inventing a new formula.

16. Further, there is nothing on record to show that the petitioner has received an undisclosed sum beyond the records, which were suppressed during self-assessment/audit assessment proceeding or has concealed the turnover. Here facts clearly bear out that the entire process of reassessment has been occasioned on account of change of opinion as there exists no fresh material/facts/information for reassessment under Section-43 of the OVAT Act. In such background, we are satisfied that since change of opinion is the basis for issuance of notice under Annexure-7 and for passing the impugned order under Annexure-11, thus, both the impugned orders have been issued without jurisdiction and thus the writ application is maintainable.

Now to the judgments relied upon by Revenue.

With regard to ***M/s.Mideast Integrated Steel Ltd. and another (supra),*** the said judgmenet is factually distinguishable. There, the issue related to payment/otherwise of royalty and it had nothing to do with re-opening of assessment under Section-43 of the "OVAT Act" and parameters for such reopening. Even otherwise, in the present case, the petitioner has paid royalty at the highest rate even on dispatch of ROM. Secondly, though the case ***M/s.Mideast Integrated Steel Ltd. and another (supra)*** refers to report of Controller of Auditor General with regard to 100% output of CLO and Fines, vis-à-vis ROM, input but it nowhere says that under such circumstances entire ROM is to be treated as CLO. Further, there exists no scientific data to show that 100% output of CLO and Fines from a given quality of ROM is not possible. In the case of ***M/s.Mideast Integrated Steel Ltd. and another (supra),*** this Court was concerned with the issue that once converted to CLO and fines, the quantum of royalty received by the State became less. Here, the said issue does not arise, as the petitioner is paying royalty at the highest rate. So there is no question of the State loosing on royalty. There the approved mining scheme clearly stipulated that no mineral benefication was permissible within the leased area, which was violated by the petitioner there.

With regard to ***M/s. Bhushan Power and Steel Ltd. (supra)*** cited by the Revenue, the said case is clearly distinguishable on facts. There, the Vigilance report was utilised in audit assessment under CST (O) Rules, 1957 illegally. This Court held that audit assessment has to completed only on the basis of materials available in audit visit report and that audit assessment and assessment of escaped turnover cover separate and distinct field. With regard to ***M/s. Bharat Petroleum Corporation Ltd. (supra),*** there it has been made

clear that re-assessment proceeding for the self-same year cannot be said to be without jurisdiction on the ground of change of opinion unless and until it is established that turn over brought to the tax in the reassessment was subject-matter of earlier assessment and no tax was levied by the assessing officer by taking a particular view. In other words, it makes it clear that if the re-assessment is sought to be done on same turn over, which was subject-matter of earlier assessment and no tax was levied by the assessing officer by taking a particular view, then re-assessment proceeding cannot be initiated as it would be a re-assessment only on the ground of change of opinion. Thus, it would become without jurisdiction. In the present case, as indicated earlier, here there has been no suppression of turn over and no higher turn over was discovered by the STO (Investigation) or by opp. party No.3. In such background, the attempt to re-open the assessment proceeding is clearly by taking another view of the matter, which is legally impermissible. In the case of M/s. Bharat Petroleum the re-assessment was done as on verification of records, it was found that the alleged turn overs were not disclosed by the assessee. Therefore, the said case is factually distinguishable.

With regard to the case of ***Commmissioner of Income Tax and others v. Chhabil Dass Agarwal (supra).*** In that case returns were not furnished for the relevant years 1995-96 and 1996-97. Secondly, the facts do not show that in that case the re-assessment proceeding was challenged as one being without jurisdiction on the ground of change of opinion. Unlike the present case, in that case as indicated earlier, there was concealment of turn over atleast for the years 1995-96 and 1996-97, but here as indicated earlier, there is no suppression of turn over and no finding to that effect by any of the authorities. Therefore, the ratio said case with regard to availing alternative remedy has no application to the present case.

With regard to the case of ***State of Orissa v. Durgadutta Moda (supra),*** cited by the Revenue it can also be said that the same is factually distinguishable. In the present case, the allegation of under-assessment is based on mere change of opinion based on three artificial parameters like abysmal low price, peculiar business module being followed by the petitioner and a suspicion relating to 100% output of input. While the parameter of abysmally low price is not backed by fact, suspicion relating to impossibility of 100% output is not backed by scientific study. In the case of ***State of Orissa v. Durgadutta Moda (supra),*** there was suppression of turn over but in the present case, there was no such suppression. In the background of such suppression, this Court came to hold that the Tribunal was not correct in law

in holding that it was the duty of the department to fix actual amount of escapement and that the Assessing Officer can make best judgment assessment. But while making best judgment, assessment supporting estimate material must be found and indicated. Further interestingly in the present case, the impugned order under Annexure-11 has travelled beyond the tax evasion report under Annexure-9/Annexure-C, which never disputed sale of ROM. In other words, while tax evasion report admits sale of ROM, the impugned order under Annexure-11 reaches a conclusion that CLO was being sold instead of ROM.

Thus, the judgment cited by the Revenue are of no help to it. In such background, when the notice under Annexure-7 and the impugned orders under Annexure-11 including the demand are products of change of opinion, thus, it is clear that these have been issued without jurisdiction. Accordingly, we quash Annexures-7 and 11 including the demand notice. The writ application is accordingly allowed. No costs.

Writ application allowed.

2017 (I) ILR - CUT-981

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

CRIMINAL APPEAL NO. 03 & 40 OF 2000

PADMANAV DAS .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

(A) EVIDENCE ACT, 1872 – S.32

Dying declaration – Deceased made dying declaration not only before P.W. 9 and 10 who are his brother and mother respectively but also in the presence of P.W. 8 an independent witness – Evidence of such witnesses not only corroborates with each other but also gets ample support from the evidence of the doctor (P.W. 6) who conducted autopsy and found the death was due to hemorrhage and shock, owing to multiple injuries, cutting of veins of forearm and leg – Learned trial court having properly assessed such evidence, the same calls for no interference by this Court. (Paras 8,16,17)

(B) **CRIMINAL TRIAL – Murder case – P.W.s 3,8,9 and 10 clearly deposed the overt act by each of the appellants in Criminal Appeal No 40 of 2000, being armed with deadly weapons like farsa and Bhujali – Motive of the accused persons to kill the deceased is apparent – The statements of the eye witnesses with regard to assault made by each of the appellants get ample corroboration from the medical evidence – Held, this court confirmed the finding of guilty recorded by the learned trial court against the accused persons in the above appeal.** (Paras 13,18,19)

(C) **EVIDENCE ACT, 1872 – S.3**

Appreciation of evidence – P.W.3. was a witness to the occurrence – He had seen the deceased was surrounded by the accused persons being armed with weapons and heard the cry of the deceased to the effect "MOTE HANI PAKAILE AND MARI PAKAILE" – He could identify the accused persons from their voice as he is a local man – Nothing has been brought out from his cross-examination disbelieving his presence at the spot – It is quite possible that P.W.3 seeing the brutal assault with deadly weapons in the dead of the night, concealed himself out of fear in a Bagayat and went to a distant village – Held, prosecution has explained properly the delay in examination of P.W. 3. (Para 13)

For appellants : M/s D.P.Dhal, A.K.Acarya, S.K. Das, B.K.Panda & S. Ghosh M/s. A.K.Nayak, J.K.Rout, D.K.Mishra, S.C.Mohanty, G.K.Nayak & R.Mahalik.
M/s.Rajen Mohapatra, Karunkar Rarh, H.S.Deo, Mr. Debashis Panda.

Respondent : Additional Government Advocate.

Date of Judgment- 05.2017

JUDGMENT

S. PANDA, J.

Both these Criminal Appeals are directed against the judgment dated 14.12.1999 passed by the 1st Addl. Sessions Judge, Puri in Sessions Trial Case No. 63/411 of 1996 in convicting the appellants for commission of offence under Section 148 I.P.C. and sentencing them to undergo Rigorous Imprisonment for three years and for commission of offence under Sections 302/149 I.P.C. and sentencing them to under Rigorous Imprisonment for life. It was also directed that both the sentences are to run concurrently and the period of detention in custody by the convicts, if any, be set off.

2. The prosecution case, in brief is that on 31.08.1994, the deceased Sukanta Panda along with P.W.3, Kalia Swain, alias Naba Kishore Swain, Panchu Jena and Hari Swain had gone to Puri and at about 6.00 P.M. on the same day they left Puri for their village. At Sakhigopal, all of them got down from the bus. Panchu Jena stayed at Sakhigopal and the deceased, P.W.3 and Hari Swain went to their village. In their way, Hari Swain left them near a bridge at village Majhikera and thereafter the deceased along with P.W.3 went to village Dihapur. While they were going as such, the accused persons being armed with Farsa, Bhujali, Lathies, etc. surrounded the deceased and P.W.3. At that time, P.W. 3 ran out of fear, but on his way, he was assaulted by the accused Sagar Dash by lathi. In between 10.30 to 11.00 P.M., P.W.8, Indramani Pradhan had been to the village Dihapur to the house of the deceased to collect the sale proceeds of green cocoanuts, which he had given to Padmalav Mahapatra, the elder brother of the deceased. There, P.W.8-Indramani Pradhan, P.W.9-Padmalav Mahapatra and P.W.10-Radhamani Panda, heard the cry of the deceased *"MOTE HANI PAKEILE"*. Hearing such shout, P.Ws.8, 9 and 10 went to the spot and found that the deceased Sukanta Panda was lying with severe bleeding injuries on his person. The accused persons were also present there on the spot. The deceased Sukanta was nourished and on being asked the deceased told that accused Iswar Pradhan, Narayan Padhan, Ananta Pradhan, Balakrishna Mahapatra and Kumar Mahapatra caught hold of him and thereafter the accused Kumar Mahapatra dealt a Farsa blow on his left leg near the knee, accused Susanta Padhan assaulted him by Farsa on his right wrist, as a result of which the right wrist with fingers were detached from his body, accused Jaya Das assaulted him by a Farsa on his right leg, accused Parasuram Sahu assaulted him by a Farsa on his left palm, accused Rabi Sahu assaulted him on his right leg with Farsa giving two blows and accused Mahia gave a Farsa blow on his left leg. The other accused persons also assaulted him by fist blows, kicks and iron rods. Thereafter, injured-Sukanta Panda was taken in a bullock cart to Sakhigopal hospital, but on the way, he succumbed to the injuries. P.W. 10, the mother of the deceased lodged the F.I.R. Accordingly the O.I.C. Satyabadi Police Station went to the spot on 01.09.1994, seized the bloodstained earth and held inquest over the dead body. He despatched the dead body for postmortem examination. After completion of investigation, charge-sheet was submitted finding sufficient evidence against the appellants and other accused persons to have committed offence under Sections 148, 302 and 149 I.P.C.

3. The appellants' defence plea was one of complete denial.

4. In order to bring home the charge, during trial the prosecution examined as many as 12 witnesses and exhibited 11 documents, which were marked as Exts. 1 to 11. On the other hand, the defence had neither examined any witness nor exhibited any document. The prosecution also proved Material Objects from M.O.I to M.O. I/5.

5. The learned Addl. Sessions Judge after threadbare discussion of the materials available on record and on consideration of evidences found the appellants guilty of the charges for commission of the offence punishable under Section 148 I.P.C. and sentenced them to undergo Rigorous Imprisonment for three years and for commission of offence under Sections 302/149 I.P.C. and sentenced them to undergo Rigorous Imprisonment for life. It was also directed that both the sentences are to run concurrently and the period of detention in custody by the convicts, if any, be set off.

6. Learned counsel for the appellant in Criminal Appeal No. 3 of 2000 submits that the impugned judgment is against the weight of evidence on record. There has been long delay in lodging the F.I.R., which was not explained. The prosecution has not proved that the appellant was a member of the unlawful assembly armed with deadly weapons. Due to previous enmity with the deceased and his father, he has been implicated in the crime.

7. Learned counsel for the appellants in Criminal Appeal No. 40 of 2000 submits that the Court below has passed the order basing on the evidence of P.Ws. 3, 8, 9 and 10 who are not at all the eyewitness to the occurrence and they are all post occurrence witnesses. The impugned judgment of conviction and sentence is based on surmises and conjectures. The appellants have been implicated due to previous animosity. He further submits that P.Ws. 9 and 10 being interested witnesses, their evidence is not to be relied. Hence the impugned order is liable to be set aside and the appellants are entitled for acquittal.

8. Learned Additional Government Adovcate strongly contended that the appellants had common motive to kill the deceased and they had come with deadly weapons. The deceased had made the dying declaration before P.Ws. 8, 9 and 10 about the assault. The evidence of such witnesses corroborates with each other. The Doctor (P.W.6), who conducted the autopsy, found that the death was due to hemorrhage and shock resulting multiple injuries, cutting of veins of forearm and leg. He further opined that the death was within 12 hours from the time of examination, i.e. 4.00 P.M. on 01.09.1994.

Therefore, the sentence imposed on the appellants has been properly assessed by the Trial Court and as such, the same calls for no interference by this Court.

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

It appears that the prosecution has basically founded its case on the basis of the statements of the witnesses, i.e. P.Ws. 3, 8, 9 and 10, so also the statements of the P.W. 6, the Doctor, who conducted the postmortem examination. The Court below found that the appellants have come with a common object to kill the deceased and accordingly passed the impugned order. Let us examine the evidence of the witnesses basing on which the Trial Court has passed the impugned order.

10. The Trial Court had convicted the appellants under Section 148 IPC.

Section 148 refers to rioting armed with deadly weapons. Consequently for punishment under any or all these sections an unlawful assembly is sine qua non, which was defined in Section 141 IPC. Possession of the deadly weapon is an essential ingredient of the offence punishable under Section 148 IPC.

Meaning of Words- "Whoever…. being armed," i.e. only the person so armed can be convicted under this section.

Applicability of Section 148 can be attracted only when a rioter is armed with a deadly weapon or with a weapon of offence likely to cause death.

In the instant case, the evidence was clear that the accused persons were armed with *Farsa* and *Bhujali*, which were deadly/dangerous weapons. Rightly the charges were framed under section 148 IPC against the accused persons so armed with deadly weapons and the order of conviction was passed accordingly.

11. Section 149 primarily requires that a person should be a member of unlawful assembly, that in prosecution of common object of that assembly, as offence should be committed by a member of that unlawful assembly, and that the offence should be of such a nature that the member of the assembly knew the offence likely to be committed in of their common object. The Court has to see the accused persons are members of the unlawful assembly with a common object with particular reference to the part played by each of the accused persons who consulted the unlawful assembly.

In dealing with applicability of Section 149 IPC, "it is necessary to bear in mind the several categories of cases which come before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is very clear case where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under Section 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under Section 302/149 if the charge is that the person before the Court along with others named constituted an unlawful assembly. (see ***Mohan Singh v. State of Punjab (1962) 3 S.C.R 848***).

12. P.Ws. 9 and 10 termed as interested witnesses. The law is well settled that evidence of interested witnesses is not necessarily unreliable by itself as such evidence should be subjected to careful scrutiny with caution. The Court is to find out as to whether the presence of the witness at the sense of the crime is probable and if so, as to whether the story narrated by such persons would carry conviction with a prudent person. If the evidence of witnesses appears to the Court to be flawless and free from suspicions, it may accept it.

With the above touch stone we examined the evidence of the witnesses.

13. P.W.3, Kalia @ Naba Kishore Swain, the witness to the occurrence has stated in his Examination-in-Chief that the occurrence took place at about 11.00 P.M. at the outskirt of the village Dihapur near the village road. On the date of occurrence, he along with deceased, Hari Swain, and Panchu Jena were coming from Puri. After getting down from the bus at Sakhigopal, they proceeded to Chandapokhari. The deceased went by scooter to village Jayarampur Chhak. At that place, he, Hari Swain met the deceased and they left for their village through the village Majhikera. Hari Swain left near the bridge to go to his village Patana. He along with the deceased while coming, the accused Sustanta Padhan, Jai Das, Parasu Sahu, Rabindra Sahu, Mahia Das surrounded the deceased. At that time, he ran away from the place leaving the cycle. While he was running from the spot, he saw accused Kalia Padhan and Bharat Padhan were proceeding towards the spot from the opposite direction. He heard the cry of the deceased to the effect *"MOTE HANI PAKAILE AND MARI PAKAILE"* . He concealed himself out of fear in

a Bagayata and thereafter he went to his village Kosala. It reveals from his evidence that he had seen the above named accused persons surrounding the deceased on the spot. He could identify the accused persons from their voice as he is a local man. Nothing has been brought out from his cross examination disbelieving his presence at the spot. The prosecution has explained the delay in examination of P.W. 3 and it is quite possible that a person in the dead of the night saw the brutal assault of deceased with deadly weapons while coming with him to the village. He fled away from the spot out of fear and concealed himself in a distance village. He has no occasion to disclose the facts immediately.

14. P.W.8, an independent witness had deposed in his examination-in-chief that on the evening of the date of occurrence, he had been to the house of deceased to collect the sale proceeds of the green coconuts. However he was told to wait till the arrival of the deceased. While waiting there, he heard hullah from the side of the road. Hearing that hullah, he along with Padmalav Mohapatra (P.W.9) and Radhamani Panda (P.W.10) proceeded towards the spot with a torch light and one chargeable torch light. The torchlight was held by P.W.9 and the chargeable or light was held by P.W.10. While going towards the spot, they heard as "HANIPAKIIE BOUKILO MARIGALI". They saw that the deceased was lying there with severe bleeding injuries on his person. On being asked by P.Ws. 9 and 10, he narrated the details of assault by the accused persons. P.W.8 could able to see the accused persons on the focus of the torch. Thereafter, the deceased was taken to the hospital. He accompanied the deceased to the hospital. On the way to hospital, the deceased could not talk near the rice mill of Panu Sahu of Village Jayarampur. In the hospital the deceased was declared to be dead by the doctor.

15. P.W.9, the elder brother of the deceased, in his examination-in-chief has deposed that on the date of occurrence at about 11 P.M. when he was sitting in from of his house, he heard a hullah "MOTE HANIPAIKELA DAUDI ASSA". Thereafter, he along with informant (P.W.10) and one Indramani Padhan (P.W.8) went to the spot. They found that the deceased-Sukanta Panda was lying on the road side and the accused persons were standing nearby armed with Farsa, Bhujali etc. Seeing them, the accused persons fled away and he nourished the injured Sukanta and he regained sense. On being asked by him, the said injured Sukanta Panda told that accused Balakrishna Mahapatra, Kumar Mahapatra, Naran Padhan and Ananta Padhan caught hold of the deceased and accused Kumar assaulted his

brother by a Farsa which struck on his left leg. Accused Balakrishna Mahapatra assaulted his brother Sukanta by a Farsa to his right leg and accused Susanta Padhan assaulted his brother by a Farsa on his right wrist and accused Parassuram Sahu assaulted his brother by a Farsa on his left palm. Accused Jayakrishna Das assaulted his brother by a Farsa on his right thigh. Accused Rabi Sahu and Mahia Das assaulted his brother by a Farsa to both of his legs. Thereafter, when his brother Sukanta wanted water the accused persons Kalia Padhan, Sagar Das and Surendra Barik threw him in a field. In his Cross-examination his statement in chief was not demolished regarding the overt act of accused persons. However as to the suggestion given regarding death of deceased while, he came to the spot, he denied the same.

16. P.W.10, mother of the deceased is the informant and she has corroborated the time and place of occurrence. After hearing the hulla of her son Patia (deceased), she along with P.Ws. 9 and 8 ran to the spot. In the focus of the torch, she saw the accused persons standing nearby whereas her son Patia was lying being unconscious. The accused persons were armed with Farsa, etc. When they focused the torch, the accused persons fled away from the spot. Thereafter, her son Padmalav Mahapatra (P.W.9) nourished the deceased by giving water. The deceased regained his sense. She put her son on her lap and on being asked her son told that accused Iswar Padhan, Narayan Padhan, Ananta Padhan, Balakrishna Mahapatra and Kumar Mahapatra caught hold of him and accused Kumar Mahapatra dealt a Farsa blow on the left leg knee of her son. Accused Susant Padhan assaulted her deceased son by Farsa on his right wrist as a result of which the right wrist with fingers was detached from the body. Accused Jaya Das thereafter assaulted her son by a Farsa on his right leg. Accused Parasu Sahu assaulted her son by a Farsa on his left palm. Accused Rabi Sahu assaulted her son on his right leg with a Farsa giving two blows and accused Mahia Das gave a Farsa blow on his left leg. The accused persons also assaulted her son by fist blows, kicks and iron rods. Accused Padu Das, was having bomb with him kept in a bag. Her injured son was taken to Sakhigopal Hospital in a bullock cart and on the way he died.

17. P.W.6, the Doctor who conducted autopsy over the dead body of the deceased at about 4. P.M. on 01.09.1994 found the injuries as follows:-

(1) On external examination, the body built is stout, completion fair, food particles on the right angle of the mouth and right nustrils. Rigour

notice present. I noticed one incised wound at the level of the right wrist joint.

Cut through separating the right hand completely the cutting part of the hand, also skin cut margin suggestive of incised wound. Both the parts brought into apposition found to be of same person after comparison of the skin muscles and bone.

(2) One incised wound 31/2" x 1" on the middle 1 ½" depth. Under lateral aspect of the right ankle joint, which caused muscles,vessels and underlined bones. Right fibula and upper part of calcareous and fibula.

(3) One incised wound size 3 ½" x 1" on the middle into half inch deptch. 2" above the right knee joiont.

(4) One incised wound of size length 1" x ½" x ½" depth on the lateral aspect of the right foot on the dorsal aspect.

(5) One incised wound 3" x ½" x 1 ½" present on the web space between the left thumb and index finger. Cutting between the left thumb and index finger. Cutting the underlined skin and muscles and vessels, including the second and third metacarpal bone.

(6) One incised wound 1" x 1'2" x ½" on the promimal phalanx of the left thumb.

(7) One incised wound 1" x ½" x ½" on the mid part of the left forearm. 3" below the left elbow joint. It cuts skin muscles and superficial vessels.

(8) One incised wound 4" x1"x2" placed over the lateral aspect of the left ankle joint. It cuts skin, muscles and vessels and underlines bones left fibula at his lower and and lateral calneous bones.

(9) One incised wound 4 1/2" x 1" x1" over the left leg 2" above the left ankle joint.

According to him, the cause of death is due to haemorrhage and shock resulted from multiple injuries cutting vessels of the forearm and legs, which is homicidal in nature.

18. On close scrutiny of the aforesaid evidences, it is evident that that P.W.3 was coming with the deceased when all the accused persons surrounded the deceased being armed with deadly weapons like *Farsa* and *Bhujali*. The motive of the accused persons to kill the deceased is apparent.

P.Ws. 3, 8, 9 and 10 deposed the overt act by each of appellants of Criminal Appeal No. 40 of 2000. Such statements are corroborated with each other. P.W.3 was witness to occurrence. His evidence is consistent. The materials available on record discloses the presence of P.W.8, the independent witness at the spot when deceased disclosed the assault made by each of the appellants with deadly weapons to his mother and brother (P.Ws.10 and 9 respectively). P.W.8 had gone to obtain the sale proceeds from P.W.9. There is no discrepancy in the evidences of all such witnesses. All such indicate that the appellants had formed unlawful assembly in prosecution of common object. The statements of the eye witnesses with regard to assault made by each of the appellants get ample corroboration from the medical evidence of the doctor (P.W. 7).

19. In view of the above, we hold that the Criminal Appeal No. 40 of 2000 filed by the accused persons is devoid of merit. We accordingly up-hold the finding of the guilty as against those accused persons as recorded by the Trial Court and also the sentence imposed in respect of the offence committed by them. Hence the appeal fails. The same is accordingly dismissed. The accused persons since are on bail, their bail bond be cancelled and they are be directed to surrender before the Trial Court to undergo the remaining period of sentence.

20. So far as the appellant in Criminal Appeal No. 3 of 2000 is concerned, the witnesses have not seen him with deadly weapons, except the evidence of P.W.10, who stated that Padu was having bomb kept in a bag. It is not possible for a person to say whether a bomb is their in the bag or not. There is no specific evidence with regard to the overt act performed by the said appellant, nor any incriminating material was recovered from him.

21. In such view of the matter, this Court sets aside the order of conviction and sentence imposed in the impugned judgment dated 14.12.1999 so far as the appellant in Criminal Appeal No.3 of 2000, i.e. Padmanav Das is concerned and allows Criminal Appeal No. 3 of 2000. Accordingly his bail bond be cancelled and he shall be discharged from criminal liability.

Cr. Appeal No 3/2000 allowed.
Cr. Appeal No 40/2000 dismissed.

2017 (I) ILR - CUT- 991

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

W.P.(C) NOs. 11558 OF 2010 & 8038 OF 2014

UMESH CHANDRA PANDA ……..Petitioner

.Vrs.

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

SERVICE LAW – Petitioner was appointed as watchman-cum-Sweeper on ad-hoc basis – He approached the Tribunal for regularization – State contested the case saying that the petitioner was appointed without any advertisement and his appointment is illegal – Tribunal while holding that the appointment of the petitioner is not in accordance with law and denied regularization, allowed him to continue on ad-hoc basis – Hence the writ petition – Record shows that the post was sanctioned and pursuant to notice issued by the authority he applied for the post and he having requisite qualification got selected by the selection Committee and got appointment – However, in the absence of wide publication, his appointment may be called irregular but not illegal and in the process he has completed 21 years of service without any interim order passed by any Court – Held, impugned order passed by the Tribunal is set aside – Direction issued to the Opp. Parties to consider the case of the petitioner for regularization. (Para 14)

Case Laws Referred to :-

1. (2006) 4 SCC 1 : Secretary, State of Karnataka & Ors. vrs. Umadevi(3) & Ors.
2. (2010) 9 SCC 247 : State of Karnataka & Ors. –vs- M.L.Kesari & Ors.
3. (2013)14 SCC 65 : Nihal Singh –v- State of Punjab.
4. (2015)8 SCC 265 : Amarkant Rai -vs- State of Bihar & Ors.

For Petitioner : M/s. Sanjib Mohanty, S.C.Mohanty, C.Sethy & B.Ganthia M/s. Saswata Patnaik, L.Mishra, S.K.Singh & S.Das.

For Opp. Parties : Addl. Govt. Adv. for State

Date of hearing : 07.04.2017
Date of judgment : 07.04.2017

JUDGMENT

S. N. PRASAD, J.

Since the issue involved in these two petitions is the same, hence both the cases have been taken up together and the same are being disposed of as follows.

2. W.P.(C) No.11558 of 2010 has been filed under Articles 226 and 227 of the Constitution of India by the petitioner assailing the order dated 28.6.2010 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A.No.2595(C) of 2009 whereby and where under the claim of the petitioner for continuance with the post in which he is discharging duty, has been held to be illegal.

3. Brief facts of the case of the petitioner is that in pursuance to the notice published in the notice board for filling up of the post of Watchman-cum-Sweeper before the District Consumer Redressal Forum, Bhadrak he has been appointed on 29.8.1996, his appointment has been made on the basis of the direction of the government dated 16.2.1998 as contained in Order No.3606 issued by the Director, Consumer Affairs-cum-Joint Secretary to Government and since then he is continuing in service.

The fact of continuance of the petitioner in service has been questioned and the petitioner had approached the Tribunal time and again, ultimately his case was considered by the Commissioner-cum-Secretary to Government, Food Supplies & Consumer Welfare Department, Bhubaneswar in pursuance to the order passed in O.A.No.2180(C) of 2001 and the Commissioner-cum-Secretary has passed order dated 19.10.2009 as contained in order No.22606 whereby and where under finding has been given that his appointment is without following due procedure, i.e. without any advertisement and as such his contention has not been accepted regarding legality and propriety of appointment, but however, the Commissioner-cum-Secretary has given his opinion that he can at best treated as an adhoc appointee on consolidated pay basis and his pay will be regulated accordingly and in pursuance to such communication the petitioner is continuing in service though as an adhoc appointee, hence he has already completed regular and continuous service of about 21 years as on date and on the date of the judgment rendered by Constitutional Bench in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others** reported in (2006) 4 SCC 1, about 10 years and as such his case ought to have been considered on the basis of para-53 of the said judgment of the Constitutional Bench, but the Tribunal without appreciating the factual aspects has rejected the claim of the petitioner by holding therein that his case is not coming under the parameter of the ratio laid down by the Constitutional Bench judgment rendered in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra).

4. Learned counsel representing the opposite party-State has defended the order by submitting that appointment of the petitioner has been made without following due procedure of law i.e. without any advertisement as well as his name was also not called upon from the Employment Exchange and as such it cannot be said to be in violation of the provision laid down under Article 16 of the Constitution of India, the Tribunal without taking into consideration this aspect of the matter has held that the appointment dehors the rule, hence the order of the Tribunal need not be interfered.

5. Heard learned counsel for the parties, perused the materials available on record as well as the order passed by the Tribunal which is impugned in this writ petitions.

6. The fact which is not in dispute in this case is that the petitioner has been appointed as Watchman-cum-Sweeper in the District Consumer Redressal Forum, Bhadrak by order of the President, Consumer Disputes Redressal Forum, Bhadrak dated 29.8.1996(Annexure-2). The appointment has been made in pursuance to the decision taken by the Secretary, Food Supplies & Consumer Welfare Department vide order dated 16.2.1998 as contained in order No.3606 and in pursuance thereof the President, District Consumer Forum, Bhadrak requested to take steps to fill up the Class-IV post on regular basis following the procedure laid down in the department letter no.26465 dated 3.9.1996, the President, District Consumer Forum, Bhadrak issued notice inviting applications for the post of Peon and Night Watchman-cum-Sweeper and other posts published in the Notice Board of the District Consumer Forum, Bhadrak, C.S.O., Bhadrak, Collector, Bhdrak and some other offices and in pursuance to such advertisement, six candidates for the post of Peon and six candidates for the post of Night Watchman-cum-Sweeper had appeared before the selection committee comprising of the President, District Forum, Bhadrak, C.S.O., Bhadrak, Lady Member of District Forum and one Assistant Teacher. The petitioner along with others had participated before it and on the basis of their performance, merit list was prepared duly signed by the members of the Committee and thereafter order of appointment has been issued in favour of the petitioner.

7. The State authorities has questioned the appointment of the petitioner on the ground that the procedure laid down under Article 16 of the Constitution of India has not been followed, i.e. the appointment has been made without issuance of any advertisement, hence appointment of the petitioner has been held to be illegal.

Petitioner had approached the Tribunal against the decision of the authority, Tribunal has passed order directing the Commissioner-cum-Secretary to take decision, in terms thereof, the Commissioner-cum-Secretary, although has come to conclusion that the appointment has been made without any advertisement but allowed the petitioner to continue in service on adhoc appointee on consolidated payment basis as would be evident from the order dated 19.10.2009 and in pursuance thereof the petitioner is continuing in service till date.

The Tribunal has passed order rejecting the claim on consideration of his regularization in service by holding therein that since the appointment is illegal and as such the judgment pronounced by the Constitutional Bench of the Hon'ble Apex Court in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra) is not applicable and as such he cannot be continued in service which is impugned in this writ petition.

8. We have examined the argument advanced on behalf of the petitioner that the ratio laid down by the Constitutional Bench of the Apex Court in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra) is applicable in the facts and circumstances of the instant case, since according to the petitioner, he is continuing since the date of his initial appointment i.e.19.8.1996 till date and as such he has already completed 21 years of regular service without getting any support of interim order passed by any court of law.

