## SUPREME COURT OF INDIA

**MADAN. B. LOKUR, J. & DEEPAK GUPTA, J.**

CRIMINAL APPEAL NO. 636 OF 2017

(Arising out of SLP(Crl) No. 7186 OF 2014)

**DR. SOU JAYSHREE UJWAL INGOLE** .....Appellant (s)

*.Vrs.*

**STATE OF MAHARASHTRA & ANR.** .....Respondent (s)

**CRIMINAL PROCEDURE CODE, 1973 – S. 482**

**Quashing of charge U/s 304-A I.P.C. – Deceased was suffering from Haemophilia – Allegation that he died due to the negligence of three doctors – Appellant was one of the doctor's on call – She attended the patient, made a note that a physician be called and left the hospital, without waiting for the physician to come – This may be an error of judgment by the doctor (appellant) but not a rash and negligent act committed by her for prosecution U/s 304-A IPC – Held, the impugned order passed by the learned single Judge rejecting her application U/s 482 Cr.P.C. to quash the proceeding is setaside – Criminal proceeding initiated against the appellant is quashed.** (Paras 9,10,11)

**Case Law Referred to** :-

1. (2005) 6 SCC [1] : Jacob Mathew v. State of Punjab & Anr.

Pet. Adv. : Mr. Shirish K. Deshpande
Res. Adv. : Mr. Rameshwar Prasad Goyal

Date of judgment : 06.04.2017

**JUDGMENT**

***DEEPAK GUPTA, J.***

Leave granted.

2. The appellant herein is a doctor and has challenged the Order dated 18.06.2014 passed by the High Court of Judicature of Bombay, Nagpur Bench in Criminal Application (APL) No. 354 of 2012, whereby the petition filed by the appellant under Section 482 CrPC for quashing the criminal proceedings initiated against her under Section 304-A IPC was dismissed.

3. Briefly stated the facts of the case are that one Shrikrishna Gawai (hereinafter referred to as the 'deceased') was admitted on account of injuries suffered in a road accident, in the Irvin Hospital, Amravati on 29.08.1997 for

medical treatment. It is the admitted case of the parties that the deceased was suffering from Haemophilia, a disease in which there is impairment of blood clotting. Therefore, special attention was required to be paid during the treatment of the patient. It is not disputed that one Dr. Manohar Mohod was on duty as an Emergency Medical Officer. On 29.08.1997 the patient was treated both by the appellant and Dr. Mohod. On 30 & 31.08.1997, the deceased was attended upon by Dr. Dhirendra Wagh. Thereafter also, the deceased remained in the Hospital under the treatment of the appellant and Dr. Mohod.

4. Dr. Mohod, the Emergency Medical Officer attended upon the deceased on 05.09.1997 at 9.00 p.m. and found that he was suffering from abdominal pain and, thereafter, a call was sent to the appellant, who was Surgeon on Call. It is not disputed that the appellant went to the Hospital on being called. She attended upon the deceased and made a note that a Physician be called. Thereafter, she left the Hospital. In the morning on 06.09.1997, the condition of the deceased worsened and he died.

5. The main allegation against the appellant is that after having called for a Physician, she did not wait in the hospital and did not attend upon the patient, especially when the patient was suffering from Haemophilia. The Physician, Dr. Avinash Choudhary, who is accused No. 1, did not turn up in the hospital. Even next morning on 06.09.1997, when Dr. Mohod again attended upon the deceased, the Physician Dr. Choudhary was not present and, unfortunately, the patient died. Thereafter, a complaint was lodged in the police station, wherein it was alleged by the brother of the deceased that the deceased died as a result of negligence of the three doctors. The complaint was investigated as Crime No. 317 of 1997 which was initially filed against Dr. Avinash Choudhary only but, later on, the names of the appellant Dr. Jayshree Ujwal Ingole and Dr. Manohar Mohod were also included.

6. A separate Departmental Enquiry was also carried out and, in that enquiry, all the three doctors were held negligent in performing their duties. Dr. Mohod was debarred from an annual increment as penalty; the appellant Dr. Jayshree Ingole was permanently prohibited from entering Irvin Hospital, Amravati, and Dr. Avinash Choudhary was transferred. It would be pertinent to mention that Dr. Mohod was discharged in the criminal case on the ground that no case of negligence was made out against him.

7. The appellant herein filed a petition for quashing the charge against her, but this petition was rejected by the learned Single Judge of the High Court of Bombay at Nagpur mainly on the ground that the question whether inaction of the appellant in leaving the deceased at about 11.00 p.m. and not waiting for the Physician to turn up, amounted to a rash and negligent act on her behalf, would be decided during trial.

8. We have heard learned counsel for the parties. Learned counsel for the appellant has placed reliance on the judgment of this Court in ***Jacob Mathew v. State of Punjab & Anr.1***, wherein this Court held that the court should be circumspect before instituting criminal proceedings against a medical professional. This Court has held that negligence comprises of (i) a legal duty to exercise due care on the part of the party complained of; (ii) breach of the said duty ; and (iii) consequential damage. It was held that in cases where negligence is alleged against professionals like doctors the court should be careful before instituting criminal proceedings. It is not possible for any doctor to assure or guarantee that the result of treatment would invariably be positive. The only assurance which a professional can give is that he is professionally competent, has requisite skill and has undertaken the task entrusted to him with reasonable care. It would be pertinent to quote the following relevant observations made in ***Jacob Mathew's*** case (supra):

> **26.** No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of *res ipsa loquitur* is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter-productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable *per se* by applying the doctrine of *res ipsa loquitur*.
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> xxx xxx xxx
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> **28.** A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.
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> **29.** If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason — whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal

(2005) 6 SCC [1]

prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society.

**30.** The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science, both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

After discussing the entire law on the subject, this Court concluded as follows:

**"48.** We sum up our conclusions as under: (*1*) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in *Law of Torts*, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", "breach" and "resulting damage". (*2*) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(*3*) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence. (*4*) The test for determining medical negligence as laid down in *Bolam vs. Friern Hospital Management Committee* (1957) 1 WLR 582 at p. 586 holds good in its applicability in India.

(*5*) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution. (*6*) The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to be read as qualified by the word "grossly".

(*7*) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which inthe given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(*8*) *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining *per se* the liability for negligence within the domain of criminal law. *Res ipsa loquitur* has, if at all, a limited application in trial on a charge of criminal negligence."

9. Applying the law laid down in *Jacob Mathew's case* (supra), we are of the view that this is not a case where the appellant should face trial especially when 20 years have already elapsed. The only allegation against the appellant is that she left

the patient. We must remember that the appellant was a Surgeon on Call. She came to the hospital when she was called and examined the patient. As per her judgment, she could find no evidence of bleeding or injury and, therefore, she had noted that a Physician be called. Thereafter, she left the hospital at about 11.00 p.m. True it is that she did not wait for the Physician to come, but it can be assumed that she would have expected that the Physician would come soon. This may be an error in judgment but is definitely not a rash and negligent act contemplated under Section 304-A IPC. It is nobody's case that she was called again by the Nursing staff on duty. If the condition of the patient had worsened between 11.00 p.m. and 5.00 a.m., the next morning, the Nursing staff could have again called for the appellant, but they did not do so. Next morning, the doctor on Emergency Duty, Dr. Mohod attended upon the patient but, unfortunately, he died.

10. In the facts and circumstance of this case, it cannot be said that the appellant is guilty of criminal negligence. At best it is an error of judgment.

11. In view of the above discussion, we are of the view that no case of committing a rash and negligent act contemplated under Section 304-A IPC is made out against the appellant. Her case is similar to that of Dr. Mohod who has been discharged. We, accordingly, allow the appeal, set aside the judgment dated 18.06.2014, passed by the learned Single Judge of the High Court of Bombay, Nagpur Bench in Criminal Application (APL) No.354 of 2012 and quash the criminal proceedings initiated against the appellant vide order dated 28.02.2001, passed by the Judicial Magistrate, First Class, Court No.6, Amravati in Regular Criminal Case No. 310 of 1999 in FIR Crime No.317 of 1997. Pending application(s), if any, stand(s) disposed of.

Appeal allowed.

**2017 (I) ILR - CUT- 738**

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

W.P.(C) . NO. 9208 & 6248 OF 2016

**DR. SHANTI SUDHA SAHU** ……..Petitioner

*.Vrs.*

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

**EDUCATION – Admission to PG Dental courses SCB, Dental College and Hospital, Cuttack for the academic session 2016-17 – Dispute relates to three seats of in-service category earmarked for unreserved candidates – In this case O.P. No 6 being the only in**

**service S.C. Candidate got selected having secured 40 % of marks but the petitioners having secured 50% of marks became deprived of – Hence the writ petition – Whether O.P. No 6 being a reserved category candidate can be admitted to an unreserved seat when she has not secured qualifying percentage of marks i.e. 50 % of marks, required for unreserved category candidates ? – Held, No.**

**Law is well settled that when in-service candidates for in-service category of seats are not available the said seats can be filled up by direct candidates – Since O.P. No 6 has secured less than 50 % of marks she is not eligible for admission to the unreserved category seat – Held, order granting admission to O.P.No 6 to the unreserved in-service seat is quashed – Direction issued to the Opposite Parties to fill up the seats from amongst eligible candidates after holding a fresh counselling.**

For Petitioner : M/s. S. Das, R.P.Dalai, K.Mohanty S.K.Samal, Mr. Budhadev Routray (Sr.Advocate) S.P.Nath, S.D.Routrary & S.Jena

For Opp. Parties : Mr. B.P.Pradhan, AGA
M/s R.C.Mohanty, K.C.Swain, R.D.Pattanayak, S.Pattnaik M/s Mr.S.K.Sarangi
M/s K.P.Mishra, S.Mohapatra, T.P.Tripathy & L.P.Dwivedy

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Disposed of on : 30.03.2017

**JUDGMENT**

***VINEET SARAN, C.J.***

The dispute in both the writ petitions relates to admission in Postgraduate Dental Courses in S.C.B. Dental College and Hospital, Cuttack for the academic session 2016-17. Hence, both the writ petitions are heard and disposed of analogously.

2. Writ Petition bearing W.P.(C) No.9208 of 2016 has been filed by Dr.Shanti Sudha Sahu, who was a candidate for admission to the Postgraduate (Dental) Courses in SCB Dental College and Hospital, Cuttack for the academic year 2016-17 under Unreserved category as direct candidate. Having secured 437 rank in all India merit list, she was declared eligible for both Unreserved and OBC category. She ranked 4$^{th}$ (fourth) in the provisional common merit list of candidates for (State Quota) MDS Courses, 2016-17 (direct). Likewise in Writ Petition bearing W.P.(C) No.6248 of 2016

has been filed by Dr.Gathani Dash, who was also a candidate for the aforesaid courses having secured 436 rank in all India common merit list and was ranked 5th in the common merit list of the State Quota. In the common merit list, she was found eligible to take admission against Unreserved seats. Needless to mention here that both the candidates have more than 50% of marks in the entrance examination.

3. Opposite party No.6 (in both the writ petitions), namely, Dr.Rashmita Majhi, is an in-service candidate from SC category. Having secured more than 40% of marks she was found eligible to take admission in the aforesaid Postgraduate (Dental) Courses and ranked 139 under category and her overall rank was 2463. She was the only in-service candidate in the provisional merit list of candidates for (State Quota) MDS courses for the year 2016-17 and belonged to SC category.

After publication of Guidelines for admission of candidates for Postgraduate (Dental) Courses in SCB Dental College & Hospital, Cuttack for the year 2016-17 under Annexure-2 (for short 'the Guidelines'), which is approved by the Department of Health & Family Welfare, Government of Odisha, the Director of Medical Education and Training, Odisha-opposite party No.2 published notice (Annexure-3). The relevant extract of such notice is reproduced below for our consideration:

> "Eligible candidates for State Quota seats as per existing State guidelines are allowed to participate in the counseling. As per DCI guidelines, the qualifying marks in entrance examination AIPGDEE 2016 shall be General-50%, SC/ST-40%. There is no reservation under OBC Category in the State."

4. The admitted position is that there were six seats to be filled up in the SCB Dental College and Hospital, Cuttack for the said course under the State quota, out of which three were to be filled up from among the direct candidates and three from in-service candidates. It is also not disputed that out of the three direct candidate vacancies, one was reserved for 'Scheduled Tribe' category and other two for 'Unreserved' category. All the three seats for in-service candidates were of 'Unreserved' category. The further undisputed position is that the candidates are to be selected in the order of merit, for both in-service and direct categories, from the merit list prepared by the "All India Post Graduate Dental Entrance Examination for Admission to MDS Courses-2016". The Guidelines also provides that in case of non-availability of candidates against in-service seats, the seats shall be filled up by direct candidate and vice versa.

5. In the present case, the candidates for direct category were available and all the three seats of direct category were duly filled up, i.e., two from amongst the Unreserved category and one from ST category. The controversy in the present writ petitions is with regard to filling up of seats of the in-service category, which seats were all earmarked for Unreserved category. The other admitted position is that the eligibility for admission for PG Dental courses is minimum 50% of marks in the entrance examination for general category candidates and 40% for the candidates belonging to SC and ST categories. The only in-service candidate available was the opposite party No.6, who belongs to SC category and had secured 43.2% in the admission test. The petitioners in these writ petitions had secured more than 50% marks and were eligible for selection as general category candidate for the seats meant for direct candidates.

6. In such situation, where the only in-service candidate available was the opposite party No.6 (who is of SC category), she was selected for admission against the seats meant for general category, on the ground that she was eligible for admission having secured 43.2% marks (which is more than 40% marks). Challenging the said admission of the opposite party No.6, these two writ petitions have been filed by two direct candidates belonging to Unreserved category, who had secured more than 50% marks and claim that they were eligible for being considered for the seats, which has been allotted to opposite party No. 6, who was ineligible for consideration for the seat meant for Unreserved category candidates.

7. We heard Mr. Saswat Das, learned counsel for the petitioners, learned Addl. Government Advocate appearing for the opposite parties 1, 2 and 4; Mr. R.C. Mohanty, learned counsel for opposite party No.3-PG (Dental) Counseling & Admission Committee; Mr.S.K. Sarangi, learned counsel for the opposite party no. 5-Dental Council of India; and Mr.K.P. Mishra, learned counsel for private opposite party No.6-Dr.Rasmita Majhi. Pleadings between the contesting parties have been exchanged and with consent of learned counsel for the parties, these writ petitions are being disposed of at the admission stage.

8. There being no dispute with regard to the position that when the in-service candidates for the in-service category seats are not available, the said seats can be allotted to, and filled up by direct candidates, the only point for consideration in the present writ petitions is as to whether a candidate belonging to reserved category (SC in the present case) can be admitted to a general category seat, when she may be qualified and eligible for admission

to a SC seat by having secured over 40% marks, but has secured less than 50% marks, which is the qualifying percentage of marks required for Unreserved category candidates. This question is pertinent because three seats meant for in-service candidates were all for Unreserved category and not reserved category.

9. Perusal of the merit list, which is the source for grant of admission under State quota and had been prepared by the 'All India Post Graduate Dental Entrance Examination for Admission to MDS Courses-2016', would go to show that the petitioner-Dr. Shanti Sudha Sahu, was found 'eligible for Unreserved and O.B.C. seats' and the other petitioner-Dr. Gathani Dash, was found 'eligible for Unreserved seat', whereas the opposite party No.6-Rashmita Majhi, was found 'eligible for S.C. seats only'.

10. As per the *Dental Council of India Revised MDS Course Regulations, 2007,* framed under Section 20 of the Dentists Act, 1948, the percentage of marks for eligibility for admission to Post Graduate Dental Course shall be 40% for the candidates belonging to Scheduled Castes and Scheduled Tribes. The submission of learned counsel for opposite party No.6 is that since the opposite party No.6 was found eligible for admission as S.C. and S.T. candidate, as she had secured more than 40% marks, she has rightly been given admission under in-service quota. The said submission has been reiterated by Sri R.C.Mohanty, as well as Sri S.K.Sarangi, learned counsel for other opposite parties.

11. What is to be considered by us is as to whether opposite party No.6 was eligible for the Unreserved seat or not. For appreciation of arguments raised by learned counsel for the parties, we feel it appropriate to deal with relevant provisions of the Guidelines for admission of candidates for PG (Dental) Courses in SCB Dental College and Hospital, Cuttack as well as the relevant provisions of '*Dental Council of India Revised MDS Course Regulations, 2007*'.

> "**6. CATEGORY OF CANDIDATES:**
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> 6.1 A **Direct Candidate** is one who at the time of application:
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> 6.1.1 Is son/daughter/spouse of a person who has served in Defence Service and stationed in Odisha for minim of 5 years by **31st MAR 2016.**
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> 6.1.2 Is either unemployed or in the employment of Government of Odisha/Public Sector Undertakings of Govt. of Odisha or Govt. of

India located in Odisha, but not completed three years of service which includes all categories of employment like contractual/ temporary / ad-hoc /regular by **31st MAR 2016**.

6.2 An **In-service** candidate is one who at the time of application:

6.21 Is under employment in Government of Odisha/Public Sector Undertakings of Govt. of Odisha or Govt. of India located in Odisha and has completed a length of three years of service which includes all categories of employment like contractual/temporary /ad-hoc/regular by 31st MAR 2016, excluding at a stretch leave of any kind of 30 days or more. However the maternity leave is exempted from this exclusion and shall be counted towards the length of three years of service.

Note: *In-service and Direct candidates in employment under Government of Odisha/PSU, are advised to apply within intimation to their Employer. Copy of such intimation is to be submitted."*

Regulation-9 thereof deals with method of selection of candidates, which reads as follows:

"**9. METHOD OF SELECTION OF CANDIDATES**

9.1 Candidates belonging to both direct and in-service category shall be selected through an Entrance Examination i.e. AIPGDEE 2016.

9.2 Candidates shall be selected in order of merit (in-service & Direct). In case of non-availability of candidates against In-service seats, the seats shall be filled up by Direct candidates and vice-versa.

9.3 Unfilled "All India Seats", if any, will be filled up as per the decision of the selection committee on the spot of counseling."

The provisions relating to selection of PG students as set out under the '*Dental Council of India Revised MDS Course Regulations, 2007*' reads as follows:-

"**SELECTION OF POSTGRADUATE STUDENTS:**

(1) Students for postgraduate dental courses (MDS) shall be selected strictly on the basis of their academic merit.

(2) For determining the academic merit, the university/institution may adopt any one of the following procedures both for P.G. Diploma and MDS degree courses:

(i) On the basis of merit as determined by a competitive test conducted by the State Government or by the competent authority appointed by the State Government or by the University/group of universities in the same state; or

(ii) On the basis of merit as determined by a centralized competitive test held at the national level; or

(iii) On the basis of the individual cumulative performance at the first, second, third & Final B.D.S. examinations, if such examinations have been passed from the same university; or

(iv) Combination of (i) and (iii);

Provided that wherever entrance test for Postgraduate admissions is held by a State Government or a university or any other authorized examining body, the minimum percentage of marks for eligibility for admission to postgraduate Dental courses shall be 50% for general category candidates and 40% for the candidates belonging to Scheduled Castes and Scheduled Tribes.

Provided further that in non-Governmental institutions fifty percent of the total seats shall be filled by the competent authority and the remaining fifty percent, by the management of the institution on the basis of merit."

(*Emphasis supplied*)

12. Opposite Party No.6 being a candidate of SC category and has been found 'eligible for SC seats only', could be accommodated against the seat reserved for SC category for which she was found eligible. From perusal of the 'Eligibility Criteria of candidates' provided in the Guidelines of 2016-17 and the Regulation 9(1) and (2) of the 2007 Regulations, we are of the opinion that if the opposite party No.6 was to be accommodated against Unreserved category seat, the same could have been done only if she had secured minimum 50% marks required for being eligible for admission into PG Dental Courses under Unreserved category. No doubt it is true that opposite party No.6 was the only in-service candidate available, but it is noteworthy that all the three seats meant for in-service candidates were for Unreserved category candidates. Admittedly, the qualification or eligibility

meant for admission to Unreserved category seats, which was minimum 50% marks, would be applicable for all Unreserved category seats, whether under direct or in-service quota. Since the opposite party No.6 has secured less than 50% marks, she could not be selected or be eligible for admission to the Unreserved category seat.