Learned counsel for the petitioner submits that the ratio laid down by the Hon'ble Apex Court in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra) is squarely covered his case reason being that as on the date of pronouncement of the judgment he has completed 10 years of service and even if the appointment is illegal, his case is fit to be considered in the light of the exception carved out by the Hon'ble Apex Court at para-53 of the judgment rendered in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra).

9. We, in order to examine the argument of the learned counsel representing the petitioner as well as the finding of the Tribunal whereby and where under the tribunal has been pleased to come to conclusion that the case of the petitioner is not coming under the parameter of the judgment rendered by the Hon'ble Apex Court in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra), have thought it proper to examine the judgment rendered in the case of **Secretary, State of**

Karnataka and others vrs. Umadevi(3) and others(supra) as well as the judgment rendered in the case of **State of Karnataka & others –vs- M.L.Kesari & others**, reported in (2010) 9 SCC 247. The decision in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra) was rendered on 10.4.2006. In that case, a Constitution Bench of the Apex Court held that appointments made without following the due process or the rules relating to appointment did not confer any right on the appointees and courts cannot direct their absorption, regularization or re-engagement nor make their service permanent, and the High Court in exercise of jurisdiction under Article 226 of the Constitution should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment had been done in a regular manner , in terms of the constitutional scheme. The Hon'ble Apex Court further held that a temporary, contractual, casual or a daily-wage employee does not have a legal right to be made permanent unless he had been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution of India. The Hon'ble Apex Court made one exception to the above position and the same is being quoted below:

> "53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa [1967 (1)SCR 128], R.N. Nanjundappa [1972 (1) SCC 409] and B.N. Nagarajan [1979 (4) SCC 507] and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. ...."

It is evident from the quoted part above, that there is exception to the general principles against regularization i.e.

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

Hon'ble Apex Court while rendering the judgment in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra) has casted duty upon the concerned Government or instrumentality, to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure and further directed that such one-time measure must be set in motion within six months from the date of its decision rendered on 10.4.2006.

The proposition laid down by the Hon'ble Apex Court in the judgment in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra), as has been taken note by the Hon'ble Apex Court in the case of **State of Karnataka & others –vs- M.L.Kesari & others**(supra) wherein their lordships of the Hon'ble Apex Court has been pleased to come to finding that in the situation where one-time measure has not been completed by State instrumentality and while dealing with such situation it has been laid down that if any employer had delayed one time exercise in terms of para-53 of the judgment in Umadevi(3) case and did not consider cases of such employees who are entitled to the benefit of para-53 of the said judgment, the employer concerned should consider their cases, as a continuation of the one-time exercise. The one-time exercise will be

concluded only when all the employees who are entitled to be considered in terms of para-53 of Umadevi(3) case, are so considered. In the backdrop of these propositions as has been referred herein above, facts of the case in hand needs to be reiterated.

10. Admitted fact in the case in hand is that the petitioner has been appointed on 29.8.1996 by order of the President, District Consumer Redressal Forum, Bhadrak, being the competent authority, on the basis of the direction passed by the Secretary, Food Supplies & Consumer Welfare, vide its order dated 16.2.1998 as contained in Order No.3606 by which the President, District Consumer Redressal Forum, Bhadrak had been requested to take steps to fill up Class-IV posts on regular basis following the procedure laid down in the Department letter No.26455 dated 3.9.1996 which clearly suggests that the post was vacant. President, District Consumer Redressal Forum, Bhadrak has initiated recruitment process by notifying vacancy position in the Notice Board of different local offices, however, without being published widely in the daily newspaper, in terms thereof, candidates along with the petitioner had appeared in which the petitioner had been declared successful and thereafter he was selected and engaged with issuance of offer of appointment dated 29.8.1996. It is clear from the factual aspect that the post was sanctioned and the petitioner having its eligible qualification requirement to hold the post but only on account of the fact that there was no wide circulation in the daily newspaper, appointment of the petitioner has been questioned, subsequently he has been terminated on the ground of irregularity.

11. We, on appreciation of the judgments rendered by the Hon'ble Apex Court in the cases of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra) and **State of Karnataka & others –vs-M.L.Kesari & others(**supra) and with critical analysis of the factual aspects of the case in hand, are not in dispute that the appointment of the petitioner can be kept under the category of irregularity not under the category of illegality as per the interpretation made by the Hon'ble Apex Court in the two decisions, hence case of the petitioner is to be considered under para-53 of the judgment rendered in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra).

The other condition which has been laid down i.e. continuance of service of 10 years which the petitioner is not fulfilling since he has been appointed on 29.8.1996 and till date when the judgment of the case of Umadevi(3) has been pronounced by the Hon' ble Apex Court i.e. on

10.4.2006, he was less of 4 months in completion of 10 years of service. In that situation, we have to consider as to whether case of the petitioner is to be considered for his regularization on the basis of the subsequent fact or not ?

We are not in dispute about the proposition laid down by the Hon'ble Apex Court in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra) and **State of Karnataka & others –vs-M.L.Kesari & others**(supra) that for consideration of regularization by carving out the exception as rendered at para-53 if the appointment is irregular. We have already held in above that appointment of the petitioner will be treated in the category of irregularity and not illegality, reason being that the petitioner had been appointed against sanctioned post being eligible to hold the post but without following due process.

12. The third contention, as has been laid down by the Hon'ble Apex Court in Umadevi(3) Case, is that for regularization of service by taking one-time measure, the appointee should have rendered 10 years of continuous service as on the date of pronouncement of judgment in Umadevi(3) Case i.e. 10.4.2006 and admittedly as on 10.4.2006 the petitioner has completed 9 years 8 months of continuous service , but we, on appreciation of the factual aspects, have found that the petitioner's case was considered by the Commissioner-cum-Secretary, Food Supplies & Consumer Welfare in pursuance to the order of the Orissa Administrative Tribunal and the Commissioner-cum-Secretary has passed order on 19.10.2009 while holding appointment of the petitioner as not in accordance with the law by denying regularization, however, allowed him to continue on adhoc basis and in the process he is still in service and thereby he has completed about 21 years of service.

13. We have gone into the factual aspects of the case in hand and considered the fact that even the Commissioner-cum-Secretary has not passed order of termination rather has allowed the petitioner to continue on adhoc basis which suggests that the authorities is in requirement of his work. In such circumstances, if direction would not be passed by this Court for consideration of the case of the petitioner for regularization, it would amount to great injustice to be meted out to the petitioner for no fault of his own.

Further he is continuing on adhoc basis in pursuance to the order passed by the Commissioner-cum-Secretary, hence this Court cannot allow an employee to complete his entire length of service on adhoc basis. We, on taking into consideration the peculiar facts and circumstances of the case as

well as the order of the Commissioner-cum-Secretary dated 19.10.2009, are of the view that the case of the petitioner needs to be considered by the authority for his regularization. The Tribunal has not considered this aspect of the matter as has been discussed herein above and rejected claim of the petitioner on the ground that the judgment rendered by the Hon'ble Apex Court in the case of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra) is not applicable to the case of the petitioner. Considering the subsequent facts of the instant cases as has been discussed, we are not in agreement with the finding that the petitioner was an illegal appointee rather his appointment is irregular for which we have given elaborate reason in the preceding paragraphs on the basis of the judgment rendered in Umadevi(3) case.

14. In a case like the case in hand it would be relevant to refer to the judgment rendered by the Hon'ble Apex Court in the case of **Nihal Singh –v- State of Punjab** reported in (2013)14 SCC 65 directed absorption of the Special Police Officers in the State of Punjab holding as under:

> "35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.
>
> 36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial

commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is-the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks."

In the other judgment rendered by the Hon'ble Apex Court in the Case of **Amarkant Rai –vs- State of Bihar and others** reported in (2015)8 SCC 265, their Lordships after taking into consideration the judgments rendered in the cases of **Secretary, State of Karnataka and others vrs. Umadevi(3) and others**(supra), **State of Karnataka & others –vs- M.L.Kesari & others**(supra) and **Nihal Singh –vs- State of Punjab**(supra) has come to finding, taking into consideration of past services of the employee of 29 years and the qualification/eligibility, and directed to consider the case for regularization, for ready reference paragraphs 13 and 14 of the said judgment is being quoted herein below:

"13. In our view, the exception carved out in para 53 of Umadevi is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bear any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularization viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularized w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 03.1.2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits be paid from 01.01.2010.

14. Considering the facts and circumstances of the case that the appellant has served the University for more than 29 years on the post of Night Guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularize the services of the appellant retrospectively w.e.f. 03.01.2002 (the date on which he rejoined the post as per direction of Registrar."

According to our considered view, the Tribunal before reaching to the conclusion that the fact of the case in hand is not to be considered for continuance in service, has not critically examined the judgment rendered in the cases of **Secretary, State of Karnataka and others –vs- Umadevi(3) and others**(supra), **State of Karnataka & others –vs- M.L.Kesari & others**(supra) and **Nihal Singh –vs- State of Punjab**(supra) and as such we, taking into consideration the factual aspects as well as legal proposition as discussed above, are of the considered view that the order passed by the Tribunal is not sustainable in the eye of law. Accordingly, the same is set aside with direction to the opposite parties to consider the case of the petitioner for regularization on the basis of the observations made herein above, within period of eight weeks from the date of receipt of copy of this order.

In the result, the writ petition (W.P.(C) No.11558 of 2010) stands disposed of.

15. In view of the order passed in W.P.(C) No.11558 of 2010, the writ petition i.e. W.P.(C) No.8038 of 2014 stands disposed of.

Writ petitions disposed of.

2017 (I) ILR - CUT- 1001

S. C. PARIJA, J.

M.A.C.A. NO. 319 OF 2006

LAXMIDHARA PRAHARAJ & ORS. ……..Petitioners

.Vrs.

MUNCHI ABDUL MEHERAJ & ANR. ……..Respondents

MOTOR VEHICLES ACT, 1988 – S.147 (4)

Policy issued in respect of the offending vehicle on issuance of cheque by the owner – Cheque dishonoured – Policy cancelled – Subsequently vehicle met with an accident – In the claim case Tribunal saddled the liability on the owner – Hence this appeal by the claimants – Since cancellation of the insurance policy in respect of the offending vehicle has not been intimated to the concerned Registering Authority,

as required U/s. 147 (4) of the M.V.Act, the insurer is liable to pay the awarded amount to the claimants with a right to recover the same from the owner of the vehicle – Held, the impugned award, directing the owner of the vehicle to pay the awarded amount is set aside – The insurance company is held liable to pay the compensation with a right to recover the same from the owner of the vehicle in accordance with law.

For Petitioners : M/s. R.N.Mohanty, B.N.Rath, R.C.Ojha & A.K.Jena

For Respondents:Mr. A.K.Mohanty & Associates.

Date of Order : 25.04.2017

ORDER

S. C. PARIJA, J.

Heard learned counsel for the parties.

This appeal by the claimants-appellants is directed against the judgment/award dated 08.12.2005, passed by the learned IIIrd Motor Accident Claims Tribunal, Balasore, in MAC No.102/125 of 2000/1998, awarding an amount of Rs.3,67,000/- as compensation along with interest @ 6% per annum from the date of passing of the award, till realization and directing the owner-respondent no.1 to pay the same.

Learned counsel for the claimants-appellants submits that as the Insurance Company had not intimated to the concerned Regional Transport Officer regarding cancellation of the policy, as required under law, the insurer is liable to pay the awarded compensation amount. It is submitted that in absence of an intimation to the concerned Regional Transport Officer regarding cancellation of the insurance policy, as required under Section 147(4) of the M.V. Act, 1988, the Insurance Company is liable to the third party with the right of recovery against the insured-owner.

Learned counsel for the Insurance Company-respondent no.2 submits that as the insurance policy issued in respect of the offending vehicle had been cancelled much prior to the date of the accident, for non-payment of the premium amount, due to the dishonour of the cheque issued by the insured-owner towards premium, no liability can be saddled on the present appellant, as the insurer of the offending vehicle. In this regard, it is submitted that as the Insurance Company adduced evidence before the learned Tribunal with regard to the cancellation of the insurance policy prior to the date of the

accident, learned Tribunal was fully justified in saddling the liability on the owner of the vehicle.

It is further submitted by learned counsel for the Insurance Company that the assessment of the compensation amount is not proper and justified and the award is on the higher side.

On a perusal of the impugned award, it is seen that the Insurance Company had taken the plea that the policy issued in respect of the offending vehicle had been cancelled much prior to the date of the accident, for non-payment of the premium amount by the owner-insured. The Insurance Company produced the letter (Ext.F) and postal receipt (Ext.G) in support of its claim that the fact regarding cancellation of policy had been duly intimated to the owner-insured. Basing on such materials, learned Tribunal has proceeded to hold that the Insurance Company is not liable and has saddled the liability on the owner of the offending vehicle.

Admittedly, no material had been produced by the Insurance Company before the learned Tribunal to show that such intimation regarding cancellation of policy had been given to the concerned Registering Authority. Therefore, in absence of an intimation to the concerned Registering Authority regarding cancellation of the insurance policy issued in respect of the offending vehicle, as required under Section 147(4) of the M.V. Act, the insurer is liable to pay the awarded compensation amount to the claimants, with the right to recover the same from the owner of the vehicle.

Coming to the quantum of compensation amount awarded and the basis on which the same has been arrived at, I feel, the interest of justice would be best served, if the awarded compensation amount of Rs.3,67,000/- is modified and reduced to Rs.3,00,000/- (Rupees Three lakhs), which is payable to the claimants-respondents along with the awarded interest. The impugned award is modified to the said extent.

Accordingly, the findings of the learned Tribunal absolving the insurer of its liability and directing the owner of the vehicle (insured) to pay the awarded compensation amount is set aside. Instead, the Insurance Company is held liable to pay the same with the right to recover the same from the owner of the vehicle, in accordance with law.

The Insurance Company-respondent no.2 is directed to deposit the modified compensation amount along with interest with the learned Tribunal within six weeks hence. MACA is accordingly disposed of.

Appeal disposed of.

2017 (I) ILR - CUT-1004

B. K. NAYAK, J.

ARBA NO. 25 OF 2011

STATE OF ORISSA & ORS. …….Appellants

.Vrs.

M/S. BUDHARAJA MINING & CONSTRUCTION LTD. ……..Respondent

ARBITRATION AND CONCILIATION ACT, 1996 – S.34

Arbitral award – Interference by Court – When – Only if the award is in conflict with the public policy of India.

In this case, appellants alleged that the arbitrator misinterpreted some clauses of the contract while allowing the claims of the respondent – If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction – Such error in construction cannot be said to be without jurisdiction – However, where the arbitrator wanders outside the contract, he commits jurisdictional error – Since no such jurisdictional error is pointed out by the learned counsel for the appellants, the award can not be said to be in conflict with the public policy of India as required U/s. 34 (2)(b)(ii) of the Act – Held, the appeal being devoid of merit, is dismissed.

(Paras 12,13)

Case Laws Referred to :-

1. (2015) 3 SCC 49 : Associate Builders -V- Delhi Development Authority.
2. (2011) 10 SCC 573 : MSK Projects (I) (JV) Ltd. -V- State of Rajasthan.

For Appellants : Additional Government Advocate
For Respondent : Mr. Rajat Rath, Senior Advocate
Mr. Avijit Pal & A. Das

Date of hearing : 22.02.2016
Date of judgment: 22.03.2016

JUDGMENT

B.K.NAYAK, J.

This appeal under Section 37 of the Arbitration and Conciliation Act 1996 has been filed by the appellants challenging the judgment dated 05.08.2011 passed by the learned District Judge, Dhenkanal in Arbitration Petition No.29 of 2010 confirming the award passed by the sole Arbitrator.

2. In response to Tender Call Notice issued by the Government of Orissa in the Department of Water Resources for execution of the work, "Construction of Structured System in the compact area of Manikmara Distributory on left bank canal of Rengali Irrigation Sub-Project", the respondent-claimant, who is a contractor with wide experience in irrigation work, submitted tender for the contract and on being found by the appropriate authority to be the most responsive and competitive, the contract was awarded in its favour for a total value of Rs.1,95,33,236/-. On demand by the appellant, the claimant furnished the performance security to the tune of Rs.9,76,662/- in the form of Bank Guarantee whereafter the agreement was executed between the parties vide Contract No.3NCB-1998-99. Appellant no.3 by his letter dated 15.03.1999 (Ext.C/2) instructed the claimant to proceed with the execution of the contract work. Subsequent to the execution of the agreement, the scope of the work was modified to the effect that Distributary-I became Distributary-I & I(A), and Distributary-2 became Distributary-2(A) & 2(B). Thus, the scope of the work got varied.

The claimant raised the claim before the arbitrator stating that under the contract (vide clause-21.1) the appellants are obliged to deliver possession of the entire work site to the claimant within seven days from the date of the issue of work order, but they failed to handover the entire work site and instead handed over possession in piecemeal manner. It was the further case of the claimant that the appellants' undue delay in furnishing the contract work drawing resulted in delay in execution of the contract. Further, the work could not be executed within the stipulated period on account of hindrances pertaining to land acquisition as well as non-completion of the design of the structure, as a result of which the claimant was compelled to file an application for extension of time, which was granted on 30.08.2001, extending the period till 14.03.2002. It is the further case of the claimant that the application for extension of time was accompanied with 'no claim' certificate on the specified format, for want of which, the appellants would not have considered the application for extension, and that furnishing of such 'no claim' certificate under the circumstances tantamounts to exercise of coercion and pressure upon the claimant. Notwithstanding the furnishing of 'no claim' certificate, the claimant received 18th and 19th R/A Bills "under protest". Due to the failure on the part of the appellants in performing their part of the contract of giving vacant possession of the work site as well as the necessary approved structured drawings to the claimant , the claimant was compelled to apply for further extension in two phases till 14.09.2004, but the

said extension of time was not granted and the work was closed after payment of 18th R/A Bill. According to the claimant, the delay in execution of the work is attributable to the appellants and therefore the claimant is entitled to the compensation claimed.

The further case of the claimant is that on account of change in the scope of the work due to improper investigation before inviting the Bid as well as due to change of alignment of the work, the quantities of executed work got varied, which has not been anticipated by the claimant and even though for the said quantity it was incumbent upon the appellants to execute a supplementary agreement, but they did not execute the same. The claimant had been making representations to the appellants seeking adjustment in rate, as provided under the contract, but the appellants after taking measurement against each BOQ item made payments till 17th R/A Bill dated 02.09.2004 and finally considering completion of the project the appellants by letter no.8234 dated 12.10.2004 closed the contract work. Thereafter, the appellants took level section measurement of the entire work on 28.11.2004 with the participation of the claimant and basing on such measurement evaluated and incorporated quantities of each BOQ items as per actual level section measurement except item no.17. The quantity of BOQ item no.17, which was prepared in the 18th R/A Bill on 30.12.2004 came to 69,659,34 CUM. But the appellants prepared 18th R/A Bill arbitrarily reducing the aforesaid executed quantity of work, for which the claimant received the amount under 18th R/A Bill recording its protest on the body of measurement book as well as the bill. Thereafter, the appellants prepared another 19th R/A and final bill on 15.03.2005 arbitrarily, which the claimant also received under protest. It is stated that the representations were made by the claimant to the appellants from time to time indicating the reasons for the delay in execution of the contract and yet the legitimate payments due to the claimant was denied.

3. The appellants in their objection filed before the arbitral Tribunal took the stand admitting that there has been delay in giving possession of the entire land on account of problems relating to land acquisition and change in the structured drawings, but stated further that there was ample land made available to the claimant for starting execution of the work, which the claimant did not do and, therefore, the claimant is not entitled to any compensation.

The appellants took the further stand that the original project pertaining to Distributary nos.1 and 2 was later sub-divided, which was for creating better irrigational potentiality, but such alteration could not have

been the ground for the claimant not to start execution of the project with right earnest from the beginning. It was stated that the contract does not indicate that the contractor will not proceed with execution unless and until possession of the entire work site is given to him and unless and until all the drawings necessary for execution of the project are handed over to him and, therefore, the contractor committed a breach of contract and hence not entitled to make any claim for compensation. It is further stated that it is true that non-providing the entire work site to the claimant may attract "compensation event", but the contract has to be read as a whole and such a reading will not entitle the claimant to make any claim of compensation especially when the claimant did not proceed with the execution even though sufficient vacant land was under its possession and sufficient drawings had been given for starting the execution. The claimant was negligent in not deploying the required number of machinery and men at the work site and it is on this score there was delay in execution of the project. It is further stated that in view of furnishing of 'No Claim' Certificate by the claimant with the application for extension, it was not entitled to claim compensation. The plea of the claimant giving 'no claim' certificate under pressure and coercion was denied. It is also pleaded that when the second extension of time was granted by the employer-appellants, it was specifically stated that the future price escalation will not be available. Apart from denying the claims made by the claimant, the appellants had also made a counter claim on the ground that non-completion of timely execution of the project caused undue hardship to the consumers, agriculturists and the State ultimately suffered huge loss.

4. The arbitral Tribunal framed seven issues and on consideration of the evidence and materials on record allowed Claim Item Nos. 1 (a), 1(b), 2 (a), 2(b), 2(c), 2(d), 3, 4 partly and 8 and awarded a total sum of Rs.70,77,981.91 along with interest @ 9% per annum and also a cost of Rs.5.00 lakhs. Claim Nos.5, 6 and 7 of the claimant and the counter claim of the appellants were rejected.

5. The appellants filed ARBA No.29 of 2010 under Section 34 of the Arbitration and Conciliation Act (in short, 'the Act) before the learned District Judge, Dhenkanal, who by the impugned judgment dismissed the said proceeding holding that the arbitral Tribunal did not commit illegality or jurisdictional error in passing the award.

6. The learned Additional Government Advocate appearing for the appellants contends that the court below has passed the impugned order in mechanical manner though the arbitral award suffers from patent illegality

which goes to the root of the matter and is resultantly opposed to public policy. It is highlighted that the arbitrator has acted contrary to the terms of the contract and misinterpreted the terms. It is also urged that in respect of claim no.1(a), the arbitrator has relied on clause nos.3.5.4.1 of the contract dealing with canal embankment though the claim was in respect of back filling around structures. Similarly, the arbitrator has wrongly interpreted clause-3.5.4.1 of the contract while considering claim item no.1 (b). It is also stated that the other claims which have been allowed are the outcome of misinterpretation of the terms of the contract.

7. The learned counsel appearing for the claimant-respondent, on the other hand, submits that the arbitral award is liable to be interfered with by the court only on limited grounds as contained in Section 34 (2) (b) (ii) of the Act, when the award is in conflict with public policy of India as per Section 34 (2) (b) (ii) of the Act. The merits of an arbitral award are to be looked into under certain specified circumstances. He also submits that heads of "Public Policy of India" are Fundamental Policy of Indian law, Interest of India, Justice or Morality, and Patent Illegality.

8. It is necessary to analyze the scope of judicial interference in an arbitral award. Referring to its different earlier decisions, the Hon'ble apex Court in the recent decision reported in ***(2015) 3 SCC 49: Associate Builders v. Delhi Development Authority,*** held that the grounds contained in Section 34 of the Act do not deal with the merits of the decision rendered by an arbitral award. In this respect, the Hon'ble apex Court held in paragraphs-17 to 19 as follows :

> "**17.** It will be seen that none of the grounds contained in sub-section (2)(*a*) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.
>
> **18.** In *Renusagar Power Co. Ltd.* v. *General Electric Co.*[3], the Supreme Court construed Section 7(1)(*b*)(*ii*) of the Foreign Awards (Recognition and Enforcement) Act, 1961:
>
> "**7. *Conditions for enforcement of foreign awards***.—(1) A foreign award may not be enforced under this Act—
>
> * * *
>
> (*b*) if the Court dealing with the case is satisfied that—

(*ii*) the enforcement of the award will be contrary to the public policy."

In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

(*i*) The fundamental policy of Indian law,

(*ii*) The interest of India,

(*iii*) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (*see* SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (*see* SCC pp. 689 & 693, paras 85 & 95).

19. When it came to construing the expression "the public policy of India" contained in Section 34(2)(*b*)(*ii*) of the Arbitration Act, 1996, this Court in *ONGC Ltd.* v. *Saw Pipes Ltd.*[4] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)

"*31*. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in *Renusagar case*[3] it is required to be held that the award could be set aside if it is

patently illegal. The result would be—award could be set aside if it is contrary to:

(*a*) fundamental policy of Indian law; or

(*b*) the interest of India; or

(*c*) justice or morality, or

(*d*) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

9. Elucidating the meaning of the expression "Fundamental Policy of Indian Law", the Hon'ble apex Court in the aforesaid decision held as follows :

*"**Fundamental Policy of Indian Law***

27. Coming to each of the heads contained in *Saw Pipes*[4] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from *Renusagar*[3] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

28. In a recent judgment, *ONGC Ltd.* v. *Western Geco International Ltd.*[13], this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)

"*35*. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in *ONGC*[4] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental

policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The *first and foremost* is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a '*judicial approach*' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

* * *

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audi alteram partem* rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury*[14] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

(emphasis in original)

29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The *audi alteram partem* principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(*a*)(*iii*) of the Arbitration and Conciliation Act. These sections read as follows:

"**18.** ***Equal treatment of parties***.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

* * *

34. ***Application for setting aside arbitral award***.—(1)

* * *

(2) An arbitral award may be set aside by the court only if—
a) the party making the application furnishes proof that—

* * *

(*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(*i*) a finding is based on no evidence, or

(*ii*) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(*iii*) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority* v. *Gopi Nath & Sons*[15], it was held: (SCC p. 317, para 7)

"*7*. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In *Kuldeep Singh* v. *Commr. of Police*[16], it was held: (SCC p. 14, para 10)

"*10*. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score[17]. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd.* v. *B.H.H. Securities (P) Ltd.*[18], this Court held: (SCC pp. 601-02, para 21)

"*21*. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

10. In the same decision, the Hon'ble apex Court elucidated the principle of "patent illegality" in paragraphs-40, 42, 42.1, 42.2 and 42.3 which are quoted hereunder :

"***Patent Illegality***

40. We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(*b*), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by

fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Denning, L.J. in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p Shaw*[20]: (All ER p. 130 D-E : KB p. 351)

"Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means (*see* Statutes 9 and 10 Will. III, C. 15). At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in *Kent* v. *Elstob*[21], that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in *Hodgkinson* v. *Fernie*[22], but is now well established."

42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1. (*a*) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(*a*) of the Act, which reads as under:

"**28. *Rules applicable to substance of dispute***.—(1) Where the place of arbitration is situated in India—

(*a*) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (*b*) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (*c*) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"**28.** ***Rules applicable to substance of dispute***.—(1)-(2)

* * *

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

11. Law is well settled, as has been held in ***MSK Projects (I) (JV) Ltd. v. State of Rajasthan (2011) 10 SCC 573*** that an error in the construction of the contract by the arbitrator cannot be said to be without jurisdiction. This has also been taken note of in the case of ***Associate Builders*** (supra) in paragraphs-44 and 45 to the following effect :

"44. In *MSK Projects (I) (JV) Ltd.* v. *State of Rajasthan*[27], the Court held: (SCC pp. 581-82, para 17)

"*17.* If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something

which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das* v. *Lachhmi Ram*[28], *Thawardas Pherumal* v. *Union of India*[29], *Union of India* v. *Kishorilal Gupta & Bros.*[30], *Alopi Parshad & Sons Ltd.* v. *Union of India*[31], *Jivarajbhai Ujamshi Sheth* v. *Chintamanrao Balaji*[32] and *Renusagar Power Co. Ltd.* v. *General Electric Co.*[33])"

45. In *Rashtriya Ispat Nigam Ltd.* v. *Dewan Chand Ram Saran*[34], the Court held: (SCC pp. 320-21, paras 43-45)

"*43*. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL* v. *Gupta Brother Steel Tubes Ltd.*[35] and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd*[36] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (*Sumitomo case*[36], SCC p. 313)

'*43*. … The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn.* v. *Central Warehousing Corpn.*[37] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is

> legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

12. The arguments on behalf of the appellants with regard to the claim item no.1(a) & 1(b) are that the arbitrator has misinterpreted some clauses of the contract and passed the award in respect of those claims. Those two items of claim related to back filling around structures and earth filling of canal embankment. With regard to claim item no.1 (a) it has been held by the arbitrator that there was no iota of material produced by the present appellants in support of the fact that suitable earth was available for filling the backfill of the structure. Similarly with regard to claim no.1 (b) the arbitrator has held that the present appellants had not been able to establish either through affidavit evidence of the Executive Engineer or any other authority that useable and suitable earth was available to the tune of 22,001.275 CUM. There was also no order of any appropriate authority of the present appellants indicating any approval of the excavated earth to be used. Similarly, the other claims, which have been allowed by the arbitrator and taken note of by the learned District Judge in the impugned judgment individually, are based on assessment of the evidence and interpretation of different clauses of the contract.

The main plank of argument of the appellants is that there is a misinterpretation of some clauses of the contract by the arbitrator in allowing the claims.

13. As has been seen above in the case of ***MSK Projects (I) (JV) Ltd.*** (supra), which has also been taken note of by the Hon'ble apex Court in the case of ***Associate Builders*** (supra), it is trite that if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. Such error in construction cannot be said to be without jurisdiction. Only where the arbitrator wanders outside the contract, he commits jurisdictional error. In the instant case, no such jurisdictional error has been pointed out by the learned counsel for the appellants and the award therefore, cannot be said to be in conflict with public policy of India as per Section 34 (2) (b) (ii) of the Act.

14. In the circumstances, this appeal has no merit and is accordingly dismissed.

Appeal dismissed.

2017 (I) ILR - CUT- 1019

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

W.P.(C) NO. 20396 OF 2015

NARAYAN DASH ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp. Parties

SERVICE LAW – Promotion – Petitioner passed departmental examination and became eligible for promotion from the rank of junior clerk to senior clerk in view of Rule 11 (a) and Appendix – B of the Odisha District and Subordinate Courts Non-Judicial staff services (Method of Recruitment and conditions of service) Rules-2008 – Promotion given to O.P.Nos. 3 and 4 though they are junior to the petitioner – Hence the writ petition – When there is no adverse entry in ACR of the petitioner in preceding 5 years, it can not be said that the petitioner has no merit or suitability on the date of promotion of O.P.Nos. 3 and 4 – Non-recoding of reasons by the then District Judge Bargarh for not promoting the petitioner – The petitioner has been illegally superseded when his juniors, opposite party Nos. 3 and 4 have been promoted and order of rejection of his representation by O.P.No.2 is also illegal and improper – Held, promotion of the petitioner is to be restored with seniority over OPP. Party Nos 3 and 4 with effect from the date OPP.Party Nos. 3 and 4 got promoted with all consequential service benefits. (Paras 25,26,29,30)

Case Law Referred to :-

1. AIR 2008 SC 1817 : Pramod Kumar v. U.P. Secondary Education Services Commission & Ors),
2. (2006) 4 SCC 1 : (Secretary, State of Karnataka & Ors.v.Uma Devi (3) & Ors.)
3. AIR 1972 SC 1767 : R.N. Nanjundappa v. T. Thimmaiah and another
4. 2007) 1 SCC (L&S) 192 : Sankar Deb Acharya and others v. Biswanath Chakraborty & Ors.

For Petitioner : M/s. Dr. J.K. Lenka, P.K. Behera & S.K. Acharya

For Opp. Party : Mr. Bibhu Prasad Tripathy, (AGA)
M/s. G.Panda, S.K.Panda, A.K.Jena & K.Panda

Date of hearing : 24.01.2017
Date of Judgment: 31.03.2017

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge has been made to the inaction of the opposite parties for not promoting the petitioner to the post of Senior Clerk with effect from the date his juniors got promoted to the rank of Senior Clerk.

FACTS

2. The factual matrix leading to the case of the petitioner is that the petitioner and the opposite party Nos.3 and 4 were appointed as Junior Clerk in the erstwhile undivided district of Sambalpur-Bargarh-Deogarh and Jharsuguda as per order No.54 dated 13.5.1998. At the same time the opposite party Nos.5 and 6 were appointed initially and joined as Junior Clerk on 22.6.1997. Be it stated that in the Gradation list communicated vide Annexure-2 the name of the petitioner finds place at Sl. No.59 and the names of opposite party Nos.3 and 4 find place at Sl. No.60 and 61 respectively but the names of opposite party Nos.5 and 6 find place at Sl. No.39 and 49 respectively.

3. It is stated that under Rule 11 (a) and Appendix-B of the Orissa District and Subordinate Courts' Non-Judicial Staff Services (Method of Recruitment and Conditions of Service) Rules, 2008 (hereinafter called "the Rules") promotion to the post of Senior Clerks shall be made from amongst the Junior Clerks, who have passed the departmental examination as laid down in Appendix 'B' annexed to these rules; provided that, if no Junior Clerk as aforesaid is available, a Junior Clerk who has put in not less than 5 years of service as such and is otherwise suitable may be promoted to the post of Senior Clerk on temporary basis subject to the condition that he shall not be allowed any increment in the time scale of pay of the said post of Senior Clerk and shall be reverted as soon as a Junior Clerk having passed departmental examination is available. It is also made clear in that rule that promotion would be considered on the basis of merit and suitability with due regard to seniority. Be it stated that the opposite party Nos.5 and 6 were promoted on ad hoc basis to the rank of Senior Clerk/U.D. Clerk even though they have not passed the departmental examination as required under the Rules and the petitioner being Junior Clerk having passed the departmental examination under the Rules was already available on the date of ad hoc promotion of opposite party Nos.5 and 6. So, the opposite party Nos.1 and 2 ignoring the Rules promoted the opposite party Nos.5 and 6 on ad hoc basis vide order dated 16.12.2011. Not only this but also the opposite party No.5 was regularized with effect from 24.12.2011 in the promotional post vide order dated 30.9.2012. It is alleged inter alia that opposite party Nos.5 and 6

had not passed departmental examination for promotion to the Senior Clerk till 16.11.2013.

4. It is the further case of the petitioner that opposite party No.6 also has not passed the departmental examination till 13.11.2015. On the other hand the opposite party Nos.3 and 4 who were in the Sl. Nos.60 and 61 of the Gradation list published in the rank of Junior Clerk superseded the petitioner and were promoted to the rank of Senior Clerk vide order No.33 dated 29/30.9.2012. The petitioner purportedly has no adverse remark in his C.C.R. and has already passed the departmental examination but was ignored while his juniors got promoted in terms of the said order passed by the opposite party No.2 vide Annexure-6.

5. Then the petitioner made representation on 9.10.2012 ventilating his grievance to the opposite party No.2 but no action was taken. So, the petitioner preferred W.P.(C) No.21681 of 2012 before this Court claiming promotion to the rank of Senior Clerk from the date the opposite party Nos.3 and 4 got promoted by quashing the promotion of opposite party Nos.3 and 4. On 16.5.2013 this Court without expressing any opinion on the merit of the case directed the opposite party No.2 to look into the grievance of the petitioner as made out in his representation by the end of July 2013. Then the opposite party No.2 purportedly promoted the petitioner vide order dated 28.10.2013 to the next higher rank, i.e., Senior Clerk vide Annexure-8 without restoring the seniority and giving consequential service benefits although the petitioner has made representation praying to give him promotion with effect from the date when his juniors got promoted. Thereafter the petitioner continuously made representation to opposite party No.2 through proper channel on 1.2.2014 and 15.12.2014. Be it stated that to the utter surprise of the petitioner the opposite party No.2 rejected the representations of the petitioner on 9.11.2015 on the vague ground that the earlier decision of the District Judge, Bargarh cannot be subject to adjudication at a later stage which would be subversive of the judicial discipline and violation of the Government notification dated 14.3.1963. So, the present writ petition is filed to quash the promotion of opposite party Nos.3, 4, 5 and 6 to the next higher rank and further promotion of opposite party No.5 to the post of Head Clerk and to direct the opposite party No.2 to promote the petitioner to the rank of Senior Clerk with all service and financial benefits from the date his juniors opposite party Nos.3 and 4 got promoted.

Per contra, the opposite party No.2 filed counter stating that in accordance with Rule 11 (a) of the Rules the opposite party Nos.5 and 6 were promoted because the opposite party No.5 has given an undertaking that he has passed the Departmental Examination conducted under parent Judgeship of Sambalpur vide Gradation list issued on 22.3.2010. Be it stated that the service of opposite party No.5 was regularized vide order dated 29/30.9.2012 but the service of opposite party No.6 has not been regularized as he has not passed the Departmental Examination.

7. The opposite party No.2 has admitted that the petitioner was considered having remained in the zone of consideration to the post of Senior Clerk but he was not found suitable and his juniors, namely, opposite party Nos.3 and 4 being found suitable have got promotion. The promotion to the post of Senior Clerk not only depends on passing of Departmental Examination but the candidate's seniority and suitability are required to be judged. Giving promotion is subjective satisfaction of the appointing authority subject to fulfillment of requirements under Rule 11 (a) of the Act. So, the petitioner was considered by then but not promoted. It is also stated that it is the prerogative of the appointing authority to give promotion if the Junior Clerk is suitable for promotion in all respect. The representation of the petitioner has been considered by the opposite party No.2 but with the observation that his promotion would be considered at the time of general transfer of the staff. Accordingly he was promoted on 28.10.2013 at the time of general transfer.

It is further averred in the counter filed by opposite party No.2 that the opposite party No.2 considered petitioner's representation made in 2013 but it was rejected since the earlier decision has been taken by the then District Judge, Bargarh and the State Government notification dated 14.3.1963 states that any decision by the appointing authority at a given point of time cannot be set aside or overruled by the successor as it would amount to impropriety and indiscipline. So, the opposite party No.2 has rightly rejected the representation and set the case of the petitioner at rest.

9. The opposite party No.5 filed separate counter stating inter alia that he was appointed as Junior Clerk earlier to the petitioner and he has appeared in the Departmental Examination in the undivided Judgeship of Sambalpur and in the Gradation list it has been mentioned that he has passed the Departmental Examination. It is his further case that the petitioner was not considered by the opposite party No.2 to be promoted. Since in the Gradation

list opposite party No.5 is shown to have passed the Departmental Examination, rightly opposite party No.2 regularised his service with effect from 24.12.2011. At the time of promotion the opposite party No.2 has considered his seniority, merit and suitability. Similarly in the year 2013 the petitioner got promoted to the rank of Senior Clerk. As the opposite party No.5 got promoted to the post of Senior Clerk earlier to the petitioner, he was promoted to the post of Head Clerk vide order dated 29/30.9.2012. So, the promotion of opposite party No.5 being made in accordance with the Rules is correct and legal and petitioner has no right to challenge the same.

SUBMISSIONS

10. Dr. J.K. Lenka, learned counsel for the petitioner submitted that Rule 11 (a) of the Rules has been clearly violated in this case by the opposite party No.2 by ignoring the merit of the petitioner. According to him when the promotions of opposite party Nos.5 and 6 were given to the post of Senior Clerk, the petitioner was available having passed the Departmental Examination in 2003-2004 and he should have been promoted instead of opposite party Nos.5 and 6 who have not passed the Departmental Examination by then. He further submitted that even if the opposite party Nos.3 and 4 are in the Gradation List at Sl. Nos.60 and 61 and junior to the petitioner, they have been illegally promoted ignoring the case of the petitioner who is senior to them and there is no adverse remark against the petitioner.

11. Dr. Lenka, learned counsel for the petitioner relying upon the decisions reported in ***AIR 2008 SC 1817 (Pramod Kumar v. U.P. Secondary Education Services Commission & others), (2006) 4 SCC 1 (Secretary, State of Karnataka and others v. Uma Devi (3) and others)*** and ***AIR 1972 SC 1767 (R.N. Nanjundappa v. T. Thimmaiah and another)*** submitted that when in the Rules there is clear provision to give promotion basing on the merit and suitability with due regard to the seniority and passing of Departmental Examination is considered as merit under the Rules, debarring the petitioner from promotion to the post of Senior Clerk vis-à-vis his juniors is highly illegal, irregular and improper. He submitted that the promotion of opposite party Nos.3 and 4 by superseding the petitioner to the rank of Senior Clerk is de hors Rule 11 (a) of the Rules and as such the same is liable to be quashed. He further submitted that the opposite party Nos.5 and 6 having not passed the Departmental Examination, a pre-condition for promotion to the higher rank under the Rules, their promotions are also equally illegal and same should be set aside.

12. It is further contended on behalf of the petitioner that the petitioner was given promotion in the year 2013 but his seniority was not restored and the opposite party No.2 has rejected his representation for restoring seniority on vague grounds. The ground for rejection of representation is quite unknown to the administrative law because in the instant case by virtue of the order of this Court in the earlier writ application the opposite party No.2 was directed to consider the representation and in administrative side it is always for the administrative authority to take a view being alive to the facts and circumstances placed before it. When the rules have been framed, the application of the said Government notification is unnecessary. So, the order dated 9.11.2015 vide Annexure-11 rejecting the representation is the outcome of non-application of mind by the opposite party No.2 and the same should also be quashed. The promotion of the petitioner vide Sl. No.100 dated 28.10.2013 may be given effect to from the date the opposite party Nos.3 and 4, who are juniors to the petitioner, got promoted and all consequential service benefits be allowed to the petitioner.

13. Mr. B.P. Tripathy, learned Additional Government Advocate submitted that the opposite party Nos.5 and 6 being recruited in the base level post earlier to the petitioner and opposite party Nos.3 and 4 have been rightly placed above them in the Gradation list. Since the performance of the opposite party Nos.5 and 6 was satisfactory and there is proviso to Rule 11 (a) to the effect that Junior Clerk can be temporarily promoted till regular recruitment is made, the opposite party Nos.5 and 6 were temporarily promoted even if they have not passed the Departmental Examination. When the opposite party Nos.5 and 6 are quite senior to the petitioner in the Gradation list, the petitioner cannot challenge their promotion to the rank of Senior Clerk and further promotion of opposite party No.5 to the rank of Head Clerk.

14. It is further submitted by the learned Additional Government Advocate that the petitioner, opposite party Nos.3 and 4 were all placed in the zone of consideration for promotion to the rank of Senior Clerk during 2012 and in view of Rule 11 (a) that the promotion has to be made on the basis of merit and suitability with due regard to seniority, the opposite party Nos.3 and 4 being found more meritorious and suitable were promoted by superseding the petitioner. It may not be out of place to mention that the petitioner, opposite party Nos.3 and 4 have all passed the Departmental Examination. The promotion depends on the subjective satisfaction of the appointing authority and in the instant case the suitability of the petitioner

being not up to the mark he was not promoted even if he is senior to the opposite party Nos.3 and 4. He further submitted that in pursuance of the order of this Court the case of the petitioner was again considered in 2013 and he was promoted. With regard to the impugned order passed by the opposite party No.2 on 9.11.2015 vide Annexure-11, the authority has taken the decision of his predecessor into consideration and found no merit in the representation for which it was rejected. According to him, had there been any direction by the superior authority to refurbish the earlier view of his predecessor, the opposite party No.2 could have taken other view. However, he fairly submitted that the opposite party No.2 could have taken a different view by not supporting the action of his predecessor. He submitted that the writ application having no merit should be rejected.

15. The points for consideration:-

(i) Whether the petitioner is entitled to be promoted to the rank of Senior Clerk while his juniors opposite party Nos.3 and 4 got promoted.
(ii) Whether the promotion of opposite party Nos.5 and 6 is liable to be quashed.

DISCUSSIONS
POINT NO.(i) :

16. It is admitted fact that the petitioner and opposite party Nos.3 and 4 were appointed on 13.5.1998. It is also admitted fact that opposite party Nos.5 and 6 joined as Junior Clerk on 22.6.1997 which is about a year before the appointment of the petitioner, opposite party Nos.3 and 4. It is also admitted fact that in the Gradation list published in the cadre of Junior Clerk vide Annexure-2, the name of the petitioner finds place at Sl. No.59 and opposite party Nos.3 and 4 find their place at Sl. Nos.60 and 61 respectively. Similarly the names of opposite party Nos.5 and 6 find place at Sl. Nos.39 and 40 respectively in the said Gradation list in the cadre of Junior Clerk. It is not in dispute that the Rules vide Annexure-12 came into force on 30.12.2008 and both parties are governed by the said Rules.

17. Rule 11 (a) is enshrined below for better appreciation:-

> "**11. Promotion to Higher Posts-** Promotion to the higher posts shall be subject to passing of the departmental examination and shall be based on merit and suitability in all respects with due regard to seniority and be made in the following manner, namely –

(a) Promotion to the post of Senior Clerks shall be made from amongst the Junior Clerks, who have passed the departmental examination as laid down in Appendix 'B' annexed to these rules; provided that if no Junior Clerk as aforesaid is available, a Junior Clerk who has put in not less than 5 years of service as such and is otherwise suitable may be promoted to the psot of Senior Clerk on temporary basis subject to the condition that he shall not be allowed any increment in the time scale of pay of the said post of Senior Clerk and shall be reverted as soon as a passed Junior Clerk is available:

Provided that, a Typist who has been appointed as Junior Clerk after passing the departmental examination shall not be required to pass a similar examination again to be eligible for promotion to the post of Senior Clerk".

Appendix 'B' with reference to Rule 11 (a) speaks about Syllabus for the Departmental Examination. It is made clear from Rule 11 (a) that any promotion to the higher posts shall be subject to passing of the departmental examination and shall be based on merit and suitability in all respects with due regard to seniority. So, passing of Departmental Examination is a condition precedent for promotion to the post of Senior Clerk from the Junior Clerk and the promotion should be strictly on merit and suitability, of course with due regard to the seniority. But there is first proviso to the effect that where Junior Clerk having passed Departmental Examination is not available, one who has put in five years service and is otherwise suitable, may be promoted to the post of Senior Clerk temporarily till a Junior Clerk having all qualification to become Senior Clerk is available. In the event of availability of such Junior Clerk, such person who is promoted temporarily will be reverted, obviously without claiming any seniority in the next higher rank as he is temporarily promoted and not allowed increment in the time scale of pay of the post of Senior Clerk.

18. In view of the above provisions, now the case of the petitioner, opposite party Nos.3 and 4 are to be examined. As it appears from the writ petition that petitioner and opposite party Nos.3 and 4 have passed the Departmental Examination. Annexure-5 shows that on 16.11.2013 the Gradation list of Class-III employees was circulated for their information. In the Gradation List it appears the names of opposite party Nos.3 and 4 find place at Sl. No.8 and 9 as Grade-III Bench Clerk with effect from their promotion from the Junior Clerk to the Junior U.D. Clerk/Senior Clerk since 5.10.2012. On the other hand, the name of the petitioner finds place in the

Junior Clerk having no promotion to the Junior U.D. Clerk. It may not be out of place to mention that the Grade Pay in the Junior Clerk is Rs.1,900/- and Grade Pay in the Junior U.D. Clerk/Senior Clerk is Rs.2,400/- and both the posts are under the Class-III Grade having one Pay Band, i.e., Rs.5,200-20,200/-. It is also clear from the Gradation List that the Departmental Examination has been cleared by the petitioner, opposite party Nos.3 and 4. Petitioner claims to have passed the Departmental Examination in 2003-2004 which has not been challenged by the opposite parties in their counter.

19. Annexure-6 shows that on 3.9.2012 opposite party Nos.3 and 4 were promoted to the cadre of Junior U.D. Clerk as aforesaid and both the parties admit that Junior U.D. Clerk is the post of Senior Clerk under the Rules having same Grade Pay. Opposite party No.2 in his counter did not dispute such facts. It is revealed from the counter that petitioner was given promotion vide order No.100 dated 28.10.2013 as available from Annexure-A/2. There is nothing found from the counter as to how the Gradation List was issued after the promotion is given to opposite party Nos.3 and 4. It is well known in the service jurisprudence that the publication of the Gradation List precedes the promotion. In the instant case the promotion has preceded the Gradation List of the Class-III employees in the Judgeship of Bargarh.

20. As discussed above, the petitioner before 2012 has passed the Departmental Examination. The opposite party Nos.3 and 4 have also passed the Departmental Examination. No doubt the petitioner was senior to opposite party Nos.3 and 4 in the feeder cadre as admitted by both the parties. Opposite party No.2 in the counter has stated in paragraph-8 that as per their records the petitioner has not been promoted to the next higher cadre even if he has passed the Departmental Examination and was in the zone of consideration for promotion to the post of Senior Clerk. Further it is stated in the same paragraph that a Junior Clerk is required to be eligible in all respect for the purpose of promotion to the post of Senior Clerk because not only he has seniority and passed the Departmental Examination but also should be meritorious and suitable. It is contended by the State that it is always a subjective satisfaction of the appointing authority to promote a Junior Clerk to the post of Senior Clerk subject to fulfillment of all requirements as envisaged in Rule 11 (a) of the Rules. The counter has not explained how the subjective satisfaction of the appointing authority is to be measured even if one person is qualified under the Rules to get promotion. Subjective satisfaction is nothing but personal caprice and whims of the appointing authority but not the requirement of the Rules. It is further mentioned in

paragraph-8 of the counter "if the then District Judge, Bargarh debarred Mr. Dash for promotion temporarily, it is then to be assumed that he was found not suitable for being promoted to the post of Senior Clerk at the relevant point of time". Of course the counter does not specify any remark of the then District Judge, Bargarh for not promoting the petitioner. No document is filed to show the reasoning of opposite party No.2 for not giving promotion to the petitioner. The propriety demands that the authority when takes away any right of a person to be promoted, he must record the reasons for his dissatisfaction on the concerned employee. It may not be very elaborate note but the reason must be assigned in brief with due regard to the documents available on record. Mere quoting the dissatisfaction in the counter is not enough to remove a person from the line of succession to next higher post. Time and again the courts have cautioned for not exercising the administrative power without any valid and proper reason. If at all the petitioner was not found suitable and meritorious in 2012 when promotion was given to opposite party Nos.3 and 4, how could he be able to satisfy the parameters and found suitable in 2013 when he was promoted to the rank of Senior Clerk. Learned Additional Government Advocate could not satisfy us with reasons, which are enough to conclude that the petitioner was wrongly deprived of promotion to the rank of Senior Clerk when opposite party Nos.3 and 4 were promoted. A single document is not placed to show the disentitlement of the petitioner for promotion to the post of Senior Clerk vis-a-vis the service records of opposite party Nos.3 and 4.

21. Learned counsel for the petitioner placed reliance on the decision reported in ***(2007) 1 SCC (L&S) 192; Sankar Deb Acharya and others v. Biswanath Chakraborty and others*** where Their Lordships observed at paragraphs-36 and 39:-

> **"36**. The promotion policy announced by the Government would clearly disclose that the consideration is merit-cum-seniority. The streams (*sic* scheme) of the Rules as referred to above and considered, also contemplates passing of departmental examination as a condition precedent for completion of probation and confirmation. In the scheme of the Rules and policy of promotion, the consideration being merit-cum-seniority, the sole basis of judging merit is the passing of the departmental examination.
>
> **x**xx xxx xxx
>
> **39.** When the principle of merit-cum-seniority is applied, it is now a well-settled principle that great emphasis is on merit and ability and

> seniority plays a less significant role. Seniority has to be given weightage only when merit and ability are approximately equal. (See ***B.V. Sivaiah v. K. Addanki Babu; (1998) 6 SCC 720 : 1998 SCC (L&S) 1656, Central Council for Research in Ayurveda & Siddha v. Dr. K. Santhakumari; (2001) 5 SCC 60 : 2001 SCC (L&S) 772***)"

22. With due respect to the said decision, it appears that in that case there is promotion policy brought out by the Government to consider for promotion on the basis of consideration on merit-cum-seniority and passing of Departmental Examination was also a condition precedent for promotion. The present Rule under which we are considering this case is similar to the case as discussed by Their Lordships. So, in the instant case the petitioner and opposite party Nos.3 and 4 having passed the Departmental Examination and without there being any contention of the opposite parties about the adverse entry in ACR of petitioner in preceding 5 years, it cannot be said that the petitioner has no merit or suitability on the date of promotion of opposite party Nos.3 and 4. On the other hand, the petitioner and opposite party Nos.3 and 4 are all meritorious and suitable for promotion. The then District Judge, Bargarh has neither recorded any reason nor the opposite party No.2 produced any documents to show any allegation or demerit of the petitioner for promotion to the rank of Senior Clerk. When the petitioner and opposite party Nos.3 and 4 are all equally meritorious and suitable for promotion, the question of seniority becomes decisive. Since the petitioner is senior to opposite party Nos.3 and 4 in the feeder cadre as per the Gradation list published in 2009, the petitioner ought to have been promoted to the rank of Senior Clerk and there is no chance of his supercessation. On the other hand, the opposite party No.2 has simply failed to substantiate the supercessation of the petitioner while giving promotion to opposite party Nos.3 and 4.

23. Learned counsel for the petitioner submitted that the petitioner has made representation to restore his seniority but it was ignored for which he had to approach this Court vide W.P.(C) No.21681 of 2012 where this Court directed the opposite party No.2 to look into the grievance of the petitioner. But the opposite party No.2 passed a cryptic order stating that since his predecessor has not considered him for promotion, he is not able to take a decision other than the decision taken by his predecessor for the reason of maintaining propriety and discipline. Counsel for the petitioner submitted that such order of the District Judge passed on 9.11.2015 is capricious and devoid of merit as in administrative law such principle is quite unknown. He further submitted that the opposite parties have not produced any such letter

of the Government of Orissa which is relied on by the opposite party No.2 while rejecting the representation of the petitioner. So, he submitted to quash such letter while observing that the petitioner has a case to get his seniority restored.

24. Learned Additional Government Advocate submitted that the rejection order of the opposite party No.2 is self-explanatory and fairly submitted that in the administrative law decision can be taken always basing on the material on record and there is no strait-jacket formula to show that the successive administrative authority will not take a decision by overruling the decision of his predecessor if it is required under law to take a new decision. However, he submitted that the order of rejection is only to justify the decision taken by his predecessor.

25. When this Court has passed order in W.P.(C) No.21681 of 2012 to take a view on the representation of the present petitioner, it is obviously to take a fresh look to the grievance of the petitioner. Moreover, under administrative law, propriety and discipline demand that the authority would take a view basing on the facts and law independently. If a fresh look is given, he is supposed to take view independently and either confirm the earlier view or modify the earlier view or replace the same with his new opinion. On perusal of the order of opposite party No.2 vide Annexure-11 it is found that he has simply adhered to the opinion of his predecessor without giving his independent view. He has referred to Government of Odisha Notification No.FI (2)-Estt.111/89 dated 14.03.1963 and observed that any question pertaining to promotion or otherwise of a particular Government servant should only be determined by an authority next higher than the appointing authority in accordance with the established principles governing promotion. Even if such circular is considered it may not be out of place to mention that this Court in the writ application has permitted the appointing authority to take a fresh view on the representation. So, the opposite party No.2 has misdirected himself by relying upon such notification. However, we are of the opinion that the petitioner ought to have been promoted when opposite party Nos.3 and 4 were promoted in 2012 and the representation of the petitioner has been illegally rejected by the opposite party No.2 vide order under Annexure-11. Point No.(i) is answered accordingly.

POINT NO.(ii)

26. Learned counsel for the petitioner submitted that the promotion of opposite party Nos.5 and 6 has been made contravening the Rule 11 (a) of the

Rules because both of them had not passed the Departmental Examination when they were promoted to the rank of Senior Clerk in the year 2011-2012 respectively. He drew the attention of the Court to the Gradation List. Learned Additional Government Advocate submitted that proviso to Rule 11 (a) allows the appointing authority to give promotion to the Junior Clerk having 5 years experience to the post of Senior Clerk if no Junior Clerk having passed the Departmental Examination is available. He also submitted that opposite party Nos.5 and 6 being senior to petitioner were promoted to the rank of Senior Clerk subject to passing of the Departmental Examination by the time the Junior Clerk having passed the Departmental Examination was available. So, he supported the decision of the opposite party No.2 in promoting the opposite party Nos.5 and 6 to the rank of Senior Clerk.

27. It is revealed from the Gradation List vide Annexure-2 that opposite party Nos.5 and 6 have occupied their position at Sl. No.39 and 49 respectively whereas the petitioner occupies the position at Sl. No.59. Annexure-3 shows that on 16.12.2011 the opposite party Nos.5 and 6 were promoted on ad hoc basis subject to passing of Departmental Examination to the cadre of Junior U.D. Clerk in the scale of pay of Rs.5,200-20,200/- plus Grade Pay of Rs.2,400/-. On further scrutiny of Annexure-3, it appears that Sl. Nos.8 to 16 were promoted to the cadre of Junior U.D. Clerk which is otherwise known as Senior Clerk and O.P. Nos.5 and 6 respectively comes within Sl. Nos.8 to 16. Out of nine candidates only these two candidates have been promoted subject to passing of Departmental Examination. On the other hand, their promotion purportedly have been made according to proviso to Rule 11 (a) of the Act inasmuch as nine persons have been promoted against the vacancies of nine posts and same promotion has been made on one day. But very strangely Annexure-4 shows that the promotion of opposite party No.5 has been regularized with effect from 24.12.2011. When Rule 11 (a) makes it mandatory to clear the Departmental Examination, it is not understood as to how opposite party No.5 got promotion on regular basis without passing the Departmental Examination.

28. The counter affidavit of opposite party No.5 stated that from the Gradation list it appears that opposite party No.5 passed the Departmental Examination. But no such document is produced by opposite party No.5 before this Court. Moreover, Annexure-5 shows that the opposite party No.5 was promoted to the post of Head Clerk even if Departmental Examination has not been passed by him although he has passed the Accounts Training Examination which is one of the condition precedents to promote a Senior

Clerk to the post of Head Clerk. When his promotion as regular Senior Clerk could not be substantiated due to absence of any document to show that he has passed the Departmental Examination to become the U.D. Clerk/Senior Clerk, mere passing of Accounts Examination and without clearing the Departmental Examination cannot justify his promotion to the post of Head Clerk vide Annexure-5. So, the promotion of opposite party No.5 to the regular cadre of Junior U.D. Clerk and further promotion to the post of Head Clerk are de hors to the Rules. But the material produced before us as to the promotion of opposite party No.6 it appears that he is still continuing in the post of Junior U.D. Clerk but not promoted to the post of Head Clerk and same is clear from Annexure-5. When he has not passed the Departmental Examination as per Annexure-5 and there are employees below him are available having passed the Departmental Examination, his continuance in the post of Junior U.D. Clerk perhaps is not according to the Rules as Rule 11 (a) of the Rules prescribes that the moment the regular candidate having passed the Departmental Examination is available, the opposite party Nos.5 and 6 would be reverted to the post of Junior Clerk. Thus, on proper anatomy of the facts and the Rules, it appears that the promotion of opposite party No.5 to regular post of Junior U.D. Clerk and temporary promotion to the post of Head Clerk and continuance of opposite party No.6 in the post of Junior U.D. Clerk/Senior Clerk are not proper and legal being de hors the Rules as discussed above.

29. It is pertinent to note here that the petitioner is not immediately below opposite party Nos.5 and 6 in the original Gradation list vide Annexure-2. In earlier writ petition, W.P.(C) No.21681 of 2012 the petitioner had claimed promotion vis-à-vis opposite party Nos.5 and 6, but no relief was granted to him. Hence, he is debarred from reagitating the same matter. Similarly petitioner has not brought any material to show that on the date of promotion of opposite party Nos.5 and 6 to the post of Junior U.D. Clerk/Senior Clerk, he was immediately below the opposite party Nos.5 and 6 to be considered for his promotion to the post of Junior U.D. Clerk/Senior Clerk as there are good number of employees available who have passed the Departmental Examination in between the petitioner and the opposite party Nos.5 and 6. When the promotion of opposite party Nos.5 and 6 vide Annexure-3 does not affect the petitioner, the petitioner has no locus standi to challenge the same. Moreover, none of the employees just below opposite party Nos.5 and 6 in the Gradation list has challenged the promotion of opposite party Nos.5 and 6. Therefore, we are of the view that the promotion of opposite party Nos.5

and 6 and their continuance in regular post even if become illegal, in terms of discussion made above, same is left open when right of petitioner is no way affected by their promotion to the next higher rank. Point No.(ii) is answered accordingly.

CONCLUSION

30. From the foregoing discussion, it is made clear that the petitioner has been illegally superseded when his junior opposite party Nos.3 and 4 have been promoted and the order of rejection of his representation by opposite party No.2 vide Annexure-11 is also illegal and improper. Thus, we are of the opinion that the promotion of the petitioner is to be restored with seniority over opposite party Nos.3 and 4 with effect from the date opposite party Nos.3 and 4 got promoted, with all consequential service benefits and accordingly we so direct. In the result, the writ petition is partly allowed.

Writ petition partly allowed.

2017 (I) ILR - CUT-1033

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

JAIL CRIMINAL APPEAL NO. 22 OF 2005

SIBARAM MOHANTA .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

(A) **EVIDENCE ACT, 1872 – S. 104**

Heavy burden lies on the prosecution to prove the guilt of the accused and in no case burden shifts to the defence – The prosecution case must stand or fall in its own legs and conviction can not be recorded taking support from the weakness of the defense case.

In this case learned trial court convicted the accused U/s 302 I.P.C. by giving much emphasis on the failure of the defence to prove its case – Since prosecution has failed to establish its case beyond all reasonable doubt this court extends the benefit of doubt in favour of the appellant – Held, impugned judgment of conviction and order of sentence are set aside. (Paras 17,18.19)

(B) EVIDENCE ACT, 1872 – S. 134

No particular number of witnesses is required to prove a particular fact – Even a fact asserted by the prosecution can be proved by examining a solitary witness but such evidence should be of unimpeachable quality and conviction can be based on the materials available in his statement. (Para 9)

(C) CRIMINAL TRIAL – Witnesses – Generally, witnesses are categorized into three types i.e witnesses who are wholly reliable, witnesses who are wholly unreliable and witnesses who are neither reliable nor wholly unreliable – So far as the 1st category is concerned, the court faces no difficulty while appreciating their evidence – Once a witness is accepted as wholly reliable, then such evidence of a solitary witness can form basis of a conviction – Secondly, a witness, who is wholly unreliable, the entire evidence can be discarded – But in case of a witness, who is neither wholly reliable nor wholly unreliable, it is the duty of the court to assess the evidence and separate the chaff from the grain and if the acceptable portion of the evidence is enough, it will not be illegal to convict the accused but in such cases it is better to look into other attending circumstances and corroboration before proceeding to convict the accused.