As such, we are of the view that the order granting admission to the opposite party No.6 to the Unreserved in-service seat, deserves to be quashed as she did not fulfill the eligibility criteria for admission to such seat. Accordingly, we allow both the writ petitions to the extent that the admission granted to opposite party No.6 in the Unreserved category of in-service candidate (even though she had not secured the requisites percentage of marks meant for general category candidate), is quashed. The opposite parties shall fill up the said seat, in accordance with law, after holding a fresh counseling from amongst the candidates found eligible in the light of the observations/directions made hereinabove.

13. It is submitted by Mr.K.P.Mishra, learned counsel appearing for opposite party No.6 that in the meantime, opposite party No.6 has already completed one year in the Postgraduate Dental course. It may however be stated, that the said admission granted was subject to the outcome of the writ petitions. As such, we would not be inclined to pass any orders on the basis of the opposite party No.6 having been a student in the College for over a year.

Writ petitions allowed.

**2017 (I) ILR - CUT- 745**

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

W.P. (C) No. 23103 OF 2013

**PAULMECH INFRASTRUCTURE PVT. LTD.** .....Petitioner

*.Vrs.*

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

**TENDER – Letter of intent (LOI) issued to the petitioner being the highest bidder – Non-payment of admitted amount by the petitioner within the stipulated time –Termination of LOI vide Letter Dt 10.12. 2013 – Action challenged – No right accrued in favour of the petitioner by mere issuance of LOI – Moreover the petitioner had not complied**

**with the LOI, even within the extended time and became a defaulter – So there was neither a concluded contract nor any right accrued in favour of the petitioner – Hence, giving opportunity of hearing to the petitioner before issuance of letter Dt. 10.12.2013 would not arise – Further there being disputed questions of fact involved in this case the same cannot be gone into in writ jurisdiction – Held, writ petition is liable to be dismissed.** (Paras 17 to 21)

**Case Laws Referred to** :-

1. 2006 (1) SC 751 : Dresser Rand S.A. v. Bindal Agro Chem Ltd.
2. (2015) 13 SCC 233 : Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and Ors.
3. AIR 1976 SC 475 : Arya Vyasa Sabha v. Commissioner of Hindu . Charitable & Religious Institutions & Endowments.
4. AIR 1976 SC 386 : DLF Housing Construction (P) Ltd. v. Delhi Municipal Corporation.
5. AIR 2004 SC 1998 : National Textile Corporation Ltd. v. Haribox Swalram.
6. AIR 2003 SC 2686 : Dwarka Prasad v. B.D. Agarwal.
7. AIR 2004 SC 4877 : Defence Enclave Residents' Society v. State of U.P.

For Petitioner : Mr. Milan Kanungo, Sr. Counsel
M/s. Yaspal Mohanty, S.K.Mishra, P.S.Acharya & A.Patnaik.

For Opp. Parties : Mr. N.K.Misra, Sr. Counsel
M/s. N.K. Mishra, A.K.Roy, A.Mishra, P.Dash & S.Pradhan

Decided on : 09.03.2017

**JUDGMENT**

***VINEET SARAN, C.J.***

M/s. Utkal Ashok Hotel Corporation Ltd. (UAHCL) was, on 24.01.1989, granted a lease of certain area of land in Puri by the Orissa Government for 99 years. The Corporation was running 'Hotel Nilachal Ashok' in the said premises at Puri. In the year 2004, the hotel was closed down with the approval of Board of Directors, as operation of the same was found unviable. The UAHCL, thereafter, decided to lease out the said property for a period of 40 years, for which proceedings had been initiated in the year 2005-06, but there were no bidders. Then in the year 2009, it was again re-tendered, in which the petitioner, as well as two others participated. The petitioner, being the highest bidder, was issued a Letter of Intent (LOI)

on 19.01.2010, according to which, besides several other conditions, the petitioner was to deposit a sum of Rs.9.34 crores within 30 days. Out of the said amount, Rs.8.82 crores was towards non-refundable upfront payment, and a sum of Rs.26.00 lakhs towards security deposit, and another amount of Rs.26.00 lakhs towards advance minimum guaranteed annual lease premium for the first year.

2. The lease deed was to be executed as per the said LOI and a lease amount of Rs.26.00 lakhs per year was to be paid for first two years, with a minimum increase of 11 % per annum every year thereafter. The said LOI was accepted by the petitioner vide Letter of Acceptance (LOA) dated 02.02.2010, with a request that petitioner be permitted to deposit an amount of Rs.4.41 crores by 19.02.2010, and the balance amount by 15.04.2010. The said offer of the petitioner for deferred payment was accepted by the opposite party- UAHCL vide communication dated 12.02.2010, wherein it was specifically stated that the terms in respect of payment in two installments up to 15.04.2010 was being accepted as a special case.

3. In terms of such Letter of Acceptance (LOA), the petitioner deposited the initial amount of Rs.4.41 crores on 18.02.2010 but defaulted in depositing the balance amount by the extended date granted, which was 15.04.2010. The lease agreement, of course, could thus not be executed. The matter remained pending, and ultimately on 25.11.2010, the opposite party-UAHCL allowed extension of time for payment of the balance bid amount by 15.12.2010. Admittedly, this was the last extension for payment of the balance amount which was granted by the opposite party-UAHCL to the petitioner. Even then, the petitioner did not deposit the balance amount within such extended time.

4. As per the case of the petitioner, and not disputed by the opposite party-UAHCL, after the extended date expired, a sum of Rs.2.00 crores was deposited on 28.12.2010, Rs.1.41 crores on 29.12.2010 and Rs.0.70 crores on 07.01.2011. Thus, according to the petitioner, after including the initial deposit of Rs.4.41 crores, a total deposit of 8.52 crores had been made by the petitioner up to 07.01.2011. The petitioner made several correspondences thereafter stating that the balance amount shall be paid by the petitioner at the time of execution of lease deed, which was not replied to by the opposite party-UAHCL.

5. It is true that the opposite party-UAHCL did not respond to any of the letters written by the petitioner after the extended date, i.e., 15.12.2010, but in

between on 02.06.2011, the General Manager, Hotel Nilachal Ashok, Puri wrote to the petitioner that certain persons were to be given voluntary retirement under the scheme (VRS) of the Corporation, the liability of which would have to be borne by the petitioner, for which it was asked to make necessary arrangement, and that the lease deed would be executed only after the payment of the said amount.

6. Then on 19.09.2013, the Board of Directors of opposite party-UAHCL took a decision to terminate the LOI issued on 19.01.2010, primarily on the ground of non-compliance of Clause-2 of the LOI, which required the petitioner to make the entire payment of Rs.9.34 crore within 30 days of issuance of LOI and also on account that because of delay on the part of the petitioner, the opposite party-UAHCL was faced with difficulties in getting clearance and as such, it was not possible for it to proceed further. The said decision of the Board of Directors of opposite party-UAHCL was intimated to the petitioner vide communication dated 10.12.2013.

7. After the decision dated 19.09.2013 had been taken by the Board of Directors and before the same was communicated to the petitioner on 10.12.2013, this writ petition was filed on 01.10.2013, initially with the prayer to direct the opposite party-UAHCL to execute the lease agreement in pursuance of the LOI dated 19.01.2010 and accept the balance amount along with interest for delayed payment, but by an amendment filed subsequently, the prayer for quashing the order dated 10.12.2013 was also incorporated. The consolidated prayers, for which this writ petition has been filed, are reproduced hereunder:

> *"1. Admit the writ petition.*
>
> *1(a) Quash the letter dated 10/12/2013 where by the Board of Directors of OP No. 5 Company had decided to terminate the Letter of Intent dated 19/01/2010.*
>
> *2. Direct the O.P. No.- 5 and O.P. No.-3 to execute the lease agreement pertaining to the lease of Hotel Nilachal Ashok, Puri in pursuance of the letter of intent dated 19.01.2010.*
>
> *3. Direct the O.P. No.5 and O.P. No.3 to calculate interest on the amounts deposited by the petitioner company, more particularly Rs.4.41 Crores since 17.02.2010, Rs. 2 Crores since 28.12.2010, Rs. 1.41 Crores since 29.12.2010 and Rs.70 lakhs since 07.10.2011 and further direct the said authorities to adjust the said interest towards balance payments."*

8. We have heard Mr. Milan Kanungo, learned Senior Counsel appearing along with Mr. P.S. Acharya, learned counsel for the petitioner; as well as Mr. N.K. Mishra, learned Senior Counsel appearing along with Mr. A. Mishra, learned counsel for the contesting opposite parties no.3 and 5, i.e., Indian Tourism Development Corporation (ITDC) and UAHCL; and also Mr. B.P. Pradhan, learned Addl. Government Advocate appearing for the State-opposite parties. The opposite party no.4, Orissa Tourism Development Corporation is not represented. Even otherwise no prayer has been made against the said opposite party no.4.

9. The submission of Mr. Kanungo, learned Senior Counsel appearing for the petitioner, primarily is that there have been laches on the part of the opposite party-UAHCL, inasmuch as they have not complied with their bit of obligation under the LOI and by their conduct, especially the letter dated 02.06.2011 requiring the petitioner to disburse the amount for payment of VRS of 30 employees, they had themselves extended the time for deposit of the balance amount by the petitioner, as in the said communication it was mentioned that the entire amount, including for VRS, should be paid prior to execution of the lease deed. According to Mr. Kanungo, the amount of VRS was to be calculated by the opposite party-UAHCL, which was never communicated to the petitioner. It is further contended that prior to the passing of the impugned order dated 10.12.2013, neither any opportunity of hearing was given, nor show cause notice was issued to the petitioner, as such the order was passed in violation of the principle of natural justice, and thus liable to be quashed.

10. Per contract, Mr. N.K. Mishra, learned Senior Counsel appearing for the contesting opposite parties no.3 and 5 has submitted that no rights had accrued in favour of the petitioner, as by mere issuance of the LOI, only an offer was made, which, though accepted by the petitioner, was not complied with by the petitioner, even though time was extended initially up to 15.04.2010 and thereafter up to 15.12.2010, and since the petitioner has not paid the admitted amount within the stipulated time or even thereafter, no right has accrued in favour of the petitioner. It is also contended that since the terms of the LOI, which was merely an offer, were not complied with, there was no concluded contract between the parties, as no agreement was signed, and thus also the petitioner would not have a right for revival of the offer or LOI, which was made by the opposite party-UAHCL. It was lastly contended that no direction or specific performance of an agreement or contract would be issued by this Court as disputed questions of fact are

involved in this petition, which can be decided only by leading evidence, which could be done in a civil court and not in writ jurisdiction.

11. We have heard learned counsel for the parties at length and have carefully perused the record. The LOI, which was issued by the opposite party-UAHCL on 19.01.2010, was merely an offer, which was accepted by the opposite party-UAHCL by its Letter of Acceptance issued on 02.02.2010. In the said Letter of Acceptance also the petitioner had made a request for extension of time, which was duly accepted by the opposite party-UAHCL vide communication dated 12.02.2010, according to which the entire payment was to be made in two instalments, first one on or before 19.02.2010 and the balance on or before 15.04.2010. It is not disputed that the second instalment was not paid by the petitioner, for which the petitioner approached the opposite party-UAHCL for extension, and finally on 25.11.2010 the last extension for payment of the balance amount was granted, which was up to 15.12.2010. It is not the case of the petitioner that the balance amount was paid within the extended time. In fact no amount was paid by the petitioner between 19.02.2010 and 15.12.2010. From the record it is clear that after 15.12.2010 there was no correspondence made by the opposite party-UAHCL extending the time of contract or accepting the payment made by the petitioner. Although it is not denied that certain deposits were made by the petitioner after the extended date, i.e., 15.12.2010, but no acknowledgement of the same by the opposite party-UAHCL has been brought on record with regard to deposit of any such amount.

12. The only correspondence after 15.12.2010 is that of the General Manager of the Hotel made on 02.06.2011 intimating the petitioner that 30 persons have sought VRS, for which the liability would be that of the petitioner, and the said amount should be paid by the petitioner prior to execution of the lease deed. In our view, the same would not amount to extension of the time by the opposite party-UAHCL for payment of the amount under LOI, as the same was not the decision of the Board of Directors or the competent officer of the opposite party-UAHCL, but a mere communication by the General Manager of the Hotel, where 30 persons were seeking voluntary retirement under the VRS Scheme, for which the payment had to be made, and since the petitioner was involved in the entire process and the management of the Hotel had yet not been handed over to the petitioner, the General Manager of the Hotel had intimated the petitioner of the liability of VRS, which would accrue, for which the petitioner would be liable as per the terms of the LOI.

13. It has been stated by learned counsel for the petitioner that the General Manager of the Hotel is an employee of the ITDC and had written on behalf of the ITDC and that ITDC was in any case the competent authority, which could have extended the time. In our view, in the facts of the present case, mere issuance of the letter by the General Manager of the Hotel would not amount to grant of extension of time for making the deposit of the balance amount by the petitioner, which was earlier fixed and then extended by UAHCL and has expired on 15.12.2010.

14. In view of the aforesaid facts, we are of the opinion that merely by issuance of LOI, no right had accrued in favour of the petitioner until the petitioner had complied with the terms of the LOI as had been accepted by the petitioner by its LOA dated 02.02.2010.

15. The apex Court in the case of ***Dresser Rand S.A. v. Bindal Agro Chem Ltd.,*** 2006 (1) SC 751 has held in paragraph-39 of the said judgment:

> *"..... a letter of intent merely indicates a party's intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract....."*

16. In the case of ***Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and Others,*** (2015) 13 SCC 233, the apex Court held:

> *"When the LOI is itself hedged with the condition that the final allotment would be made later after obtaining CRZ and other clearances, it may depict an intention to enter into contract at a later stage. Thus, we find that on the facts of this case it appears that a letter with intention to enter into a contract which could take place after all other formalities are completed. However, when the completion of these formalities had taken undue long time and the prices of land, in the interregnum, shot up sharply, the respondent had a right to cancel the process which had not resulted in a concluded contract."*

17. In view of the legal position and the facts of the case where the petitioner had not complied with the terms of making the deposit within the extended time also, we can safely arrive at a conclusion that there was neither a concluded contract nor any right had accrued in favour of the petitioner on the basis of the aforesaid LOI. In such view of the matter, issuing of show cause notice or giving opportunity to the petitioner prior to the Board of

Directors taking a decision on 19.09.2013 or communication of the said decision by order dated 10.12.2013 would not arise, as the petitioner was itself a defaulter of the terms of LOI and LOA.

18. Where the question as to violation of fundamental right is dependent upon the investigation and determination of question of facts, the court may refuse to go into it by allowing the parties to take recourse to appropriate proceedings.

In ***Arya Vyasa Sabha v. Commissioner of Hindu Charitable & Religious Institutions & Endowments***, AIR 1976 SC 475, notices were issued by the authority calling upon the petitioners to have their temples and institutions registered. It was contended that the action was violative of Articles 14, 19(1)(f), 25, 26 and 31 of the Constitution.

The High Court dismissed the petition observing that whether or not a particular institution is of a religious denomination is a question of fact or, in any event, a mixed question of fact and law which can more satisfactorily and effectively be adjudicated upon in a competent civil court. The Supreme Court held that by dismissing the petition, the High Court had not committed any error.

19. In ***DLF Housing Construction (P) Ltd. v. Delhi Municipal Corporation***, AIR 1976 SC 386, the question related to the right of ownership over the land and vesting thereof in the corporation. It was contended by the petitioner that the action of the corporation to acquire right over the land was violative of the provisions of the Constitution. The High Court dismissed the petition.

Confirming the order, the Supreme Court stated:

> *"In our opinion, in a case where the basic facts are disputed, and complicated questions of law and fact depending on evidence are involved the writ court is not the proper forum for seeking relief."*

20. In ***National Textile Corporation Ltd. v. Haribox Swalram***, AIR 2004 SC 1998, the petitioner asserted that though goods were manufactured by the respondent and payment was made, no goods were supplied. The respondent, however, denied receipt of payment or manufacture of goods for the petitioner. It was held that such highly disputed 'questions of fact' could not be decided in a writ petition under Article 226 of the Constitution.

Similar view has also been taken by the apex Court in ***Dwarka Prasad v. B.D. Agarwal***, AIR 2003 SC 2686, as well as in ***Defence Enclave Residents' Society v. State of U.P.,*** AIR 2004 SC 4877.

21. Considering the law laid down by the apex Court in the aforementioned judgments and applying the same to the present context, this Court is of the considered view that disputed questions of fact are involved in this petition, which cannot be gone into in writ jurisdiction, as for deciding the issues involved in the case, parties will have to lead evidence, which cannot be done under Article 226 of the Constitution of India. Accordingly, we are of the view that prayers made in this writ petition do not deserve to be granted in writ jurisdiction. However, it shall be open for the petitioner to approach the appropriate forum available to it in law for redressal of its grievance, if so advised.

22. With the aforesaid observations, the writ petition is accordingly dismissed. No order to cost.

Writ petition dismissed.

**2017 (I) ILR - CUT-753**

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

W.P.(C) . NO. 3572 OF 2017

**KAUSTUVA SAHU** .....Petitioner

*.Vrs.*

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

**TENDER – Petitioner submitted required documents before the appropriate authority i.e. Executive Engineer R.W. Division, Padampur but wrongly mentioned in the affidavit as Executive Engineer, M.I. Division Padampur – Rejection of petitioner's technical bid on the ground of wrong affidavit – Hence the writ petition – Mistake occurred in the affidavit is typographical in nature – It neither materially affect the case nor adversely affect the interest of any of the parties – Such mistake could have been waived or permitted to have been corrected by allowing him to file a fresh affidavit – Held, order rejecting the technical bid of the petitioner is quashed – Direction issued to open the financial bid of the petitioner and if it is at par with other qualified bidders his case shall also be considered alongwith other bidders.**

(Paras 8,9)

**Case Law Referred to** :-

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

For Petitioner : M.s. Prabodha Ch.Nayak & S.K.Rout

For Opp. Party : Mr. B.P. Pradhan, AGA.

Disposed of on : 27.03.2017

**JUDGMENT**

***VINEET SARAN, C.J.***

In response to the Tender Call Notice dated 15.12.2016 issued by the Chief Engineer, Rural Works, Odisha, Bhubaneswar-opposite party No.3, the petitioner had also applied for one of the eight items which had been advertised. To be more precise, the petitioner had applied for *"Construction and maintenance of P.R. road to Brahmantal road in the district of Bargarh under MMSY 2016-2017"*, which was at Serial No.5 of Annexure-1 of Tender Call Notice, relating to the list of works. The petitioner had submitted his tender on 30.01.2017. Then, on 23.2.2017, the technical bids of all the bidders were opened and by order of the same day, it was uploaded in the website. Out of five bidders, three bidders were found to be qualified. The bid of fourth bidder was rejected for 'insufficiency of machineries', and the bid of the petitioner was rejected on the ground of 'wrong affidavit'. Challenging the said order of rejection of his tender, the petitioner has approached this Court.

2. We have heard learned counsel for the petitioner as well as learned Additional Government Advocate appearing for the opposite parties.

By order dated 01.03.2017, time was granted to the learned Addl. Government Advocate appearing for opposite parties to obtain instructions in the matter or file counter affidavit. Learned Additional Government Advocate states that he has received instructions in the matter. As such, with the consent of learned counsel for the parties, the matter is taken up for final disposal on merit at the stage of admission.

3. Perusal of the affidavit filed by the petitioner along with the application, which has been annexed as Annexure-7 to the writ petition, would go to show that the same has been sworn before the Notary Public, Nuapada which was "*In the matter of an affidavit to be filed before the*

*Executive Engineer, R.W. Division, Padampur"*, which is clearly mentioned at the top of the affidavit. In paragraph-2 of the said affidavit, it has been stated that the tender paper has been submitted by the petitioner before the Executive Engineer, R.W. Division, Padampur on 15.12.2016. However, in paragraph 7 of the said affidavit, it has been stated that the tender paper along with other documents have been submitted before the Executive Engineer, M.I. Division, Padampur.

4. Learned Additional Government Advocate has submitted that though the statement made in paragraph-7 is that the tender paper along with other documents have been submitted before the Executive Engineer, M.I. Division, Padampur (instead of Executive Engineer, R.W. Division, Padampur), but in fact, all the documents mentioned in paragraph-7 were actually presented before the Executive Engineer, R.W. Division, Padampur and not the Executive Engineer, M.I. Division, Padampur. The Notary Public, Nuapada has also written to the Superintending Engineer, R.W. Circle, Sambalpur (Annexure-10) that all the documents were actually given by the petitioner in his presence to the Executive Engineer, R.W. Division, Padampur and not the Executive Engineer, M.I. Division, Padampur and further stated that a mistake had occurred in paragraph-7 of the affidavit filed by the petitioner due to inadvertence.