In this case P.W. 1 is the solitary witness to the occurrence and he can be termed as a chance witness – His evidence can not be brushed aside lightly or viewed with suspicion – His presence on the spot and the fact that he heard the "hallah" is doubtful as he had stated that the occurrence took place in the month of shrabana and at that time he was cutting (harvesting) paddy from his field – The court takes judicial notice of the fact that the month of shrabana falls in rainy season – Further he has said to have seen the incident from a distance of 300 meters – There is a limitation to human vision, even a person with healthy eyes can not identify a person at a distance of 300 meters – Moreover, this witness has no acquaintance with the accused or deceased prior to the occurrence – Held, evidence of P.W.1 appears to be improbable and no conviction can be based upon such evidence.

Case Law Referred to :-

1. (2004) 11 SCC 410 : Sachchey Lal Tiwari v. State of U.P.

For the Appellant : M/s. Namita Pattanaik, S.K. Dey
For the Respondent : Sri B.P. Pradhan (Addl. Govt. Adv.)

Date of Judgment : 15.05.2017

JUDGMENT

S.K.MISHRA, J.

This is an appeal against the judgment of conviction and order of sentence. On 05.07.2002, at about 1.30 P.M., one Dasarath Nayak was working in his agricultural field (stated to be cutting paddy from his field). He heard 'hallah' from a distance and turned his attention to the road, i.e. situated at a distance from the paddy field and saw that the accused-convict, namely, Sibaram Mohanta was assaulting the deceased, his own father, by means of a stone. The said witness further saw the accused to be running away from the spot. Hence, he rushed to the village and informed the matter to Lokanath Nayak (P.W.3) and Duryodhan Nayak (P.W.2). They chased the accused and Duryodhan caught hold of him. Then, on their asking, the convict told that he assaulted his father due to anger. These three persons brought the convict to the spot where they found that the deceased was lying dead in a pool of blood. One Kedarnath Naik, Ward Member of the village was informed, who in turn, lodged FIR before the Officer In-Charge, Keonjhar Sadar Police Station, who in turn registered P.S. Case No.111/2002 for the alleged commission of offence under Section 302 of the Indian Penal Code, 1862, hereinafter referred to as 'the IPC' for brevity and took up the investigation of the case. Out of the aforesaid case, the case, bearing S.T. Case No.13/21 of 2003-04 (G.R. Case No.566/2002) arose and after being committed, the same came to the court of Adhoc Addl. Sessions Judge (F.T.), Keonjhar for trial.

2. In course of investigation, the Investigating Officer examined several witnesses, made seizures, visited the spot, dispatched the dead body of the deceased for post-mortem examination, arrested the accused and forwarded him to court. He after receiving the post-mortem report made further queries from the doctors, who had conducted the post-mortem examination over the dead body of the deceased and then finally after completion of investigation finding a prima facie case against the petitioner submitted charge-sheet under Section 302 IPC, *inter alia* stating that the petitioner has committed murder of his father on 05.07.2002, at 1.30 P.M. on the village road near Sahebkata jungle.

3. In course of trial, the convict-accused-appellant pleaded not guilty and took the plea that his father fell down from a 'Sal' tree and sustained injuries and, therefore, he died.

4. In order to prove its case, the prosecution examined seven witnesses in total, led into evidence 16 documents, marked as Exhibits 1 to 16/1 and 7

material objects. P.W.4, Kedarnath Nayak is the informant of the case. He is not an eye witness to the occurrence. The solitary eye-witness to the occurrence is Dasarath Nayak. He has been examined as P.W.1. P.W.2, Duryodhan Nayak and P.W.3, Lokanath Nayak are the two persons before whom P.W.1 Dasarathi Nayak narrated about the incident and they decided to catch hold of the appellant and thereafter chased the appellant and caught hold to him. P.W. 5, Jugal Kishore Barik is the constable, who escorted the dead body of the deceased for post-mortem examination. On return to the Police Station, he produced wearing apparels of the deceased and command certificate, which were seized by the I.O. P.W.7 is the doctor, who has conducted post-mortem examination on the dead body of the deceased and also rendered his opinion on the query made by the I.O. P.W.6, Balmukanda Sarangi is the Investigating Officer of the case.

5. In his defence, the appellant himself examined as D.W.1 but did not lead any documents and material object into evidence. Taking into consideration the evidence on record, especially the statement of P.W.1, who was supposedly corroborated by P.Ws. 2 and 3 and the medical opinion rendered by P.W.7, the learned Addl. Sessions Judge went on to convict the appellant under Section 302 of the IPC and sentenced him to undergo imprisonment for life. The learned Addl. Sessions Judge has also examined the defence plea and has come to the conclusion that the plea of the defence is not established. Such judgment of conviction and order of sentence are assailed in this appeal.

6. In course of hearing, the learned counsel for the appellant challenged the judgment of the learned Addl. Sessions Judge on the ground of erroneous appreciation of the evidence led by the prosecution and the defence. In her contention, the learned counsel submitted that the Addl. Sessions Judge erred in convicting the appellant for the offence under Section 302 IPC as the case is based on a chance, solitary witness, whose evidence cannot be believed because of the attending circumstances and the fact that he saw the alleged incident from a distance of about 300 meters. The learned counsel for the appellant also submitted that the learned Addl. Sessions Judge did not appreciate the materials on record in its proper perspective and fastened guilt on the appellant on the basis of latches of the defence case without examining whether the prosecution has successfully brought home the charges leveled against the appellant beyond all reasonable doubt.

Therefore, he argued that this is a fit case where the judgment of conviction should be set aside.

On the contrary, the learned Addl. Government Advocate argued that the Addl. Session Judge has a perspicacious view of the materials on record and there is no reason to disturb the findings in appeal. In other words, he supported the judgment rendered by the learned Addl. Sessions Judge.

7. In a trial of offence of murder, the most important aspect that needs to be examined at the threshold is whether the death of the deceased is homicidal in nature or not. The doctor has categorically stated that the injury found on the deceased is the cause of death and he has also opined that the death of the deceased could have been caused by means of stone. However, he also opined that the injury on the deceased-appellant be possible by fall from a height. So, taking into consideration the medical evidence available, it cannot be conclusively stated that the death of the deceased was homicidal in nature. Such a finding has to be dependent other evidence available on record.

8. Undisputedly, the prosecution heavily relied upon the testimony of P.W.1, who happens to be the eye witness to the occurrence, as claimed by the prosecution. In his statement, he stated that he knew the accused. He also knew the deceased-father of the appellant. He has further stated on oath that the occurrence took place about two years back in the month of Shrabana, at about 1 to 2 P.M. At that time, the witness was cutting paddy from his field. In course of such cutting the paddy, he heard 'hallah' from a distance and hence he focused his attention and found the accused to be assaulting the deceased by means of a stone. He has further stated that the accused was running from the spot. The witness decided to rush to the village and informed the villagers about the incident. He has specifically informed Lokanath and Durjyodhan and others of the village. The villagers decided to catch hold of the appellant. Thereafter, the witness himself, Durjyodhan and Lokanath chased the accused and Durjyodhan caught hold of the accused. Thereafter, the appellant was asked why he assaulted the deceased to which the appellant answered that he assaulted his father by means of a stone due to anger. Then, the appellant was taken to the place of occurrence where the deceased was lying with multiple injuries on his body. The Ward Member of the village was informed. He informed the matter before the police. Police came, arrested the accused, who was detained in the village. In the cross-examination, P.W. 1 has stated that prior to incident he had no acquaintance with the accused or the deceased. He has further stated that the place of

occurrence is at about 300 meters away from-where he was cutting the paddy. He has further stated that the location was surrendered by Sal bushes. Still the spot is visible from his paddy field. He further stated that his village is at a distance of half kilometers from paddy field. He further stated that after the incident he went to the village, he came back to the spot about 30 minutes later. A contradiction has been brought out from the mouth of this witness, which has also proved by P.W.6. It is established by the defence by confronting the statement of the witness recorded under Section 161 of the Code of Criminal Procedure, 1973, hereafter referred to as 'the Code' for brevity, and also drawing attention of the I.O. to that aspect of the evidence. This witness has not stated before the I.O. that he heard 'hallah' from a distance and focused his attention in that direction; and that after informing the villagers, himself, Durjyodhan Nayak and Lokanath Nayak chased the accused and that Durjyodhan Nayak caught hold of the accused.

9. Section 134 of the Indian Evidence Act, 1872 provides that no particular number of witnesses is required to prove a particular fact. So, a rational interpretation of the provision leads this Court to hold that even a fact asserted by the prosecution can be proved examining a solitary witness but such evidence of solitary evidence should be of unimpeachable quality, so that conviction can be based on the materials available in his statement. The witnesses are generally categorised into three types, viz., witnesses who are wholly reliable, witnesses who are wholly unreliable and witnesses who are neither wholly reliable nor wholly unreliable.

10. As far as the 1st category is concerned, while appreciating their evidence, Court faces no difficulties. Once a witness is accepted as wholly reliable, then such statement/evidence of a solitary witness can form basis of a conviction. Secondly, a witness, who is wholly unreliable, entire evidence can be discarded but in case of witness, who is neither wholly reliable nor wholly unreliable, it is the duty of the Court to assess the evidence and separate the chaff from the grain and if the acceptable portion of the evidence is enough, it will not illegal to convict the accused on the basis of such evidence but normally as a rule prudence the court while appreciating a witness, who is neither wholly reliable nor wholly unreliable, it is better to look into the other attending circumstances and corroboration before proceeding to convict the accused.

11. The same principle applies to solitary witness. Generally witnesses, who are examined in court, come in the 3rd category. Most of them are

neither wholly reliable nor wholly unreliable. In this case also, this Court is of the opinion that P.W.1, namely, Dasarath Nayak is a witness, who can be termed as neither wholly reliable nor wholly unreliable. Moreover, he is the solitary witness to the occurrence. As noted earlier, even on the basis of evidence of a solitary witness, conviction can be recorded but a rule prudence is that while assessing evidence of solitary witness, his evidence should be tested with anvils of objective circumstances of the case. If evidence of the solitary witness fits into the anvils of the objective circumstances, then only on the basis of evidence of a solitary witness, conviction can be upheld in appeal.

12. Moreover, in this case, it is argued that the P.W.1, Dasarath Nayak as presence on the spot and heard the 'hallah' is doubtful as he is stated the occurrence took place in the month of Shrabana and at that time he was cutting paddy from his field. The Court takes judicial notice of the fact that the month of Srabana falls within the rainy season. Other agricultural activity like planting of seeds, transplantation of sapling and other things take place but the paddy of khariff season is generally sowed in the month of Asada and Shrabana, i.e. in the month of June-July and the paddy cutting takes place in the month of October, if it is short duration paddy. In case of long duration paddy, the paddy crop is harvested in the month of December. So, the contention raised at the Bar is that in all probability P.W. 1 could not be reliable as there is hardly any chance of harvesting of paddy crop in the month of Sarabana. It is well known that in the month of Shrabana, it rains heavily in Odisha because of the onset of the monsoon.

13. Thus, P.W.1 could be termed as a chance witness. In the case of ***Sachchey Lal Tiwari v. State of U.P.,*** (2004) 11 SCC 410, the Hon'ble Supreme Court while considering the evidentiary value of a chance witness in a case of murder observed that the evidence of a chance witness cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, the Hon'ble Supreme Court further stipulated that there must be an explanation for his presence there. In this case, the prosecution explains the presence of P.W.1 in his paddy field because of the fact that he was cutting (harvesting) paddy on his own field and that he heard 'hallah' and saw the incident. This Court has already taken note of the fact that in the month of Shrabana, there is hardly any probability of standing paddy crop in a field, which needs harvesting. Moreover, in the preceding paragraph, this Court has also taken note of the fact that in his statement made before the Investigating Officer recorded under Section 161 of the

Code, this witness has not stated hearing hallah he focused his attention and saw the incident. His evidence, therefore, is not found to be of unimpeachable character.

14. Judging the case from this angle, it is seen that P.W.1 is not only a solitary witness to the occurrence but also appears to be a chance witness to the occurrence. In such a case, the Court must seek corroboration from independent materials though not in the shape of statement of any other witnesses, but incriminating circumstances appearing in the case to examine if it provides support to such testimony of P.W.1 before upholding conviction solely based on the testimony of such witness. From a holistic analysis of the entire evidence on record, this Court takes note of the fact that the solitary witness available in this case saw the incident as per his own admission from a distance of 300 meters. He had no acquaintance with the accused or the deceased prior to the occurrence. So, in all probability, this Court finds that the evidence of P.W.1 cannot be taken to be reliable as there is a limitation to human vision. Even a person with healthy eyes cannot identity a person at a distance of 300 meters. This Court takes this aspect of the case very seriously.

15. It is further apparent from the records that the witness saw the occurrence, then he saw the accused running away from the spot, the witness rushed to the village, which is ½ kms from his paddy field, informed other persons, especially P.Ws. 2 and 3, all of them then chased the accused and caught hold of him. On the contrary, D.W.1 himself has stated that his father sustained injury by falling from the tree, he went to the village seeking help. Now, if both the cases are taken into consideration, it appears that the version of P.W.1 that he ran to the village, got help, chased the accused who left the place ½ hour before them and caught hold of him appears to be improbable.

16. On the discussion resorted to in the preceding paragraphs, this Court takes note of the fact that P.W.1 has not described the manner the accused assaulted the deceased. He only saw that the accused was assaulting the deceased by means of a stone. The doctor, who has conducted post-mortem examination, i.e. P.W.7 has stated that stones seized in course of investigation, i.e. material objects M.O. I and M.O. II can possibly because injuries found on the deceased. However, in the cross examination, he has also stated that the injuries sustained by the injured may be possible by a fall from height. It is the prosecution case that the road in which the dead body of the deceased was found is a stony road and it is also seen that a tree stands

near the place. Hence, adjudging the reliability of the solitary witness, this Court comes to the conclusion that his evidence does not fit to the anvils of the objective circumstances of the case.

17. The learned Addl. Sessions Judge has given much emphasis on the failure to the defence to prove its case. It is settled principles that the prosecution shall succeed only by proving the very case it proposes. A heavy burden relies to the prosecution to prove the guilt of the accused. The prosecution must prove its case beyond all reasonable doubts. In no case, such burden shifts to the defence. There are certain exceptions like plea of alibi or plea of right to private defence, the onus of proving its case shifts to the defence. That is not the case here. The prosecution case must stand or fall on its own legs and conviction cannot be recorded by taking support from the weaken of the defence case. Hence, this Court is in agreement with the arguments advanced by the appellant that the learned Addl. Sessions Judge did not assess the evidence of the prosecution in its proper perspective and has arrived at an erroneous conclusion. This Court is of the opinion that there is enough doubt in the prosecution case to extend the benefit of doubt in favour of the appellant.

18. Another aspect, i.e. crept up during course of hearing is that the appellant allegedly made an extra judicial confession before P.W. 1, 2, 3 and 4 to the effect that out of anger he assaulted his father by means of stone. However, it is also noticed that the accused, when he was arrested, found to have been sustained an injury on his head and was referred to the medical. Secondly, it is seen that these witnesses, especially P.Ws. 1 to 3, chased, caught hold the appellant and brought him to the spot. So, the alleged confessional statement that made before the witnesses by the appellant cannot be said to be voluntary and once the Court entertains a doubt regarding the voluntariness of the allegedly extra judicial confession, it cannot be accepted. In this case, the injury on the person of the appellant, the fact that he was detained by the villagers reveals that his alleged confession of not voluntary and without coercion. Hence, it cannot form a basis to convict the appellant. It cannot be relied upon to uphold his conviction under Section 302 of the IPC.

19. On the basis of the aforesaid discussions, this Court is of the opinion that the prosecution, in this case, has failed to establish the very case it proposes beyond all reasonable doubts. There appears certain element of doubt regarding the complexity of the accused-appellant. Hence, this Court has no hesitation to extent the benefit of doubt in favour of the appellant.

Therefore, the appeal is allowed. The Judgment of conviction and order of sentence dated 29.11.2004 passed in S.T. Case No.13/21 of 2003/2004 are hereby set aside. The accused-appellant be set at liberty forthwith, unless his detention is required in any other criminal case.

Appeal allowed.

2017 (I) ILR - CUT- 1042

C.R. DASH, J.

ABLAPL NO. 18056 OF 2016

PRAMOD KUMAR RAY & ORS. ……..Petitioners

.Vrs.

STATE OF ODISHA ……..Opposite Party

(A) S.C. AND S.T. (PREVENTION OF ATROCITIES) ACT, 1989- S.15A
(As amended w.e.f. 26.01.2016)

Right of notice to the victim or his/ her dependent – The court is to be satisfied that the victim or his / her dependent has received "reasonable, accurate and timely notice" of "any court proceeding" including bail proceeding – Held, though notice U/s 15-A(3) of the Act is mandatory in nature, presence of the victim or his / her dependent in course of the proceeding is not mandatory. (Para 5)

(B) CRIMINAL PROCEDURE CODE, 1973 – Ss 438, 482
R/w Ss 3,14,15 A,18 of the S.C. & S.T. (Amendment) Act.

Anticipatory bail – Offence under the provisions of S.C. & S.T. (Prevention of Atrocities) Act, 1989 (as amended in January, 2016) – Whether any facilitatory relief can be granted to the accused-petitioner directing him to move the special court for bail, and whether, in the interregnum period (i.e from the date of passing of the order by this court and the date when the special court is moved for bail) any interim protection can be given to him, and whether the special court while hearing the bail application can grant interim bail to the petitioner without waiting for sufficiency of notice on the victim or his/ her dependent ?

There is no concept of "interim bail" in Cr.P.C. – However, it is an incidental/implicit power in the hands of the Court exercising Jurisdiction over regular bail.

No person should unnecessarily be detained awaiting a procedural requirement of notice to the victim or his dependent – But while granting interim bail on the same day the petitioner surrenders, the Special Court should impose the conditions to protect the interest of the victim and his dependent, and the special court should impose the conditions binding down the petitioner to appear before the I.O. for the purpose of investigation at an interval of certain days or weeks, so that the petitioner cannot be in a position to repeat the offence alleged against him and can not avoid the process of law.

Direction issued to the petitioners to surrender before the learned Sessions Judge-Cum-Special-Judge, Puri in G.R. case No 138 of 2016 arising out of Delanga P.S. case No 169 of 2016 within 7 days from the date of re-opening of the court after the ensuing summer vacation and seven days prior to the date of surrender, a copy or such number of copies of the bail petition as required by the public prosecutor/special public prosecutor be served on such P.P. or S.P.P. for the purpose of notice to the victim or his dependent – On the date of surrender, the petitioner shall be admitted to interim bail after hearing the P.P./S.P.P. in the aforesaid case – The question of rejection or allowing the bail application on merit shall be dealt with at the time of final hearing of the bail application after sufficiency of notice on the victim or his/her dependent, irrespective of his/her presence or absence – However the petitioner shall be bound by the following conditions besides the conditions imposed by the trial court.

(I) The petitioners shall appear before the I.O. once in a week on the day and time fixed by the I.O. till the date the condition is lifted by the learned trial court;

(II) They shall not threaten, induce or coerce the victim or any witness of the case in any manner whatsoever; and

(iii) They shall not involve themselves in similar or any other offence during currency of this order. (Paras 6,21,23)

(C) CRIMINAL PROCEDURE CODE, 1973 – Ss 438, 482
R/w Ss 15A, 18 of S.C. & S.T (Amendment) Act.

Anticipatory bail – No prima-facie offence under the S.C. & S.T. (Amendment) Act – Jurisdiction of the Court to provide facilitatory relief.

By invoking jurisdiction U/s 482 Cr.P.C., this court in a petition U/s 438 C.r.P.C. can direct the petitioner to approach the special court for bail within a specified period – While applying bail before the Special court, the petitioner must have to submit to the jurisdiction of

the special court by surrendering before that court – Before seven days of the date of his surrender, one copy or more copies of the bail application, as required by the special P.P./P.P may be served upon him towards notice for compliance of sub-section 3 of section 15 A of the S.C. &.ST. (Amendment) Act – On the date of surrender of the petitioner the special P.P./P.P. shall have the case Diary and other relevant records with him in order to assist the special court with regard to the interim bail – Held, without prejudice to any party, this court makes it clear that barring certain grave offences, like the offence punishable U/ss 302, 306 I.P.C. (where the petitioner alleged, to have made the victim to commit suicide for harassing him on the ground of his/her caste as S.C. or S.T.), Section 376 and 436 I.P.C. (where the dwelling house of a member of the S.C.& S.T. community has been burnt), section 307 I.P.C. (where the injuries sustained by the victim/ victims are near fatal and he is still in bad shape) coupled with the offence-offences under the S.C.& S.T. (Amendment) Act., in all other cases interim bail, as a rule is to be granted to the petitioner on the date of his surrender and the matter of grant or rejection of regular bail can be re-examined in the light of the contentions of the parties and the materials available on record at the time of final hearing of the bail application after sufficiency of notice on the victim or his/ her dependent. (Para 21)

(D) **S.C. & S.T. (Prevention of Atrocities Act,) 1989 - S. 15 A (6)**
(As amended w.e.f. 26.01.2016)

Provision made U/s 15 A (6) for payment of traveling allowances to the victim or his/ her dependent during investigation, enquiry and trial – However, the state Government has not made any provision for payment of "BATA Expenses" to a victim or his /her dependent for participating in a proceeding before the special court under the S.C. & S.T. (Amendment) Act – Direction issued to the State Government in Home Department and Finance Department to place funds at least Rs. 50,000/- to the sessions Judge of each districts and Rs. 1, 00,00/- at the disposal of the Registrar (Judicial) for payment of "BATA Expenses" to the victim or his/her dependent for participating in the proceeding before the special courts as well as High Court within a period of two months – Till that date such "BATA Expenses" shall be paid by the Collector if the concerned district where Special Court sits and such payment by the Collector shall be made basing on the certificate issued by the public prosecutor – However, where there is no special court, each special P.P/P.P should be placed with fund of Rs. 20,000/- which may be spent for issuing notice by post.

(Para 22)

Case Laws Referred to :-

1. A.I.R. 1995 SC 1198 : State of Madhya Pradesh vrs. R.K. Balothia.
2. AIR 2012 SC 2216 : Vilas Pandurang Pawar and Another vrs. State of Maharastra & Ors.
3. (2014) 15 SCC 521 : Sakuntala Devi vrs. Balinder Singh.
4. (2014) 3 SCC 471 :Bachu Das vrs. State of Bihar and others.
5. 2014 (2) OLR-720 : Dharani Pradhan and another vrs. State of Orissa.
6. 2015 (1) I.L.R. Cuttack 1127 : Ratikanta Ray vrs. State of Orissa.
7. 1996 (10) OLR-466 / 1996 Crl.J. 2743 : Ramesh Prasad Bhanja and Ors. vrs. State of Orissa.
8. (2012) 5 SCC 690 : Rashmirekha Thatoi vrs. State of Orissa & Ors.
9. 2012 (2) OLR (SC) 936 : Sudam Charan Das vrs. State of Orissa.
10. (2007) 12 SCC 1) : Inder Mohan Goswami and another vrs. State of Uttaranchal & Ors.
11. AIR 1980 SC 1632 : Gurbaksh Singh vrs. Sarbjit Singh.
12. (2009) 8 SCC 325 : Savitri Agarwal and others vrs. State of Maharashtra & Anr.
13. (2012) 5 SCC 661 : Rashmirekha Thatoi vrs. State of Odisha.
14. AIR 2015 SC 3090 : Bhadresh Bipinbhai Sheth vrs. State of Gujarat & anr.
15. 2005 (I) OLR 628 : Dr. Rabindranath Pradhan vrs. State of Orissa.

For Petitioners : Mr. Jagannath Pattnaik, Senior Advocate (Amicus Curiae)
M/s. R.N. Mohanty, M.K. Barik, A.K. Majhi & P.K. Das.

For Opp. Parties: Mr. S.P. Mishra, Advocate General
Mr. S.K. Nayak, Addl. Govt. Advocate&
Mr. T. Praharaj, Addl. Standing Counsel

Date of Order :10.05.2017

ORDER

C.R. DASH, J.

Heard Mr. Jagannath Pattnaik, learned Senior Counsel, who acted as Amicus Curiae on the request by this Court, and Mr. S.P. Mishra, learned Advocate General.

2. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("S.C. & S.T. Act" for short) came into force w.e.f. 30.01.1990. It needs no mention that, this Act is relatable to the expression

'Law' in Article 17 of the Constitution of India. The objects and reasons of the S.C. & S.T. Act clearly pronounce that the members of the S.C. & S.T. communities remain vulnerable and they are denied number of civil rights in the society.They are also subjected to numerous humiliation and harassments.

Since the Protection of Civil Rights Act (1951) and the general provisions of the Indian Penal Code were found inadequate to meet the situations faced by the members of the S.C. & S.T. communities, a special legislation in the form of S.C. & S.T. Act was promulgated to check and deter crimes against the members of the S.C. & S.T. communities. Recently, some important amendments were brought into the S.C. & S.T. Act. Said Amendment of 2015 (Act-1 of 2016) ("S.C. & S.T. Amendment Act" for short) has come into force w.e.f. 26.01.2016 to further the objects outlined supra. In the S.C. & S.T. Act, Section 18 of the Act barred jurisdiction of the competent courts so far as application of Section 438 of the Code of Criminal Procedure to persons committing an offence under the S.C. & S.T. Act is concerned. The vires of Section 18 of the S.C. & S.T. Act barring application of Section 438, Cr.P.C. to the offences under the Act was the subject matter of challenge before Hon'ble the Supreme Court in an Appeal by the State of Madhya Pradesh. Hon'ble the Supreme Court in the said case (**State of Madhya Pradesh *vrs.* R.K. Balothia,** A.I.R. 1995 SC 1198) held that the provision of Section 18 of the S.C. & S.T. Act is intra vires. Hon'ble the Supreme Court further proceeded to observe that the offences enumerated in Section 3 of the said Act are committed to humiliate and subjugate the members of the S.C. & S.T. communities, and these offences constitute a separate class and cannot be compared with offences provided in the Indian Penal Code.

3. Subsequently, in umpteen decisions, Hon'ble the Supreme Court and different High Courts dealt with the question of bar of Section 438, Cr.P.C. in Section 18 of the S.C. & S.T. (P.A.) Act.

In the case of **Vilas Pandurang Pawar and Another *vrs.* State of Maharastra and others, AIR 2012 SC 2216** (Para-9 at Page-3319), Hon'ble the Supreme Court held that, where an offence is registered against a person under the provision of S.C. & S.T. Act, **no Court shall entertain any application for anticipatory bail unless it prima facie finds that such an offence is not made out.** Hon'ble the Supreme Court, again in the case of **Sakuntala Devi *vrs.* Balinder Singh,** (2014) 15 SCC 521, relying on the case of **Vilas Pandurang Pawar** (supra) held that the High Court is required

to give a finding that an offence under the Act has not been made out before granting anticipatory bail *(para-4).* Same is the view of Hon'ble the Supreme Court in the case of **Bachu Das *vrs.* State of Bihar and others,** (2014) 3 SCC 471. This Court also in the cases of **Dharani Pradhan and another *vrs.* State of Orissa,** 2014 (2) OLR-720, **Ratikanta Ray *vrs.* State of Orissa,** 2015 (1) I.L.R. Cuttack 1127, **Ramesh Prasad Bhanja and others *vrs.* State of Orissa,** 1996 (10) OLR-466 / 1996 Crl.J. 2743, took similar view.

4. While the position of law stands thus, S.C. & S.T. (Amendment) Act, 2015 has come into force w.e.f. 26.01.2016. It is seen from Section 3, which provides for punishment for offences of atrocities that the Section has been substantially amended and more categories of atrocities constituting offence under the said Act have been provided. Section 14 of the Act providing for establishment of Special Court has been amended, authorizing the Special Court to take cognizance of the offence. So far as Section 18 is concerned, the same remains unaltered. It is also to be noted that, in Chapter IV-A, Section 15-A has been inserted, and relevant provisions of Section 15-A so far as the present discussion is concerned, reads as follows :-

> **15-A. Rights of victims and witnesses. –**
> (1) xx xx xx xx
> (2) xx xx xx xx
>
> (3) A victim or his dependent **shall have the right to reasonable, accurate, and timely notice** of any Court proceeding including any bail proceeding and the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under this Act.
>
> (4) xx xx xx xx
>
> (5) A victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing.
>
> xx xx xx xx

5. It is seen from the aforesaid provisions that, notice of "any proceeding before the Court" is a right on the part of the victim or his dependent. The word "shall" in the opening sentence of Sub-Section (3) of Section 15-A and

the words "reasonable, accurate and timely notice" read with the provisions contained in Sub-Section (5) of Section 15-A makes it clear that such notice is mandatory. As the notice under Sub-Section (3) of Section 15-A is held to be mandatory, the Court is to be satisfied that the victim or his/her dependent has received "reasonable, accurate and timely notice" of "any court proceeding" including bail proceeding. The question now arises, whether notice is to be served through court process or through any other agency. Sub-Section (3) of Section 15-A, in clear terms following the conjunction 'and' enjoins the duty on the Special Public Prosecutor / Public Prosecutor or the State Government to inform the victim about any proceeding under the Act. Therefore, it is the duty of the persons seeking bail, to serve two applications for bail on the Special Public Prosecutor / Public Prosecutor, out of which one is to be sent as notice to the victim or his/her dependent. If the Special Public Prosecutor / Public Prosecutor so requires, more number of copies of such petitions are to be served on him for the purpose of such notice. Factum of any proceeding before the Special Court under this Act is to be noticed to the victim or his/her dependent through the Special Public Prosecutor / Public Prosecutor or the State Government, as the case may be. Before taking up "any proceeding" including the bail proceeding, the Special Court or the Court in seisin over the matter is to satisfy itself that the Special Public Prosecutor / Public Prosecutor has given "reasonable, accurate and timely notice" of any Court proceeding including any bail proceeding to the victim or his/her dependent. **Such satisfaction can be reached by seeking a written undertaking from the Special Public Prosecutor / Public Prosecutor or the agency of the State Government, as the case may be, about the information received by the victim or his/her dependent about the proceeding.**

The provision of Sub-Section (3) of Section 15-A is therefore held to be mandatory in nature, non-compliance of the provision has to negate, frustrate or make otiose, the relief granted to a party without noticing the victim or his/her dependent. **It is however worthwhile to mention here that, though notice under Sub-Section (3) of Section 15-A of the Act is mandatory in nature, presence of the victim or his/her dependent in course of the proceeding is not mandatory. On receipt of notice, it is left to the choice of the victim or his/her dependent to participate or not to participate in the proceeding.**

6. Keeping in view the aforesaid discussion and provisions in mind about the scope of entertaining application under Section 438, Cr.P.C. so far

as the offences under S.C. & S.T. (Amendment) Act are concerned, the following Issues were framed in this case by this Court in its order dated 23.03.2017.

> (i) There being bar under Section 18 of the S.C. & S.T. (Amendment) Act, whether interim protection can be given to an accused, who has filed an application for anticipatory bail before production of the Case Diary by the State, from which it can be ascertained whether any offence under the Act is prima facie made out or not;
>
> (ii) After the amendment in January, 2016 in S.C. & S.T. Act, even if application for anticipatory bail is rejected, whether any scope is left for this Court to protect innocent persons from getting arrested before moving the Special Court for bail, and whether in the interregnum period any interim protection can be given.