5. Since it is not disputed that the documents required to be submitted by the petitioner were all in order and the same were actually submitted before the Executive Engineer, R.W. Division, Padampur, we are of the opinion that it is a clear case of typographical mistake. The mention of "Executive Engineer, M.I. Division, Padampur" is clearly a mistake, which had occurred in the affidavit, especially keeping in view the communication thereafter made by the Notary Public, Nuapada and also the fact admitted by the opposite parties that the tender paper, along with required documents mentioned in paragraph-7 were actually presented before the Executive Engineer, R.W. Division, Padampur and not the Executive Engineer, M.I. Division, Padampur. From the other contents of the said affidavit also, it is clear that everywhere the reference has been made to the Executive Engineer, R.W. Division, Padampur and not the Executive Engineer, M.I. Division, Padampur.

6. While considering a case where the tenderer had not deposited the earnest money by Banker's cheque of the State Bank of India as was required, and instead submitted a cheque of Union Bank of India which was duly authenticated by the bank and the bank's assurance to honour the same

was obtained, the Apex Court in the case of ***M/s Poddar Steel Corporation vs. M/s. Ganesh Engineering Works****, AIR 1991 SC 1579* held in paragraph-6 that

> "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."

7. 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 appreciably different…"

8. Applying the aforesaid principle of law laid down by the Apex Court to the facts of the present case, we are of the opinion that a mistake which occurred in the affidavit filed by the petitioner, which is merely

typographical in nature and possibly by inadvertence, could have either been ignored or permitted to be corrected by the petitioner by allowing him to file a fresh affidavit.

9. In the given circumstances, considering the fact that it is admitted that all the papers had actually been submitted before the appropriate authority, as such the mistake which occurred in the affidavit was by inadvertence and did not materially affect the case or adversely affect the interest of any of the parties, and thus the same ought to have been condoned and the rejection of the tender of the petitioner was unjustified and liable to be quashed.

10. Accordingly, we allow this writ petition and quash the order of rejection of the tender of the petitioner. The financial bids of three qualified bidders were the same, as all had quoted 14.99% less than the estimated cost. In such view of the matter, we direct that the rejection order under Annexure-8, so far as it relates to the technical bid of the petitioner, is quashed. The financial bid of the petitioner shall be opened, and if the bid of the petitioner is at par with that of other qualified bidders and the selection is to be done by draw of lottery, the case of the petitioner shall also be considered along with other bidders.

11. The writ petition is, accordingly, allowed to the extent indicated above.

Writ petition allowed.

**2017 (I) ILR - CUT-757**

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

W.P.(C) NO. 8485 OF 2005

**BATAKRUSHNA DAS** .....Petitioner

*.Vrs.*

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

**CONSTITUTION OF INDIA, 1950 – ART. 226**

**Writ Petition – Inordinate delay – Though no period of limitation has been provided for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily, it should be filed within a reasonable time.**

**In this case, the petitioner has challenged conversion of the nature of the case land from "Jalasaya" to "stitiban" and grant of lease in favour of O.P.No. 6, long twelve years after the cause of action arose and in the meantime third party rights have emerged – On merit also the lands in question have been converted by following due procedure of law and transferred in favour of O.P.No.6 on accepting premium and a market is functioning over the said lands – Held, this Court is not inclined to unsettle the settled position after expiry of such long period – The writ petition is liable to be dismissed on merits as well as for delay and laches.** (Para 19)

**Case Laws Referred to** :-

1. 2012 (II) OLR 1040 : Tapan Kumar Das v. Commissioner, Cuttack Municipal Corporation and Ors.
2. AIR 2014 SC 1078 : Sadashiv Prasad Singh v. Harendar Singh.
3. (1998) 8 SCC 685 : State of Uttar Pradesh v. Raj Bahadur Singh.

For Petitioner : M/s. Dr. A.K.Mohapatra, Sr. Counsel, R.K.Mohanty, N.C.Rout, S.K.Padhi, N.R.Rath, S.Lal, D.Mohapatra, S.K.Mohapatra & B.Mohapatra

For Opp. Parties: Mr. R.K.Mohapatra, Govt. Adv. M/s. B.K.Sharma, S.R.Mohanty & B.Mohanty

Date of argument: 03.03.2017
Date of Judgment: 10.03.2017

**JUDGMENT**

***DR. B.R. SARANGI, J.***

The legality and propriety of sanction of lease and conversion of nature of the lands appertaining to plot no.27 measuring Ac.1.40 decimals recorded as Jalasaya-II, Pokhari; and plot no.51 measuring Ac.1.50 decimals recorded as Jalasaya-II, Gadia, corresponding to Khata No.1206 of village-Chatra in the district of Jagatsinghpur originally stood recorded in the name of Irrigation and Power Department of Government of Odisha as per the Record of Rights published on 01.02.1985, is the subject-matter of consideration in the present application.

2. The factual matrix of the case, as borne out from the records, is that the lands in question had been recorded as 'Jalasaya' under the Record of Rights (ROR)-Annexure-1 prepared by the competent authority. The same was corrected, as per Revenue Lease Case No.33 of 1993, and prepared in the name of Secretary, Regulated Market Committee (RMC), Jagatsinghpur with

'stitiban' status, being plot no.27/4764 measuring Ac.1.00 decimals and plot no.51/4765 measuring Ac.1.00 decimals both recorded as Gharabari corresponding to khata no.1043/220 of village-Chatra. The Executive Engineer, Irrigation Department wrote a letter on 16.09.1993 to the Tahasildar, Jagatsinghpur to deposit the market value. Further, on 29.10.1993, the Executive Engineer also wrote a letter to the Sub-Collector, Jagatsinghpur for realization of market value from R.M.C., Jagatsinghpur.

3. As originally the lands in question belonged to Irrigation and Power Department, the Government in Irrigation Department relinquished the lands in question measuring Ac.2.00 decimals in favour of Revenue Department vide letter dated 14.01.1993. Accordingly, the Revenue Department in its letter dated 22.02.1993 intimated the Collector, Cuttack to transfer possession of land and correct the ROR. In Revenue Misc. Case No.26 of 1993, the ROR was corrected and the Secretary, RMC, Jagatsinghpur was intimated to file an application for lease as per the corrected ROR. The Secretary filed the application and accordingly the ROR was corrected, and the Secretary was authorized by the committee to sue or to be sued in case of future litigation. Public objection was invited on 27.10.1993 and no objection was received from anybody within the time limit.

4. The lands in question, having remained free from all encumbrances, the market value was determined at Rs.1,20,000/- per acre. As per the calculation sheet, the lands in question, being Ac.2.00 decimals, a sum of Rs.2,40,000/- was determined as premium, which the RMC, Jagatsinghpur was to pay for value of the lands. Besides, rent was also fixed at Rs.2400/- at the rate of 1% of the market value. Accordingly, the case was recommended to the Collector, Jagatsinghpur for sanction of the lease of the said lands subject to payment of full market value and ground rent. Although initially advance possession was sanctioned pending sanction of the lease, ultimately sanction of lease in favour of RMC, Jagatsinghpur was made for construction of market complex, subject to payment of advance premium. Against such settlement of land, this application has been filed.

5. Dr. A.K. Mohapatra, learned Senior Counsel appearing for the petitioner strenuously contended that conversion of land from "Jalasaya" to "Stitiban" and consequential direction for payment of premium, having not been complied, any construction undertaken over the lands in question cannot be allowed to continue/sustain and, as such, direction be given to the Revenue Divisional Commissioner, Cuttack to cause an inquiry and furnish a

report in the interest of justice, equity and fair play. To substantiate his contention, he has relied upon the judgment of this Court in the case of ***Tapan Kumar Das v. Commissioner, Cuttack Municipal Corporation and others***, 2012 (II) OLR 1040.

6. Mr. R.K. Mohapatra, learned Government Advocate for the State-opposite parties contended that the contention raised by learned counsel for the petitioner cannot sustain in the eye of law, in view of the fact that the petitioner has no locus standi to raise such objection. It is stated that, when public objections were invited, the petitioner did not raise any objection for conversion of lands in question and, still then, if the petitioner was in any way aggrieved, he could have preferred an appeal in accordance with law challenging the order passed by the competent authority dated 30.11.1993. More so, the cause of action having arisen in the year 1993, the petitioner has approached this Court in the year 2005, after long lapse of 12 years. Therefore, the writ petition suffers from delay and laches and, accordingly, he states that the same should be dismissed.

7. Mr. B.K. Sharma, learned counsel for opposite party no.6 specifically stated that in view of the order passed by the Tahasildar for payment of premium amount, the land stood recorded in favour of RMC, Jagatsinghpur, and in compliance of the same an amount of Rs.2,62,479/- having been paid towards the market value of the land in three installments, i.e., 15.03.1994, 31.03.1994 and 26.08.1994 (wrongly mentioned in the counter affidavit as 26.08.2004, which is typographical error), opposite party no.6 has received the advance possession of the lands and acted upon the same. Therefore, at a belated stage, the contention raised by learned counsel for the petitioner cannot sustain in the eye of law.

8. We have heard Dr. A.K. Mohapatra, learned Senior Counsel for the petitioner; Sri R.K. Mohapatra, learned Government Advocate for opposite parties no.1 to 5, as well as 7 and 8, and Mr. B.K. Sharma, learned counsel for opposite party no.6 and perused the records. Pleadings between the parties have been exchanged and, as such, with the consent of the learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

9. There is no dispute to the facts, as enumerated above. Only contention raised that conversion of nature of the land from “Jalasaya to “Stitiban”, as well as grant of lease and permission to the RMC, Jagatsinghpur-opposite party no.6 to go for construction cannot sustain in the eye of law in view of

the judgment of this Court in ***Tapan Kumar Das*** (supra). We have perused the judgment of this Court in ***Tapan Kumar Das*** (supra), wherein this Court had held that the water bodies are required to be retained and such requirement is envisaged not only in view of the fact that the right to water as also quality life are envisaged under Article 21 of the Constitution of India, but also in view of the fact that the same has been recognized in Articles 47 and 48-A thereof. Article 51-A of the Constitution furthermore makes a fundamental duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife. There is no dispute on the question of proposition set forth by this Court in the aforementioned judgment, but at the same time this Court had already held in the very same judgment that if the lands which have lost their character as "Jalasaya", and those, which are actually not "Jalasayas" or Swampy lands but have been recorded as "Jalasaya", change of classification of such lands may be allowed.

10. A counter affidavit has been filed on behalf of opposite parties no.3, 4 and 5 on 28.02.2006, paragraph-10 of which states as follows:

> *"10. That this deponent further submits that the land in question belongs to water resources department as per Annexure-1 of the writ petition. The aforesaid land was water logged low lying land. Due to digging of earth for canal bank road, though the Kisam of land was recorded as Jalasaya, but actually the same was never used as Jalasaya. Due to excavation of borrow fit for earth work of canal bank, the land has become low lying land water used to be filled up in the rainy season and it dried in summer. It was mosquito breeding centre and the same is never used by the villagers or any general public either for irrigation or for any other purpose."*

11. To the aforesaid contention of opposite parties no.3, 4 and 5, no rebuttal assertion has been made by learned Senior Counsel for the petitioner by way of filing rejoinder affidavit. As such, it can be safely inferred that the lands in question, though have been recorded as "Jalasaya", are not being used as such, and the same have become low lying lands in which water used to be filled up in the rainy season and dried in the summer and the same are never used by the villagers or any other general public either for irrigation or for any other purposes and the lands remain 'swampy'. Therefore, the lands in question were converted in the year 1993 by following due procedure of law and by giving opportunity to the general public by issuing notice and on

that basis the lease was sanctioned, subject to receipt of premium of Rs.2,62,479/-. The petitioner had not objected to the same nor participated in the proceeding, and on conclusion of the conversion proceeding the lands in question were transferred in favour of the Secretary, RMC, Jagatsinghpur.

12. Opposite party no.6 has also filed counter affidavit. Paragraph-7 of which states as follows:-

> *"7. That this deponent has paid a sum of Rs.2,62,479/- as the premium towards the market value of the land in three instalments dt.15.3.94, 31.3.94 and 26.8.2004. So the market value of the land has been realized from this deponent."*

13. Mr. B.K. Sharma, learned counsel for opposite party no.6 in course of argument stated that the date "26.08.2004", mentioned in the counter affidavit of opposite party no.6, is a typographical error and it should be read as "26.08.1994". It is stated that the premium amount having been paid in the year 1994, advance possession was given to opposite party no.6 and they are in possession and, as such, the premium amount was paid in view of the sanction of lease by the RDC, Central Division.

14. In paragraph-13 of their counter affidavit opposite parties no.3, 4 and 5 have stated as follows:-

> *"13. That it apt to submit here that the Secretary, R.M.C., Jagatsinghpur deposited the market value before the Tahasildar i.e. Rs.2,62,479/- as premium and the Tahasildar initiated Misc. Case No.26/93 and 33/93 for conversion of Kisam to 'Urnat Anabadi Jogya' and the matter was moved before the Sub-Collector who recommended the Collector, Jagatsinghpur for considering the sanction of lease of Ac.2.00 of land and delivery of advance possession in favour of R.M.C. and the Collector recommended R.D.C., Central Division, Cuttack for sanction of lease.*
>
> *That the R.D.C., Central Division sanction the lease of the said land with certain conditions and the said letter was communicated to Tahasildar, Jagatsinghpur vide letter No.1373 dtd.31.3.1994.*"

In paragraph-14 of the counter affidavit filed by opposite parties no.3, 4 and 5, it has been stated that the lease deed was executed by the Collector, Jagatsinghpur in favour of Secretary, RMC, Jagatsinghpur on 01.09.1994 and before execution of the lease deed possession of the lands was taken and the

RMC already constructed the market yard since 1994 and the market is functioning over the said land.

15. In view of the aforesaid facts and circumstances, even if objections were invited by the competent authority by issuing public notice, the petitioner did not participate in the proceeding by filing objection, nor subsequently challenged the same before the appropriate forum. When by following due procedure of law, the land was settled in favour of opposite party no.6 and on receipt of premium amount the lease deed was executed in the year 1994 and on that basis the market complex has already been constructed, challenge to such conversion proceeding at a belated stage, i.e., after long lapse of 12 years cannot sustain in the eye of law. More so, the petitioner, having not participated in the conversion proceeding, is estopped from challenging the same.

16. On perusal of the pleadings available on record, it clearly demonstrates that no satisfactory explanation has been given by the petitioner to approach this Court at a belated stage. Even though no period of limitation has been provided for filing of the writ petition under Article 226 of the Constitution of India, yet ordinarily, a writ petition should be filed within a reasonable time.

17. In ***Sadashiv Prasad Singh v. Harendar Singh***, AIR 2014 SC 1078, the apex Court held that the petition should have been dismissed on the ground of delay and laches, especially because third party rights had emerged in the meantime.

18. In ***State of Uttar Pradesh v. Raj Bahadur Singh***, (1998) 8 SCC 685, the apex Court held that "there is no time limit for filing the writ petition. All that the Court has to see is whether the laches on the part of the petitioner are such as to disentitle him to the relief claimed by him".

19. Considering the facts and law discussed above, we are of the considered view that even though no limitation has been prescribed in filing the writ petition under Article 226 of the Constitution of India, but the petitioner has approached this Court at a belated stage and, as such, in the meantime the third party rights have emerged. Apart from the above, on merits also by following due procedure of law, the lands in question have been converted and transferred in favour of opposite party no.6-Secretary, RMC, Jagatsinghpur on accepting premium amount and a market is functioning over the said lands, we are not inclined to unsettle the settled position after expiry of such long period. Consequentially, the writ petition is

liable to be dismissed on merits, as well as for delay and laches and, thus the same is hereby dismissed. No order to costs.

Writ petition dismissed.

**2017 (I) ILR - CUT-764**

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

WRIT APPEAL NO. 419 OF 2016

**C.E.O., C.E.S.U., BBSR & ANR.** .....Appellants

*.Vrs.*

**ANJANA PRUSTY** .....Respondent

**Law of torts – Electrocution Death – Claim for compensation – Liability – A person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertaking.**

**In this case, deceased died due to electrocution – If the voltage of electricity transmitted through the wires is potentially of dangerous dimension, the managers of the supply company have the added duty to take all safety measures to prevent escape of such energy and to see that the wire snapped would not remain live on the road – Considering the lapse on the part of the appellant-company the learned single judge directed to pay an interim compensation of Rs. 1.00.000/- to the respondent – Held, applying the doctrine of "strict liability" this Court do not find any infirmity in the impugned judgment passed by the learned single judge for interference.** (Paras 5,6,7)

**Case Law Referred to** :-

1. 2015 (I) OLR 637 : T.Bimala Vs. Cutttack Municipal Corporation, Cuttack & Ors.
2. AIR 2005 MP 2 : Ramesh Singh Pawar Vs. Madhya Pradesh Electricity Board & Ors.
3. AIR 2002 sc 551 : M.P.Electricity Board Vs. Shail Kumar & Ors.

For Appellants : Mr. Suresh Chandra Dash
For Respondent : M/s.Umesh Ch. Mohapatra & P.K. Naik

Date of hearing : 05. 04.2017
Date of Judgemnt: 05.04.2017

**JUDGMENT**

***K. R. MOHAPATRA, J.***

This intra-Court Appeal has been filed assailing the judgment dated 10.08.2016 passed by the learned Single Judge in W.P.(C) NO. 8977 of 2009 directing the appellants herein to pay the interim compensation of Rs. 1,00,000/- (one lakh) to the respondent (writ petitioner) within a period of two months, and further permitting the petitioner to work out her remedies in the common law forum for higher compensation.

2. Brief statement of facts relevant for adjudication of this appeal is that one Lokanath Prusty (deceased father of the respondent) while returning home after collecting firewood on 04.07.2006 at about 8 A.M., came in contact with 11 KV High Tension overhead line, as a result of which, he died instantaneously. The nephew of the deceased Lokanatha reported the matter before the O.I.C., Tangi Police Station. Accordingly, UD Case No. 12 of 2006 was registered. After inquest, the dead body was sent to S.C.B. Medical College & Hospital, Cuttack for autopsy. Postmortem report revealed the cause of death to be contact with live electric wire. Accordingly, final form was submitted disclosing the cause of death due to electric shock. It also indicated that there was no suspicion of any foul play. As the family was in distress, the respondent had represented to the appellant No.1 on 04.01.2008 for payment of compensation, which remained un-responded. Accordingly, she had filed Writ Petition bearing W.P.(C) No. 8977 of 2009 for compensation.

The appellants who were opposite parties in the writ petition filed their counter affidavit denying the averments made in the writ petition and stating that the writ petition was not maintainable as the same involved adjudication of disputed questions of fact. Although the incident occurred in the year 2006, the writ petition was filed after a lapse of four years. The appellants in their counter affidavit also stated that the respondent had approached this Court with un-clean hands making out a cock and bull story alleging negligence of the appellants. No such representation dated 04.01.2008, as alleged, was ever received by the appellants. The investigation was conducted by t he Police without intimating the officials of Central

Electricity Supply Utility (CESU). They also denied other averments made in the writ petition.

3. Learned Single Judge, taking into consideration the rival contentions of the parties and case laws reported in 2015 (I) OLR 637 (**T.Bimala Vs. Cutttack Municipal Corporation, Cuttack and others**); AIR 2005 MP 2 (**Ramesh Singh Pawar Vs. Madhya Pradesh Electricity Board and others**); AIR 2002 sc 551 (**M.P.Electricity Board Vs. Shail Kumar and others**), and 1968 Law Reports (3) HL 330 (**Rylands Vs. Fletcher**) held that the opposite parties cannot shirk from their responsibility on trivial grounds. For the lackadaisical attitude exhibited by the opposite parties, a valuable life was lost. Keeping in view the age and avocation of the deceased, learned Single Judge directed the appellants (opposite parties in the writ petition) to pay interim compensation of Rs. 1,00,000/- within two months, and further permitted the petitioner to work out her remedies in the common law forum for higher compensation.

4. Mr. Dash, learned counsel for the appellant vehemently submits that the writ petition under Article-226 could only be maintainable if the negligence is admitted. In the instant case, the appellants who were opposite parties in the writ petition had categorically denied their involvement as well as negligence which caused the death of the father of the respondent. He further contends that learned Single Judge has given a finding that the appellants were negligent in performing their duties which is based on no evidence. It would also render the appellants defenceless, in the event the respondent files a suit claiming higher compensation. In that view of the matter, he prays for setting aside the impugned judgment.

5. Mr. Mohapatra, learned counsel for the respondent, per contra, submits that the fact that the father of the respondent died due to electrocution by coming in contact with 11 KV live wires, remains unchallenged. It is further submitted that the learned Single Judge has not given any finding on facts, which would render the appellants defenceless, in the event a suit for higher compensation is filed by the respondent. Learned Single Judge has only awarded an interim compensation of Rs. 1,00,000/- to save the family of the deceased from distress. In that view of the matter, there being no illegality and material irregularity in the impugned judgment, the same needs no interference.

6. We have heard learned counsel for the parties and perused the case record. The cause of death of Lokanatha (the deceased) due to electrocution

is not disputed. The appellants are responsible for supply of electricity and to maintain the towers and transmission equipments including the overhead wires in immaculate condition is also not in dispute.

In the case of case of *Shail Kumar (supra)* as relied upon by the learned Single Judge, in paragraph-7, the Hon'ble Supreme Court held as under :

> "It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human being, who gets unknowingly traped into it the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimension the managers of its supply have the added duty to take all safety measures to prevent escape of such energy or to see that the wire snapped would not remain live on the road as users of such raod would be under peril. It is no defence on the part of the management of the Board that somebody committed mischief byh siphoning such energy of his private property and that the electrocution was from such diverted line. It is the look out of the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road the electric current thereon should automatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps." *(emphasis supplied)*

7. It is thus, well-settled that a person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as 'strict liability'.

In the case of *Rylands (supra)*, the doctrine of 'strict liability' is described as under :

> "The rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does so he is prima

facie answerable for all the damage which is the natural consequence of its escape".

Learned Single Judge on a meticulous reading of the aforesaid case law and the materials available on record, directed the appellants to pay an interim compensation of Rs. 1,00,000/- to the respondent.

8. In view of the discussions made above, more particularly applying the doctrine of 'strict liability', we do not find any infirmity in the impugned judgment. Thus, the writ appeal being devoid of merit, is accordingly dismissed.

Writ appeal dismissed.

**2017 (I) ILR - CUT-768**

**INDRAJIT MAHANTY, J. & BISWAJIT MOHANTY, J.**

CRIMINAL APPEAL NO. 530 OF 2007

**SWADESH RANJAN SWAIN** .....Appellant

*.Vrs.*

**STATE OF ORISSA** .....Respondent

**(A) EVIDENCE ACT, 1872 – S.27**

**Leading to discovery – Where recovery of articles are not recovered from a hidden/concealed place, it can not be described as discovery U/s. 27 of the Act – Further if the place of recovery is easily accessible to all and Sundry then no reliance should be placed on such recovery.**

**In this case except the wearing apparels of the deceased, the dead body, rope and bicycle were not recovered from concealed place but found from open space accessible to all – So the recoveries except the wearing apparels can not be utilized against the appellant – No evidence connecting the rope with the strangulation/ligature mark – There are also serious contradictions relating to time/stage of recording of disclosure statement of the appellant, leading to discovery – Held, in the absence of any other circumstantial evidence it would not be proper to uphold the conviction of the appellant only**

**on the basis of the discovery of blood stained apparels of the deceased at the behest of the appellant.** (Paras14,15,18)

**(B) CRIMINAL TRIAL – Murder case – Conviction based on last seen theory – Long gap between the time the appellant was last seen with the deceased and the recovery of the dead body – It would be dangerous to come to a conclusion about the culpability of the accused as the possibility of others intervening can not be ruled out.**

**In this case P.W.10 stated to have seen the appellant alongwith a young boy of 14 years of age on 19.05.2004 at 11.30 am at her shop for the first time and dead body of the deceased was located around 12 noon of 20.05.2004 – During cross-examination P.W.10 admitted that she has never seen the appellant after 19.05.2004 till 24.11.2006 – Nothing on record that she had previous acquaintance with the appellant – So keeping in mind the limitation of human memory and the fact that on a particular day a shop is visited by many customers and the identification of the appellant by P.W.10 in the Court for the first time after a gap of 2 ½ years creates a doubt about such identification – Since the evidence of P.W.10 is not free from doubt and the case against the appellant has not been proved beyond all reasonable doubt, this Court grants benefit of doubt to the appellant and acquit him of the charge U/ss. 364A, 302, 201 IPC – Held, the impugned judgment of conviction and sentence is set aside.**

(Paras 16,17,19)

**Case Laws Referred to** :-

1. 1984) 4 SCC 116 : Sharad Birdhichand Sarda v. State of Maharashtra as
2. AIR 1947 P.C.67 : Pulukuri Kottaya and others -v- Emperor

For Appellant : M/s. Dr. Gangadhar Tripathy, Sr. Adv.
M.M.Das, S.Satapathy, J.Tripathy,
A.Das & S.P.Kar

For Respondent : Ms. S.Pattnaik, A.G.A.

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Date of Judgment:17.3.2017

**JUDGMENT**

***BISWAJIT MOHANTY, J.***

The present Criminal Appeal is directed against the judgment dated 1.10.2007 passed by the learned Sessions Judge, Koraput at Jeypore in Criminal Trial No.416 of 2004 convicting the appellant under Sections - 364A/302/201, I.P.C. Vide the impugned judgment, the appellant has been

sentenced to undergo imprisonment for life and to pay a fine of Rs.25,000/-, in default, further to undergo Rigorous Imprisonment for two years under Section - 302, I.P.C. No separate sentence has been awarded for the offences under Sections - 364A & 201, I.P.C.

**2.** The prosecution story in brief is that on 19.5.2004, P.W.4, who happens to be the mother of the deceased, received a phone call at 9.30 A.M. to send someone to collect rice sample from the shop of P.W.5. Accordingly, she sent her deceased son to the shop of P.W.5 and the deceased, who is aged about 14 years, went to the shop of P.W.5 by his bicycle. When the deceased son did not return, P.W.4 rang to the shop of P.W.5, who denied to have called over phone. Accordingly, P.W.4 asked him to send her son back. At 12.00 Noon, another call was received by father of the deceased, namely, P.W.6 and the caller disclosed himself to be one Mishra calling from Pottangi and demanded ransom of Rs.5,00,000/- for release of the deceased son, otherwise he (deceased son) would be murdered. The caller instructed P.W.6 to pay the aforesaid money to him in Semiliguda Engineering College premises. P.W.6 became extremely alarmed and started searching for his deceased son along with P.Ws.1,2 & 3. They went to the telephone exchange to ascertain the telephone number from which calls came to his residence. On enquiry, he came to know that the phone call came from Lucky Pay Phone Booth of Russian Market, Sunabeda. Accordingly, he went to the said telephone booth. There, one Prasanta Maharana (not examined), the owner of the telephone booth told him that the appellant booked a telephone call to his residence in the morning regarding the rice sample. On 20.5.2004, P.W.6 reported the fact before Sunabeda Police Station vide F.I.R. under Ext.8. Accordingly, P.W.11 (Investigating Officer) registered a case, took up investigation and took the appellant into custody. While in custody, the statement of the appellant was recorded vide Ext.1 as per which he confessed to have conspired with late accused Simanchal Naik and accused Chandrasen Takri to kidnap the deceased for ransom. In the statement, the appellant gave out details of the plan and how the deceased was killed. Pursuant to the statement of disclosure, the appellant led P.W.11 accompanied by P.Ws.1,2, 3 & 6 and gave recovery of the dead body, the stone over dead body, wearing apparels of the deceased, a plastic rope (M.O.VII) and a Hercules Bicycle. In course of investigation, seizures were made, inquest report was prepared, post mortem examination was held and witnesses were examined. On completion of investigation, charge sheet was filed. During course of trial, accused Simanchal Naik died and accordingly, the learned Sessions Judge on 31.8.2006, ordered that the case of the accused Simanchal Naik stood abated.

The prosecution in order to bring home charges, examined 12 witnesses including the Doctor, two I.Os. and exhibited 21 documents. From the side of the defence/appellant, none was examined.

**4.** P.W.6, who is the informant, is the father of the deceased, P.W.4 is the mother of the deceased. P.Ws.1 to 3 are co-employees and neighbours of P.W.6. P.W.5 is the owner of grocery shop in the Russian market complex. P.W.7 is the telephone booth owner, whose telephone booth was styled as "OMM SHANTI". P.W.8 is the Doctor, who conducted autopsy. P.W.9 is the Junior Telecom Officer, Telephone Exchange, Sunabeda, P.W.10 is the lady, who was managing a shop on 19.5.2004. P.Ws.11 and 12 are the Investigating Officers.

**5.** In the examination under Section 313, Cr.P.C., the appellant answered most of the questions saying that the evidence appearing against him is false. However, in reply to question no.3 relating to he being taken into custody by the police, the appellant admitted the same to be true. With regard to question nos.43,49,53 and 56, the appellant replied that he has no knowledge regarding the matters covered by these questions. The appellant also took plea of false implication.

**6.** Dr. Gangadhar Tripathy, learned Senior Advocate for the appellant submitted that there exists no eye-witness to the occurrence and thus, there is no direct evidence against the appellant. Hence, it is a case of circumstantial evidence and though the chain of circumstance is not complete, the learned trial court has gone wrong in recording a judgment of conviction against the appellant which requires to be quashed. Secondly, he submitted that in a case of present nature, the principle of last seen theory has been wrongly pressed into service by the learned trial court despite large time gap and there is no evidence worth the name to prove that the appellant made the call at 12 Noon on 19.5.2004 demanding ransom. In this context, he submitted that though it has come out in the evidence that such a call was made from Laxmi Pay Phone/Lucky pay Phone Booth, however, neither the owner nor the attendant nor anybody, who heard the conversation of the appellant making such call demanding ransom to P.W.6, has been examined. In such background, he submitted that once there is no evidence to prove that the call at 12 Noon on 19.5.2004 demanding ransom has been made by the appellant, then no motive can be attributed to the appellant in the matter. Thirdly, he submitted that so far as leading to discovery is concerned, nothing much turns on that as admittedly, the dead body of the deceased and the rope under M.O.VII were recovered from an open place as has been admitted by P.Ws.2 and 11. He

further submitted that a reading of the evidence of P.Ws.2 and 3 makes it clear that confessional statement of the appellant under Ext.1 was recorded only after return from the place of occurrence. Fourthly, he submitted that the rope that was recovered (M.O.VII) never sent to the Doctor (P.W.8), who conducted the autopsy to connect the same with mark of strangulation. This has been admitted by P.W.8 himself. Thus, according to him, the chain of circumstance in this case is not complete to warrant a conviction of the appellant. Fifthly, he submitted that with regard to answer-statements under Section 313 Cr.P.C. apart from the fact that such statements are no evidence, even otherwise the appellant is protected under Sub-section 3 of Section 313 of Cr.P.C. Lastly, he submitted that the appellant is in custody for more than 12 years.

**7.** Ms. S. Pattnaik, learned Additional Government Advocate defended the judgment of the learned trial court and submitted that the appellant has been rightly convicted under Sections - 364A/302/201, I.P.C. Further, according to her, the last seen theory has been rightly pressed into service by the learned trial court as the appellant and the deceased were last seen together at 11.00 A.M. on 19.5.2004. Further, the appellant himself led to the discovery of dead body, blood stained earth and blood stained wearing apparels of the deceased, which have been marked as M.Os. III, IV & V. Further, the appellant has also given recovery of the plastic rope under M.O. VII. According to her, P.W.8 had clearly opined that the case was one of homicide and besides this, there is ample material on record to show that it was the appellant and appellant alone, who had given the phone call demanding ransom. This coupled with the fact that the appellant had given false answers to the questions put to him under Section 313, Cr.P.C., this is a case where chain of circumstance is complete and accordingly, the impugned judgment does not require interference of this Court.

**8.** Heard learned counsel for the respective parties.

**9.** Perused the LCR and the impugned judgment.

**10.** In order to appreciate the contentions of both the parties, we have to scan the evidence.

The Doctor, who conducted Post Mortem Examination, has been examined as P.W.8. In his evidence, he clearly stated that all the injuries found on the dead body of the deceased were ante-mortem in nature, cause of death was due to asphyxia and venous congestion, which was due to manual strangulation by means of a rope. This coupled with the inquest report would

clearly show that in the present case, death was homicidal in nature and the appellant had not disputed the same. Though the rope seized by the police i.e. M.O.VII was confronted to P.W.8 during trial and though he said that the strangulation can be caused by the said rope however during cross-examination, he stated that I.O. had never sent any rope to him for his examination. He further made it clear that from the dimension of the ligature mark, the size of rope applied for causing that ligature mark can be determined. All these clearly mean that there exists no evidence worth the name to connect M.O.VII with the ligature mark.

P.W.1 is a colleague of P.W.6, who is the father of the deceased. In his examination-in-chief, P.W.1 stated that when he was in his quarters, P.W.6 came to him and informed that he got a telephone message that his son has been kidnapped by somebody and the culprits were demanding Rs.5,00,000/- as ransom to be paid to them in the Engineering College premises failing which his son would be murdered. P.W.6 further told him that his son has gone to Russian market to collect rice sample and therefrom he has been kidnapped. After hearing this, they went to the Telephone Exchange and ascertained therefrom that the telephone call was made from Laxmi Pay Phone, which has been described by P.W.6 as Lucky Pay Phone Booth. Thereafter, he along with others went to the telephone booth and ascertained that the appellant had booked that telephone call. Accordingly, they searched the nearby area, but could not trace out the deceased son. So, they proceeded to the Police Station and P.W.6 reported the matter before the Sunabeda Police Station. Further according to P.W.1, after registration of F.I.R., the appellant was brought to the Police Station and they were informed. Accordingly, they went to the Police Station and saw the appellant in custody. P.Ws.2 & 6 were there along with others in the Police Station along with P.W.1. On interrogation by the police, the appellant confessed to the crime in details, led them and the police to Landa Hill area, showed them the dead body of the deceased son of P.W.6 and gave recovery of wearing apparels of the deceased from a concealed place. Police scribed the confessional statement (Ext.1) of the appellant and made seizure list in presence of P.W.1 and others. The police also seized the rope, blood stained earth, as per the seizure list. The dead body was lying with face downwards and there was rope binding sign on the neck of the dead body. Later on, inquest report was prepared. P.W.1 proved seized shirt and pant of the appellant identified as M.Os. I & II and Chadi, T Shirt & black colour full pant of the deceased identified as M.Os. III, IV & V. He also proved the

white colour plastic rope seized as M.O.VII. In his cross-examination, P.W.1 stated that the confessional statement of the appellant was recorded by the police at 9 A.M. to 10 A.M. Further, in his cross-examination, P.W.1 stated that as the hill top was without any trees or plants and that is why it was called as 'Landa Pahad', but there were grass and small bushes. The back side of the deceased excepting the portion of neck, was visible to outside. Thus, P.W.1 is mainly a witness leading to discovery of various things. However, his statement that confessional statement was recorded at 9 A.M. to 10 A.M cannot be accepted as in the present case, F.I.R. was lodged at 11.15 A.M.

P.W.2 like P.W.1 is also a witness to the leading to discovery. In addition, in his evidence he has stated that on 19.5.2004, P.W.6 informed him that his son had been kidnapped by somebody and in spite of search, he could not be traced out. On 20.5.2004 morning, when he was starting for his duty, he got information from P.W.6 that the appellant is in police custody in connection with kidnapping of his son. On his call, P.W.2 went to Sunabeda Police Station along with P.W.1. There, upon interrogation, the appellant confessed his crime, led to Landa Pahad, showed the dead body and gave recovery of wearing apparels of the deceased, rope & blood stained earth. In his cross-examination, P.W.2 stated that on 19.5.2004 he had also searched for the deceased. Like P.W.1, he has stated that while the wearing apparels of the deceased were not visible, the dead body was visible to outside. He also stated that the father of the appellant was an employee of H.A.L., who was dead. There was no ill-feeling between him and the family of the appellant. He denied a suggestion about the existence of ill-feeling of the appellant between him and the appellant.

P.W.3 is also a witness to the leading to discovery. According to him on 20.5.2004, he heard the appellant has been caught by the police and accordingly, he went to the Police Station. P.Ws.1,2 & 6 were present in the Police Station. On interrogation, the appellant confessed to have committed the murder of the deceased, led them and the police to Landa Pahad, showed the dead body and gave recovery of wearing apparels of the deceased. In his cross-examination, P.W.3 stated that it is only after return from the place of occurrence shown by the appellant, the confessional statement was recorded so also the seizure list prepared. In his cross-examination, he further stated that in the Landa Pahad, the dead body was there in an open condition and visible to outside.

P.W.4 is the mother of the deceased. In her deposition, she stated that the deceased was aged about 14 years and on 19.5.2004 at about 9.30 A.M., someone telephoned from the shop of P.W.5 to send somebody to take rice sample. Again for the second time, alike telephone call came and by that time, the deceased was at home. Accordingly, P.W.4 sent the deceased to the shop of P.W.5 and the deceased went in his bicycle. Thereafter, she got a third telephone call from P.W.5 that he had not called the deceased over phone. So, P.W.4 told him over telephone to send back the deceased. But the deceased did not return home. P.W.6, husband of P.W.4 returned from duty at 12.00 Noon and she disclosed the above facts to him (P.W.6) and at this time a telephone call came, which was attended by P.W.6. The caller disclosed himself to be one Mishra from Pottangi and demanded Rs.5,00,000/- ransom in order to hand over the deceased son. She stated that her son was wearing M.Os.III, IV & V. Though on that day and night, search for the missing son was launched, however the same proved to be the futile. On the next day morning, it was informed that the appellant was caught by the police and had confessed about murdering her son. In her cross-examination, P.W.4 stated that on 19.5.2004, her husband-P.W.6 had not informed the police station regarding the missing son and Police had not examined her in connection with the occurrence and that she was deposing before the Court for the first time.

P.W.5 is the owner of the grocery shop, who in his evidence, made it clear that on 19.5.2004, he was present in his shop. At about 10.00 A.M., the deceased came to his shop and told that he had come to take rice sample pursuant to his telephone to his residence. But he denied to have made such a telephone call. The deceased telephoned to his mother and intimated the said fact and then he handed over the telephone to P.W.5. P.W.4 told P.W.5 to direct his son to return to home. Accordingly, P.W.5 asked the deceased to return back home. On the next day, he came to know that the appellant committed the murder of the deceased after demanding a sum of Rs.5,00,000/- as ransom from P.W.6. In his cross-examination, P.W.5 stated that the O.I.C. has examined him in connection with the case and that P.W.6 happens to be a permanent customer of his shop. He denied a suggestion that he is deposing false because of his good relationship with P.W.6.

P.W.6 is the informant and father of the deceased. In his examination-in-chief, he stated that the deceased was his only son and on 19.5.2004 at 12.00 Noon after returning from duty, his wife P.W.4 informed him that in the morning at about 9.00 A.M. after getting a call from Kumuti shop, she

sent the deceased to bring rice sample but when his son reached there, Kumuti-P.W.5 denied making telephone call to their house. Accordingly, P.W.4 asked the deceased to return back home, but he has not returned yet. At about 12.00 Noon, P.W.6 received a phone call from one Mishra of Pottangi demanding ransom of Rs.5,00,000/- for releasing his son otherwise he would face dire consequence. The person telephoning him (P.W.6) further instructed him to pay the aforesaid money to him in Semilliguda Engineering College premises and threatened him not to inform the matter either to the police or anybody else. However, P.W.6 expressed his inability to pay Rs.5,00,000/- and asked to have grace on him. Being extremely alarmed, he disclosed the fact to his friends and neighbours and went to the telephone exchange to ascertain the telephone number from which the telephone had come to his residence. P.W.1 was there with him. He ascertained that the call was booked from Lucky Pay Phone Booth of Russian market of Sunabeda to his residence. Accordingly, he went to the said telephone booth and there one Prasanata Maharana (not examined) the owner of the telephone booth, told him that the appellant had booked a telephone call therefrom to his residence in the morning regarding rice sample. Further, P.W.6 in his examination-in-chief stated about lodging of F.I.R. under Ext.8, confession made by the appellant in the Police Station, the appellant leading to the spot of occurrence and showing them the dead body and giving recovery of wearing apparels of the deceased and seizure of wearing apparels along with blood stained earth and stone. He also stated that M.Os.II, III & IV are the wearing apparels of his deceased son. In his cross-examination, P.W.6 stated that the appellant had good acquaintance with him as a neighbour and he had never misbehaved with him previously. From the telephone call received at 12.05 P.M., he guessed that it was by the appellant. However, he admitted that on 19.5.2004, he had not intimated this fact to the Police Station. He further has not stated that the police examined him in connection the case after recovery of the articles. In his cross-examination, P.W.6 also stated that the dead body was visible to outside and hill top but not from the foot of the hill.