7. Mr. Jagannath Pattnaik, learned Senior Counsel, relying on the cases of **Rashmirekha Thatoi *vrs.* State of Orissa and others,** (2012) 5 SCC 690 and **Sudam Charan Das *vrs.* State of Orissa,** 2012 (2) OLR (SC) 936, submits that, once the application under Section 438, Cr.P.C. is rejected, no order can be passed directing the petitioner to surrender before the trial court and make a motion before the trial court, and the trial court further cannot be directed to release him on bail on the basis of the said motion on such terms and conditions as deem fit and proper. It is further submitted by him that, Hon'ble the Supreme Court while disagreeing with the view of the High Court in the aforesaid case, set aside the impugned order and held that, if an anticipatory bail application has been rejected, there could not have been any further direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest. Drawing a parlance from the aforesaid judgments of Hon'ble the Supreme Court, Mr. Pattnaik, learned Senior Counsel would proceed to argue that, it is evident that the Hon'ble Supreme Court in no uncertain terms held in the aforesaid decisions that, once the application for anticipatory bail is rejected, the High Court is denuded of its power to pass any further order tantamounting to protection of the accused from arrest.

8. Being enlightened by Mr. Jagannath Pattnaik, learned Senior Counsel, I am of the view that the second question above should have been framed in the following manner :-

(i) After the amendment of the S.C. & S.T. Act in January, 2016, whether any facilitatory relief can be granted to the accused-petitioner directing him to move the Special Court for bail, and whether in the interregnum period (i.e., from the date of passing of the order by this Court and the date when the Special Court is moved for bail) any interim protection can be given to him, and whether the Special Court while hearing the bail application can grant interim bail to the petitioner without waiting for sufficiency of notice on the victim or his/her dependent.

9. An application under Section 438, Cr.P.C. has been barred in Section 18 of the S.C. & S.T. (Amendment) Act. Under Chapter XVIII of the Rules of the High Court of Orissa in Rule-4, it has been provided that, no application for bail shall be made without notice in writing given to the Public Prosecutor not later than noon of the day preceding the date on which the application is to be made. Therefore, at the time of hearing of the bail application under Section 438, Cr.P.C. at the first instance, especially in view of Sub-Section (3) of Section 15-A of the S.C. & S.T. (Amendment) Act and Rule 4 under Chapter-XVIII of the Rules of the High Court of Orissa, the question arises as to whether at this stage the Court is to be satisfied that the victim or his/her dependent has to be informed of the existence of the proceeding.

Mr. Pattnaik, learned Senior Counsel further submits that, at the initial stage it is not necessary for the Court to be satisfied about such notice to the victim or his dependent, in as much as, under the Rules of the High Court the Public Prosecutor has already received notice and represents the cause of the victim. Otherwise also when at the first instance the bail application is to be taken for consideration soon after service of notice on the learned Public Prosecutor, it is not possible for him to inform the victim of the date of hearing of the bail matter at that stage. Further it is submitted by him that, as would be seen from Sub-Section (3) of Section 15-A of the S.C. & S.T. (Amendment) Act, the legislature has nowhere provided that at the time of a proceeding under the Act being taken up, the presence of the victim is to be ensured. In other words, the presence of the victim or his representation is not mandatory at the time of any proceeding before the Court, but all the same elaborate procedures has been provided for in the S.C. & S.T. (Amendment) Act for the protection of the interest of the victim or his/her dependent to secure the ends of justice. But, at the time of final disposal of the bail application, as submitted by Mr. Pattnaik, learned Senior Counsel,

this Court is required to be satisfied that the Public Prosecutor has duly served notice on the victim or his/her dependent and the latter has knowledge of the existence of the proceeding.

10. Mr. S.P. Mishra, learned Advocate General, on the other hand submits that, whatever be the stage of the proceeding, notice to the victim being mandatory under Sub-Section (3) of Section 15-A, such notice is to be given to him notwithstanding his presence or absence at the time of the proceeding. He agrees with Mr. Jagannath Pattnaik, learned Senior Counsel, to the effect that though notice to the victim or his/her dependent is mandatory, in Sub-Section (3) of Section 15-A, his presence at the time of proceeding is not mandatory, but the Court is to be satisfied that the victim or his/her dependent has received "reasonable, accurate and timely notice".

11. It is no more res-integra that the civilized countries have recognized that, liberty is the most precious of all human rights. American declaration of independence 1776, French declaration of rights of men and citizen 1789, Universal declaration of human rights and the international covenant of civil and political rights 1966, all speak with one voice – ***liberty is the natural and inalienable right of every human being.*** Similarly, Article 21 of the Constitution of India proclaims that, no one shall be deprived of his liberty except in accordance with the procedure prescribed by law. Arrest and imprisonment means infringement of precious right of an individual. *(Reference may be made to* ***Inder Mohan Goswami and another vrs. State of Uttaranchal and others,*** *(2007) 12 SCC 1).* Such being the position of liberty in the eye of the Constitution of India and in the eyes of all civilized countries, it is the duty of every court to protect the liberty of an individual. Sections 436 to 439, Cr.P.C. are provisions dealing with question of liberty of a person, who has been arrested or who has been submitted to the jurisdiction of the Court or who apprehends arrest for a non-bailable offence. Notice through any agency, whosoever he or it may be, takes some time and at the initial stage if any Court has any implicit or incidental power, such power cannot be circumspected or narrowed down for want of notice. Sufficiency or otherwise of notice, as provided under Sub-Section (3) of Section 15-A is to be insisted upon at the final hearing of an application for regular bail or anticipatory bail, in as much as notice instantaneously at the initial stage is far from possibility. At the cost of repetition, I reiterate here that, presence of the victim or his/her dependent at the time of any proceeding including bail proceeding is not mandatorily required. The Court is to be satisfied about "reasonable, accurate and timely notice" to the victim or his/her dependent

about the existence of a proceeding including the bail proceeding, and choice is to be left upon the victim or his dependent either to absent himself from the proceeding or to come and participate in the proceeding. **Therefore, at the initial stage of hearing of any petition under Section 438, Cr.P.C. or any bail petition if question of exercise of incidental or implicit power arises, the exercise of power by the Court cannot be deferred for want of notice. "Reasonable, accurate and timely notice" of the proceeding, as enshrined in Sub-Section (3) of Section 15-A of the S.C. & S.T. (Amendment) Act shall be taken care of at the final stage of hearing of any proceeding including a bail proceeding, may it be anticipatory bail or regular bail.**

12. Coming to the question of passing of order of interim protection at the threshold in an anticipatory bail application involving offences under the provisions of S.C. & S.T. (Amendment) Act, it is relevant to mention here that, Hon'ble the Supreme Court on more than one occasions has propounded that interim protection can be given by the Court while hearing the bail application under Section 438, Cr.P.C. Reference may be made in this regard to the Constitution Bench decision of Hon'ble the Supreme Court in the case of **Gurbaksh Singh *vrs.* Sarbjit Singh,** AIR 1980 SC 1632 and other decisions of Hon'ble the Supreme Court in the case of **Savitri Agarwal and others *vrs.* State of Maharashtra and another,** (2009) 8 SCC 325, **Rashmirekha Thatoi *vrs.* State of Odisha,** (2012) 5 SCC 661, **Bhadresh Bipinbhai Sheth *vrs.* State of Gujarat and another,** AIR 2015 SC 3090. There is no doubt that, this Court is clothed with the power to grant interim protection at the threshold in exercise of the jurisdiction under Section 438, Cr.P.C. irrespective of the nature of the offence. But the question arises for consideration as to whether such interim protection can be granted in cases involving offences under the provisions of S.C. & S.T. (Amendment) Act in view of the clear bar in Section 18 of the S.C. & S.T. (Amendment) Act and ruling of the Hon'ble Supreme Court and this Court, as discussed supra, to the effect that before granting anticipatory bail under Section 438, Cr.P.C., a clear finding is to be given that no prima facie offence under the provisions of the S.C. & S.T. Act has been committed.

13. Hon'ble the Supreme Court, in the case of **Gurbaksh Singh** (supra) was considering the question of personal liberty of the individual, as enshrined in Article 21 of the Constitution of India in the context of Section 438, Cr.P.C. In that case, Hon'ble the Supreme Court held that, interim bail can be granted while considering bail application under Section 438, Cr.P.C.

and the matter can be re-examined in the light of the contention of the parties at the time of final hearing.

14. Drawing a parlance from the discussion in the aforesaid Constitution Bench decision, Mr. Jagannath Pattnaik, learned Senior Counsel submits that Section 18 of the S.C. & S.T. (Amendment) Act cannot act as a fetter on the power of the Court to grant interim protection at the threshold, and it is further submitted by Mr. Pattnaik that a prima facie case about commission of the offence under the S.C. & S.T. (Amendment) Act can be found out from the copy of the F.I.R. attached with the application for anticipatory bail at the time of its filing. Further, relying on the case of **Dr. Rabindranath Pradhan *vrs.* State of Orissa,** 2005 (I) OLR 628, it is submitted by learned Senior Counsel Mr. Pattnaik that, interim protection can be given and arrest of the petitioner can be stayed by exercising power under Section 482, Cr.P.C. till availability of the credible evidence against the accused-petitioner.

It is further submitted by Mr. Pattnaik, learned Senior Counsel that the decisions of Hon'ble the Supreme Court and different High Courts as regards Section 18 of the S.C. & S.T. Act, 1989, as has been referred to supra, in the forgoing paragraphs are relatable and relevant at the time of final disposal of the anticipatory bail application, when all the required materials are available for consideration. But at the threshold, in view of the observation of Hon'ble the Supreme Court in the Constitution Bench decision in the case of **Gurbaksh Singh** (supra), this Court is not denuded of any power to grant interim protection in a case involving offence under the provision of S.C. & S.T. (Amendment) Act.

15. Mr. S.P. Mishra, learned Advocate General, on the other hand submits that, interim protection is a matter of discretion of the Court and it is not a matter of right on the part of the accused-petitioner invoking the fundamental right enshrined in Article 21 of the Constitution of India. It is further submitted by him that, in clear terms Hon'ble the Supreme Court and this Court in very many decisions have held that in view of the bar under Section 18 of the S.C. & S.T. Act, a petition under Section 438, Cr.P.C. can only be allowed on the basis of the finding that no prima facie case involving offence under the provision of the S.C. & S.T. Act is made out from record. Said decisions cannot be stretched to the extent of granting interim protection to an accused involved in committing offence under the provisions of the S.C. & S.T. (Amendment) Act. It is further submitted by him that, observation of

Hon'ble the Supreme Court in the Constitution Bench decision of **Gurbaksh Singh** (supra) has no application to the fact of the present case, especially in view of the bar under Section 18 of the S.C. & S.T. (Amendment) Act.

16. In this regard, I feel persuaded to refer to paragraph-2 of the Statement of Objects and Reasons of the S.C. & S.T. (Amendment) Act, which reads as follows :-

> ***Statement of Objects and Reasons –*** *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted with a view to prevent the commission of offences of atrocities against the members of the Scheduled Castes and Scheduled Tribes and to establish Special Courts for the trial of such offences and for providing relief and rehabilitation of the victims of such offences.*
>
> ***2.*** *Despite the deterrent provisions made in the Act, atrocities against the members of the Scheduled Castes and Scheduled Tribes continue at a disturbing level. Adequate justice also remains difficult for a majority of the victims and the witnesses, as they face hurdles virtually at every stage of the legal process. The implementation of the Act suffers due to (a) procedural hurdles such as non-registration of cases; (b) procedural delays in investigation, arrests and filing of charge-sheets; and (c) delays in trial and low conviction rate.*

From the aforesaid paragraph, it is clear that, procedural delay in arrest is one of the causes for bringing amendment in the S.C. & S.T. Act, 1989. When the Act has provided a particular bar in a particular Section, such a bar is total and absolute in contradistinction to partial and relative. Such bar cannot be over-reached unless the tests underlined by Hon'ble the Supreme Court and different High Courts have been satisfied. Hon'ble the Supreme Court and different High Courts in clear terms have held that the Courts are not precluded from entertaining a petition under Section 438, Cr.P.C. irrespective of the bar under Section 18 of the S.C. & S.T. Act. But, unless a finding is reached by the Court to the effect that no offence under the provisions of the S.C. & S.T. Act has prima facie been made out from the records of the case, no anticipatory bail can be granted. Copy of the F.I.R. filed along with the application for anticipatory bail cannot be held to be an encyclopedia of all the circumstances attending and following a particular transaction. The members of S.C. & S.T. communities are generally rustic and majority of them are illiterate. They cannot be expected to file an F.I.R. satisfying all the ingredients of the offences prescribed in the S.C. & S.T.

(Amendment) Act. The finding regarding the conclusion that, no prima facie offence under the provisions of the S.C. & S.T. (Amendment) Act has been made out, can be reached only on perusal of the entire Case Diary. **In view of the bar under Section 18 of the S.C. & S.T. (Amendment) Act and the anxiety of the legislature, as outlined in paragraph-2 of the Statement of Objects and Reasons, no interim protection at the threshold can be given to the petitioner filing a petition for anticipatory bail, as it would militate against the provisions contained in Section 18 of the S.C. & S.T. (Amendment) Act.**

17. So far as this Court is concerned, three kinds of reliefs are granted in a petition for anticipatory bail –

(i) Preemptive or Preventive Relief;
(ii) Substantive Relief; and
(iii) Facilitatory Relief.

Preemptive or Preventive Relief is granted in the form of interim protection, the contents of which varies from Court to Court. Whatever be the content, the offender is protected from arrest by police during currency of the preemptive or preventive relief or till final disposal of the anticipatory bail application.

Substantive Relief is the grant of anticipatory bail to an accused-petitioner in a given case on conclusion of hearing.

Facilitatory Relief is generally given by this Court in the form of allowing the petitioner to surrender before the competent court and directing the competent court to dispose of his bail application on merit on the same day. Such relief is usually granted in a case where the co-accused persons similarly circumstanced with the petitioner have already been released on bail, and where this Court feels that instead of relief in an anticipatory bail, the matter may be dealt with appositely by the appropriate court in a bail proceeding.

18. Taking into consideration the bar under Section 18 of the S.C. & S.T. (Amendment) Act and requirement of giving a finding regarding non-commission of offence under the S.C. & S.T. (Amendment) Act prima facie by the Court before granting anticipatory bail and the anxiety of the legislature in paragraph-2 of the Statement of Objects and Reasons, as quoted supra, **I am of the view that, no preemptive or preventive relief can be**

given in an application for anticipatory bail involving offence under the provisions of the S.C. & S.T. (Amendment) Act.

19. So far as Substantive Relief is concerned, on hearing of the learned Public Prosecutor / Special Public Prosecutor after sufficiency of notice on the victim or his/her dependent under Sub-Section (3) of Section 15-A of the S.C. & S.T. (Amendment) Act, if the Court finds that no prima facie offence is made out under the provisions of S.C. & S.T. (Amendment) Act against the accused-petitioner, he/she can be granted anticipatory bail.

20. Coming to the Facilitatory Relief, the Court exercising the jurisdiction under Section 438, Cr.P.C. being devoid of any jurisdiction in view of the bar under Section 18 of the S.C. & S.T. (Amendment) Act till a conclusion is reached to the effect that no prima facie offence under the provision of S.C. & S.T. (Amendment) Act has been made out, no interim protection during the interregnum period (from the date of passing of the order till the date the accused-petitioner moves for bail before the Special Court) can be granted.

21. I have dealt with the question exhaustively in the preceding paragraphs, so far as jurisdiction of this Court in dealing with the petitioners involved in commission of offence under the S.C. & S.T. (Amendment) Act in a petition under Section 438, Cr.P.C. is concerned. I have dealt with the jurisdiction of the Court to pass order in an anticipatory bail application and regular bail application at the threshold, and the power of the Court to grant interim protection to a person involved in offence under the S.C. & S.T. (Amendment) Act. From my discussion supra, it is clear that, a competent court dealing with a petition for bail shall have jurisdiction over the matter to grant interim bail in exercise of incidental and implicit power under Section 437 / 439, Cr.P.C. The question now arises as to whether at the threshold when this Court has reached no conclusion to the effect that no prima facie offence under the S.C. & S.T. (Amendment) Act has been made out, can any jurisdiction be exercised to give facilitatory relief, as discussed supra.

In my considered view, by invoking the power of general superintendence of the High Court over the Sub-ordinate Courts and by invoking the jurisdiction under Section 482, Cr.P.C., this Court in a petition under Section 438, Cr.P.C. can direct the petitioner to approach the Special Court for bail within a specified period. In order to apply for bail before the Special Court, the petitioner must have to submit to the jurisdiction of the Special Court by surrendering before that Court. Before seven days of the date of his surrender, which he or his counsel knows better, a copy of the bail

application or such number of copies of the bail applications, as may be required by the Special Public Prosecutor / Public Prosecutor, may be served upon him towards notice for compliance of Sub-Section (3) of Section 15-A of the S.C. & S.T. (Amendment) Act. On the date of surrender of the petitioner, the Special Public Prosecutor / Public Prosecutor shall have the Case Diary and other relevant records with him in order to assist the Special Court so far as the question of interim bail is concerned. Without prejudice to any party, I feel persuaded to make it clear that, barring certain grave offences like the offence punishable under Sections 302, I.P.C., 306, I.P.C. (where the petitioner is alleged to have made the victim to commit suicide for harassing him on the ground of his/her caste as S.C. or S.T.), 376, I.P.C., 436, I.P.C. (where the dwelling house of a member of the S.C. & S.T. community has been burnt), Section 307, I.P.C. (where the injuries sustained by the victim / victims are near fatal and he is still in bad shape) coupled with the offence / offences under the S.C. & S.T. (Amendment) Act, in all other cases interim bail, as a rule, is to be granted to the petitioner on the date of his surrender, and the matter of grant or rejection of regular bail can be re-examined in the light of the contentions of the parties and the materials available on record at the time of final hearing of the bail application, after sufficiency of notice on the victim or his dependent in compliance of Sub-Section (3) of Section 15-A of the S.C. & S.T. (Amendment) Act.

The lists of grave offences given above, is not exhaustive and complete. Different Benches sitting at different time, on consideration of the materials on record and the circumstances prevailing in the society at the relevant time, may add to the said list of grave offences more number of offences.

From the number of cases filed in Court during my incumbency in the assignment, I have found out the aforesaid grave offences usually committed against the members of the S.C. & S.T. communities. Further, I feel worthwhile to mention here that the restraint on the power of the Special Court, so far as the aforesaid grave offences are concerned, is more relative than absolute. In spite of the gravity of the offence as enumerated supra, the Special Court, from the materials on record, may find ground to grant interim bail, and the Special Court may do so in exercise of its judicial discretion in appropriate case.

I feel further persuaded to observe here that, there is no concept of "interim bail" in the Code of Criminal Procedure. But, it is no more res-

integra that grant of interim bail is an incidental / implicit power in the hands of the Court exercising jurisdiction over "regular bail". Such a facilitatory relief in an application for anticipatory bail, in my view, is a step forward to further the intention of the Constitution-makers so far as the rights enshrined in Article 21 of the Constitution of India is concerned. No person should unnecessarily be detained awaiting a procedural requirement of notice to the victim or his dependent. But, while granting interim bail on the same day the petitioner surrenders, the Special Court should impose the conditions to protect the interest of the victim and his dependent, and the Special Court should also impose conditions binding down the petitioner to appear before the I.O. for the purpose of investigation at an interval of certain days or weeks, so that the petitioner cannot be in a position to repeat the offence which is alleged against him, and he cannot avoid the process of law and he cannot keep himself at large.

22. People of S.C. & S.T. communities are generally poor persons. Provision has been made in Sub-Section (6) of Section 15-A to give Travelling Allowances, etc. during investigation, enquiry and trial, to the victim or his dependent. If a victim or his dependent comes to the Court to participate in a proceeding, including a bail proceeding, he is required to be paid with "BATA Expenses", especially taking into consideration his poverty. But the State Government has made no provision for payment of "BATA Expenses" to a victim or his dependent intending or coming to participate in a proceeding in a Special Court under the S.C. & S.T. (Amendment) Act, and it is the duty of the State Government to make adequate arrangement for payment of such expenses to a victim or his dependent.

In view of such fact, the State Government in Home Department and Finance Department are directed to place at least Rs.50,000/- (rupees fifty thousand) each at the disposal of the Sessions Judge of each districts of the State to meet the "BATA Expenses" to a victim or his dependent belonging to S.C. or S.T. community. On a certificate given by the Public Prosecutor / Special Public Prosecutor regarding participation of a victim or his dependent in a proceeding under the S.C. & S.T. (Amendment) Act, the concerned Sessions Judge shall pay "BATA Expenses", as admissible to any witness in a case, to the victim or his dependent who has participated in the proceeding under the S.C. & S.T. (Amendment) Act. If such "BATA Expenses" cannot be paid on the same day, the same be sent to the victim o r his dependent by

Bank Draft or by Money Order, whichever facility is available, within 7 (seven) days of his appearance.

A fund of Rs.1,00,000/- (rupees one lakh) should also be placed at the disposal of the Registrar (Judicial), Orissa High Court, Cuttack for the aforesaid purpose, so that "BATA Expenses" can be paid to the victim or his dependent coming to this Court for participating in any proceeding under the S.C. & S.T. (Amendment) Act. Such payment can also be made on the basis of the certificate given by the Public Prosecutor to the victim or his dependent.

The aforesaid funds are to be made available to the concerned Sessions Judges and the Registrar (Judicial), Orissa High Court within a period of two months from today. Till that date such "BATA Expenses" shall be paid by the Collector of the concerned District where the Special Court sits, and such payment by the Collector shall be made on the basis of the certificate given by the Public Prosecutor.

For the purpose of Notice, etc., each Special Public Prosecutor / Public Prosecutor (where there is no Special Court) should be placed with fund of Rs.20,000/- (rupees twenty thousand) at least, and such fund may be spent by the Special Public Prosecutor / Public Prosecutor towards Postal Expenses, etc. for issuing notice by Post. A copy of the order each be communicated to the Secretary to the Government in Finance Department and Secretary to the Government in Home Department to do the needful at their end within the time specified.

23. Taking into consideration the aforesaid discussion, so far as the present bail application is concerned, the petitioners are directed to surrender before the learned Sessions Judge-cum-Special Judge, Puri in G.R. Case No.138 of 2016 arising out of Delanga P.S. Case No.169 of 2016 within 7 (seven) days from the date of re-opening of the Court after the ensuing Summer Vacation. The petitioners, if so feel, may surrender earlier before the aforesaid date, if the Court is in seisin over the matter during the Summer Vacation. Seven days prior to the date of surrender of the petitioner, a copy or such number of copies of the bail application, as required by the Public Prosecutor / Special Public Prosecutor, be served on the learned Public Prosecutor / Special Public Prosecutor for the purpose of notice to the victim or his / her dependent. On the date of surrender, the petitioner shall be admitted to interim bail after hearing the Public Prosecutor / Special Public Prosecutor in the aforesaid case. The question of rejection or allowing the

bail application on merit shall be dealt with at the time of final hearing of the bail application after sufficiency of notice on the victim or his/her dependent, irrespective of his/her presence or absence. The petitioners shall be bound by the following conditions besides the conditions imposed by the learned trial court.

(i) The petitioners shall appear before the I.O. once in a week on the day and time fixed by the I.O. till the date the condition is lifted by the learned trial court;
(ii) They shall not threaten, induce or coerce the victim or any witness of the case in any manner whatsoever; and
(iii) They shall not involve themselves in similar or any other offence during currency of this order.

24. Before parting with the order, I put on record the fair and enlightened assistance rendered by Mr. Jagannath Pattnaik, learned Senior Counsel, Mr. Surya Prasad Mishra, learned Advocate General, Mr. Saubhagya Ketan Nayak, learned Addl. Govt. Advocate and Mr. Tapas Praharaj, learned Addl. Standing Counsel in reaching the conclusion, as discussed in detail supra.

25. The ABLAPL is accordingly disposed of. A free copy of this order each be supplied to Mr. Jagannath Pattnaik, learned Senior Counsel and Mr. S.P. Mishra, learned Advocate General.

Petition disposed of.

2017 (I) ILR - CUT-1060

DR. A.K. RATH, J.

C.M.P. NO. 1193 OF 2015

SUBASH MOHAPATRA ……Petitioner

.Vrs.

SMT. KAMALA MOHAPATRA & ANR. …….Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O- 23, R- 3A

Compromise decree – Allegation of fraud – What is the remedy available to the party aggrieved when a question relating to lawfulness of the agreement or compromise is raised before the court that passed the decree on the basis of any such agreement or compromise ? Held, the aggrieved party to make an application before the learned trial court under Order 23, Rule 3A C.P.C. for his remedy which is maintainable. (Paras 6 to 9)

Case Law Relied on:-

1. (2014) 15 SCC 471 : R.Rajanna v. S.R. Venkataswamy & Ors.

Case Law Referred to :-

1. 1975 (I) CWR 52 : Rama Krushna Swain v. Smt. Fulmani Kamila & Anr. (No longer good law)

For Petitioner : Mr. P.K. Rath
For Opp. Parties : S.S.K. Nayak

Date of hearing : 05.04. 2017
Date of judgment : 05.04. 2017

JUDGMENT

DR.A.K.RATH, J.

By this petition under Article 227 of the Constitution of India, challenge is made to the order dated 11.08.2015 passed by the learned District Judge, Bhadrak in Civil Revision No.04 of 2011. By the said order, learned revisional court allowed the revision and set aside the order dated 8.7.2011 passed by the learned Civil Judge (Senior Division), Bhadrak in I.A. No.375 of 2010 filed under Order 23 Rule 3(A) CPC and remitted the matter back for de novo enquiry.

02. Opposite party nos.1 & 2 as plaintiffs instituted C.S. No. 105 of 2009-I in the court of the learned Civil Judge (Senior Division), Bhadrak for partition of the suit schedule property impleading the petitioner as defendant. During pendency of the suit, a compromise was arrived at between the parties. Accordingly, a compromise petition was filed in the Lok Adalat. Thereafter, the suit was disposed of in terms of the compromise. While matter stood thus, plaintiff no.1 filed an application to set aside the compromise on the ground of fraud. The defendant objected to the same. Learned trial court rejected the same. Challenging the same, plaintiff no.1 filed Civil Revision No.04 of 2011 before the learned District Judge, Bhadrak. The learned Revisional Court set aside the order dated 8.7.2011 and remitted the matter back to the learned trial court for disposal of I.A. No. 375 of 2010.

03. Heard Mr. P.K. Rath, learned counsel for the petitioner and Mr. S.S.K. Nayak, learned counsel for the opposite parties.

04. Mr. Rath, learned counsel for the petitioner, submits that against the order dated 8.7.2011 passed by the learned trial court, the revision is not maintainable. According to him in view of proviso to Section 115 CPC if the

order in favour of a party applying for revision would have given finality to the suit or other proceeding, then only the revision is maintainable.

05. Per contra, Mr. Nayak, learned counsel for the opposite parties, submits that since fraud has been played in the court, an application was filed in the court below to set aside the compromise petition. In such an eventuality, the aggrieved party may file an appropriate application under Order 23 Rule 3 CPC in the same court or file an appeal. Thus the learned trial court is justified in rejecting the application under Order 23 Rule 3(A) CPC.

06. The seminal question that hinges for consideration is what is the remedy available to the party aggrieved when a question relating to lawfulness of the agreement or compromise is raised before the Court that passed the decree on the basis of any such agreement or compromise ?

07. Order 23 Rule 3(A) CPC is the hub of issue. The same reads as under:-

> "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit :
>
> Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.
>
> Explanation : An agreement or compromise which is void or avoidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.

08. In R.Rajanna v. S.R. Venkataswamy and others, (2014) 15 SCC 471, the apex Court held thus;

> "10. It is manifest from a plain reading of the above that in terms of the proviso to Order XXIII Rule 3 where one party alleges and the

other denies adjustment or satisfaction of any suit by a lawful agreement or compromise in writing and signed by the parties, the Court before whom such question is raised, shall decide the same. What is important is that in terms of Explanation to Order XXIII Rule 3, the agreement or compromise shall not be deemed to be lawful within meaning of the said rule if the same is void or voidable under Indian Contract Act, 1872. It follows that in every case where the question arises whether or not there has been a lawful agreement or compromise in writing and signed by the parties, the question whether the agreement or compromise is lawful has to be determined by the Court concerned. What is lawful will in turn depend upon whether the allegations suggest any infirmity in the compromise and the decree that would make the same void or voidable under the Contract Act. More importantly, Order XXIII Rule 3A clearly bars a suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful. This implies that no sooner a question relating to lawfulness of the agreement or compromise is raised before the Court that passed the decree on the basis of any such agreement or compromise, it is that Court and that Court alone who can examine and determine that question. The Court cannot direct the parties to file a separate suit on the subject for no such suit will lie in view of the provisions of Order XXIII Rule 3A of CPC. That is precisely what has happened in the case at hand. When the appellant filed OS No.5326 of 2005 to challenge validity of the compromise decree, the Court before whom the suit came up rejected the plaint under Order VII Rule 11 CPC on the application made by the respondents holding that such a suit was barred by the provisions of Order XXIII Rule 3A of the CPC. Having thus got the plaint rejected, the defendants (respondents herein) could hardly be heard to argue that the plaintiff (appellant herein) ought to pursue his remedy against the compromise decree in pursuance of OS No.5326 of 2005 and if the plaint in the suit has been rejected to pursue his remedy against such rejection before a higher Court.

11. The upshot of the above discussion is that the High Court fell in a palpable error in directing the plaintiff to take recourse to the remedy by way of separate suit. The High Court in the process remained oblivious of the provisions of Order XXIII Rules 3 and 3A of the CPC as also orders passed by the City Civil Court rejecting the plaint in

which the Trial Court had not only placed reliance upon Order XXIII Rule 3A but also the decision of the Court in Pushpa Devi's case (supra) holding that a separate suit was not maintainable and that the only remedy available to the aggrieved party was to approach the Court which had passed the compromise decree. The following passage from the decision of Pushpa Devi (supra) case is, in this regard, apposite:

"17...Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8- 2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code."

09. The inescapable conclusion is that the application under Order 23 Rule 3(A) CPC is maintainable. Learned trial court is not justified in holding that the petition is not maintainable.

10. Before parting with the case, it is apt to state here that the learned trial court relied upon a Division Bench decision of this Court in the case of Rama Krushna Swain v. Smt. Fulmani Kamila and another, 1975 (I) CWR 52 and held that the petition is not maintainable.

11. In Rama Krushna Swain (supra), this Court on the interpretation of Rule 3 Order 23 CPC held that:-

> "8.We have not been shown any decision of this Court though we called upon counsel for parties to cite such precedence, if any. There is, in our opinion, consensus in the judicial opinion on the interpretation of Rule 3 of Order 23, of the Code, namely, the enquiry envisaged under the Rule admits of two questions being examined, that is
>
> (1) (a) whether there has been an adjustment or compromise;
>
> (b) whether such adjustment or compromise is lawful and
>
> (2) challenge on grounds of undue influence, fraud, or misrepresentation make an agreement voidable and not void and when a compromise is challenged on such ground, the matter is not within the ambit of Rule 3 and must be left to be decided by an independent suit."