P.W.7 is the owner of the telephone booth, i.e., "OMM SANTI". In his examination-in-chief, he stated that the appellant had booked a telephone call from his shop on 19.5.2004 morning and he also identified the appellant. He also stated that the appellant had asked for a rope for binding bag of rice and on his request, he had given the rope by cutting a portion. The balance portion of the rope has been seized by the police from the secret telephone booth. In his cross-examination, P.W.7 stated that he had no earlier

acquaintance with the appellant as he did not have any business dealing with him. On 19.5.2004, the appellant came to his telephone booth for the first time and for the second time, he saw him when police brought him to his shop. He further deposed that the police had not asked him to produce computerized bill nor also the police enquired from him as to the telephone number to which the appellant booked a call from his booth. However, he also stated that it is a fact that the cut portion of the rope seized by the police (M.O.VII) is the same rope which he used to sell in his grocery shop. He further stated that the two pieces of rope identified by him had no special identification mark on them to know that these were the same rope which he had given to the appellant and which the police seized from his shop (M.O.XI).

P.W.9, who is the J.T.O. Sunabeda, in his examination in chief, stated that on 19.5.2004, on the request made by one of his subordinate Prasant Nayak, a related brother of P.W.6, he had supplied the relevant numbers from where the phone calls were coming to the residence of P.W.6. Further in his cross-examination, he stated that the above noted things were not supplied in a properly certified manner and the police has not examined him in connection with this matter.

P.W.10, who was managing the shop and selling Cigarettes, sachets of Khaini, Chocolates, Cold Drinks, etc., in her examination-in-chief, stated that on 19.5.2004 at about 11.30 A.M., a boy of about 14 years along with another young man of 21 years came to her shop and purchased a bottle of cold drink, four sachets of Gutka and four chocolates and both of them shared the bottle of cold drink in front of her shop. The elder one amongst them paid the money and she identified the elder one. She identified the present appellant as the elder one. Two days thereafter, she came to know that the appellant has killed the young boy, who had been to the shop with him. In her cross-examination, P.W.10 admitted that she saw the appellant to whom she identified in the Court on 24.11.2006 for the first time in her shop on 19.5.2004. She did not remember the exact colour of their wearing apparels. She also admitted that she had never seen both of them which include the appellant thereafter till 24.11.2006, i.e., the date on which she was deposing as a witness. She could not say definitely as to whether the appellant had killed the deceased. Two days after 19.5.2004, the police examined her and she never stated before the police during such examination that she could identify those persons if they were shown to her.

P.W.11 is the I.O. In his examination-in-chief he mainly stated about the course of investigation and also proved the F.I.R. vide Ext.8 and confessional statement under Ext.1. In his examination-in-chief, he stated how the appellant led him and other witnesses to the top of Landa Pahad, showed dead body and gave recovery of concealed wearing apparels of the deceased. He further stated that during course of investigation, he found ligature mark on the neck of the deceased and blood to have been oozed out from the nostril, eyes and mouth. Thereafter, he prepared dead body challan and despatched the dead body to the District Headquarters Hospital, Koraput for Post Mortem examination. He also stated about the seizure of stone, which was put on the neck of the deceased, some sample earth, some blood stained earth from near the spot. He also proved the seizure list like Exts.2 to 5. He also seized plastic rope from the shop of P.W.7 as the same was said to be a part of the rope seized from the ground of Board High School and prepared seizure list vide Ext.10. He also spoke regarding arrest of the appellant along with other accused persons. He also sought opinion of the Doctor as to whether ligature mark found on the neck of the deceased was possible by a rope and whether such ligature injury contributed to the death of the deceased. He also proved Materials Objects. In his cross-examination, he admitted that he did not visit the spot wherefrom the deceased was said to have been kidnapped. He apprehended the appellant from the Timber depot of OSIC, Sunabeda. He further stated that in the Case Diary, he mentioned about recording of disclosure statement of the appellant after his apprehension. But he had not mentioned time of recording of such statement. With regard to recovery of the dead body, he stated that the dead body was visible to the naked eye and it was not kept concealed. He also admitted that he had not tried to ascertain the telephone from which the incoming calls were given to the telephone of the deceased immediately past to the date of kidnapping of the deceased. He also stated that it is a fact that while making the enquiry, he has not mentioned the thickness of the rope seized in his query to the Doctor seeking his opinion with regard to the ligature injury found on the neck of the deceased. He also admitted that the seized bicycle was lying in an open place, which was accessible and visible to all and that long rope, which was seized from the ground was also lying in an open and accessible place. In his cross-examination, he further stated that his investigation revealed that the appellant had made telephone call to the house of the deceased but he had not collected any computerized bill from the STD booth from where the telephone call was made evidencing the same. He also admitted that he had not collected details with regard to telephone calls made

to the house of the deceased on the date of kidnapping from the telephone exchange during investigation of the case.

P.W.12, who is the other I.O., in his examination-in-chief, has stated that after taking charge of investigation, he tested all the witnesses examined by P.W.11 and also examined P.W.10. He received Post Mortem examination report and then made a prayer to the learned S.D.J.M., Koraput to send the seized exhibits to R.F.S.L., Berhampur for chemical examination. Ext.19 in three sheets contain the Chemical Examination Report. During course of investigation, he gave requisition to the J.T.O., Sunabeda on 4.9.2004 to give call details of telephone no.222828 of P.W.6 for the date 19.5.2004. Ext.20 is the carbon copy of the requisition. Ext.21 is the report of the J.T.O. received on the said requisition. A perusal of Ext.21 dated 11.9.2004 shows that the J.T.O. intimated that there existed no provision of automatic recording of incoming calls of a particular telephone number. Moreover, the details of calls of telephones are available only for two months. So the details of the telephone no.222828 for the date mentioned were no more available in the exchange. In his cross-examination, P.W.12 stated that P.W.10 was not examined by P.W.11. The house of P.W.10 is nearer to the spot and by the time he examined P.W.10, the appellant was in custody. It is a fact that P.W.10 had not named the appellant in her statement. He denied the suggestion that in order to implicate the appellant, P.W.10 set her as a witness of circumstances against the appellant.

**11.** In such background, we have to see whether the appellant was the author of crime as has been held by the learned trial court. Before beginning our analysis, we think it proper to refer to the principles relating to appreciation of circumstantial evidence as has been laid down by the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda** v. **State of Maharashtra** as reported in **(1984) 4 SCC 116** in the following manner:

It has been made clear by the Hon'ble Supreme Court that the following conditions must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence;

> "(*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court

in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(*3*) the circumstances should be of a conclusive nature and tendency,

(*4*) they should exclude every possible hypothesis except the one to be proved, and

(*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

**12.** From a scanning of evidence, it is clear that most of the links are missing here to complete the chain of circumstantial evidence. This would be clear from the following analysis of evidence.

**13.** Here P.W.4 speaks about four telephone calls on 19.5.2004. The last telephone call which came around 12.00 Noon, which was attended by her husband P.W.6, indicated that the caller was one Mishra from Pottangi, who demanded Rs.5,00,000/- ransom to hand over the deceased son. Though P.W.6 in his cross-examination stated that from the tone of the person, he could guess that it was the appellant's call, however, there remains no legal evidence to connect the appellant with the said call. It is well settled that suspicion however strong cannot take the place of evidence. Rather P.W.6 in his cross-examination has stated that appellant had good acquitance with him as a neighbour and has never misbehaved with him previously. Further, the evidence of P.Ws.1 & 6 show that after the said call, on enquiry, they ascertained that it came from Laxmi Pay Phone Booth (according to P.W.1) and Lucky Pay Phone Booth (according to P.W.6). However, not a single person – neither the owner nor attendant of the owner nor anybody else who has heard the conversation while such a call was made to the house of P.W.6 has been examined to prove that it was the appellant and the appellant alone,

who made the call demanding ransom giving out a threat that in case of non-payment, the consequence would be dire. Though P.W.6 spoke about meeting the owner of the said pay phone booth, namely, Prasanta Maharana, however, said Prasanta Maharana has not been examined by the prosecution. Even otherwise, as per the evidence of P.W.6, said Prasanta Maharana only told to P.W.6 that the appellant had booked a telephone call therefrom to his residence in the morning regarding rice sample. A perusal of evidence of P.W.4 would show that such call relating to rice sample came at around 9.30 A.M. in the morning. No doubt, that may be a false call, but with regard to the relevant call, which came at 12.00 Noon, the details of the same have not been proved so as to connect the appellant with that call. As indicated earlier, P.W.11 has also admitted in his cross-examination that he had not collected any computerized bill from the STD booth from where the telephone call was made evidencing the same and that he has also not collected the details with regard to telephone calls made to the house of P.W.6 on the date of kidnapping of his son from telephone exchange during investigation of this case. Only an attempt was made by P.W.12 for getting the details but vide Ext.21, it was made clear to the investigating authority that such details are no more available in the exchange as in the meantime, more than two months have elapsed. In any case as indicated earlier none has been examined to prove about involvement of the appellant in making a call at 12.00 Noon demanding ransom for releasing of son of P.W.6 from the Laxmi Pay Phone Booth/Lucky Pay Phone Booth. Once the involvement of appellant is not proved in making this call at 12.00 Noon demanding ransom, consequently there remains no evidence worth the name with regard to motive of the appellant in committing the crime. The evidence of P.W.7 with regard to telephone call also nowhere helps the prosecution as he spoke about a telephone call being made by the appellant in the morning of 19.5.2004. Here, we are mainly concerned with the telephone call made at 12.00 Noon. P.W.7 is also silent on the subject matter of such telephone call. Even with regard to morning phone call, P.W.7 has not given any details of the conversation made by the appellant. He also does not prove that such phone call was made by appellant to the residence of P.W.6 with the help of computer machine paper roll.

So far as leading to discovery is concerned let us first refer to the leading decision on the subject i.e. **Pulukuri Kottaya and others –v- Emperor (AIR 1947 P.C.67).** After quoting Section-27 of the Evidence Act, it lays down as follows:-

"X X X X

Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that is practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S.26, added by S.27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact

> discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered in very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant. (emphasis supplied)
>
> X X X X"

**14.** In the present case with regard to dead body, P.Ws.2 and 3 have stated that they found the dead body to be visible from outside. P.W.3 in his cross-examination specifically admitted that the dead body was found in an open condition. P.W.11 in his cross-examination has admitted that the dead body was not concealed but was visible to naked eye. With regard to the rope (M.O.VII) seized from the ground of Board High School, he stated that the same was also lying in an open and accessible place. With regard to seizure of bicycle, he stated that it was also lying in an open space, which was visible and accessible to all. P.W.2 in his cross-examination admitted that such type of cycle and rope are commonly available in the market. Since the above noted recoveries are not from some place of concealment, such recoveries are of little use and cannot be utilized against the appellant except the recoveries relating to wearing apparels of deceased discovered from a concealed place. It may be noted that recovery of any article cannot be described as discovery under Section-27 of the Evidence Act, where it is not recovered from a hidden/concealed place and which could have been found out in normal course of investigation. It is settled that if the place of recovery is easily accessible to all and sundry then no reliance should be placed on such recovery. In such background, all the above noted recoveries except wearing apparels of deceased cannot be utilized against the appellant. Secondly, besides the above there also exists serious contradiction relating to time/stage of recording of disclosure statement of the appellant under Ext.1 leading to

discovery. P.W.1 says that after lodging of F.I.R., police called the appellant and on their interrogation, the appellant confessed and led to recovery. However, in cross-examination he says that confessional statement of the appellant was recorded at about 9 A.M. to 10 A.M. Here it is important to note that the F.I.R. was registered at 11.15 A.M. under Ext.8. P.W.3 in his cross-examination states that after their arrival the appellant was interrogated. On his reply to the interrogation, he was taken to show the occurrence spot soon after without recording his confessional statement. It is only after return from the place of occurrence shown by the appellant, the confessional statement was recorded. Similarly, P.W.6 in his cross-examination states that he does not remember perfectly where the police scribed the confessional statement of the appellant-in the police station or in the hill top. He has also stated that he was examined by the police after recovery of the articles. P.W.11 in his examination-in-chief says he apprehended the appellant at 11.30 and during course of investigation he gave the information relating to dead body, rope, bi-cycle and concealed wearing apparels of deceased. Accordingly, he recorded the statement under Ext.1 and thereafter the appellant led to recovery. In his cross-examination he has admitted that he has not mentioned about the time of recording of disclosure statement. All these thrown a doubt about the timing of information received from the appellant and as to whether such information preceded the discovery.

**15.** Further, with regard to the rope, i.e., M.O.VII, which was seized from an open and accessible place of Board High School ground, though the said rope was confronted to P.W.8, however, the said rope was not sent to P.W.8 while sending query for its examination. As admitted by P.W.11 in his cross-examination, while sending querry, he has also not mentioned about the thickness of rope for seeking opinion of the doctor with regard to injury on the neck. P.W.8 in his cross-examination, admitted that he could not determine the size of the rope applied to the injury in the present case. The dimension of the ligature mark is dependant upon the size of the rope applied for causing that ligature mark. In other words, since the said rope was not supplied to him, though he stated while being confronted that strangulation can be caused by this rope, however, there is no evidence to show that it is the said rope under M.O.VII, which was used to cause the ligature mark on the body of the deceased. In such background, the deposition of P.W.7 connecting the rope seized under M.O.VII with the rope seized under M.O.XI and so also the S.F.S.L. report dated 21.8.2004 under Ext.19 connecting both the seized ropes are of little value.

**16.** Now coming to the last seen theory, it is the evidence of P.W.10 that she saw the appellant along with a young boy of 14 years of age on 19.5.2004 at 11.30 A.M. in her shop for the first time. In the present case, the dead body of the deceased was located around 12.00 Noon of 20.5.2004. This would be clear from the evidence of P.W.2 and the inquest report under Ext.6. It may further be noted in the present case that F.I.R. was lodged at 11.15 A.M. of 20.5.2004. Thus, there exists a long gap between the time, the appellant was last seen with the deceased and the recovery of dead body. It is well settled that when the time gap is long, it would be dangerous to come to a conclusion about the culpability of the accused as the possibility of others intervening cannot be ruled out. Here as indicated earlier, other necessary corroborative pieces of evidence are also absent. Even otherwise, the evidence of P.W.10 is not free from doubt. She had identified the appellant for the first time in the Court on 24.11.2006 after a gap of 2½ years. It may be noted here that as per her evidence, she saw the appellant for the first time on 19.5.2004 in her shop. In her cross-examination she admitted that she has never seen appellant after 19.5.2004 till 24.11.2006. There is nothing to show that she had previous acquaintance with the appellant or knew him otherwise. Rather in her cross-examination she has stated that she never told the police during investigation that she could identify the appellant. Probably for this reason T.I. parade has not been conducted in the present case. In such background, keeping in mind limitation of human memory and the fact that on a particular day a shop is visited by so many customers, the identification of appellant by P.W.10 in the Court for the first time after a gap of 2½ years creates a doubt about such identification.

**17.** In such background, we have no hesitation in accepting the contention of Mr. G.D. Tripathy, learned Senior Advocate for the appellant that chain of circumstance in the present case is incomplete and thus, the case against the appellant has not been proved beyond all reasonable doubt. The learned trial court has given unnecessary emphasis on the morning call ignoring that there exists no evidence worth the name for proving the conversation made during the said call. He has also missed the fact that there exists no evidence to prove the call details made at around 12 Noon demanding money and holding out threat. With regard to seizure of plastic rope, i.e., M.O.VII, the learned trial court has glossed over the fact that the said rope was recovered from an open place which was accessible to all and there exists no evidence as discussed earlier connecting the said rope with the strangulation/ligature mark. With regard to last seen theory relied upon by the learned trial court,

we have already indicated on account of large time gap, in the present case, the said theory cannot be relied upon.

**18.** Submissions of Ms. Pattnaik, learned Additional government Advocate on last seen theory, leading to discovery of various things have already been taken care above and the same requires no repetition. Only on the basis discovery of blood stained apparels of deceased at the behest of appellant and some incorrect answers to questions under Section 313 Cr.P.C. and in absence of any other circumstantial evidence against the appellant, we do not think it would be proper to uphold the conviction of the appellant keeping in mind the ratio of **Sharad Birdhichand Sarda** (supra). In any case falsity of answers under Section 313 Cr.P.C. can not take place of the proof of facts, which the prosecution is bound to establish in order to succeed.

**19.** For all these reasons, we grant the benefit of doubt to the appellant and acquit him of the charge under Sections-364A/302/201, I.P.C. Accordingly, the order of conviction and sentence dated 1.10.2007 passed by the learned Sessions Judge, Koraput at Jeypore in Criminal Trial no.416 of 2004 is set aside. The appellant-Swadesh Ranjan Swain be set at liberty forthwith, if his detention in jail custody is not required in connection with any other criminal case. The Criminal Appeal is allowed.

Appeal allowed.

**2017 (I) ILR - CUT- 786**

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

CRIMINAL APPEAL NO. 01 OF 2001

**GAJENDRA BHOI** ……Petitioner

*.Vrs.*

**STATE OF ORISSA** …….Opp. Party

**CRIMINAL TRIAL – Murder case – Due to absconding of the appellant, there was split up trial in respect of four other accused persons who were acquitted – Evidence of P.Ws. 1, 3 & 4 is consistent that the appellant had attacked the deceased with a knife – Their evidence is corroborated with the evidence of the doctor (P.W.2) – There was massive hemorrhage to the left internal carotid artery,**

**which was sufficient to cause death of the deceased – Appellant cannot take the plea that accused persons in the split up trial are acquitted as they did not share the common intention with the present appellant in killing the deceased – Held, there can not be any doubt that the present appellant is the author of the crime, hence this court is not inclined to interfere with the impugned judgment of conviction and sentence – Appeal is dismissed.** (Paras 13,14)

**Case Law Referred to** :-

1. A.I.R. 1983 S.C. 284 : Jawahar Lal and another V. State of Punjab
2. 1984 (I) OLR 20 : Lachhman Dhublia Vrs. State,
3. (2013) 56 OCR 269 : S.K.Salim @ Pyara Vrs. State.

For Petitioner : Mr. D.P.Dhal
For Opp. Parties : Addl. Govt. Adv.

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Date of Judgment : 07.04.2017

**JUDGMENT**

***S. PANDA, J.***

This Criminal Appeal is directed against the judgment dated 20.11.2000 passed by the learned Addl. Sessions Judge, Sonepur in Sessions Case No. 16/10 of 2000 in convicting the appellant for commission of offence under Section 302 of the Indian Penal Code and sentencing him to undergo Imprisonment for life.

2. The prosecution case, in brief is that on 23.04.1997 at about 5.00 P.M. the present appellant-Gajendra Bhoi along with one Chakadola Gura came to the liquor *Bhati* namely "*Gatarkela country liquor distillery and sales shop*" wherein the deceased-Kasinath Prasad was working as Manager and Ramavatar Prasad (P.W.4) as the *gadidar*, and they asked P.W.4 to give them liquor free of cost. P.W.4 when denied to give them liquor free of cost, they became angry and picked up a quarrel with him. However, one Santosh Sandh who was then working in a nearby sugarcane field intervened and was able to persuade the present appellant and his accomplice to leave the place. Shortly after this incident the present appellant again came to the *bhati* being accompanied by Chakadola and quarreled with P.W.4, the *gadidar* and also assaulted P.W.4, however they were again persuaded by Sanotsh Sandh and one Ganesh to leave the place. At that time Kasinath the deceased was not present in the *bhati* having gone to Sonepur for some work. While going away from the *bhati*, the present appellant had threatened P.W.4 to see him. Some time thereafter the deceased Kasinath Prasad, the Manager of the *bhati*

returned from Sonepur and sat on a chair in front of the *bhati* house. At about 7.30 P.M. on that day while the deceased was sitting on the chair, the present appellant and his four accomplices, namely Subal, Beda, Chakadola and Trilochan came to the *bhati* and of them Subal gave a 100 rupee note to P.W.4 and asked him to give liquor. P.W.4 received the money and went inside the *bhati* to bring liquor. Beda Jena and Subal while followed P.W.4, the present appellant and his friend Chakadola stood near the deceased Kasinath Prasad who was then sitting on a chair. While P.W.4 was bringing liquor, he heard the deceased Manager, Kasinath Prasad shouting as "*CHURA MARDIA, CHURA MARDIA*". Kartik Bagarty (P.W.3) a cook under the deceased Kasinath and Akrura Guru (P.W.1) a labourer who were present inside the *bhati* at that time, they also heard the deceased shouting "*CHURA MARDIA CHURA MARDIA*". All of them came out immediately and found the deceased Manager was lying in a pool of blood in front of the main gate of the *bhati* house, who died soon.