12. The decision in the case of Rama Krushna Swain (supra) was rendered before the CPC was amended. The law has undergone a sea change. The CPC was amended. The 'proviso' and 'explanation' was inserted to Rule 3 Order 23 CPC by Act 104 of 1976, which came into effect on 01.02.1977. In view of the amendment to the CPC and authoritative pronouncement of this Court in the case of R.Rajanna (supra), decision of this Court in the case of Rama Krushna Swain (supra) is no longer law.

13. As a sequel to above, the order dated 08.07.2011 passed by the learned Civil Judge (Senior Division), Bhadrak is quashed. The matter is remitted back to the learned trial court to dispose of the application on merit. The petition is disposed of. No costs.

Petition disposed of.

2017 (I) ILR - CUT- 1066

DR. A.K. RATH, J.

C.M.P. NO. 1290 OF 2016

SRIKRISHNA ESTATE & CONSTRUCTION PVT. LTD. & ANR. ……..Petitioners

.Vrs.

NETRANANDA BHOI & ORS. ……..Opp. Parties

EVIDENCE ACT, 1872 – Ss 63,65

Secondary evidence – Admissibility – Whether, Photostat copy of a document is admissible as secondary evidence ? Held, No.

The impugned order Dt 11.07.2016 passed by the learned Civil Judge (Sr. Division) Bhubaneswar, allowing the application of the plaintiffs to admit the Photostat copy of the agreement Dt 13.03.2017 as exhibit is quashed. (Paras 6,8,9)

For Petitioners : Mr. Pradeep Kumar Mohapatra,
For Opp. Parties : Mr. Bibekananda Bhuyan,

Date of Hearing :05.04.2017
Date of Judgment:12.4. 2017

JUDGMENT

DR.A.K.RATH, J.

This petition challenges the order dated 11.7.2016 passed by the learned Civil Judge (Sr.Division), Bhubaneswar in C.S.No.688 of 2008. By the said order, the learned trial court allowed the application of the plaintiffs to admit the photostat copy of the agreement dated 13.3.2017 as exhibit.

2. The opposite parties as plaintiffs instituted the suit for declaration that the registered sale deed no.6011 dated 30.5.2007 executed by defendant no.1 in favour of defendant no.2 is illegal, invalid, void and inoperative, declaration of right, title, interest, possession and permanent injunction impleading the petitioners as opposite parties. Pursuant to issuance of summons, the defendants entered appearance and filed a written statement denying the assertions made in the plaint. While the matter stood thus, the plaintiffs filed an application on 27.1.2016 under Order 16 Rule 6 C.P.C. read with Section 65 of the Indian Evidence Act praying for a direction to defendant no.1 to produce the original agreement dated 13.3.20017, which is

in his possession so as to admit the photostat copy thereof as secondary evidence. It is stated that defendant no.1 had obtained the agreement for sale. He kept the original with him and handed over a photostat copy of the same to the plaintiffs. They have filed the photostat copy in the Court. Unless the original document, which is under the custody of defendant no.1, is filed, the secondary copy thereof is not admissible. Thereafter the plaintiffs filed an application on 19.3.2016 praying to admit the photostat copy of the agreement dated 13.3.2007. It is stated that the photostat copy, which is filed in the court, being a copy obtained in mechanical process is admissible as secondary evidence. The defendants filed objection stating therein that though no agreement was executed between the defendants with plaintiff no.1, but then the plaintiffs instituted the suit basing upon the agreement which is not in existence. They denied that the Managing Director of defendant no.1 obtained the agreement for sale, kept the original with him and handed over a photostat copy to the plaintiffs. It is specifically stated that photostat copy of the so called agreement is forged one and manufactured for the purpose of this case. The learned trial court came to hold that when the plaintiffs have laid foundation to lead the secondary evidence of the agreement for sale dated 13.3.2007 by way of photostat copy, they are at liberty to mark the same as secondary evidence particularly when the signatures of the plaintiffs are admitted on it. Held so, it allowed the application.

3. Mr.Mohapatra, learned Advocate for the petitioners submitted that Section 65 of the Evidence Act permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned therein. The secondary evidence of the contents of a document cannot be admitted without non-production of the original. The foundation must be laid by a party for leading secondary evidence in the shape of photostat copy. The assertion of the defendants is that the agreement for sale dated 13.3.2007 has not seen the light of the day. The photostat copy filed in the court is a fabricated one. In view of the same, the learned trial court is not justified in permitting the plaintiffs to mark the photostat copy as exhibit.

4. Per contra, Mr.Bhuyan, learned counsel for the opposite parties 2 to 4 submitted that the Managing Director of defendant no.1 obtained an agreement for sale, kept the original with him and handed the photostat copies to the plaintiffs. The plaintiffs filed an application calling for the original, but the defendants had not produced the same. Thereafter an application was filed by the plaintiffs to mark the photostat copy of the

agreement. The photostat copy of the agreement has been obtained in a mechanical process and the same is admissible in secondary evidence. Thus, the conditions enumerated in Section 65 of the Indian Evidence Act has been satisfied and have been laid for leading secondary evidence. The learned trial court is justified in allowing the petition.

5. Before adverting to the contentions raised by the learned counsel for both parties, it will necessary to set out some of the provisions of the Indian Evidence Act.1872.

"Sec. 63. Secondary evidence.—Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it."

"Sec.65. Cases in which secondary evidence relating to documents may be given.

xx xx xx

(a) when the original is shown or appears to be in the possession or power-

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;"

6. An identical matter came up for consideration before the Apex Court in the case of Smt.J.Yashoda v. Smt. K. Shobha Rani, AIR 2007 SC 1721. On an interpretation of Sec.63 & 65(a) of the Evidence Act, the apex Court held :

"**7.** Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be

inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

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

"After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the Court of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other

> contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy. Prayer was also made by the appellant that in case respondent no. 1 denied that the said manuscript had been written by him, the Photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession of respondent no.1. The appellant further failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

7. The instant case may be examined on the anvil of the decision cited supra.

8. There is no whisper in the plaint that the plaintiffs entered in to an agreement for sale of the suit schedule property with the defendant no.1 on 13.3.2007. It is pleaded that an agreement was executed between the plaintiffs and defendant no.1 on 13.3.2007 by which the plaintiffs had granted exclusive right of development to the later over the suit land. The defendants assert that the agreement for sale dated 13.3.2007 has not seen the light of the day. The same is a fabricated one and has been manufactured for the purpose of this case. The so-called agreement dated 13.3.2007 is not an agreement for sale. In view of the same, the conditions enumerated in clause

(a) of Section 65 of the Indian Evidence Act have not been satisfied. No foundation has been laid by the plaintiffs to lead the secondary evidence.

9. In the wake of the aforesaid, the order dated 11.7.2016 passed by the learned Civil Judge (Sr.Division), Bhubaneswar C.S.No.688 of 2008 is quashed. The petition is allowed. There shall be no order as to costs.

Petition allowed.

2017 (I) ILR - CUT-1071

DR. B.R. SARANGI, J.

O.J.C. NO. 14396 OF 1997

FERTILIZER CORPORATION OF INDIA LTD. ……..Petitioner

.Vrs.

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

(A) ELECTRICITY – Monthly demand charges – Demand has to be made on the basis of contract demand, even if power supply of the consumer has been disconnected for other reason.

In this case, the petitioner-consumer applied for reduction of contract demand from 55-6 MVA to 16 MVA on account of repair of its major equipments – However bills issued raising demand for the months of July and August, 1996 basing on the contract demand as per agreement – Hence the writ petition – If the petitioner will be permitted to reduce the contract demand at its sweet will, then it will violate the conditions stipulated in the agreement vis-a-vis Regulation 85 of Odisha Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 – Held, demand has to be made on the basis of the contract demand, as the quantity of energy contracted has been reserved to be made available for the consumer to utilize the same. (Paras 9)

(B) ELECTRICITY – Billing dispute – Appropriate forum for the consumer to approach Grievance Redressal Forum for its redressal – Held, since the present writ petition relates to billing dispute, the same is liable to be dismissed. (Para 10)

For Petitioner : Mr. Ganeswar Rath, Senior Advocate,
M/s. A.K.Panda, T.K.Praharaj & B.K.Nayak

For Opp. Parties : M/s. B.K.Sahoo & (Ms.) A.Sahoo

Date of argument: 27.04.2017
Date of Judgment: 04.05.2017

JUDGMENT

DR. B.R. SARANGI, J.

Fertilizer Corporation of India Limited, a public sector undertaking under the Union of India, established a unit at Talcher for production of fertilizer for use and consumption of farmers of Orissa. It has filed this application challenging the demand raised in the bills for the month of July, 1996 and August, 1996 for an amount of Rs.4,85,38,261.80 and Rs.4,86,82,963.10 respectively and consequential rejection of the application filed for reduction of contract demand of 56.6 MVA to 16 MVA vide letter dated 3.5.1997 in Annexure-7.

2. The factual matrix of the case in hand is that the Fertilizer Corporation of India Limited (hereinafter referred to as "FCIL") entered with an agreement on 23.12.1976 (Annexure-1) with erstwhile Orissa State Electricity Board to supply power not exceeding maximum demand of 55,600 KVA for running the industry for production of fertilizer. As per the regulation and agreement, the General Manager of FCIL wrote a letter on 05.06.1996 (Annexure-3) to the Executive Engineer, with a copy to the Chief Engineer, GRIDCO, for reduction of contract demand of 16 MVA from 55.6 MVA for a period of two months w.e.f. 01.07.1996 to 31.08.1996 for maintenance of some vital equipments and also deposited Rs.1000/- towards processing fees along with the said letter. The Executive Engineer forwarded the same to the Superintendent Engineer for consideration of the case of the petitioner. When the application was pending for consideration by the competent authority, the Executive Engineer on 01.08.1996 and 02.09.1996 issued bills for the months of July, 1996 and August, 1996 to the tune of Rs.4,85,38,261.80 and 4,86,82,963.10 respectively. Hence, this application.

3. Mr. Ganeswar Rath, learned Senior Counsel appearing along with Mr. B.K. Nayak, learned counsel for the petitioner states that when the petitioner's claimed for reduction of contract demand on account of repair of its major equipments, the demand raised for the months of July and August, 1996 on the basis of contract demand existed in the agreement, cannot sustain

in the eye of law. It is contended that if the maximum demand recorded as 15.616 MVA and 38.920 MVA respectively during the month of July and August, 1996, in that case, the demand raised on the basis of contract demand of 55.6 MVA cannot sustain in the eye of law, when the application for reduction of contract demand from 55.6 MVA to 16 MVA is pending before the authority concerned. It is further contended that for "break down" of the industry, the petitioner is not liable to pay on the basis of the contract demand as per the agreement. If it will be construed to be a "shut down" the petitioner may be liable for the said amount. It is also contended that as against the demand in respect of the bills for the months of July and August, 1996, if the reduction of contract demand is allowed, then the amount would be substantially reduced and the petitioner would not be liable to pay the amount as demanded.

4. Mr. B.K. Sahoo, learned counsel for opposite party nos.2 to 5 raised a specific contention that the petitioner is not entitled to get the relief, as sought for in the writ application, inasmuch as since there is billing dispute, the petitioner has to approach the appropriate forum, namely, Grievance Redressal Forum to ventilate its grievance. In that view of the matter, the writ application is not maintainable. It is further contended that as the petitioner has sought for reduction of contract demand from 55.6 MVA to 16 MVA, and the application filed for the purpose is pending consideration before the concerned authority, the benefit sought for is not admissible under the law. More so, the reason for asking reduction of contract demand, which is for maintenance work of certain machineries for a stipulated period of two months, is also not admissible under law. Therefore, the relief sought for cannot be granted and, as such, the demand raised, being well within the jurisdiction of the authority concerned, does not warrant any interference by this Court.

5. Heard Mr. Ganeswar Rath, learned Senior Counsel along with Mr. B.K. Nayak, learned counsel for the petitioner and Mr. B.K. Sahoo, learned counsel for opposite parties no.2 to 5, and perused the records. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties, this writ application is disposed of finally at the stage of admission.

6. The undisputed fact being that the petitioner applied for contract demand for a period of two months for maintenance of its machineries. The said application is pending before the authority concerned and no order has been passed with regard to reduction of contract demand. But, under law, the

contract demand cannot be reduced for a specific period as claimed by the consumer. In exercise of powers conferred under Section 181 (2) (t) (v) (w) and (x) read with Part-VI of the Electricity Act, 2003, Orissa Electricity Reforms Act and all other powers enabling it in that behalf, the Orissa Electricity Regulatory Commission makes regulations to govern distribution and supply of electricity and procedures thereof such as the system of billing, modality of payment of bill, the powers, functions and obligations of the distribution licensees and/or suppliers and the rights and obligations of consumers called "Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004".

7. Chapter-VI of Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 (for short "Code, 2004") deals with contract demand. Regulation-2 (l) defines contract demand, which states as follows:

> *"Contract demand" means maximum KW or KVA or HP as the case may be, agreed to be supplied by the licensee and reflected in the agreement executed between the parties. Where the agreement stipulates supply in KVA, the quantum in terms of KW may be determined by multiplying the KVA with 0.9"*

For just and proper adjudication of the case, Regulations-64, 66, 67, 68 and 69 are reproduced below:

> *"64. Contract demand for loads of 110 KVA and above shall be as stipulated in the agreement and may be different from the connected load. Contract demand for a connected load below 110 KVA shall be the same as the connected load. However in case of installation with static meter/meter with provision of recording demand, the recorded demand rounded to nearest 0.5 Kw shall be considered as the contract demand requiring no verification."*
>
> *xx xx xx*
>
> *"66. Reduction of Contract Demand – (1) Every application for reduction of contract demand shall be made to the designated authority of the licensee.*
>
> *(2) Subject to Regulation 67 below no application for reduction in contract demand shall be entertained within three months from the date of commencement of initial or revised supply unless the agreement provides otherwise.*

67. Contract demand above 20 KW shall not be allowed to be reduced more than once within a period of thirty-six months from the dte of initial supply or from the date of last reduction. Contract demand of 20 KW and below shall not be allowed to be reduced more than once within a period of twelve months from the date of initial supply or from the date of last reduction. The designated authority of the licensee may for reasons to be recorded, allow such reduction more than once within the aforesaid period of thirty-six months or twelve months as applicable.

68. Every application for reduction of contract demand shall be accompanied by

(1) such processing fees as may be notified by the licensee for the particular category of consumer,

(2) test report from the licensed contractor where alteration of installation is involved,

(3) meter reading of the previous three months, and

(4) letter of approval of Electrical Inspector wherever applicable.

69. No permission shall be granted to reduce the contract demand if on a consideration of the investment made by the licensee for effecting power supply to the consumer, the reduction is likely to result in the investment becoming non-remunerative according to the norms fixed by the licensee with the approval of the Commission, unless the consumer is agreeable to bear the financial burden of making the investment viable due to such reduction."

8. In view of the provisions contained in Regulation-66, power has been vested with the consumer to make an application for reduction of contract demand to the original authority of the licensee and, as such, contract demand above 20 KW shall not be allowed to be reduced more than once within a period of thirty-six months from the date of initial supply or from the date of last reduction. The designated authority of the licensee may for reasons to be recorded, allow such reduction more than once within the aforesaid period of thirty six months or twelve months as applicable. As such, the regulation does not contemplate for reduction of contract demand for a period of two months for maintenance of heavy machineries of the petitioner. The reasons for non-allowing reduction of contract demand frequently is obvious because of the fact that on the basis of the agreement executed between the supplier and the consumer, much of power is kept reserved for reduction of contract demand for a specific period and that can only be allowed once within a period of thirty-six months. Therefore, as has been stated in the writ application and also argued by Mr. G. Rath, learned

Senior Counsel for the petitioner, the reduction of contract demand for a period of two months only is not permissible under law. The consumer is bound by terms and agreement and also the regulation applicable to it from time to time.

9. In view of such position, if the petitioner will be permitted to reduce the contract demand at its own suit will, then it will be violative of the conditions stipulated in the agreement vis-à-vis the provisions of the Regulations applicable to it. Reduction of contract demand is not admissible frequently in view of the fact that the demand charges are payable because of the quantity of energy contracted has been reserved and/or kept ready to be supplied to the consumer as per his requirement, as and when required by the consumer during the continuance of the term of agreement. Therefore, even if during the disconnection period the petitioner is liable to pay the demand charges on the basis of the contract demand, reason being the computation of demand charges in an alternative method does not depend upon the consumption of energy. Therefore, the law is well settled by this Court as well as the apex Court time and again that the demand has to be raised on the basis of contract demand, even if power supply of the consumer has been disconnected for other reason. Therefore, the reason for asking for reduction of contract demand for a period of two months, being for repair of heavy machineries, is not admissible and, as such, no billing can be done on the basis of actual consumption made during the said period on the presumption of reduction of contract demand as claimed in the writ petition. Rather, the demand has to be made on the basis of contract demand, as the power is made available for the consumer to utilize the same. But for some reason or other, if it cannot utilize the same, that *ipso facto* cannot disentitle the petitioner not to pay the demand raised by the authority concerned.

10. In view of the aforesaid facts and circumstances, the claim made by the petitioner in this writ application cannot sustain. Further, if the petitioner raises dispute with regard to billing, this Court has no jurisdiction to entertain the same, inasmuch as for billing dispute the writ application is not maintainable. However, if the petitioner so likes, it may approach the appropriate forum ventilating its grievance in accordance with law. Therefore, considering the case from both angles, factually as well as legally, this Court finds no merit in the writ application.

11. The writ application is thus dismissed. No order to cost.

Writ application dismissed.

2017 (I) ILR – CUT-1077

DR. B.R. SARANGI, J.

W.P.(C) NO. 1779 OF 2016

DR. SMRUTISUDHA PATTNAIK …….Petitioner

.Vrs.

ACHARYA HARIHAR REGIONAL CANCER CENTRE, CUTTACK & ORS. ……..Opp. Parties

SERVICE LAW – Advertisement Dt. 27.08.2015 issued to make an appointment pursuant to Resolution Dt. 03.02.2014 – Petitioner applied for the post of Senior Resident on the subject Gynecologic Oncology against one unreserved post – However, selection has been made pursuant to the Government Resolution Dt. 11.01.2013 and corrigendum Dt. 19.02.2013 – Action challenged being arbitrary, unreasonable and hit by the principle "once game is played the rule of game cannot be changed in the midst".

So once a process of selection starts, the prescribed selection criteria cannot be changed – Since the above advertisement issued to make an appointment pursuant to Resolution Dt. 03.02.2014, the same cannot be and could not have been changed during the selection process by adhering to the Government Resolution Dt. 11.01.2013 and corrigendum Dt. 19.02.2013 which is violative of Article 16 of the Constitution of India – Held, the impugned selection made vide order Dt. 30.10.2015 is quashed – Direction issued to O.P.No.1 to prepare a select list in consonance with the Government Resolution Dt. 03.02.2014. (Paras 13 to 17)

Case Laws Referred to :-

1. (2010) 2 SCC 637: AIR 2010 SC 932 : Rakhi Ray v. High Court of Delhi.
2. (1990) 2 SCC 669 : A.P. Public Service Commission, Hyderabad v. B. Sarat Chandra.
3. AIR 1983 SC 1143: A. A. Calton v. The Director of Education.
4. AIR 1990 SC 405 : P. Mahendran v. State of Karnataka.
5. 2005 (2) Supreme 615 : Secretary, A.P. Public Service Commission Vrs. B. Swapna & Ors.
6. 100 (2005) CLT 465 : Mrs. Madhumita Das v. State of Orissa.

For Petitioner : Mr. J. Pattnaik, Senior Advocate,
M/s. B.Mohanty, T.K.Pattnayak, A.Patnaik,
S.Patnaik, B.S.Rayaguru & S.Mohapatra

For Opp. Parties : M/s. B.Nayak & B.M.Bhuyan
Mr. A.K.Mishra, Addl. Govt. Adv.

Date of hearing : 25.04.2017
Date of judgment: 02.05.2017

JUDGMENT

DR. B.R. SARANGI, J.

Acharya Harihar Regional Cancer Centre (AHRCC) is a society registered under the Societies Registration Act, 1860. All members of its Governing Council are officers of the State Government. The Health Minister of the State of Odisha is the President and Health Secretary is the Secretary of the Society. The said Society was formed on 24.04.1984. Acharya Harihar Regional Centre for Cancer Research and Treatment Society Bye-laws Amendment Rules, 2013 (hereinafter referred to as "Rules, 2013") came into force w.e.f. 28.02.2013. As per Rule 18 of Chapter-3 of Rules 2013, appointment to all posts shall be made on the basis of recommendation of the Selection Committee or Staff Selection Committee, as the case may be, by the appointing authority. Director shall, in consultation with the Secretary to Government, Health & Family Welfare Department, Government of Odisha, frame standing order for the purpose of fixing the age, qualification and experience etc. required for direct recruitment to any post of the Centre and for promotion to any post belonging to Group-B, C & D. The Society is run by the fund given by State Government of Odisha, Government of India, the grants, donations and gifts from other Governments, Corporate Bodies, Institutions, Organization, other individuals, and charges collected towards admission, care and treatment of patients.

2. Pursuant to advertisement dated 27.08.2015 (Annexure-1), applications were invited in the prescribed form from eligible candidates for the post of Senior Residents in different disciplines to work in the AHRCC. The last date for submission of application form was 15.09.2015 (5.00 P.M.). The appointment was to be made in accordance with Government of Odisha Health and F.W. Department Resolution No. 2705/H of 03.02.2014. The petitioner, being a doctor and serving under the Government of Odisha at Cuttack, after completion of her post-graduation in the subject of Obstetrics and Gynecology, applied for the post of Senior Resident on the subject Gynecologic Oncology against one unreserved post. After selection was over, the result of unreserved category post of Senior Resident Gynecologic Oncology was published on 30.10.2015, in which the petitioner's name was not found place.

3. Being aggrieved, the petitioner filed a representation on 31.10.2015 before opposite party no.1. Due to in-action of the authority, she approached this Court by filing W.P.(C) No. 21814 of 2015, which was disposed of by order dated 14.12.2015 directing opposite party no.1 to consider and dispose of the representation and pass appropriate order within a period of four weeks from the date of communication of that order. In compliance of the same, opposite party no.1 passed an order on 28.01.2016 stating therein that AHRCC, Cuttack (opposite party no.1) was guided by resolution/ notification issued by Government of Odisha from time to time. During the selection process, Government Order vide No. ME-I-IM -12/08/15510/H dated 11.06.2014 reached the office wherein the appropriate Government issued instruction to all the Dean and Principal that Senior Resident/Tutor required, as per the MCI norm, should be filled up as per the previous Government resolution no.1314/H dated 11.01.2013 and corrigendum issued vide letter no. 5756/H dated 19.02.2013, whereas the advertisement clearly indicates that the appointment would be in accordance with the Government of Odisha Health and Family and Welfare Department Resolution No. 2705/H dated 03.02.2014, and consequentially rejected the representation, hence this application.

4. Mr. J. Pattnaik, learned Senior Counsel appearing along with Mr. B. Mohanty, learned counsel for the petitioner strenuously contended that the selection, having not been done in consonance with the advertisement dated 27.08.2015 in Annexure-1 pursuant to Government of Odisha Health and Family and Welfare Department Resolution No. 2705/H dated 03.02.2014, cannot sustain in the eye law. Once an advertisement issued to give appointment pursuant to resolution dated 03.02.2014, the same should be adhered to. If any instruction (Government order dated 11.06.2014) was received during the selection process to select and give appointment pursuant to previous Government resolution no. 1314/H dated 11.01.2013 and corrigendum issued vide letter no. 5756/H dated 19.02.2013, the same is absolutely bad in law. Therefore, the petitioner seeks for interference of this Court.

5. Mr. B. Nayak, learned counsel for opposite party no.1 states that AHRCC, Cuttack is guided by the Resolution/notification issued by the Government of Odisha from time to time. During the selection process, the Government order dated 11.06.2014 reached to the office, wherein the appropriate Government issued instruction to all the Dean and Principal to engage Senior Resident/Tutor required, as per the MCI norms, pursuant to the

previous Government resolution no. 1314/H dated 11.01.2013 and corrigendum issued vide letter no. 5756/H dated 19.02.2013. Therefore, the selection and appointment, having been done pursuant to the Government Resolution dated 11.01.2013 and consequential corrigendum issued on 19.02.2013, no fault can be found with the authority concerned and, as such, the selection of candidate for recruitment of Senior Resident under such resolution is wholly and fully justified, which warrants no interference of this Court.

6. Mr. A.K. Mishra, learned Addl. Government Advocate appearing for opposite party no.2 states that the opposite party no.1, being a society, has to adhere to its Rules and Regulations. Therefore, any action taken by opposite party no.1 in consonance with the Rules and Regulations of the Society, the State has nothing to do in the matter, save and except framing the guidelines, which opposite party no.1 is required adhere, and affording some funding for its management.

7. The opposite party no.3, who has been selected to join as Senior Resident having stood first in the selection list at Annexure-3, in spite of notice being issued, did not choose to appear and contest the matter. The opposite party no.1 in its counter affidavit specifically stated that opposite party no.3 has been relieved from the Centre to join as Senior Resident in the department of O & G, SCB Medical College and Hospital, Cuttack. So far as appointment of Senior Resident from the wait list is concerned, none have joined as Senior Resident in the said subject till date. Therefore, the petitioner has neither impleaded them as party nor notices have been issued on them to participate in the proceeding.

8. This Court heard Mr. J. Pattnaik, learned Senior Counsel along with Mr. B. Mohanty, learned counsel for the petitioner; Mr. B. Nayak, learned counsel for opposite party no.1; and Mr. A.K. Mishra, Addl. Government Advocate for opposite party no.2 and perused the record. Pleadings between the parties having been exchanged, this writ petition is disposed of finally at the stage of admission with the consent of learned counsel for the parties.

9. In the advertisement dated 27.08.2015 issued by opposite party no.1, it was specifically mentioned that appointment to the post of Senior Resident in Gynecologic Oncology under one unreserved category would be in accordance with the Government of Odisha Health and Family and Welfare Department Resolution No. 2705/H dated 03.02.2014. The said resolution deals with guidelines for engagement of Senior Resident/tutor in Government

Medical/Dental Colleges in the State of Odisha. For just and proper adjudication of the case, relevant provisions of the said resolution dated 03.02.2014 are reproduced below.

> *" 2.* ***Objective and Applicability of the Guidelines:***
>
> *xx xx xx*
>
> *2.2. Present guidelines would be applicable or all appointment, selection of SR/Tutor in Government Medical Colleges of the State superseding earlier notifications made by Government in this connection.*
>
> *xx xx xx*
>
> *5.* ***Selection Process:***
>
> *xx xx xx*
>
> *5.3 A panel of SR/Tutor will be prepared by the committee which will remain valid for a period of one year from the date of its approval.*
>
> *xx xx xx*
>
> *6.* ***Eligibility and Qualifications for SR/Tutor:***
>
> *xx xx xx*
>
> *6.5 The MBBS degree holders applying for post of Tutor must have completed three years of service as Assistant Surgeon under Govt. of Orissa (regular/contractual/ad hoc/temporary).The Candidates with MD/MS/MDS qualification applying for SR/Tutor must also have same requirement of three years of service as Assistant Surgeon out of which at least two years of service shall be post P.G. under Government of Orissa which may be regular/contractual/ad hoc/temporary."*

10. As per the above mentioned provisions, the candidate with MD/MS/MDS qualification applying for SR/Tutor must also have same requirement of three years of service as Assistant Surgeon, out of which at least two years of service shall be Post P.G. under Government of Orissa. The select list prepared in Annexure-3 dated 30.10.2015 is not in adherence to the provisions contained in Clause-6.5 of Resolution dated 03.02.2014. As such, the candidates so selected are not eligible to be appointed as Senior Resident in the subject advertised as they lack minimum requirement of three years of service as Assistant Surgeon out of which at least two years of service shall be post P.G. under Government of Orissa which may be regular/contractual /ad hoc/ temporary.

11. While disposing of the representation filed by the petitioner, in Annexure-6 dated 28.01.2016, it has been mentioned as follows:

> *"AHRCC, Cuttack is guided by the Resolution/notification issued by the Government of Odisha from time to time. During the selection process, the Government order dated 11.06.2014 reached to the office, wherein the appropriate Government issued instruction to all the Dean and Principal to engage Senior Resident/Tutor require as per the MCI norms should be filled as per the previous Government resolution no. 1314/H dated 11.01.2013 and corrigendum issued vide letter no. 5756/H dated 19.02.2013"*

Similarly, in paragraph-10 of the counter affidavit filed by opposite party no.1, it has been stated as follows:

> *"That as regards, the fact stated in Para-6 to 8, it is humbly submitted that, AHRCC, Cuttack is guided by the Resolution/notification issued by the Government of Odisha from time to time. During the selection process, the Government order dated 11.06.2014 reached to the office, wherein the appropriate Government issued instruction to all the Dean and Principal to engage Senior Resident/Tutor require as per the MCI norms should be filled as per the previous Government resolution no. 1314/H dated 11.01.2013 and corrigendum issued vide letter no. 5756/H dated 19.02.2013"*

With reference to the resolution dated 11.01.2013, the selection process having been conducted and select list have been prepared on the basis of the said resolution, the same is contrary to the conditions stipulated in the advertisement itself.

12. In ***Rakhi Ray v. High Court of Delhi*** (2010) 2 SCC 637 : AIR 2010 SC 932, the apex Court held that the process of selection begins with the issuance of advertisement and ends with the filling up of notified vacancies.

In ***A.P. Public Service Commission, Hyderabad v. B. Sarat Chandra,*** (1990) 2 SCC 669, the apex Court held that the process consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or *viva voce* and preparation of list of successful candidates for appointment.

In ***A.A. Calton v. The Director of Education,*** AIR 1983 SC 1143, the apex Court held that law as it stood at the point of time when the process of

selection commenced will be the law according to which the selection has to be completed.

Similar view has also been taken by the apex Court in ***P. Mahendran v. State of Karnataka,*** AIR 1990 SC 405.

13. In view of the law discussed above, there is no dispute that pursuant to advertisement issued in Annexure-1 dated 27.08.2015, the process of selection for appointment to the post of Senior Resident was to be conducted in consonance with the resolution dated 03.02.2014, as specified in the advertisement. But, as would be evident from Annexure-6, the order dated 28.01.2016 disposing the representation of the petitioner, as well as the counter affidavit, the process of selection has been done pursuant to the Government Resolution dated 11.01.2013 and corrigendum issued dated 19.02.2013. As per Clause 2.2 of Resolution dated 03.02.2014, the Government Resolution dated 1314/H dated 11.01.2013 and corrigendum issued vide letter no. 5756/H dated 19.02.2013 had already been superseded. Therefore, the selection made pursuant to the Government Resolution dated 11.01.2013 and corrigendum issued on 19.02.2013 is dehores advertisement dated 27.08.2015 and Government Resolution dated 03.02.2014. To be more specific, by publishing an advertisement and specifying therein that the appointment would be made pursuant to resolution dated 03.02.2014, the subsequent disclosure of fact that the selection has been done pursuant to the Government Resolution dated 11.01.2013 and corrigendum dated 19.02.2013, without bringing the same to the notice of the candidates, is arbitrary, unreasonable and hit by the principle ***"once game is played the rule of game cannot be changed in the midst"***.