Immediately after such occurrence, P.W.4 straightway headed to Sonepur P.S. where he reported that in the evening at 7.30 P.M., while he was in the *bhati* he heard the deceased Manager shouting "*CHURA MARDIA CHURA MARDIA*" and when he came out, the deceased was lying dead in front of the main gate of the *bhati* house. Shortly after such oral report, which was reduced to writing by the O.I.C., the O.I.C. reached the spot and investigated into the matter. He noticed a stab wound on the left side neck of the deceased, besides one abrasion near the left axial. The body of the deceased was sent to district headquarters hospital, Sonepur for autopsy. Akrura Guru (P.W.1), Kartika Bagarty (P.W.3) and Ramavatar Prasad (P.W.4) told the Investigating Officer (P.W.5) that the present appellant-Gajendra along with his four accomplices were seen running away from the place of assault shouting after the stabbing of the deceased. All the four accomplices were arrested, while the present appellant remained absconded. After completion of investigation, charge-sheet was submitted finding sufficient evidence against the appellant to have committed offence under Sections 302/34 I.P.C. As the present appellant was absconded, the case record was split up against him and the trial in respect of other accused persons were concluded. In the instant case, the appellant surrendered before the Court below on 23.04.2000 and thereafter the split up case was taken up.

3. The appellant's defence plea was one of complete denial.

4. In order to bring home the charge, during trial the prosecution examined as many as 5 witnesses and exhibited 7 documents. On the other

hand, the defence had neither examined any witness nor exhibited any documents. The prosecution also proved five Material Objects from M.O.I to M.O. V.

5. The learned Addl. Sessions Judge after threadbare discussion of the materials available on record found that it was the present appellant who had killed the deceased with a knife while the deceased was sitting outside near the door of the *bhati.* He has also given the finding that all the accomplices of appellant had gone to the *bhati* at a time, but none of them had done overt act nor had participated in assaulting the deceased. Accordingly, he acquitted all the four accomplices from the offence of murder stating that they had not shared their common intention with the present appellant in killing the deceased. Therefore, the Trial Court convicted the present appellant for commission of the offence punishable under section 302 IPC and sentenced him to undergo imprisonment for life.

6. Mr. Dhal, learned counsel for the appellant submits that the impugned judgment of conviction and sentence is based on surmises and conjectures. He further submits that the Trial Court at paragraph-9 of the judgment referred to the split up trial in respect of four other co-accused persons who had been acquitted on the finding that they had not been participated in assaulting the deceased. On the said impression he has considered the evidence on record and convicted the appellant, which is illegal and liable to be set aside and the appellant is entitled for acquittal. In alternative, learned counsel for the appellant submits that in case the appellant has assaulted the deceased, he has only dealt a singular blow. Thus the offence is not coming under section 302 I.P.C., rather under Section 304, Part II of the I.P.C and as such lesser sentence may be imposed. In support of his contention he has cited the decisions reported in ***A.I.R. 1983 S.C. 284, Jawahar Lal and another V. State of Punjab, 1984 (I) OLR 20, Lachhman Dhublia Vrs. State, (2013) 56 OCR 269, S.K.Salim @ Pyara Vrs. State***.

7. Learned Additional Government strongly contended that there are corroborative evidences of P.W.1, 3 and 4 that the appellant had given the stabbing in the neck of the deceased manager with a knife. According to him, the Doctor (P.W.2), who conducted the autopsy also corroborated with the evidence of the witnesses about one Stabbing injury on the body of the deceased, which is sufficient to cause death of a person. The sentence imposed on the appellant has been properly assessed by the Trial Court and as such, the same calls for no interference by this Court.

8. 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 eye witnesses, i.e. P.Ws. 1, 3 and 4, so also the statements of the P.W. 2, the Doctor, who conducted the post mortem examination.

9. P.W.1, who is the Ex-Manager of Gatarkela liquor *bhati* and was present in the liquor shop at the time of occurrence had deposed in his examination-in-chief that he had been to *bhati* to take his labour charge from the deceased Manager. When he reached the *bhati* he saw the Manager was sitting in front of the liquor *bhati* on a chair and was gossiping with the Gadidar (P.W.4) and one Kartika Bagarty (P.W.3). At that time, Subal Mali came to the *bhati* along with 4 others including the present appellant. Reaching their Subal handed over a 100 rupee note to the *gadidar* and told him to give liquor. On receipt of the money when *gadidar* went inside the *bhati* to bring liquor, he, Subal, Kartik and Beda followed P.W.4. While they were still inside the *bhati,* they heard the Manager shouting *"CHURA MARDIA CHURA MARDIA"*. Hearing the shout they all came out of the *bhati* where the deceased was sitting and saw there the appellant-Gajendra running away from the *bhati* along 4 others namely Subal, Beda, Chakadola and Trilochan, while the Manager was lying injured on the chair having sustained bleeding injuries on his neck. Shortly after the stabbing Manager died on the spot while the gadidar reported the matter at Sonepur police station.

10. P.W.3, who was working as a cook in the liquor *bhati* and was present in the liquor *bhati* at the time of occurrence had deposed in his examination-in-chief that on the date of occurrence one Subal and Beda came to the *bhati* and of them Subal handed over a 100 rupee note to the *Gadidar* of *bhati* to give him liquor. *Gadidar* took the money and went inside *bhati* to bring liquor being followed by P.W.1 and accused Beda and Subal. At that point of time, he was in the kitchen room. Shortly after the *Gadidar* went inside the *bhati* to bring wine at that point of time he heard the deceased Manager Kasinath shouting as *"CHURA MARDIA CHURA MARDIA"*. Hearing such shout, he along with *Gadidar* and others when came out of the *bhati* saw that the deceased Manager lying injured on the chair in front of the *Gadi*. He further found that deceased Manager's neck was cut and there was profuse bleeding from the wound. At that point of time, he further saw that the

present appellant-Gajendra was running away from the *bhati* along with Subal, Beda and Trilochan. Being stabbed on his neck the Manager Kasinath died on the spot.

11. P.W.4, who is the *gadidar* of the *bhati* and was the informant, in his examination-in-chief had deposed that on 23.04.1997 at about 5 P.M. while he was present in the *bhati,* he saw the present appellant came to *bhati* along with one Chakadola Guru to take liquor. Appellant-Gajendra reaching the *bhati* asked him to give liquor (daru) free of cost. He told him liquor will be supplied on payment of cost. The appellant thereafter picked up quarrel with him. One local man working in the sugarcane field near the *bhati* came and pacified the matter and sent the appellant out of the *bhati* premises. Shortly after leaving the *bhati* premises the appellant again came to *bhati* and picked up quarrel with P.W.4. Thereafter he left the *bhati* with threatening for dire consequence. On the same day at about 7.30 P.M. appellant came along with four other persons, namely, Chakadola, Subal, Beda and Trilochan. Out of them Subal handed over him a 100 rupee note and demanded for liquor (daru). On receipt of the money when he went inside the *bhati* to bring liquor, Subal and Beda followed him while the appellant stood near the deceased Kasinath Prasad who was then sitting near the door of the *bhati*. While he was just bringing the liquor at that time he heard Kasinath shouting "*CHURA MARDIA CHURA MARDIA"*. Hearing the shout of Kasinath, he along with P.W.1 and P.W.3 immediately rushed towards Kasinath where they saw the neck of Kasinath was cut. There was profuse bleeding from his neck. P.W.1 and P.W.3 were with him at the time of occurrence. Seeing brutally injured, P.W.4 caught hold of Kasinath and wrapped a *gamucha* (napkin) around his neck to check bleeding, but in vain. In the meantime appellant fled away from the *bhati* premises along with his four associates. Subsequently Kasinath died on the spot. Thereafter he lodged an oral report at Sonepur P.S. stating that Kasinath was murdered by the appellant and his four associates. His report was reduced to writing by police. In the cross examination, P.W.4 has stated that when the deceased told that "*CHURA MARDIA CHURA MARDIA"* he saw the appellant taking out the knife from the neck of the deceased and fled away from the spot with his associates.

12. P.W.2, the doctor who conducted the post-mortem examination over the dead body found one injury over the left side of his neck by sharp cutting weapon. He also found one abrasion near the left axial of the deceased. Both the above injuries are ante-mortem in nature. The cause of death of the deceased was due to shock and massive hemorrhage due to the injury to left

internal carotid artery. The cause of death was due to injury to major venet (internal carotid artery, left), shock and massive hemorrhage. Death is homicidal in nature.

13. On close scrutiny of the evidences of the witnesses as indicated above, it is evident that blow of knife in the neck of the deceased has been corroborated by P.W.1, 3 and 4. According to the evidence of P.W.4, no one was there along with the deceased at the time of occurrence since all the accomplices had been inside to the *bhati* along with him to bring liquor. Due to the previous quarrel on that date, the appellant had come prepared. The evidence of the doctor who conducted autopsy over the dead body is consistent with the evidence of the witnesses so far as stabbing in the neck of the deceased is concerned. According to the Doctor, there were only two injuries on the body of the deceased out of which, one was stabbing injury made by sharp pointed cutting weapon by which there were massive hemorrhage to the left internal carotid artery and the same was sufficient to cause the death of the deceased. The other one is abrasion which might have been caused due to rubbing against a hard and rough surface.

14. As to the decisions cited by the learned counsel for the appellant, on a reading of the same, it is found that in the case of ***Jawahar*** as well as ***Lachhman (supra)*** there are solitary blow of knife by the accused following trivial quarrel and single blow inflicted with knife in course of sudden quarrel, therefore the Court has convicted under Section 304, Part II of the I.P.C. However in the case of ***S.K.Salim (supra)*** successive blows were given and the deceased succumbed to injuries after 15 days therefore the conviction under Section 304, Part I of the I.P.C. In the present case, since there was no sudden quarrel or hit of passion the decisions cited on behalf of the appellant as discussed in the above paragraph is not applicable to the present case.

Taking all these things into account, there cannot be any doubt that the present appellant is the author of the crime. In such background, there is no force in the arguments advanced by the learned counsel for the appellant to interfere with the impugned order. Thus, this Court is not inclined to interfere with the impugned judgment of conviction and sentence.

The Criminal Appeal stands dismissed accordingly.

15. The appellant was released on bail pursuant to the order of this Court dated 06.02.2008. In view of the dismissal of the appeal, the bail bond so furnished be cancelled and the appellant be taken into custody forthwith.

Appeal dismissed.

**2017 (I) ILR - CUT-793**

**S. C. PARIJA, J.**

W.P.(C) . NO. 15989 OF 2016

**BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD.** .…….Petitioner

*.Vrs.*

**GOURIMANI MISHAR @ MANORAMA MISHRA & ORS.** ……..Opp. Parties

**MOTOR VEHICLES ACT, 1988 – Ss. 166, 168**

**Composite negligence – Joint tort-feasors – Liability of – Right of the claimant to recover compensation – Law is well settled that even in case of composite negligence, the claimants are entitled to sue both or any one of the tort-feasors and recover the entire compensation as the liability of joint tort-feasors is joint and several – Further, in a case of composite negligence, the apportionment of compensation between the two tort-feasors vis-à-vis the claimants is not permissible – He can recover at his option the whole damages from any one of them – However, where both tort-feasors have been impleaded as parties to a claim proceeding, the Tribunal is required to determine the inter se extent of their negligence for the purpose of apportionment of the liability amongst such tort-feasors.**

**In this case, Insurance Company filed petition under Order 1, Rule 10, C.P.C. to implead the owner and insurer of the other vehicle responsible for the accident which was rejected by the learned Tribunal – Hence the writ petition – Held, there is no infirmity in the impugned order passed by the Tribunal rejecting the application of the Insurance Company, warranting interference by this Court.**

**Case Law Referred to** :-

1. 2015 (2) T.A.C. 677 (SC) : Khenyei -V- New India Assurance Co. Ltd. & Ors.

For Petitioner : M/s.G.P.Dutta

For Opp. Parties : M/s. P.K.Mishra, P.P.Mishra

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Date of order: 08.30.03.2017

**ORDER**

***S.C.PARIJA, J.***

Heard learned counsel for the parties.

This writ petition has been filed by the Insurance Company challenging the order dated 09.3.2016, passed by the 1st Motor Accident

Claims Tribunal, Puri, in MAC No.299 of 2012, rejecting the application of the petitioner-Insurance Company filed under Order 1 Rule 10 C.P.C., to implead the owner and insurer of the other vehicle (Travera Car) No.OR-13-G/2426, as parties to the claim petition.

Learned counsel for the petitioner-Insurance Company submits that as there are materials to show that the other vehicle (Travera Car) No.OR-13-G/2426 was also responsible for the accident and it is a case of composite negligence, the owner and insurer of the other vehicle (Travera Car) are necessary and proper parties to the proceeding. Learned counsel for the petitioner has relied upon a decision of the apex Court in ***Khenyei –vrs– New India Assurance Co. Ltd. and others***, 2015 (2) T.A.C. 677 (S.C.), wherein the Hon'ble Court has held that in case all the joint tort-feasors have been impleaded as parties to the proceeding, it is open to the Court/Tribunal to determine the extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort-feasors is only for the purpose of their inter se liability, so that one may recover the sum from the other tort-feasor.

Learned counsel for the claimants while supporting the impugned order submits that the learned Tribunal, on the basis of the evidence available on record, having come to a clear finding that the driver of the offending Tractor-Trolley, which stood insured under the present petitioner, was rash and negligent in causing the accident, the plea of the petitioner-Insurance Company regarding composite negligence is erroneous and misconceived. It is submitted that even in a case of composite negligence, it is neither mandatory nor incumbent for the claimant to implead both the tort-feasors as parties to the claim proceeding. The liability of the joint tort-feasors being joint and several, the claimant may choose to sue both or any one of them to recover the entire compensation amount.

On a perusal of the impugned order, it is seen that though the informant, who is the wife of the deceased, had lodged the FIR regarding the accident, admittedly she was not an eye witness to the occurrence. Learned Tribunal has come to find that the Investigating Officer, on completion of the investigation, has submitted charge-sheet against the driver of the offending vehicle (Tractor-Trolley) Nos.OR-13-B/4497 and OR-13-B/4498, with regard to his rash and negligent driving, which resulted in the death of Rabinarayan Mishra. On the basis of such findings, learned Tribunal has proceeded to reject the application of the petitioner-Insurance Company for impleading the owner and insurer of the other vehicle as parties to the proceeding.

Law is well settled that even in case of composite negligence, the claimants are entitled to sue both or any one of the tort-feasors and to recover the entire compensation, as the liability of joint tort-feasors is joint and several. Further, in a case of composite negligence, the apportionment of compensation between the two tort-feasors vis-a-vis the claimants is not permissible. He can recover at his option the whole damages from any one of them. Therefore, only where both tort-feasors have been impleaded as parties to a claim proceeding, the Court/Tribunal is required to determine the inter se extent of their negligence for the purpose of apportionment of the liability amongst such tort-feasors. This, in fact is the ratio laid down by the apex Court in ***Khenyei–Vrs– New India Assurance Co. Ltd. and others*** *(supra)*, which has been relied upon by the petitioner-Insurance Company.

For the reasons as aforestated, I do not find any infirmity in the impugned order of the learned Tribunal, so as to warrant any interference. Writ petition being devoid of merits, the same is accordingly dismissed.

Writ petition dismissed.

**2017 (I) ILR - CUT-795**

**B.K. NAYAK, J.**

CRLMC NO. 2010 OF 2016

**PURUSHOTTAM LAL KANDOI & ANR.** ……..Petitioners

*.Vrs.*

**STATE OF ORISSA** …….Opp. Party

**CONSTITUTION OF INDIA, 1950 – ART. 21**

**Delay in criminal proceeding – Violation of right to speedy trial – Occurrence took place in 1987-88 but the same is still pending even after 29 years – Order sheet of the case record indicates lackadaisical attitude of the presiding officers of the trial court – There were twenty adjournments for non-attendance of prosecution witnesses – No effective steps taken for procuring their attendance – So delay in trial cannot be attributed to the accused persons, rather it would be sheer harassment for them – Violation of petitioners constitutional right of speedy trial – So continuance of the criminal proceeding further will be abuse of the process of the court – Held, Vig. G.R. case No. 52 of 1992 pending on the file of the learned SDJM (S) Cuttack is quashed.**

(Paras 13 to18)

**Case Law Referred to** :-

1. (1998) 7 SCC 507 : Raj Deo Sharma Vrs. State of Bihar
2. (1999) 7 SCC 604 : Raj Deo Sharma (II) Vrs. State of Bihar.
3. (1996) 4 SCC 33 : Registered Society Vrs. Union of India
4. (2002) 4 SCC 578 : P. Ramachandra Rao Vrs. State of Karnataka
5. (1992) 1 SCC 225 : A. R. Antulay Vrs. R. S. Nayak
6. (2009) 3 SCC 355 : Vakil Prasad Singh Vrs. State of Bihar

For Petitioners : M/s. B.P.Tripathy, D.Pradhan & G.S.Das
For Opp. Party : Mr. P.K.Pani, A.S.C.

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Date of hearing : 06.03.2017
Date of judgment: 07.04.2017

**JUDGMENT**

***B.K.NAYAK, J.***

This petition under Section 482, Cr.P.C. has been filed to quash the proceeding in Vig. G.R. Case No.52 of 1992 pending before the learned S.D.J.M.(S), Cuttack on the ground mainly of inordinate delay in trial and disposal of the said case.

2. During the pendency of this petition, petitioner No.2 Sri Bimal Kumar Kandoi expired and the G.R. Case in respect of him has abated by order dated 23.12.2016 passed by the Trial Court.

3. The aforesaid Vigilance G.R. Case was initiated on the basis of F.I.R. lodged by Inspector of Police Vigilance, C.D., Cuttack dated 21.12.1992 alleging that the petitioners and others being the Board of Directors of M/s. Aditya Steel Industries Limited supplied steel of various sizes to Paradeep Phosphates Limited and had submitted bills claiming ` 3,22,461.61p. towards octroi tax showing the same to have been paid to the Municipality during the year, 1987-88 and received payment from Paradeep Phosphates Limited ( "in short PPL" ). But on inquiry it was found that M/s. Aditya Steel Industries Limited did not deposit the octroi tax amount which the petitioners' received from PPL. It was, therefore, alleged that they have committed offences under Sections 420/406/34, I.P.C.

4. Learned counsel for the petitioners submitted that the prosecution against the petitioner was lunched in the year, 1992 for an alleged occurrence of 1987-88 and though charge-sheet was submitted in the year, 1994, five years thereafter the trial started and in November, 1999 prosecution witness No.1 (P.W.1) was examined. Thereafter, P.W.2 was examined and cross-

examined and on 01.03.2001 the Manager, Accounts of PPL was examined as P.W.3. Nearly a year thereafter, the Assistant Manager, Project of PPL was examined as P.W.4 and, thereafter, only the Investigating Officer was left to be examined, but since February, 2002 the prosecution failed to examine any further witness, though the petitioners used to attend the Court and as such they are facing immense harassment both physically and mentally.

5. It is stated that only on 06.02.2015, the petitioners could not be able to appear personally before the Trial Court because of a wrong date noted by their counsel in his diary, as a result of which the Trial Court passed order issuing N.B.W. against the petitioners. Challenging the said order petitioners filed CRLMC No.2962 of 2015 before this Court under Section 482, Cr.P.C., wherein this Court directed the petitioners to surrender before the Trial Court and accordingly the petitioners surrendered on 09.07.2015 and were released on fresh bail. Thereafter, though the petitioners approached the Trial Court for expeditious hearing and disposal of the case, no further prosecution witness was examined inspite of issuance of summons to some charge-sheet witnesses. On the other hand the prosecution has filed a petition on 14.10.2015 under Section 311, Cr.P.C. praying for examination of three persons as witnesses for the prosecution even though those persons have not been shown as witness in the charge-sheet. In the said petition the prosecution has also indicated that the informant-Investigating Officer, Mr. D. D. Rout, another inspector of Vigilance Mr. B. B. Tripathy are already dead, and that one Nityananda Dalai, Ex. D.S.P., (Vigilance), Cuttack, who is not a charge-sheet witness, but his name has been mentioned in the case diary, should be examined.

6. It was submitted by the learned counsel for the petitioners that a bare perusal of the order-sheets of the Trial Court records would go to indicate that the investigation as well as trial of the case is continuing in a snail's pace since twenty-four years and the petitioners, who are quite old, are suffering for an alleged imaginary offence of deceiving the Cuttack Municipality.

It is thus submitted that the petitioners' Fundamental Right to speedy trial as envisaged in Article 21 of the Constitution has been violated, and, therefore, the entire prosecution against the petitioners should be quashed.

7. It was also submitted by the learned counsel for the petitioners' that the evidence of three prosecution witnesses examined so far, who are said to be material witnesses do not disclose anything incriminating against the petitioners, and that the Investigating Officers having already died further

continuance of the trial would end in fiasco and allowing such prosecution to continue further would be an abuse of the process of the Court.

8. Learned Additional Standing Counsel for the Vigilance Department contended that delay in trial *ipso facto* cannot be a ground for quashing the criminal proceeding. Question of delay has to be decided having regard to the totality of the circumstances of each individual case. Unless the delay can be called oppressive or un-warranted, it would not be violative of Article 21 of the Constitution.

9. Perusal of the lower court records revealed that for the alleged occurrence of 1987-88 F.I.R. was registered on 21.12.1992 and the charge-sheet, on completion of investigation, prepared on 18.12.1993 was filed before the Chief Judicial Magistrate (CJM), Cuttack on 13.06.1994. The case suffered several adjournments for supply of police papers to the accused-petitioners, which were ultimately supplied on 08.01.1996. Thereafter by order dated 22.02.1996 the case was fixed for framing of charge. After some adjournments, on 28.10.1996, in absence of the accused persons who were represented by their counsel, charges were framed under Section 420/406 and 34, IPC and the defence counsel pleaded not guilty, and, therefore, summons were issued to prosecution witnesses fixing the case to 16.12.1996 for trial. From 16.12.1996 till 06.09.1999 the case suffered twenty adjournments for non-attendance of prosecution witnesses. On all these dates the accused were represented by their counsel under Section.317, Cr.P.C. On 15.11.1999 the first prosecution witness (P.W.1) Sri K. Janaki Rao was examined, cross-examined and discharged and summons to other witnesses were issued. On 06.01.2000 P.W.2 was examined. After more than a year P.W.3, Kamalakanta Sashtri was examined on 01.03.2001. P.W.4 was examined on 11.04.2002. Since then till 01.12.2006 the case suffered several adjournments. On 01.12.2006 a prosecution witness sought for time on ground of illness which was allowed and the case was directed to be put up on 11.10.2007 for further orders. And again in the next breath by the same order the C.J.M., transferred the case to the file of S.D.J.M., Cuttack for disposal according to law stating that the offences are under Sections 406/420, IPC. Though the record was transferred, some original documents were not sent to the Court of the S.D.J.M. and on the prayer of the Public Prosecutor the S.D.J.M. passed order on 30.10.2007 calling for original documents from the Court of the C.J.M., Cuttack. The case was thereafter adjourned twenty-nine times till 24.01.2012 by the S.D.J.M. awaiting receipt of documents from the C.J.M. From 24.01.2012 the case was further posted

to 20.03.2012 awaiting documents from the Office of the C.J.M. Order dated 20.03.2012 of the S.D.J.M., however does not indicate whether original documents were received from the C.J.M. or not. However, the S.D.J.M. directed for issuance of summons to the prosecution witness posting the case to 11.04.2012 for hearing. Since then till 06.02.2015 the S.D.J.M mechanically passed orders on twenty occasions for issuance of summons to charge-sheet witnesses without indicating whether summons earlier issued were served or not served. The accused persons (petitioners) were present on two to three occasions and on rest of the dates during the period they were represented by their advocate under section 317, Cr.P.C.

10. On 06.02.2015 in the absence of the accused persons and their counsel, learned S.D.J.M. directed for issuance of N.B.W. against the petitioners. The petitioners having challenged that order of issuance of N.B.W. before this Court in CRLMC No.2962 of 2015, they were allowed by order dated 02.07.2015 of this Court to surrender before the S.D.J.M., to be released on fresh bail. Accordingly the petitioners surrendered before the S.D.J.M. on 09.07.2015 and were released on bail and the case was then fixed to 16.08.2015 for hearing. After three adjournments, in absence of any witness for the prosecution, on 14.10.2015 the Assistant Public Prosecutor filed a petition under Section 311, Cr.P.C. and the case was posted to 10.11.2015 for filing of objection to the said petition and at the same time awaiting receipt of original documents from the Court of the C.J.M. Surprisingly, during the last about twenty-five dates there was no mention in the order-sheets about receipt or non- receipt of the original documents from the C.J.M. From 10.11.2015 till 01.08.2016 the case suffered ten adjournments and on all those dates the accused persons were represented by their counsel under section 317, Cr.P.C. and during this period on four occasions the S.D.J.M. issued reminders to the C.J.M., Cuttack for sending original documents. Nothing was indicated about the petition dated 14.10.2015 filed by the prosecution under section 311, Cr.P.C. for summoning some persons to be examined as prosecution witnesses, nor the said petition was heard. On 01.08.2016 the prosecution filed another petition under section 311, Cr.P.C. for recalling some prosecution witnesses and accordingly the case was adjourned for filing objection to the said petition and awaiting receipt of original documents from the Court of the C.J.M. The counsel for the defence filed a petition before the S.D.J.M. stating about the pendency of the present CRLMC under section 482, Cr.P.C. before this Court for quashing of the criminal proceeding. Even though the S.D.J.M. became

cognizant of the fact that no order of stay was passed by this Court in the CRLMC, instead of hearing the petitions under section 311, Cr.P.C., the Court below adjourned the hearing of the case on seven occasions awaiting intimation from this Court and ultimately on the direction of this Court transmitted the Lower Court Records on 16.01.2017, till which date the original documents have not been received from the Court of the C.J.M. nor hearing on the petitions under section 311, Cr.P.C. have been taken up.

11. Both the counsels relied on some decisions of Hon'ble Apex Court with regard to right of the accused for speedy trial.

Considering the correctness of the propositions laid down in Raj Deo Sharma Vrs. State of Bihar: (1998) 7 SCC 507; Raj Deo Sharma (II) Vrs. State of Bihar: (1999) 7 SCC 604 and Common Cause, a Registered Society Vrs. Union of India: (1996) 4 SCC 33**,** a seven Judge Constitution Bench of the Hon'ble Supreme Court in the case of P. Ramachandra Rao Vrs. State of Karnataka: (2002) 4 SCC 578 affirmed the view expressed in the case of A. R. Antulay Vrs. R. S. Nayak: (1992) 1 SCC 225 and summed up the principles relating to right to speedy trial in Paragraph-29 of the judgment as follows:-

> " **29**. For all the foregoing reasons, we are of the opinion that in Common Cause case (I) [ as modified in Common Cause (II) and Raj Deo Sharma (I) and (II) the court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:
>
> 1) The dictum in A.R. Antulay case is correct and still holds the field.
>
> 2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A.R. Antulay case adequately take care of right to speedy trial. We uphold and reaffirm the said propositions.
>
> 3) The guidelines laid down in A.R. Antulay case are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.
>
> 4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings.

The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I), Raj Deo Sharma (I) and Raj Deo Sharma (II) could not have been so prescribed or drawn and are not good law. The criminal Courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause case (I), Raj Deo Shrma Case (I) and (II). At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A.R. Antulay case and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.

5) The Criminal courts should exercise their available powers, such as those under sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be a better protector of such right than any guidelines. In appropriate cases, jurisdiction of the High Court under Section 482, Cr.P.C. and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions.

6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary—quantitatively and qualitatively--by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act.

We answer the questions posed in the orders of reference dated 19.09.2000 and 26.04.2001 in the above said terms."

12. In the case of **Vakil Prasad Singh Vrs. State of Bihar: (2009) 3 SCC 355** the Hon'ble Supreme Court while considering the power of the High Court under Section 482, Cr.P.C. to quash the criminal proceeding, held as follows:-

> "**15.** The power possessed by the High Court under the said provision is undoubtedly very wide but it has to be exercised in appropriate cases, *ex debito justitiae* to do real and substantial justice for the administration of which alone the courts exist. The inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. It is trite to state that the said powers have to be exercised sparingly and with circumspection only where the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. (**See Kurukshetra University v. State of Haryana, Janata Dal v. H.S. Chowdhary and State of Haryana v. Bhajan Lal**.)"

After taking note of the propositions laid down in the case of **A.R. Antulay** (supra) and **P. Ramachandra Rao** (supra) the Hon'ble Court in Paragraph-24 further held as follows:-

> "**24.** It is, therefore, well settled that the right to speedy trial in all criminal prosecutions (sic prosecutions) is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the proceeding police investigations as well. The right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case."

13. In the instant case the trial in respect of an occurrence that allegedly took place in 1987-88 is still pending even after 29 years of the occurrence. It took the state more than four years from the date of the alleged occurrence for registering the F.I.R. in 1992. Even though investigation was completed in about two years, charge was framed two years thereafter. It is found from the order-sheets of the Trial Court record that very casually the Chief Judicial Magistrate passed orders, date after date, directing for supply of police papers to the accused persons stating that the police papers were not ready. The Court below did not take care to find out why police papers were not made ready promptly after submission of the charge-sheet. After framing

of charge it took three years to examine only four prosecution witnesses after trial was started. It also appears that after examination of P.W.4 in April, 2002 till transfer of the case by the C.J.M. to the Court of the S.D.J.M. in December, 2006, without examining any further witness apparently no effective step was taken for procuring attendance of the other prosecution witnesses. Even when on 01.12.2006, the C.J.M. directed to put up the case on 11.10.2007 for further order, by the same order again he transferred the part-heard case to the Court of the S.D.J.M. merely because of the nature of the offences involved. This appears to be wholly unjustified. Even though the case record was transferred to the Court of S.D.J.M., the C.J.M. even did not bother to send the original documents pertaining to the case, and the S.D.J.M. went on adjourning the hearing of the case awaiting receipt of original documents from the Court of the C.J.M. Even after sometime the S.D.J.M. forgot about non-receipt of original documents from the C.J.M. and therefore nothing was mentioned in the order-sheets for several dates about the documents. It was only in 2016 and 2017, shortly before transmission of the Lower Court Records to this Court the S.D.J.M., was suddenly reminded of non receipt of documents from the C.J.M., and, therefore, thought it appropriate to issue reminders to the C.J.M. to send the original documents. The order-sheets do not show receipt of documents till the LCR was sent to this Court.

14. From the side of the prosecution no effort was made to procure the attendance of the prosecution witnesses. Belatedly two petitions, one in 2015 and the other in 2016, were filed by the prosecutor under Section 311, Cr.P.C. for summoning some persons who were not shown in the charge-sheet as prosecution witnesses and for recalling some P.Ws already examined. Even the petition filed in 2015 has not yet been heard and no order has been passed thereon. Even the prosecutor did not pray for early hearing of the petitions.

A reading of the order-sheets of the Lower Court Records manifests utter callousness, insensitivity and lackadaisical attitude of the Presiding Officers of the Trial Court and the prosecutors who dealt with the matter.

15. It is not known what would be the result of the two petitions filed by the prosecutor under Section 311, Cr.P.C. It is also not known when they are going to be heard and disposed of. Decision of the Court below on those two petitions is likely to be challenged in higher Courts by the party who would be aggrieved by such orders, which will further delay the trial. On prosecutions' own showing the material Investigating Officers are already

dead, and, therefore, it would not be possible on the part of the defence to bring out contradictions in the evidence of other P.Ws to the notice of the Court for want of confronting such contradictions to the concerned Investigating Officers.

16. The prosecution allegations are that a sum of rupees three lakh and some odd collected by the accused persons from P.P.L. towards octroi tax were not deposited or paid to the Municipality. Having regard to the amount involved and the nature of offence alleged, pendency of the prosecution for more than twenty-five years, which may continue further several years, is nothing but sheer harassment to the accused persons.

17. On a very few dates the defence sought for adjournments and on one occasion because of the absence of accused persons N.B.W. was issued against them and this Court allowed the petitioners to surrender before the Trial Court and go on bail. The earlier CRLMC before this Court filed by the petitioners remained pending only for a few months. Otherwise the petitioners mostly were represented before the Trial Court by their counsel under Section 317, Cr.P.C. The delay in the trial in the instant case therefore cannot be attributed to the accused persons.

18. Thus, on the facts in hand as noticed above, the Court is of the opinion that the delay in trial clearly violates the petitioner's constitutional right to speedy trial under Article 21 of the Constitution. This Court feels that under the circumstances, further continuance of the criminal proceeding against the accused-petitioner No.1, who has in the meantime grown quite old, is unwarranted and deserves to be quashed.

Consequently, this application is allowed and Vig. G.R. Case No.52 of 1992 pending on the file of the S.D.J.M.(S), Cuttack is hereby quashed. The CRLMC is thus disposed of, LCR be sent back forthwith.

CRLMC disposed of.

**2017 (I) ILR - CUT- 805**

**DR. A.K. RATH, J.**

CMP NO. 1699 OF 2014

**PURNA CHANDRA BISWAL** …….Petitioner

*.Vrs.*

**KIRAN KUMARI BRAHMA** ……..Opp. Party

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

**Whether the claim in respect of the property, which is not the subject matter of the suit, can be the subject matter of counter claim ? Held, No**

**The defendant can not file a counter claim in respect of the property, which is not the subject matter of the suit.**

**In this case, suit has been instituted in respect of plot Nos. 85, 89 and 90 appertaining to Khata No. 17 of Mouza- Jagannathpur, Keonjhar, where as counter claim has been filed in respect of Plot No. 38/421 appertaining to Khata No. 102/768 of Mouza – Jagannathpur, Keonjhar – The subject matter of the suit and the counter claim is totally different – Counter claim has been filed in respect of a different cause of actions, which has no bearing in the suit schedule land – The impugned order can not be said to be illegal, warranting interference of this Court.** (Paras 7 to 11)

For Petitioner : Mr. G.M. Rath
For Opp. Party : Mr. D.P.Mohanty

Date of Hearing : 07.03.2017
Date of Judgment:17.03.2017

**JUDGMENT**

***DR.A.K.RATH, J.***

This petition challenges the order dated 22.9.2014 passed by the learned Civil Judge (Sr.Division), Keonjhar in Civil Suit No.100 of 2012. By the said order, the learned trial court excluded the counter claim of the defendant.

2. The opposite party as plaintiff instituted the suit for permanent injunction impleading the petitioner as defendant. Pursuant to issuance of summons, the defendant entered appearance and filed a written statement and counter claim seeking declaration of right, title, interest over 'A' schedule

property and recovery of possession of 'B' schedule property by evicting the plaintiff, permanent injunction and demarcation.

3. While the matter stood thus, the plaintiff filed an application under Order 8 Rule 6 (C) C.P.C. to exclude the counter claim. It is stated that the suit has been instituted in respect of Plot nos. 85, 89 and 90 appertaining to Khata no.17 of mouza. Jagannathpur, Keonjhar. She has constructed her dwelling house over the same, but then counter claim has been filed in respect of Plot no.38/421 appertaining to Khata no.102/768 of mouza-Jagannathpur, Keonjhar The plaintiff objected the same. The learned trial court came to hold that the defendant has filed a counter claim in respect of the land, which is not the subject matter of the suit. Held so, the learned trial court allowed the objection filed by the plaintiff and excluded the counter claim from the written statement and granted liberty to the defendant to institute a fresh suit.

4. Heard Mr. G.M. Rath, learned Advocate for the petitioner and Mr. D.P. Mohanty, learned Advocate for the opposite party.

5. Mr.Rath, learned Advocate the petitioner submitted that the plaintiff and defendant are adjacent land owners. There is long standing dispute between them. The counter claim has been admitted by the court. In view of the same, the learned trial court was not justified in excluding the same.

6. Per contra, Mr.Mohanty, learned Advocate for the opposite party submitted that the petitioner filed a counter claim in respect of the property, which is not the suit schedule property. The learned trial court has rightly excluded the same.

7. The question does arise as to whether the claim in respect of the property, which is not the subject matter of the suit, can be the subject matter of counter claim ?

8. Order 8 Rule 6A (1) and 6C, which are hub of the issue, are quoted below:-

> "6A.(1) A defendant in a suit may in addition to his right of pleading a set-off under Rule6, set-up by way of counterclaim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence of before the time limited for delivering his defence has expired whether such counterclaim is in the nature of a claim for damages or not;

> Provided that such counterclaim shall not exceed the pecuniary limits of jurisdiction of the Court.
>
> xxx xxx xxx
>
> 6C. Where a defendant sets up a counterclaim and the plaintiff contends that the claim they raised ought not to be disposed of by way of counterclaim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counterclaim, apply to the Court for an order that such counterclaim may be excluded and the Court may, on the hearing of such application make such order as it thinks fit."

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

10. Admittedly, the suit has been instituted in respect of Plot nos. 85, 89 and 90 appertaining to Khata no.17 of mouza-Jagannathpur, Keonjhar, whereas counter claim has been filed in respect of Plot no.38/421 appertaining to Khata no.102/768 of mouza-Jagannathpur, Keonjhar. The subject matter of the suit as well as counter claim is totally different. The counter claim has been filed in respect of a different cause of action, which has no bearing on the suit schedule land.

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

Petition dismissed.

**2017 (I) ILR - CUT- 808**

**DR. A.K. RATH, J.**

C.M.P. NO. 40 OF 2015

**ROHIT BAHADUR SINGH** ……..Petitioner

*.Vrs.*

**RAGHUNATH MISHRA & ANR.** ……Opp. Parties

**CIVIL PROCEDURE CODE, 1908 – O-9, R-7**

**Whether application under Order-9, Rule 7 C.P.C. is maintainable after closure of the evidence when the suit is posted for judgment ? Held, No.** (Paras 4,5,6)

**Case Law Referred to** :-

1. AIR 2014 ORISSA 79 : Mamita Thati -V- Nepura Pradhan

For Petitioner : Mr. A. Mohanty
For Opp. Party : Mr. S. Udgata

Date of Hearing : 21.03.2017
Date of Judgment:21.03.2017

**JUDGMENT**

***DR.A.K.RATH, J.***

This petition challenges the order dated 20.10.2014 passed by the learned Civil Judge (Jr.Division), Rairakhol in C.S.No.4/2004/33/2011, whereby and whereunder the learned trial court rejected the application of defendant no.2 under Order 9 Rule 7 C.P.C. to set aside the ex parte order dated 8.1.2007.

2. Opposite party no.1 as plaintiff instituted the suit for declaration of right, title, interest and permanent injunction impleading the petitioner and opposite party no.2 as defendants. The petitioner was defendant no.2 in the suit. He was set ex parte. When the suit was posted for judgment, at this juncture, he filed an application under Order 9 Rule 7 C.P.C. praying inter alia to set aside the ex parte order dated 8.1.2007. The plaintiff filed objection to the same. The learned trial court rejected the same on the ground that no good cause has been assigned by defendant no.2. Held so, the learned trial court dismissed the petition.

3. Heard Mr.A.Mohanty, learned Advocate for the petitioner and Mr.S.Udgata, learned Advocate for opposite party no.1.

The question does arise as to whether application under Order 9, Rule 7 C.P.C. is maintainable after closure of the evidence when the suit is posted for judgment ?

5. The subject matter of dispute is no more res integra. In the case of Mamita Thati Vrs. Nepura Pradhan, AIR 2014 ORISSA 79, the Division Bench of this Court in paragraph-12 of the said report held as follows:-

> "12. In the case of Arjun Singh v. Mohindra Kumar and others, AIR 1964 SC 993, the Hon'ble Supreme Court held thus:-
>
> "The opening words of that rule are, as already seen, 'Where the Court has adjourned the hearing of the suit ex parte'. Now, what do these words mean? Obviously they assume that there is to be a hearing on the date to which the suit stands adjourned. If the entirety of the "hearing" of the suit has been completed and the Court being competent to pronounce the judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under O. XX R. 1, there is clearly no adjournment of "the hearing" of the suit, for, there is nothing more to be heard.
>
> xx xx xx
>
> If, therefore, the hearing was completed and the suit was not "adjourned for hearing", O.IX, R.7 could have no application and the matter would stand at the stage of O.IX, R.6 to be followed up by the passing of an ex parte decree making R.13 the only provision in Order IX applicable."
>
> In view of the above, we hold that application under Order 9, Rule 7, C.P.C. filed by the appellant before the court below is misconceived."