14. In ***Secretary, A.P. Public Service Commission Vrs. B. Swapna and others,*** 2005 (2) Supreme 615, where the Andhra Pradesh Public Service Commission had initially advertised for recruitment to 8 posts of Asst. Public Relation Officers. Subsequently 7 more vacancies were advertised. Therefore, the recruitment was made for 15 vacancies. The selection was finalized on 2.7.1996. During the currency of the wait list, the competent authority again notified 14 more vacancies on 14.04.1997 to be filled up by the candidates from the wait list. In that case, the Apex Court held that there were two principles in service laws, which were indisputable. Firstly, there could not have been appointment beyond the advertised number; and secondly, the norms of selection could not have been altered after the selection process had started. Paragraph 16 of the judgment of the Apex Court is reproduced hereunder:

"The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by Learned Counsel for the applicant-respondent No. 1 it was unamended rule, which was applicable. Once a process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a certain criteria e.g., minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If the Rule is expressed in a language which is fairly capable of either interpretation it ought to be considered as prospective only."

In the above mentioned facts and circumstances, and the law laid down by the Apex Court, this Court has come to the conclusion that once selection process was started the norms fixed in the advertisement could not have been changed and if they were liable to be changed then the same should have been published in the like manner in which initial advertisement was published. Non-publication of the norms changed subsequently after starting of the selection process was violative of Article 16 of the Constitution and thus is not sustainable in the eye of law.

15. Relying upon the said judgment of the apex Court, this court also in the matter of recruitment of Ad hoc Additional District Judges under the Orissa Judicial Service (Special Scheme) Rules, 2001 in pursuance of the advertisement issued by the High Court of Judicature, Orissa, Cuttack by advertisement no. 1 of 2003 has taken a similar view in ***Mrs. Madhumita Das v. State of Orissa,*** 100 (2005) CLT 465.

16. In view of the law discussed above, there is no iota of doubt that once the advertisement issued to make an appointment pursuant to Resolution dated 03.02.2014, the same cannot be and could not have been changed during the selection process by adhering to the Government Resolution dated 11.01.2013 and corrigendum dated 19.02.2013 which is violative of Article 16 of the Constitution of India. Consequentially, the impugned selection

made, for appointment of the Senior Resident in the discipline of Gynecologic Oncology under unreserved category, vide Annexure-3 dated 30.10.2015 cannot sustain in the eye of law, accordingly, the same is hereby quashed.

17. While issuing notice, this Court directed that any action taken pursuant to advertisement issued under Annexure-1 shall abide by the result of the writ petition. Therefore, the post of Senior Resident in the discipline of Gynecologic Oncology is to be made in pursuance of the Government Resolution dated 03.02.2014. Accordingly, it is directed that opposite party no.1 should prepare a select list in consonance with the Government Resolution dated 03.02.2014 from amongst the candidates who have appeared pursuant to advertisement to the post of Senior Resident in the discipline Gynecologic Oncology under unreserved category for one post. The entire exercise shall be done within a period of one month from the date of communication of this judgment.

18. The writ petition is allowed. No order to cost.

Writ petition allowed.

2017 (I) ILR - CUT- 1085

DR. B.R. SARANGI, J.

W.P.(C) NO. 10305 OF 2010

M/S. R.C. ENTERPRISES ……..Petitioner

.Vrs.

THE ASST. P.F. COMMISSIONER (COMPLIANCE E.P.F.O, ROURKELA & ANR.) ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART. 226

Writ petition – Maintainability – Non-grant of adequate opportunity to the petitioner – Violation of principles of natural justice – Further the person who has passed the impugned order Dt. 15.03.2010, himself has issued the certificate proceeding – Held, fundamental right of the petitioner having been infringed, this court has jurisdiction to entertain the writ petition under Article 226 of the Constitution of India, even if there is availability of alternative remedy of appeal under the relevant statute.

In this case the petitioner made an application U/s. 7-A(4) of the EPF and M.P. Act, 1952 to set aside the exparte order on the ground that he could not appear in the proceeding U/s. 7-A of the Act on 15.03.2010 due to serious illness of his wife who ultimately expired on 16.03.2010 – Though the reason was genuine the same was mechanically rejected without application of mind – Held, the impugned order Dt. 15.03.2010 and the consequential demand for recovery are quashed. (Paras 14, 15)

Case Law Referred to :-

1. (2008) 16 SCC 276 : Nagarjuna Construction Company Limited v. Government of Andhra Pradesh.
2. AIR 1981 SC 818 : Swadeshi Cottom Mills v. Union of India.
3. AIR 1954 SC 403 : Himmatlal v. State of Madhya Pradesh.
4. AIR 1987 SC 2186 : Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya.
5. AIR 1958 SC 86 : State of Uttar Pradesh v. Md. Nooh.

For Petitioner : M/s. Sanjeev Udgata, N.C.Pattnaik, S.Udgata & A.Mishra

For Opp. Parties : M/s. P.K.Mishra & S.S.Mishra

Date of Judgment : 06.04.2017

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner, which is a proprietorship firm, has filed this application to quash Annexure-1, the ex-parte order dated 15.03.2010 passed by the Asst. Provident Fund Commissioner (Compliance), Employees Provident Fund Organization in Case No. 7A/25/2008 under Sections 7-A and 7-Q of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "the Act"); as well as Annexure-3, the consequential notice of demand dated 04.05.2010 issued in Certificate Case No. 54 of 2010.

2. The factual matrix of the case, in a nutshell, is that the petitioner received an ex-parte order dated 15.03.2010 passed by the Asst. Provident Fund Commissioner (Compliance) determining a sum of Rs.1,62,492/- payable towards contribution on provident fund, pension fund, insurance fund and administrative charges for the period 1/05 to 3/08 under section 7-A of the Act, and further determining an amount of Rs.80,534/-, towards interest @ 12% per annum under Section 7Q of the Act for delay in remittance of the principal dues, the total of which comes to Rs.2,61,938/-. In the said order,

the petitioner has been directed to deposit the above amount within 15 days from the date of receipt of the order, failing which the same shall be recovered in the manner prescribed under Section 8B to 8G of the Act.

3. On receipt of order dated 15.03.2010 (Annexure-1), the petitioner filed an application for review under Section 7B of the Act but the same was rejected on the ground of limitation and others. Thereafter, the petitioner filed an application under Section 7-A(4) of the Act on or about 02.06.2010 before opposite party no.1 stating inter alia that the petitioner could not attend the office of opposite party no.1 and file the fresh evidence and written statement, as the wife of the proprietor of the petitioner firm was seriously ill and passed away on 16.03.2010 (a day after passing of ex-parte order on 15.03.2010), and prayed for setting aside the ex-parte order and sought for an opportunity for production of evidence and written statement. While such application under Section 7-A(4) of the Act was pending for consideration, Certificate Case No. 54 of 2010 was initiated against the petitioner and he received a notice of demand from the Recovery Officer-opposite party no.2 to pay a sum of Rs. 2,43,026/- + Rs.214/- within a period of fifteen days, failing which steps would be taken for attachment, arrest of the petitioner and for appointment of receiver. The petitioner has already deposited the admitted dues towards EPF contribution on wages amounting to Rs.99,446/-. The balance demand of Rs.1,62,492/- relates to demand of EPF Contribution on service charges and interest of Rs.80,534/-. The petitioner is not liable to pay any contribution towards service charges under the Act. Hence this application.

4. Mr. S. Udgata, learned counsel appearing for the petitioner contended that the impugned order dated 15.03.2010 has been passed ex-parte without complying with the principles of natural justice, inasmuch as no adequate opportunity has been given to the petitioner for hearing. Furthermore, notice issued by opposite party no.2 in Certificate Case No. 54 of 2010 is without jurisdiction, as opposite party no.1, who has passed the ex parte order under Annexure-1, and opposite party no.2, who has issued the notice for recovery under Annexure-2, is one and same person, who has acted as the prosecutor, adjudicator and executor. It is further contended that the impugned order passed under Sections 7-A and 7-Q of the Act, even though is appealable under Section 7-I of the Act and there is availability of alternative remedy under the statute, having been passed without affording any opportunity of hearing and non-compliance of principle of natural justice and the same being without jurisdiction, instead of availing the alternative remedy, the petitioner

approached this Court by filing this application under Article 226 of the Constitution of India, for which there is no legal bar.

5. Mr. P.K. Mishra, learned counsel appearing for the opposite parties strenuously urged before this Court that the order passed under Section 7-A of the Act is appealable under Section 7-I of the Act and as such, Employees Provident Funds Appellate Tribunal has been constituted and the same is functioning at New Delhi. Therefore, the petitioner could have preferred an appeal under Section 7-I of the Act against the order passed under Sections 7-A and 7-Q of the Act. It is further contended that when adequate alternative remedy under the statute is available, instead of availing the same and exhausting the said appellate forum, the petitioner has approached this Court by invoking the extra ordinary jurisdiction under Article 226 of the Constitution of India, consequentially the writ petition is not maintainable and is liable to be dismissed.

6. On the basis of the factual matrix available, there is no dispute that the impugned order dated 15.03.2010 was passed ex parte. The opening of the order itself indicates that none had appeared on behalf of petitioner-establishment nor any written submission was filed though the employer was well aware of the day's proceedings. As such, in the counter affidavit, it has been admitted that on the day of final hearing the petitioner did not produce any document/record to defend the establishment. Consequentially, the final order was passed on 15.03.2010. Though the petitioner filed an application under Section 7-B for review of the order dated 15.03.2010, the same was rejected on the ground of limitation and others. However, for implementation of the said order dated 15.03.2010, a certificate case was initiated and demand notice was issued on 04.05.2010. After one month of receiving the demand notice, the petitioner filed an application under Section 7-A(4) of the Act to set aside the ex-parte order on the ground that he could not appear on 15.03.2010 due to serious illness of his wife. The wife of the petitioner died on 16.03.2010, the next date to the final order passed on 15.03.2010.

7. On perusal of Annexure-2 dated 02.06.2010, wherein a request was made for setting aside the ex-parte order passed under Section 7-A of the Act, it would be evident that the petitioner had shown the cause that on 15.03.2010 his wife was seriously ill and lying on the death bed who expired on 16.03.2010. As such, the reason, for non-appearance on the part of the petitioner on 15.03.2010 in the proceeding under Section 7-A, was genuine. The petitioner, having been prevented from appearing in the proceeding

under Section 7-A of the Act due to sufficient case, made a request to set aside the order dated 15.03.2010 passed under Section 7-A allowing him to give an opportunity to produce the fresh evidence, which could not be produced on 15.03.2010 due to his absence. The sufficient cause having been shown in application filed on 02.06.2010 under Section 7-A(4) of the Act, the same could not and should not have been rejected mechanically without application of mind and compliance of principle of natural justice.

8. ***Nagarjuna Construction Company Limited v. Government of Andhra Pradesh***, (2008) 16 SCC 276, the apex Court held that:

> *"over the years by a process of judicial interpretation two rules have been evolved as representing the fundamental principles of natural justice in judicial process including therein quasi-judicial and administrative process, namely, an adjudicator should be disinterested and unbiased (nemo judex in causa sua) and that the parties must be given adequate notice and opportunity to be heard (audi alteram partem). They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men."*

9. In ***Swadeshi Cottom Mills v. Union of India,*** AIR 1981 SC 818, the apex Court held as follows:

> *"Principles of natural justice are principles ingrained into the conscience of men. Justice being based substantially on natural ideals and human values, the administration of justice here is freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. Principles/rules of natural justice are not embodied principles/rules. Being means to an end and not an end in them, it is not possible to make an exhaustive catalogue of such rules (principles).*

10. The only plea advanced by the learned counsel for the opposite parties, that due to availability of alternative remedy the writ petition is not maintainable, cannot be construed to be valid in view of the fact that no adequate opportunity was given to the petitioner and there was non-compliance of principle of natural justice.

11. In ***Himmatlal v. State of Madhya Pradesh,*** AIR 1954 SC 403 the apex Court held that:

> *"There are however certain exceptions in this regard which have been well recognised by this time. In case of allegations of infringement of fundamental rights, the bar of alternative remedy does not apply.*

12. In ***Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya,*** AIR 1987 SC 2186, the apex Court held that:

> *"Where an authority has acted wholly without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of existence of an alternative remedy."*

13. In ***State of Uttar Pradesh v. Md. Nooh,*** AIR 1958 SC 86, the apex Court held as follows:

> *"The doctrine has no application where the impugned order has been made in violation of the principles of natural justice."*

14. Applying the principles, referred to above, which have been laid down by the apex Court, this Court is of the considered view that, on the factual matrix of the case in hand, due to non-grant of adequate opportunity to the petitioner there was violation of principles of natural justice. Therefore, even if alternative remedy by way of statutory appeal is available, this Court has got jurisdiction to entertain the application under Article 226 of the Constitution of India. Furthermore, the consequential initiation of certificate proceeding is without jurisdiction, as because the person, who has passed the impugned order dated 15.03.2010, himself has issued certificate proceeding. In such circumstance, this Court can exercise the power under Article 226 of the Constitution, even if there is availability of alternative remedy, as the fundamental right of the petitioner has been infringed. Therefore, taking into consideration all the counts, this Court has jurisdiction to entertain this application under Article 226 of the Constitution of India, even if there is availability of alternative remedy under the statute.

15. Factually also it appears that sufficient cause has been shown in the application filed under Section 7-A(4) to set aside the ex-parte order passed by opposite party no.1 and the same has been mechanically rejected without application of mind. Therefore, the order dated 15.03.2010 passed in Annexure-1 and consequential notice of demand for recovery issued in

Annexure-3, being not sustainable in law, are hereby quashed. The matter is remitted back to the Asst. Provident Fund Commissioner (Compliance)-opposite prty-1 to rehear and dispose of the same in accordance with law by giving adequate opportunity of hearing to the petitioner and in compliance of the principles of natural justice.

16. Needless to say that the petitioner will render all cooperation to the opposite parties for early disposal of the proceeding and will not ask for unnecessary adjournments in the matter and, as such, the opposite party no.1 shall dispose of the proceeding as expeditiously as possible, preferably within a period of four months from the date of communication of this order. If the petitioner appears on 20th April, 2017 before opposite party no.1, along with the certified copy of the order, he shall act upon the same and fix a date to proceed with the matter. In view of the aforesaid facts and circumstances, the writ petition is allowed. No order as to cost.

Writ petition allowed.

2017 (I) ILR - CUT-1091

SATRUGHANA PUJAHARI, J.

CRLA NO. 93 OF 2010

ATABUL SEKH & ORS. ……..Appellants

.Vrs.

STATE OF ORISSA ……..Respondent

PENAL CODE, 1860 – Ss 489-B, 489 -C

To attract offence U/ss 489-B and 489-C, possession with knowledge or reason to believe that the questioned G.C. note is forged, is important – Even mere possession of a forged note without the Knowledge that the same was forged or reason to believe the same to be forged, will not attract the mischief of the aforesaid sections.

In this case P.W.2 could not identify the person who made over the suspected G.C. note amongst the accused persons – Even if it is assumed that the suspected note was in possession of one of the accused persons who handed over the same to P.W.2, seeking notes of lower denominations, the same itself is not sufficient to infer that the accused persons had knowledge or reason to believe that the aforesaid

G.C. note was a forged one – In the absence of clear and convincing evidence inculpating the accused persons with regard to possession of a single G.C. note with the aforesaid knowledge or reason to believe, their conviction is not sustainable in law – Held, the accused persons are acquitted of the charge under sections 489- B and 489-C read with section 34 IPC. (Paras 5,6,7)

For appellants : Mr. P. Ramakrishna Patra, Advocate
(Amicus Curiae)

For respondent : Addl. Government Advocate.

Date of hearing : 20.12. 2016
Date of judgment: 20.12.2016

JUDGMENT

S. PUJAHARI, J.

This appeal is directed against the judgment of conviction and order of sentence dated 21.07.2009 passed by the learned Adhoc Addl. Sessions Judge (F.T.C.), Baripada in Sessions Trial No.23/26 of 2008. By the impugned judgment, the learned trial court held the appellants (hereinafter referred to as "the accused persons") guilty of the charge under Sections 489-B, 489-C read with Section 34 of the Indian Penal Code, 1860 (for short "the IPC") and sentenced each of them to undergo rigorous imprisonment for five years and to pay a fine of Rs.1000/-, in default, to undergo R.I. for a further period of three months on each count.

2. Prosecution placed a case before the trial court to the effect that on 26.06.2007 at about 7 A.M. while the informant, namely, Baishnab Chandra Mohanty (P.W.2), the then Manager of Reliance Petrol Pump, Udala, was in the Counter of said Petrol Pump, the accused persons along with another came and one of them handed over one five hundred rupee currency note asking for lower denomination notes. However, the P.W.2 suspected the same to be forged currency note and when he appraised them of his opinion, all of them tried to escape, but the P.W.2 and others chased and apprehended them. The matter was thereafter reported to the police vide Ext.1. The police took up investigation of the case, seized the suspected G.C. notes and on completion of investigation, charge-sheet was submitted against the accused persons under the aforesaid sections. Thereafter, the case of the accused persons was committed to the Court of Sessions for trial while the case against the absconded accused – Asen Sekh was split up.

The accused persons pleaded not guilty to the charge. In the trial, as such, prosecution examined 7 witnesses and also relied upon documents vide Exts.1 to 7 in order to establish the charge. The accused persons took the plea of denial and false implication in their defence and examined two witnesses. The trial court on conclusion of the trial discarding the defence plea that as the accused persons denied to construct the house of the informant, a false report was lodged against them, rendered the impugned judgment of conviction and order of sentence, as assailed here in this appeal.

3. The learned Amicus Curiae appearing for the accused persons submits that there being nothing on record indicating the fact that the accused persons handed over 500 rupee G.C. note to the P.W.2 knowing or having reason to believe the note to be forged or counterfeit and when there is nothing on record to hold that they possessed such G.C. note knowing or having reason to believe the same to be forged, particularly when they are construction worker, their conviction discarding the defence plea supported by the evidence, is against the weight of evidence and is, therefore, not sustainable either in law or in fact.

4. Assailing such contention, the learned Addl. Government Advocate for the State contends that the accused persons possessed of a forged G.C. note and when approached P.W.2 to exchange that note with G.C. notes of lower denomination, they had knowledge and had reason to believe the G.C. note to be forged, their conviction as such being based on evidence on record, needs no interference.

5. Before adverting to the contentions raised, it would be apposite to mention that ‘Knowledge’ or “reason to believe” are mens rea of the offence under Section 489-B of IPC. Similarly, in order to attract the mischief of Section 489-C of IPC, prosecution must establish that the accused persons must be in possession of a forged G.C. note. The possession of forged G.C. note must be “conscious possession” and not a passive possession having no reason or reason to believe the same to be forged. The onus lies on the prosecution to prove the circumstances which can clearly, indubitably and irresistibly lead to the inference that the accused persons had dishonest intention to foist the note with public at large. Knowing or reason to believe that it is to be forged, is the crux of the matter. Hence, mere possession even of a forged note without the knowledge that the same was forged or reason to believe the same to be forged will not attract the mischief of aforesaid Sections.

6. Keeping in mind the aforesaid, the contention raised vis-à-vis the evidence on record is required to be addressed. It appears from the evidence of P.W.2 that she could not identify the person who made over the suspected G.C. note amongst the accused persons. That leads to definite conclusion that P.W.2 was not aware as to who were those culprits and amongst them who handed over the suspected G.C. note to him. Even it is assumed that the suspected note was in possession of one of the accused persons who handed over that note to P.W.2 seeking notes of lower denominations, and save and except that evidence, nothing more being brought on record, the same itself is not sufficient to infer that the accused persons had knowledge or reason to believe that the aforesaid G.C. note was a forged one. Prosecution has failed to adduce any material on record as to who possessed that questioned note and who made over that note to P.W.2. This is a material question remained unanswered before the trial court. When P.W.2 could not identify the persons to be the culprits and person who handed over the questioned G.C. note to him and when in cross-examination he stated that the person who handed over the G.C. note to him was not present in the dock, it is most unsafe to rely on such fragile evidence to hold all the accused persons guilty under Section 489-B and 489-C read with Section 34 of IPC. The gist of the offence charged being possession with knowledge or reason to believe the questioned G.C. note to be forged or counterfeit, and the evidence on record being not indicating the same, such evidence do not attract the mischief either of Section 489-B and 489-C of IPC. In absence of any clear, clinching and convincing evidence to inculpate the accused persons with regard to possession of a single G.C. note with the aforesaid knowledge or reason to believe, their conviction is not sustainable in law.

7. Therefore, the impugned judgment of conviction and order of sentence in the absence of any other evidence is unsustainable. Accordingly, this criminal appeal stands allowed. The impugned judgment of conviction and order of sentence is set-aside. Consequently, the accused persons are acquitted of the charge under Sections 489-B and 489-C read with Section 34 of IPC.

Since Mr. Patro, the learned Amicus Curiae has assisted this Court effectively, the Orissa High Court Legal Services Committee is directed to pay an amount of Rs.3000/- (rupees three thousand) as remuneration to him forthwith. LCR received along with the copy of this judgment be returned forthwith.

Appeal allowed.

2017 (I) ILR - CUT-1095

SATRUGHANA PUJAHARI, J.

CRA NO. 95 OF 1992

SURENDRA SABUTA …….Appellant

.Vrs.

STATE OF ORISSA …….Respondent

N.D.P.S. ACT, 1985 – S. 20(b)(i)

Seizure of Gunny bag containing "Ganja" – Conviction U/s. 20(b)(i) of the Act – Conviction based only on official witnesses – When the above section provides stringent punishment, the version of official witnesses must be clear, cogent and convincing to the effect that what was seized from the possession of the accused was nothing but "Ganja" and prosecution must adduce clear evidence to show that what was sent for chemical examination had nexus with the articles found in the gunny bag seized from the possession of the accused.

In this case, the chemical examination report (Ext. 10) reveals that the seal put on the sample packet does not tally with the specimen seal separately sent to the Laboratory – Moreover, the aforesaid sample was not sent through the process of the Court – Prosecution failed to connect the sample sent to the chemical examiner as representative sample taken from the gunny bag seized from the possession of the accused – So, even if the version of the official witnesses with regard to seizure is acceptable, there is no convincing evidence that what was sent for chemical examination was the sample collected from the seized gunny bag – Held, the impugned judgement of conviction and sentence is set aside.

Case Laws Referred to :-

1. AIR 1973 SC 2783 : Nathusingh -V- State of Madhya Pradesh
2. (1990) 3 OCR 219 : Nilambar Sahu -V- State of Orissa
3. 1991 CRI.L.J. 1595 : Shyam Sunder Rout -V- State of Orissa

For Appellant : Mr. A.Tripathy
For Respondent : Addl. Govt. Adv.

Date of Hearing : 06.01.2017
Date of Judgment: 06.01.2017

JUDGMENT

S.PUJAHARI, J.

The appellant herein calls in question the judgment of conviction and order of sentence passed against him in Sessions Case No.33 of 1991 (N) on the file of the Sessions Judge, Ganjam-Berhampur. The learned Sessions Judge, Ganjam-Berhampur vide the impugned judgment and order held the appellant (hereinafter referred to as "the accused") guilty under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "N.D.P.S. Act") and sentenced him to undergo R.I. for three years and to pay a fine of Rs.5000/-, in default, to undergo R.I. for a further period of six months.

2. The case of the prosecution is that on 05.02.1991 at about 4.30 p.m. while S.I. of Excise, E.I.B. – Prasanna Kumar Mohanty (P.W.3) patrolling near Goilundi Bus stand, Berhampur with his constable – Fakir Charan Sahu (P.W.2), found the accused proceeding towards bus stand carrying a gunny bag emitting smell of 'Ganja'. Suspecting the accused, P.W.3 detained him and found the gunny bag containing 7 Kgs. of 'Ganja'. After observing all formalities, P.W.3 collected samples of said 'Ganja' from the gunny bag, seized the 'Ganja' with gunny bag, arrested the accused, produced him before the Sessions court, sent the sample of 'Ganja' for chemical examination to the State Drugs Control and Research Laboratory, Bhubaneswar. On completion of investigation, P.W.3 files prosecution report against the accused for alleged commission of offence punishable under Section 20(b)(i) of the N.D.P.S. Act. The accused being charged for the aforesaid offence and having pleaded not guilty, faced trial before the learned Sessions Judge, Ganjam-Berhampur. On conclusion of the trial, basing on the evidence of official witnesses viz. P.Ws.2 and 3, the learned trial court returned the impugned judgment of conviction and order of sentence as aforesaid discarding the defence plea of denial and false implication.

3. It is submitted by the learned counsel for the accused that since the learned trial court placed absolute reliance on the uncorroborated testimony of tainted official witnesses and the only independent witness (P.W.1) having not supported the prosecution version, and there being no clinching evidence that what was sent for chemical examination was the article kept in the gunny bag allegedly seized from the possession of the accused, the impugned judgment of conviction and order of sentence are unsustainable.

4. Per contra, the learned Addl. Government Advocate appearing for the State defends the impugned judgment of conviction and order of sentence, the evidence of the official witnesses being trustworthy and unreliable.

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 accused was carrying a gunny bag containing 'Ganja' is not supported by the only independent witness, P.W.1 who has a tea stall near the spot of alleged seizure. 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, 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 such decision is in 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"

6. Reverting back, when Section 20(b)(i) of the N.D.P.S. Act provides for stringent punishment, the version of official witnesses must be clear, cogent and convincing to the effect that what was seized from the possession of the accused was nothing but 'Ganja'. The prosecution in this regard must adduce clear evidence to show that what was sent for chemical examination

had nexus with the articles found in the gunny bag seized from the possession of the accused. Here, the chemical examination report, Ext.10 unerringly reveals that seal put on the sample packet does not tally with the specimen seal separately sent to the Laboratory. Admittedly, the aforesaid sample was not sent through the process of the Court. Incidentally, the Investigating Officer himself had retained the seal the specimen of which was sent to the questioned Laboratory. There is nothing on record to show what precautions taken by P.W.3 for safe custody of seized articles before the sample was sent for chemical examination. Since no substantial material placed on record that what was sent for chemical examination was the representative sample of the article seized from the possession of the accused, there is no trustworthy evidence in this case that what was seized from the possession of the accused was nothing but 'Ganja'. Prosecution has miserably failed to connect the sample sent to the chemical examiner as representative sample taken from the gunny bag seized from the possession of the accused as alleged by the prosecution. Hence, even if the version of the official witnesses with regard to seizure is acceptable, but there being no convincing evidence that what was sent for chemical examination was the sample collected from the seized packet, the impugned judgment of conviction and order of sentence are unsustainable.

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

Appeal allowed.

2017 (I) ILR - CUT- 1099

BISWANATH RATH, J.

W.P.(C) . NOs. 2684 ,2686,2688,2690,& 2693 OF 2017

SWADHIN KU. SAHOO ……..Petitioner

.Vrs.

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

INDIAN STAMP ACT, 1899 – S. 47-A
R/W Rule 23 of odisha Stamp Rules 1952

Instrument presented for registration – Registration withheld by the Sub-Registrar for under valuation of the instrument – Action challenged – Determination of under valuation is beyond the purview of the sub-Registrar – Petitioners claim that they have valued the instruments looking at the bench mark valuation available in the particular locality – No denial to such claim – Held, Registering Authority is bound to register the instrument and then refer the matter to the collector or Sub-collector, whoever is authorized for adjudication of the proceeding U/s 47-A of the Act – Direction issued to the sub-Registrar to register the instruments and handover the same to the petitioner with an undertaking that they will be abided by the ultimate outcome in the Stamp Act Cases. (Para 10)

For Petitioner : Mr. Ramakanta Mohanty, Sr. Adv.
M/s. R.Roy, S.K.Singh, S.Sourav & A.Pradhan

For Opp. Parties : Mr S. Dash, (ASC)

Date of Hearing : 21.03.2017
Date of Judgment:30.03.2017

JUDGMENT

BISWANATH RATH, J.

The petitions involved herein have not only a common set of facts but also a common prayer except change of person and change in the stamp case number, which remain as under:-

> "It is therefore prayed in all the writ petitions that let this Hon'ble Court may graciously be pleased to admit this writ petition, call for the records from the Opp.Parties and after hearing allow the same by issuing writ/ writs in the nature of certiorari/mandamus quashing Annexures- 2,3,4,6,7,9 and 11, the entire proceeding initiated in

pursuance of Stamp Case Nos.9 of 2015, 10 of 2015, 11 of 2015, 12 of 2015 and 8 of 2015 respectively in the file of the Stamp Collector cum Sub-Collector, Dhenkanal/O.P.No.2 and commanding the Opp. Parties to return the petitioner's registered sale deed (under Annexure-1) forthwith in the interest of justice;

And pass any other writ/writs, order/orders and direction/directions as fit and proper to secure the ends of justice."

W.P.(C) No.2684 of 2017 –Stamp Case No.09 of 2015
W.P.(C) No.2686 of 2017 –Stamp Case No.10 of 2015
W.P.(C) No.2688 of 2017 –Stamp Case No.11 of 2015
W.P.(C) No.2690 of 2017 –Stamp Case No.12 of 2015
W.P.(C) No.2693 of 2017 –Stamp Case No.08 of 2015

2. Common fact as revealed from the aforesaid cases is that the petitioners involved therein duly presented an instrument for registration in accordance with law and the instrument presented for registration by each of the petitioner has been withheld under the premises of initiation of under valuation cases under Section 47-A of the Indian Stamp Act and as amended by Indian Stamp (Odisha Amendment) Act, 2008 (Odisha Act 8 of 2009). All the petitioners challenge the impugned action on the premises that withholding such instrument is without jurisdiction. They also challenge the very initiation of the Stamp proceedings for being contrary to the provisions contained in Section 47-A of the Act and made a claim that the instruments once submitted for registration, the registration is compulsory subject to however initiation of any proceeding in the garb of under valuation and initiation of any such proceeding being an independent proceeding has nothing to do with the registration. The facts further reveals that the cases involved sale deeds executed by the petitioners on 30.3.2015 in favour of the prospective buyers were duly presented for registration before the competent authority. The petitioners further pleaded that the instruments have been executed following the prevailing benchmark valuation made effect from 1.4.2013 supplied by opposite party no.3 therein, hence all the petitioners claimed that there is no infirmity in the instrument presented before the Registering Authority requiring initiation of any proceeding under the Stamps Act.

3. Assailing the impugned actions, Sri R.K.Mohanty, learned senior counsel appearing for the petitioners involving all the cases being assisted by

Sri Rajeet Roy submitted that the very initiation of the proceedings under the Stamp Act is an example of serious abuse of process of law also involving arbitrary action of the Stamp Collector. It is also claimed that the proceedings also suffer for being contrary to the provision of law and without any authority. Annexure-6 involved therein cannot be termed as an intimation as contemplated under section 47-A of the Stamp Act. It is also contended that determination of under valuation is beyond the purview of the Sub-Registrar. It is thus claimed that the basis of under valuation is without any foundation and renders contrary to the earlier assessment made under Aannexure-7 as the benchmark valuation arrived at statutorily at that point of time. As per law, benchmark valuation has to be reassessed/revised biennially. The previous benchmark valuation being made on 1.4.2013, it is to remain effective till 30.3.2015 and the instruments, appearing at Annexure-1, having been presented on 30.3.2015 was well within the statutory period of limitation and while the benchmark valuation made under Annexure-5/A was very much in force, any variation thereof can only be by way of amendment prescribed under sub-Rule 2 of Rule 40 of the Stamp Rules, which is vested only with the Collector. Sri Mohanty, thus contended that assessment made by the Registering Authority is without jurisdiction. Under the premises, Sri Mohanty, learned senior counsel appearing for the petitioners contended that the impugned action on valuation is not only illegal but also runs contrary to the provisions contained in Stamp Act and Rules therein. Referring to two of the decisions of this Court in the cases of ***Guru Prasad Mohanty and Anr. and Kailash Sahu v. State of Orissa and Ors.,*** *2009 (II) OLR 65* and ***M/s.Harshpriya Construction (P) Ltd. v. The Inspector General of Registration, Orissa, Cuttack & Others****, 2010 (1) OLR 760,* Sri Mohanty, learned senior counsel submitted that the claims of the petitioners involving each of the writ petition have clear support of the above decisions of this Court and the writ petitions having support of statutory provision of law ought to be allowed.

3. Sri Saugat Dash, learned Additional Standing Counsel while strongly refuting the objections at the instance of the petitioners involving in each of the cases referring to several provisions from the Registration Act,1908 and Rules therein submitted that there is no infirmity in none of the orders involved herein and all the impugned actions taken by the Registering Authority are in consonance with the provisions contained in the act and rules thereunder. It is further submitted by Sri Dash, learned Additional standing Counsel that for the petitioners facing proceeding under the Stamp

Act dispute involving the registration of the document is still under adjudication following the direction of the District Judge, Dhenkanal in F.A.O. No.6 of 2015 directing for reopening of stamp cases involved therein, this is a case subjudice and thus claimed that the writ petition is a premature one and should be dismissed on this ground asking the petitioner to wait till the final outcome in the case involved.

4. From the pleadings involved in the writ petitions and the submissions made by the respective counsels as referred to hereinabove, this Court gathers petitioner while assailing the initiation of the stamp proceeding involved in each of the writ petitions has also sought for a direction against the Registering Authority for registering the instrument and returning the same to the petitioners involved therein, subject to however the outcome in the Stamp cases.

5. Part-III of the Registration Act deals with compulsory registration of certain documents under the Registration Act and the instrument submitted herein needs compulsory registration. Part-IV of the Act deals with time of presentation of documents whereas Part-V deals with place of registration of documents relating to land. While part-VI deals with persons to present documents for registration, Section 34 under Part-VI requires inquiry in certain contingencies before registration and Section 35 of the Act in Part-VI prescribes procedure on admission and denial of execution respectively, Section 71 of Part XII of the Registration Act gives power to the Registering Authority to assign reason for refusal for registration of a document and person aggrieved by such order are entitled to appeal to the Registrar.

6. From the narration of facts involved in the present cases, it appear, on presentation of an instrument, the District Sub-Registrar, Dhenkanal upon receipt of the instrument for registration simultaneously functioning as Stamp Collector initiated appropriate proceeding and called upon the respective petitioners involving their instruments for their submission. After coming to a conclusion that there has been no proper valuation in the instrument and after calculating the deficit stamp duty thereby as registration fees directed each of the persons involved in the instruments seeking for registration to deposit the deficit stamp duty in exercise of power under Section 47-A of the Indian Stamp Act, 1899. Petitioners submitted their response to the aforesaid notice. While objecting the claim of the Stamp Collector, petitioners requested for recalling the notice and registering the instruments thereby. In the meantime, notice has also been issued in the stamp cases to the respective

petitioners to appear on a particular date in the proceedings involved therein and answer to the claim vide Annexure-10 to which all the objectors filed their response. The cases were again posted to another date and in the meantime another set of objections were also filed. In the meantime the stamp cases so initiated against each of the petitioners have been concluded against each of the petitioners resulting therein the petitioners preferred first appeal before the District Judge. Appeals being heard, finally decided by order dated 6.9.2016, remitting the matters back to the Sub-Collector-cum-Stamp Collector, Dhenkanal for holding an inquiry in terms of Rule 23 of the Stamp Rules, 1952 read with guidelines contained in Orissa Stamp (Amendment) Rules, 2001 and the remand proceedings are still pending and at this point of time, the petitioners brought the writ petitions before this Court for consideration.

At this stage, this Court finds the matter involved two points:

(i) Whether the initiation of the stamp cases are appropriate or not?

(ii) Whether the denial of registration of instruments on the premises of initiation of stamp cases involving recovery of deficit stamps for registration of the instruments is proper or not?

7. Admittedly, the proceedings under Section 47-A of the Stamp Act are already initiated against the petitioners on the premises of under valuation of instrument being presented.The petitioners claim that they have the instrument prepared and valued looking to the benchmark valuation available in the locality. State has not filed any counter refuting the same. Thus, this Court finds there is no denial to the aspect that there already existing a benchmark valuation involving the lands in the particular locality and the Registering Authority cannot implant any other valuation in existence of a benchmark valuation available in the locality. Section 47-A (1) and (2) of the Indian Stamp Act, 1899 reads as follows:

"**47-A. Instruments under-valued how to be dealt with-**

(1) Where the registering officer under the Registration Act. 1908, while registering any instrument of conveyance, exchange, gift, partition or settlement has reasons to believe that the market value of the property which is the subject matter of such instrument has not been rightly set forth in the instrument or is less than the minimum value determined in accordance with the rules made under this Act, he shall, before registering such instrument, refer the matter to the Collector, with an intimation in writing to the person concerned, for

determination of the market value of such property and the proper duty payable thereon.]

(2) On receipt of a reference under Sub-section (1), the Collector shall, after giving the parties an opportunity of making their representations and after holding an inquiry in such manner as may be prescribed by rules made under this Act, determine the market value of the property which is the subject-matter of such instrument, and the duty as aforesaid and the deficient amount, if any, shall be payable by the person liable to pay the duty."

Thus even assuming that the Registering Authority has an opinion that the instrument of conveyance does not bear a right valuation and is less than the minimum valuation in accordance with the rules made under the said Act, he shall, before registering such instrument, refer the matter to the Collector with an intimation in writing to the person concerned for determination of the market value of such property and proper duty payable thereon and following the aforesaid provision, the statute again requires the Collector upon such reference giving parties the liberty of making their representation and after holding an inquiry, as prescribed under the rules, made in the particular Act, determines the market value of the property involving instrument. Thus, it becomes a duty of a person liable to pay the deficit amount. Section 47-A again prescribes provision for appeal to the District Judge by the aggrieved persons.

8. Rule 23 of the Orissa Stamp Rules, 1952 since relevant is quoted as herein below**:**

"23. Reference to Collector of instruments for determination of Market Value– If the Registering Officer while registering any instrument of conveyance, exchange, gift, partition or settlement has reasons to believe that the market value of the property has not been correctly set forth in the instrument, as per the market value guidelines under Clause (j) of Rule 2, he may, after registering the instrument, refer the same to the Collector for determination of the market value and duty payable thereon, while referring the document to the Collector, the fact and circumstances that prompted the Registering Officer to come to the belief that property, has been undervalued shall be fully and clearly stated."

Reading of the above rule, it becomes clear that in the case of undervalue instrument, in the event the R egistering Authority has reason to

believe that market value of the property involved has not been done correctly set forth in the instrument, he may, after registering the instrument, refer the same to the Collector for determination of market value and duty payable thereon**,** after fully and carefully stating for arriving at his such opinion and it is only in such event and after receipt of a reference under Section 23, the Collector is required to start a miscellaneous case and close such proceeding giving opportunity of evidence and objections to the person likely to be affected. From the fact narrations involved in the case, this Court finds the proceeding initiated against the petitioner is initiated under the premises of tendering an undervalued instrument and consequential initiation of a proceeding under section 47-A of the Indian Stamp Act.

9. The **definition of Collector at Section 2(9) of the Indian Stamp Act, 1899 reads as follows**:

2(9) **"Collector"**- Collector:-

(a) means, within the limits of the towns of Calcutta, Madras and Bombay, the Collector of Calcutta, Madras and Bombay, respectively and without those limits, the collector of a district, and

(b) includes a Deputy Commissioner and any officer whom the State Government may, by notification in the Official Gazette, appoint in this behalf;"

From the submission of learned Additional Government Advocate, this Court finds the Sub-Collector has been empowered to deal with the reference of the Registering Authority and the Sub-Collector taking up the proceedings has the jurisdiction for the provision contained in Rule 23 of the Orissa Stamp Rules 1952 read with Section 2(9) of the Indian Stamps Act 1899.

10. Under the circumstance and for the discussions made hereinabove, this Court observes that initiation of the Stamp Act proceeding by the Sub-Collector cannot be held to be bad, as a consequence the proceedings before the District Judge are also held valid, hence the order remanding the matter to the Sub-Collector to rehear the Stamp Act proceedings does not warrant any interference. But as it is a clear case of involvement of an undervalued instrument, following the provision in Rule 23 of the Stamp Rules, this Court observes the Registering Authority is bound to register the instrument and then refer the matter to the Collector or Sub-Collector, whoever is authorized for adjudication of the dispute under Section 47-A of the Act. As a

consequence, this Court directs the Sub-Registrar to register the instruments and hand over the same to the petitioners but subject to however with a condition that the petitioners involved in each of the writ petition will submit an affidavit with an undertaking that they will be abided by the ultimate outcome in the Stamp Act Cases involved each of them and payment, if any required, ultimately shall also be cleared by them within a period of two weeks from the date of final outcome of such proceedings. In the result, the writ petitions are partly allowed. No cost.

Writ petitions partly allowed.

2017 (I) ILR - CUT-1106

S.K. SAHOO, J.

CRIMINAL REVISION NO. 206 OF 1996

BHAGIRATHI MISHRA & ORS. .....Petitioners

.Vrs.

STATE OF ORISSA .....Opp. Party

PENAL CODE, 1860 – S. 408
r/w section 313 Cr.P.C.

In order to attract the ingredients of section 408 I.P.C, prosecution is required to prove that the accused was a Clerk or Servant and he was entrusted in such capacity with property or with any dominion over property and he committed criminal breach of trust in respect of such property.

In this case there is no dispute that the petitioner was a clerk in the School in question – But, so far as entrustment of the bus fair to the petitioner is concerned, though the witnesses have stated to have deposited the amount with the petitioner but in the accused statement no specific question has been put to the petitioner in that aspect to meet the requirement of the principles of natural justice – The accused should have been asked to furnish some explanation as regards the incriminating circumstances associated with him and the Court must take note of such explanation – The circumstances which are not put in his examination U/s. 313 Cr.P.C. cannot be used against him and the

same must be excluded from consideration – Once the entrustment part is excluded from consideration, the ingredients of the offence u/s. 408 I.P.C. cannot be attracted against the petitioner – Held, the impugned judgment and order of conviction and sentence is set aside and the petitioner is acquitted of the charge u/s. 408 I.P.C.

(Paras 6,7)

Case Law Referred to :-

1. 2012 (Suppl-II) O.L.R. 382 : Debi Charan Sunani -V- State of Orissa

For Petitioners : Mr. Nibas Ch. Misra
For Opp. Party : Mr. Deepak Kumar, Addl. Standing Counsel

Date of Hearing :16.02.2017
Date of Judgment:16.02.2017

JUDGMENT

S. K. SAHOO, J.

The petitioner Bhagirathi Mishra along with one Kulamani Rath faced trial in the Court of Addl. Chief Judicial Magistrate (Special), Cuttack in G.R. Case No. 2137 of 1986 for offences punishable under sections 408/477-A/120-B of the Indian Penal Code. The learned Trial Court vide impugned judgment and order dated 27.09.1994 acquitted the co-accused Kulamani Rath of all the charges and also the petitioner of the charges under sections 477-A/120-B of the Indian Penal Code. The petitioner however was found guilty under section 408 of Indian Penal Code and sentenced to undergo R.I. for three months and to pay a fine of Rs.500/- (rupees five hundred only), in default, to undergo R.I. for 20 (twenty) days.

The appeal preferred by the petitioner before the learned Sessions Judge, Cuttack in Criminal Appeal No. 141 of 1994, was also dismissed vide impugned judgment and order dated 12.04.1996, hence this revision.

It is not in dispute that the petitioner Bhagirathi Mishra is dead and his legal heirs have been substituted as petitioners nos. 1-A, 1-B, 1-C, 1-D and 1-E to continue the revision petition.

2. It is the prosecution case that the petitioner Bhagirathi Mishra was the Clerk and co-accused Kulamani Rath (acquitted) was the Head Master of Orissa Police High School, Tulasipur, Cuttack during the period 1981 to 1984. It is the further prosecution case that an amount of Rs.272/- (rupees two hundred seventy two only) was collected from different students by the respective Class Teachers which was deposited with the petitioner, but the

accused persons did not deposit the said amount in the Police Office, Cuttack and dishonestly misappropriated the same.

3. On the basis of the First Information Report submitted by S.A. Hassan, Inspector, CID, CB, Orissa, Cuttack before the Inspector-in-Charge, Bidanasi Police Station, the case was registered. During the course of investigation, the relevant witnesses were examined, documents were seized and after completion of investigation, charge sheet was submitted against the petitioner as well as the co-accused Kulamani Rath under sections 408/477-A/120-B of Indian Penal Code. 4. During the course of trial, the prosecution examined 27 witnesses, out of which P.W. 2 to 16 are the teachers of the Orissa Police High School, Cuttack and all of them have stated that they collected bus fares from the students and deposited the same with the petitioner. P.W.1 is the Head Clerk in the Office of Inspector of School, Cuttack-I Circle and he has stated about the role assigned to the petitioner as Clerk and co-accused Kulamani Rath as Head Master of the School. P.W.17 was the Senior Assistant attached to D.G. of Police Office, Buxi Bazar, Cuttack and he has stated about the procedure relating to deposit of the bus fare collected from the students of the school in the Establishment Section of D.G. Police Office. P.W.18 was the Duftary in the Odisha Police High School, Tulasipur and he stated that he use to go to I.G. Office for deposit of money of the school. P.W.19 to P.W.24 are the seizure witnesses, out of which P.W.22, Head Master in Charge of Orissa Police High School has stated about the internal audit conducted as per the direction of the Secretary and also preparation of audit report. P.Ws. 25, 26 and 27 are the Investing Officers.

4. The learned Trial Court after discussing the evidence on record has been pleased to observe that from the evidence of the teachers, Head Master of the School and Sr. Assistant of the D.G. Police Office (P.W. 17), it is seen that the practice was that the cash was collected from the students by the Class Teachers and the same was being deposited in the D.G. Office by the Head Master. The learned Trial Court further held that P.Ws. 2 to 14 have deposed in their evidence that they collected bus fare from the students and handed over the same to the petitioner and the petitioner on receipt of the money made endorsement in daily collection register reflecting the amount collected from the respective teachers and all teachers have stated that they handed over the cash to the petitioner. The learned Trial Court further observed that Ext.2 is the daily collection register in which the bus fare was reflected and the petitioner made endorsements vide Ext.A and Ext.B in Ext.2

showing that he deposited the bus fare with the accused Head Master and the endorsement was made in his own hands but there was no endorsement of the co-accused Head Master. The learned Trial Court was of the view that there was no material to show that the petitioner deposited the amount with the co-accused Head Master Kulamani Rath and accordingly, he came to hold that the petitioner had not deposited the bus fare which was collected from the students and dishonestly misappropriated the same for his own use. The learned Trial Court however held that the prosecution has not been able to prove the offences under sections 477-A and 120-B of the Indian Penal Code against the petitioner.

The learned Appellate Court has been pleased to hold that there is no dispute that the amount has not been deposited in the Police Office, Cuttack and there is convincing evidence that an amount of Rs. 272/- collected towards bus fare in the month of October 1981 was received by the petitioner as cashier. The learned Appellate Court agreed with the finding of the learned Trial Court in convicting the petitioner under section 408 of the Indian Penal Code.

5. Learned counsel for the petitioner Mr. Nibas Chandra Mishra, challenging the impugned judgment and order of conviction contended that there are materials available on record that the money collected by the petitioner from different class teachers was deposited with the Head Master and the Head Master having been being acquitted of the charge, the conviction of the petitioner was not proper and justified. It is further contended that the documentary evidence also revealed that the amount collected was handed over to the Head Master but that has not been properly considered. It is further contended that the material questions relating to the entrustment part having not been put in the accused statement, the learned Courts below should not have utilized such circumstances against the petitioner which has resulted in causing serious miscarriage of justice and therefore, the impugned judgment and order of conviction is not sustainable in the eye of law and should be set aside.

Mr. Deepak Kumar, learned Addl. Standing Counsel for the State on the other hand contended that it is the consistent evidence of all the class teachers that after collecting the bus fare from different students, they had deposited the amount with the petitioner who had received the same and the endorsement of the petitioner in token of receipt of such amount is available in the daily collection register (Ext.2). The learned counsel further contended

that since there is no documentary or clinching oral evidence that the money which was handed over to the petitioner was given to the Head Master, therefore, the learned Trial Court rightly acquitted the co-accused Head Master. It is contended that the case of the petitioner stands in a completely different footing and that there having been no illegality or infirmity either in the assessment of the evidence or in the order of conviction, the concurrent findings of facts should not be disturbed.

6. Considering the submissions made by the learned counsels for the respective parties and on perusal of the impugned judgments of the Courts below and the evidence on record, it appears that the conviction of the petitioner under section 408 of the Indian Penal Code is mainly based on the evidence of the teachers who have stated that after collecting the amount towards bus fare, they deposited the same with the petitioner.

In order to attract the ingredients of the section 408 of the Indian Penal Code, the prosecution is required to prove that the accused was a Clerk or servant and he was entrusted in such capacity with property, or with any dominion over property and he committed criminal breach of trust in respect of such property.

There is no dispute that the petitioner was a clerk in the School in question. So far as entrustment of the bus fare to the petitioner is concerned, though the witnesses have stated that they deposited the amount with the petitioner but most peculiarly in the accused statement, no specific question has been put to the petitioner on that aspect. The only question which is relevant so far as this bus fare amount is concerned, is as follows:-

> "**Q-3**. It appears from their evidence that a sum of Rs.272/- (rupees two hundred seventy two only) was collected from different students of your school during the period from 01.01.1981 to 31.12.1981 as bus fare to be deposited in the Police Headquarters, Cuttack. What have you got to say?
>
> **Ans**. It is false (Micha Katha)."

This question does not indicate the entrustment part which the witnesses have stated in their depositions. In case of **Sujit Biswas -Vrs.- State of Assam reported in (2013) 55 Orissa Criminal Reports (SC) 1036**, it is held that in a criminal trial, the purpose of examining the accused person under section 313 Cr.P.C., is to meet the requirement of the principles of natural justice, i.e. audi alterum partem. This means that the accused may be

asked to furnish some explanation as regards the incriminating circumstances associated with him and the Court must take note of such explanation. The circumstances which are not put in his examination under section 313 of Cr.P.C. cannot be used against him and must be excluded from consideration. In case of **Debi Charan Sunani -Vrs.- State of Orissa reported in 2012 (Suppl.-II) Orissa Law Reviews 382**, it is held that unless the circumstance appearing against an accused is put to him in his examination under section 313 of Cr.P.C., the same cannot be used against him.

It is strange that when the Trial Court is under a legal obligation to put the incriminating circumstances to the petitioner and solicit his response and when the prosecution has examined as many as twenty-seven witnesses and exhibited fifty-four documents, not a single document has been referred to nor the evidence of any particular witness has been referred to in the accused statement. Out of the seven questions put to the petitioner in the accused statement, question no.6 is "you heard the witnesses deposing in this case?" and question no.7 is 'do you like to adduce evidence in defence?" The rest five questions have been put in an omnibus manner without specific reference either to any witness or to any document. The entire prosecution evidence should not have been encapsulated in few questions, without relevant details being indicated. The learned Trial Court seems to have thought that the examination of the accused is an idle formality and therefore, the slipshod manner which he has adopted in framing the questionnaire has caused serious prejudice to the petitioner and the whole object of affording a fair and proper opportunity to the petitioner of explaining the circumstances appearing against him in the evidence has been frustrated.

Therefore, in view of the fact that on the most vital aspect of the case relating to the entrustment of the bus fare to the petitioner having not been specifically put to him in the 313 Cr.P.C. statement of the petitioner giving opportunity to furnish explanation, the said circumstance cannot be utilized against the petitioner and it has to be excluded from consideration. Once the entrustment part is excluded from the consideration, I am of the humble view that the ingredients of the offence under section 408 of the Indian Penal Code cannot be attracted against the petitioner.

The learned Trial Court as well as the learned Appellate Court were not justified in relying upon the evidence relating to the entrustment part of the bus fare as per the evidence of the class teachers P.Ws.2 to 16 and documentary evidence Ext.2 i.e. the daily collection register against the

petitioner without the question relating to the entrustment having been put to him in the accused statement.

7. In view of the above discussions, I am of the view that the impugned judgment and order of conviction and the sentence passed there under is not sustainable in the eye of law and the same is hereby set aside. Accordingly, the revision petition is allowed. The petitioner Bhagirathi Mishra is acquitted of the charge under section 408 of the Indian Penal Code.

Petition allowed.

2017 (I) ILR - CUT-1112

S. K. SAHOO, J.

CRIMINAL REVISION NO. 274 OF 2001

KARTIKA MAHANANDIA ……..Petitioner

.Vrs.

STATE OF ORISSA ……..Opp. Parties

PENAL CODE, 1860 – Ss. 392, 397

Robbery – Conviction based on the evidence of P.W.2 which suffers from material contradictions – Moreover, in view of the definition of robbery, it is not sufficient that in the transaction of committing theft, "hurt" has been caused – The 'hurt' caused by the offender must be with the object of facilitating the commission of theft or while the offender was committing theft or attempting to carry away the property obtained by theft – The assault was not made to P.W.2 as per his cross-examination by the petitioner for the purpose of taking away the cigarettes but when during hitch between the two, the petitioner did not pay the price of cigarettes – Learned Courts below were not justified in placing reliance on the testimony of P.W.2 to come to a finding that the petitioner committed an offence of robbery and caused grievous hurt at the time of committing robbery – Held, the impugned judgment and order of conviction and sentence is set aside. (Para 9)

For Petitioner : Mr. Maitrijit Mohanty
For Opp. Parties : Mr. Deepak Kumar, Addl. Standing Counsel

Date of hering : 16.02.2017
Date of Judgment: 16.02.2017

JUDGMENT

S. K. SAHOO, J.

The petitioner Kartika Mahanandia faced trial in the Court of learned Chief Judicial Magistrate -cum- Assistant Sessions Judge, Jeypore in Sessions Case No.08 of 1997 for offences punishable under section 392 read with section 397 of the Indian Penal Code on the accusation that on 01.10.1996 at about 4.00 p.m. he committed theft of four nos. of cigarettes at village Mathalput Bazar and in committing such theft, voluntarily caused grievous hurt to B. Dillaswar Rao (P.W.2) by means of a glass jar.

The learned Trial Court vide impugned judgment and order dated 07.03.1998 found the petitioner guilty under section 392 read with section 397 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years.

The petitioner preferred an appeal in the Court of learned Sessions Judge, Koraput, Jeypore in Criminal Appeal No.32 of 1998 and the learned Appellate Court vide impugned judgment and order dated 10.04.2001 upheld the impugned judgment of the Trial Court and dismissed the appeal, hence the revision.

2. The prosecution case, as per the first information report submitted by Judhistir Sahu (P.W.1) before the Inspector in Charge, Damanjodi Police Station is that P.W.2 had come to the house of the informant as a guest and on 01.10.1996 the informant had been to attend some other work leaving P.W.2 at his betel shop situated at Mathalput Bazar. At that point of time, the petitioner came there and asked P.W.2 for cigarettes. P.W.2 refused to give cigarettes as the owner of the betel shop was not available. The petitioner forcibly took four cigarettes and picked up a glass jar from the shop and dashed it on the face of P.W.2 for which one tooth of P.W.2 was broken.

On the basis of such first information report, Damanjodi P.S. Case No.39 of 1996 was registered on 01.10.1996 under section 397 of the Indian Penal Code and the Inspector in Charge himself took up investigation of the case. He examined the witnesses, sent the injured (P.W.2) to Mathalput PHC for his medical examination on police requisition. He visited the spot, seized blood stained shirt of P.W.2, pieces of broken glass jar and a piece of tooth under seizure list Ext.2. On 02.10. 1996 the I.O. arrested the petitioner and

forwarded him to Court and on completion of investigation, he submitted charge sheet on 28.10.1996 under section 397 of the Indian Penal Code against the petitioner.

3. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure, where the learned Trial Court charged the petitioner under section 392 read with section 397 of the Indian Penal Code and since the petitioner refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to establish his guilt.

4. In order to prove its case, the prosecution examined eight witnesses.

P.W.1 Judhistir Sahu, is the informant who is a postoccurrence witness.

P.W.2 B. Dilleswar Rao is the injured who has stated about the occurrence.

P.W.3 Damburudhar Jena is a witness to the seizure of glass jar and the broken tooth and blood stained shirt under seizure list Ext.2.

P.W.4 Bhagaban Jena is a post-occurrence witness.

P.W.5 Baidyanath Mali stated that P.W.2 told him that the petitioner assaulted him with a glass bottle.

P.W.6 Biswanath Sahu is a post occurrence witness.

P.W.7 Suresh Kumar Panda who was the Inspector in charge of Damanjodi Police Station is the investigating officer.

P.W.8 Dr. Basanta Manjari Swain is the Medical Officer attached to Mathalput P.H.C. who examined P.W.2 on police requisition and proved the medical report vide Ext.4

The prosecution exhibited four documents. Ext.1 is the first information report, Ext.2 is the seizure list, Ext.3 is the medical requisition and Ext.4 is the injury report of P.W.2.

The prosecution also proved three material objects. M.O.I is the blood stained shirt, M.O.II is the broken pieces of glass jar and M.O.III is the broken tooth.

5. The defence plea is one of denial. It is pleaded that due to previous enmity, the case has been foisted.

6. The learned Trial Court relying mainly on the evidence of the injured (P.W.2) and doctor (P.W.8) came to hold that the petitioner assaulted P.W.2 with a glass jar causing bleeding injury on his upper lip and broke a tooth. The learned Appellate Court also relied upon the statements of the aforesaid witnesses and upheld the impugned judgment and order of conviction passed by the learned Trial Court.

7. The learned counsel for the petitioner, Mr. Maitrijit Mohanty contended that the learned Courts below should not have placed implicit reliance on the solitary testimony of P.W.2 which is not clinching, trustworthy and above board and full of material contradictions.

Learned counsel for the State Mr. Deepak Kumar on the other hand contended that the evidence of the injured P.W.2 is corroborated by the medical evidence and therefore, the learned Trial Court as well as the Appellate Court have not committed any illegality in placing reliance upon such evidence and accordingly, the concurrent findings of the facts of the Courts should not be disturbed in exercise of revisional jurisdiction.

8. Adverting to the nature of injuries sustained by the injured, P.W.8 Dr. Basanta Manjari Swain who was the Medical Officer, P.H.C., Mathalput stated that she examined P.W.2 on 01.10.1996 on police requisition and found the following injuries:-

(i) Fracture of upper lateral incisor, i.e. tooth on the right side,

(ii) An abrasion of size ½" x ¼" in the middle of the upper lip.

Injury No.(i) was opined to be grievous in nature and injury No.(ii) was simple in nature and the injuries were opined to have been caused by hard and blunt object. The age of the injuries was about one to two hours at the time of examination which was done at 4.30 p.m. She proved the injury report vide Ext.4. Though in the chief examination, the doctor stated that she examined P.W.2 on police requisition but in the crossexamination, she stated that at the time she treated the injured, she had not received police requisition. The investigating officer stated that after the F.I.R. was lodged, he sent the injured to Mathalput P.H.C. for the medical examination under police requisition Ext.3. Though there appears to be some discrepancies in the evidence of P.Ws.7 and 8 as to whether the injured was first treated in the P.H.C. and then the police requisition was sent or he was examined on police requisition but such discrepancies are not very much material to adjudicate the issue involved in the case.

9. There is no dispute that the entire accusation against the petitioner revolves around the acceptability or otherwise of the evidence of P.W.2 B. Dilleswar Rao, the injured in the case.

P.W.2 in his chief examination has stated that when he was in the shop of P.W.1, at that time the petitioner came and demanded cigarettes on credit but he refused to give him the cigarettes on credit for which he lifted a glass bottle kept in the betel shop and assaulted him for which his front tooth was broken and there was profuse bleeding from his mouth and his shirt was stained with blood and then the petitioner forcibly took four cigarettes without paying the price.

In the cross examination, P.W.2 however stated that the petitioner came and asked him to give cigarettes and he handed over four Capstan cigarettes and while the petitioner was going away without paying the price, he asked 8 him to pay the price of the cigarettes and caught hold of his hand and when he pulled his hand, P.W.2 left his hand and thereafter asked him to pay the price or to return the cigarettes. All on a sudden, the petitioner picked up a glass bottle and assaulted him.

If the chief examination and the cross examination of P.W.2 are read together, it appears that there are material contradictions in the same. In the chief examination, it is stated by P.W.2 that first the assault was made and then the petitioner forcibly took four cigarettes whereas in the cross examination, it is stated that P.W.2 first gave cigarettes to the petitioner when he asked for the same and subsequently when the petitioner was going away from the betel shop, P.W.2 asked for payment of the price of the cigarettes and also caught hold of the hand and then the assault was made with a glass bottle. Similarly whereas in the chief examination, it is stated that the petitioner forcibly took the cigarettes, in the cross examination, it is stated that P.W.2 gave cigarettes to the petitioner when it was asked for. P.W.2 stated that he had previous acquaintance with the petitioner and on many occasion, the petitioner was coming to the shop and taking articles on payment.

P.W.5 though in the chief examination stated that P.W.2 told him that the petitioner assaulted him with a glass bottle but in the cross-examination, he has stated that he did not ascertain anything from P.W.2 and P.W.2 also did not tell him anything. Therefore, the evidence of P.W.5 is no way helpful to the prosecution.

The other witnesses examined by the prosecution have not stated about the actual incident of assault and they are all post occurrence witnesses.

Law is well settled that in order to base a conviction on the testimony of a solitary witness, the evidence must be absolutely reliable, clinching, trust-worthy

and above board. Since P.W.2 is the solitary witness and his evidence suffers from material contradictions, it is very difficult to place implicit reliance on his testimony.

Moreover, in view of the definition of robbery, it is not sufficient that in the transaction of committing theft, 'hurt' has been caused. The 'hurt' caused by the offender must be with the object of facilitating the commission of theft or while the offender was committing theft or attempting to carry away the property obtained by theft. The assault was not made to P.W.2 as per his cross-examination by the petitioner for the purpose of taking away the cigarettes but when during hitch between the two, the petitioner did not pay the price of cigarettes.

Therefore, I am of the view that the learned Courts below were not justified in placing reliance on the testimony at P.W.2 to come to a finding that the petitioner committed an offence of robbery and caused grievous hurt at the time of committing robbery.

In view of the above discussion, I am of the view that the impugned judgment and order of conviction passed by the learned Courts below are not sustainable in the eye of law.

Accordingly, the revision petition is allowed. The impugned judgment and order of conviction of the petitioner under section 392 read with section 397 of the Indian Penal Code and the sentence passed there under is hereby set aside. The petitioner is on bail by virtue of the order of this Court. He is discharged from the liability of his bail bond. The personal bond and surety bond stand cancelled.

Revision allowed.

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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 : 2.5.2017

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 leaned 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 onw 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 pf 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 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 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.