6. In view of the authoritative pronouncement of this Court in the case of Mamita Thati (supra), the learned trial court is justified in rejecting the application. The petition is dismissed. No Costs.

Petition dismissed.

**2017 (I) ILR - CUT- 810**

**DR. A.K. RATH, J.**

CMP NO. 494 OF 2014

**V. MADHAVI** …….Petitioner

*.Vrs.*

**JAMMULA CHANDRASEKHAR & ANR.** ……..Opp. Parties

**CIVIL PROCEDURE CODE, 1908 – O-8, R-6A (4)**

**Suit and counter claim – Death of Original Plaintiff – Legal heirs of the plaintiff substituted in the suit – However, defendant No. 1 has not taken steps for substitution of the plaintiff in the Counter claim – Whether the counter claim would abate for non-substitution of the legal heirs of the original plaintiff ? Held, No.**

**Once the substitution is allowed in the suit and legal heirs brought on record in the suit, they have full opportunity to defend the counter claim since both the suit and counter claim tried in the same proceeding – Held, the impugned order rejecting the application filed by the J. Drs cannot be said to be perfunctory calling for interference by this Court.** (Paras 7,8,9)

**Case Laws Referred to** :-

1. 47 (1979) CLT 529 : Durjodhan Jena & Anr. -V- Moti Dei & Ors.
2. AIR 1979 SC 1393 : N.Jayaram Reddi & Anr. -V- The Revenue Divisional Officer and Land Acquisition Officer, Kurnool.
3. (2003) 9 SCC 187 : Organic Insulations -V- Indian Rayon Corporation Ltd.

For Petitioner : Mr. S.S. Rao
For Opp. Party : Mr. Gautam Mishra

Date of hearing : 08.03.2017
Date of judgment:17.03. 2017

**JUDGMENT**

***DR. A.K.RATH, J***

By this application under Article 227 of the Constitution of India, challenge is made to the order dated 7.4.2014 passed by the learned Civil Judge (Senior Division), Berhampur in I.A No.40 of 2013. By the said order, learned trial court rejected the application under Section 47 CPC filed by the J.Drs.

**2.** V. Rama Rao, husband of the plaintiff, instituted T.S No.123 of 2000 in the court of the learned Civil Judge (Senior Division), Berhampur for declaration of title, in the alternative for a direction to the defendant no.2 to execute the registered sale deed in his favour and damages impleading the opposite parties as defendants. The defendants filed a counter-claim. The suit was dismissed, but the counter-claim of defendant no.1 was allowed. Assailing the judgment and decree, the widow of the plaintiff, petitioner herein, filed RFA No.8 of 2012 and RFA No.11 of 2013 before the learned District Judge, Berhampur. Both the appeals are sub judice. While the matter stood thus, defendant no.1 levied execution case for eviction of the plaintiff, which is registered as E.P No.14 of 2012. The J.Drs filed an application under Section 47 CPC to dismiss the execution case on the ground that during pendency of the suit, the original plaintiff died. His legal heir was substituted in the suit; but in the counter-claim no substitution was made and as such, the counter-claim abated. Learned trial court dismissed the application.

**3.** Heard Mr. S.S. Rao, learned counsel for the petitioner and Mr. Gautam Mishra, learned counsel for the opposite parties.

**4.** Mr. Rao, learned counsel for the petitioner, submitted that during pendency of the suit, the original plaintiff died. An application for substitution was filed by the legal heir of the plaintiff for substitution. The same was allowed. But then, the defendant no.1 had not taken any step for substitution of the plaintiff in the counter-claim. Thus the counter- claim abates and as such, execution case is liable to be dropped. He relied on the decision of this Court in the case of Durjodhan Jena and another v. Moti Dei and others, 47 (1979) CLT 529.

**5.** Per contra, Mr. Mishra, learned counsel for the opposite parties, submitted that once the application for substitution was allowed in the suit and the legal heir was brought on record, latter had full opportunity to defend the counter-claim since both the suits and counter-claim were tried in the same proceeding and as such, no prejudice would be caused to the legal heir of the plaintiff in the counter-claim. The legal heir of the plaintiff was on record. Thus the counter-claim does not abate. He relied on the decision of the apex Court in the case of N. Jayaram Reddi and another v. The Revenue Divisional Officer and Land Acquisition Officer, Kurnool, AIR 1979 SC 1393.

**6.** In N. Jayaram Reddi (supra), the State of Andhra Pradesh acquired the land of the appellant and others. The land oustees accepted the compensation under protest and made an application under Section 18 of the Land Acquisition Act for reference. Learned Subordinate Judge enhanced the compensation. Both the parties felt aggrieved against the award. The State of Andhra Pradesh preferred appeal in the High Court of Andhra Pradesh. The claimants filed cross-appeal against the said award. In the cross-appeal filed by the claimants, one of the claimants died. After his death, his heir filed an application for substitution. The same was allowed. But then, the State did not take any step for substitution in the cross-appeal. The High Court of Andhra Pradesh dismissed the claimants' appeal but allowed the Government appeal and reduced the price of the acquired land. The matter went to the apex Court. The question arose before the apex Court, as to whether omission to substitute the deceased respondent in the cross-appeal, the appeal filed by the State would abate ? The apex Court held thus;

> "40. The following conclusions emerge from these decisions:
>
> (1) If all legal representatives are not impleaded after diligent search and some are brought on record and if the Court is satisfied that the estate is adequately represented meaning thereby that the interests of the deceased party are properly represented before the Court, an action would not abate.
>
> (2) If the legal representative is on record in a different capacity, the failure to describe him also in his other capacity as legal representative of the deceased party would not abate the proceeding.
>
> (3) If an appeal and cross-objections in the appeal arising from a decree are before the appellate court and the respondent dies, substitution of his legal representatives in the cross-objections being part of the same record, would enure for the benefit of the appeal and the failure of the appellant to implead the legal representatives of the deceased respondent would not have the effect of abating the appeal but not vice versa.
>
> (4) A substitution of legal representatives of the deceased party in an appeal or revision even against an interlocutory order would enure for the subsequent stages of the suit on the footing that appeal is a continuation of a suit and introduction of a party at one stage of a suit would enure for all subsequent stages of the suit.

(5) In cross-appeals arising from the same decree where parties to a suit adopt rival positions, on the death of a party if his legal representatives are impleaded in one appeal it will not enure for the benefit of cross-appeal and the same would abate."

**7.** Taking a cue from N. Jayaram Reddi (supra), the apex Court in Organic Insulations v. Indian Rayon Corporation Ltd., (2003) 9 SCC 187 held that although sub-rule (4) of Order 8 Rule 6-A CPC says that the counter-claim will be treated as a plaint, under sub-rule (2), such counter-claim has the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original suit and on the counter-claim. As the substitution has been made by the plaintiff in the suit, the legal heir of the plaintiff will have full opportunity to defend the counter-claim as both the suit and the counter-claim will be tried in the same proceeding and therefore, no prejudice would be caused to the legal heir of the plaintiff in the counter-claim.

**8.** The ratio in N. Jayaram Reddi (supra), applies with full force to the facts of the case. The decision cited by Mr. Rao in the case of Durjodhan Jena (supra) is distinguishable on facts. In the said case, the appellants filed T.S No.6 of 1968 against the respondents whereas respondent no.1 filed T.S. No.107 of 1968 against the appellants and other respondents. Both the suits were tried analogously. During pendency of the suit, defendant nos.5 and 10 died. The appellants applied for substitution in place of the deceased defendants and for setting aside abatement. Learned Subordinate Judge having rejected the application, the appeal was filed before this Court. Placing reliance on the decision of the Madras High Court in the case of Shankaranaraina Saralaya v. Laxmi Hengsu and others, AIR 1931 Madras 277, learned Singh Judge held that no doubt, the legal representatives of the deceased defendants had been substituted in Title Suit No.107 of 1968, but the appellants cannot derive any benefit out of that. Where two suits are independently filed, the plaintiff in one suit cannot claim benefit of the fact that the legal representatives of the deceased parties have been substituted in one suit within the period of limitation and, therefore, say that it should be taken that those legal representatives have also been substituted in place of the deceased parties in the other suit. Be it noted that the ratio in the case Shankaranaraina Saralaya (supra) was held to be not correct enunciation of law by the apex Court in N. Jayaram Reddi (supra)

**9.** The offshoot of the above conclusion is the order of the learned executing court is indefeasible. The order of the learned trial court cannot be

said to be perfunctory or flawed warranting interference of this Court under Article 227 of the Constitution. The petition, sans merit, is dismissed. No costs.

Petition dismissed.

**2017 (I) ILR - CUT- 814**

**DR. A.K. RATH, J.**

S.A. NO. 157 OF 1989

**PRATIBHA PRAKASH BHAVAN** .....Appellant

*.Vrs.*

**STATE OF ORISSA & ANR.** .....Respondents

**CONTRACT ACT, 1872 – Ss. 65, 70**

**Pursuant to order placed by B.D.O, plaintiff supplied goods – B.D.O. can not escape its liability to pay price of goods on the ground that he had no authority to place orders – Goods received for official use and at no stage plaintiff was intimated to take back the goods – By no stretch of imagination, it can be said that the action of the B.D.O was unauthorized – When state deals with a citizen it should not ordinarily rely on technicalities – B.D.O. is liable to pay price of goods – Held, the impugned judgment and decree of the appellate court is set aside and the judgment and decree passed by the trial court is affirmed.** (Paras 12 to 15)

**Case Laws Referred to** :-

1. (1981) 1 SCC 11 : M/s. Jit Ram Shiv Kumar & Ors. -V- State of Haryana & Ors.
2. 2017 (I) OLR 256 : State of Orissa & Anr. -V- Sri Dwarika Das Agarwalla

For Appellant : Mr. P.V.Balakrishna
For Respondents: Ms. Samapika Mishra, ASC.

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Date of hearing : 09.03.2017
Date of judgment: 17.03.2017

**JUDGMENT**

***DR. A.K.RATH, J.***

This is an appeal by the plaintiff against the judgment and decree dated 23.1.1989 and 6.2.1989 respectively passed by the learned 1st Addl. District Judge, Ganjam-Berhampur in Money Appeal No.11 of 1988

reversing the judgment and decree dated 14.7.1988 and 22.7.1988 respectively passed by the learned Subordinate Judge, Berhampur in Money Suit No.72 of 1987.

**2.** The plaintiff instituted the suit for realisation of Rs.15,658/- from the defendants. The case of the plaintiff is that it deals in forms, registers and stationeries etc. The Block Development Officer, Raikia, defendant No. 2, in his official capacity having agreed to the terms and conditions and rate of the plaintiff placed an order for supply of forms and registers etc. Therefore, the plaintiff supplied all the articles on four different occasions and submitted a consolidated bill amounting to Rs.10,370/-. As defendant no.2 did not make any payment against the said bill, it issued a statutory notice under Section 80 CPC.

**3.** Pursuant to issuance of summons, the defendants entered appearance and filed a written statement denying the assertions made in the plaint. The case of the defendants is that defendant no.2 was not empowered to place orders for local purchase worth more than Rs.10,000/-. The plaintiff had violated the terms and conditions of the agreement by not supplying all the articles in time, for which the defendant had incurred huge expenses by deputing a messenger and transporting some of the articles sent by the plaintiff to Phulbani through a transport company.

**4.** On the inter se pleadings of the parties, learned trial court struck four issues. To prove his case, the plaintiff had examined one witness and on his behalf, twelve documents had been exhibited. The defendants had examined one witness and on their behalf, one document had been exhibited. Learned trial court decreed the suit. The defendants filed Money Appeal No.11 of 1988 before the learned 1st Addl. District Judge, Ganjam, Berhampur, which was allowed.

**5.** The appeal was admitted on the following substantial questions of law;

> I. Whether in view of the findings of both the courts below that the B.D.O had placed orders in his official capacity and the articles that were supplied and were utilized by the State Government, Sections 65 and 70 of the Indian Contract Act will come to the aid of the appellants?
>
> II. When a person lawfully does anything for another person, not intending to do so gratuitously and such other person enjoys the

benefit thereof, the latter is bound to make compensation to the former in respect of, the things so done or delivered?

III. Whether the learned Appellate Court is justified in his interpretation of Ext.A which forms the foundation of the suit?"

**6.** Heard Mr. P.V. Balakrishna, learned counsel for the appellants and Ms. Samapika Mishra, learned Addl. Standing Counsel for the State.

**7.** Mr. P.V. Balakrishna, learned counsel for the appellants, submitted that pursuant to the order placed by the BDO, the plaintiff has supplied the goods. The same was received. Thus, the defendants cannot escape its liability on the ground that the BDO had no authority to place the order to the plaintiff. He further submitted that earlier the plaintiff had supplied the goods. Since the defendants did not pay the money, the plaintiff instituted the suit. The suit was decreed. Thereafter, the State of Orissa filed an appeal before this Court and the same was allowed. He relied on the decision of this Court in the case of State of Orissa and another v. Prathibha Prakash Bhavan, AIR 1995 Orissa 62.

**8.** Ms. Mishra, learned Addl. Standing Counsel for the State, on the other hand, submitted that the BDO was not authorized to place the order to the plaintiff. The defendants are not liable to pay for the action of the BDO. She relied on the decision of the apex Court in the case of M/s. Jit Ram Shiv Kumar and others v. State of Haryana and others, (1981) 1 SCC 11.

**9.** In Prathibha Prakash Bhavan (supra), the plaintiff supplied articles pursuant to the order place by the Block Development Officer. Since the bill submitted by the plaintiff was not paid, it instituted the suit for realisation of money. A plea was taken by the defendants that the Block Development Officer was not authorised under financial rules to place orders. This Court held that it was not the case of defendant No.1 that Block Development Officer had received the goods in his personal capacity. Goods were received for being used officially in the block. Such goods were not intended to be handed over by plaintiff gratuitously. If Block Development Officer was not authorised, defendant No. 1 could have informed plaintiff to take back the goods. There was no such intention. When goods were received and used for official purpose and at no stage plaintiff was intimated to take back the goods on account of violation of financial discipline by Block Development Officer, both defendants are liable to pay the price of goods as provided under Section 65 of the Contract Act. The ratio in the said case applies with full force to the facts of this case.

**10.** Section 65 of the Indian Contract Act provides obligation of person who has received advantage under void agreement, or contract that becomes void. The same is quoted below:

> "65. Obligation of person who has received advantage under void agreement, or contract that becomes void.-When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

**11.** This Court in Sadasiva Panda v. Prajapati Panda and another (S.A No.217 of 1998 disposed of on 3.3.2017) held thus:

> "14. The Privy Council in the case of Harnath Kaur v. Indeer Bahadur Singh, AIR 1922 PC 403, held that the section deals with (a) agreements and (b) contracts. The distinction between them is apparent from section 2. By clause (e) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (h) an agreement enforceable by law is a contract. Section 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to be void. An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.
>
> xxx xxx xxx
>
> 17. The principle underlying Section 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation as held by Privy Council in the case of Babu Raja Mohan Manucha and others v. Babu Manzoor Ahmad Khan and others, A.I.R. 1943 Privy Council 29."

**12.** The judgment relied on by Ms. Mishra, learned Addl. Standing Counsel is distinguishable on facts. In Jit Ram Shiv Kumar (supra), the Municipal Committee of Bahadurgarh, established Mandi in Bahadurgarh Town with a view to improve trade in the area. The Municipal Committee decided that the purchasers of the plots for sale in the Mandi would not be required to pay octroi duty on goods imported within the said Mandi.

Pursuant to the said decision, a resolution was passed by the Municipality. Hand bills were issued for the sale of the plots on the basis of the resolution. It was proclaimed that such Mandi would remain exempt from payment of octroi. Subsequently the Committee resolved to levy octroi duty on goods. The resolution was annulled by the Punjab Government. Thereafter, the Committee passed a resolution requesting the State Government to cancel the committee's earlier resolution granting levy of octroi. The Government accepted the same. The appellants being aggrieved by the decision filed writ petition in the Punjab and Haryana High Court. The Full Bench of the High Court rejected the petition. The matter went to the apex Court. The apex Court held that the plea of estoppel is not available against the State in the exercise of its legislative or statutory functions. It was further held that the principle of estoppel is not available against the Government in exercise of legislative, sovereign or executive power. The apex Court further held that Sections 65 and 70 provide for certain reliefs in void contracts and in unenforceable contracts where a person relying on a representation has acted upon it and put himself in a disadvantageous position. The Indian Constitution as a matter of high policy in public interest has enacted Article 299 so as to save the Government liability arising out of unauthorized acts of its officers and contracts not duly executed. The apex Court further held that on a consideration of the decisions of this Court it is clear that there can be no promissory estoppel against the exercise of legislative power of the State. So also the doctrine cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The Government would not be bound by the act of its officers and agents who act beyond the scope of their authority and a person dealing with the agent of the Government must be held to have notice of the limitations of his authority. The Court can enforce compliance by a public authority of the obligation laid on him if he arbitrarily or on his mere whim ignores the promises made by him on behalf of the Government. It would be open to the authority to plead and prove that there were special considerations which necessitated his not being able to comply with his obligations in public interest.

**13.** By no stretch of imagination, it can be said that the action of the BDO was unauthorized. In view of the same, the decision in the case of Jit Ram Shiv Kumar (supra) is distinguishable on facts. Furthermore, in earlier occasion the plaintiff had supplied the goods. The money was not paid on the ground that the BDO was not authorized to place the order. This Court has negatived the contention of the State and decreed the suit. The substantial questions of law are answered accordingly.

**14.** Before parting with the case, it is apt to refer a decision of this Court in the case of State of Orissa and another v. Sri Dwarika Das Agarwalla, 2017 (I) OLR 256. This Court held:

> "No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manne as he wishes. State is a virtuous litigant. About 60 years back in the case of Firm Kaluram Sitaram v. The Dominion of India, AIR 1954 Bombay 50, Chief Justice Chagla (as he then was) speaking for the Bench stressed that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person."

**15.** In the wake of the aforesaid, the judgment and decree of the learned Addl. District Judge, Jeypore is set aside. The judgment and decree of the learned Subordinate Judge, Jeypore is affirmed. The suit is decreed. The appeal is allowed, but in the circumstances of the case, parties are to bear their own costs throughout.

Appeal allowed.

**2017 (I) ILR - CUT- 819**

**DR. B.R.SARANGI, J.**

W.P.(C) . NO. 199 OF 2003

**GIRISH CHANDRA TRIPATHY** ……..Petitioner

*.Vrs.*

**ORISSA STATE CO-OPERATIVE MARKETING FEDERATION LTD. & ANR.** ……..Opp. Parties

**SERVICE LAW – Petitioner was reverted from the post of Area Manager to Godown Manager by the disciplinary authority basing on the report of the inquiry officer – Punishment confirmed by the appellate authority – Hence the writ petition – Appointment of inquiry officer challenged as he is an outsider, other than an official of OSCMFL, who could not have been appointed in view of Note-2(a) of Rule 84 of the Odisha State Co-operative Marketing Federation Employees Recruitment Classification, Control and Appeal Rules, 1990 – Held, appointment of the inquiry officer is bad in law – Impugned**

**order passed by the disciplinary authority and consequential order passed by the appellate authority are quashed – It is open for OSCMFL to appoint an inquiry officer in accordance with the Regulation and proceed with the same afresh**. (Paras 18,19)

**Case Law Referred to** :-

1. 1992 LAB. I.C. 2012: Siba Kishore Pattnaik v. Chief Engineer, Paradeep
2. AIR 1967 SC 1857 : Port Trust & anr. Rajasthan State Electricity Board v. Mohan Lal
3. AIR 1981 SC 212 : Som Prakash Rekki v. Union of India
4. (2010) 5 SCC 349 : Union of India v. Alok Kumar

For Petitioner : Mr. N.C.Panigrahi, Sr. Counsel
M/s.G.S.Dash, N.K.Tripathy & S.R.Panigrahi

For Opp. Parties : Mr. G.Rath, Sr. Counsel
M/s. S.Rath, S.Mishra, S.Mohanty & T.K.Prahraj

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Date of argument: 05.04.2017
Date of Judgment: 05.04.2017

**JUDGMENT**

***DR. B.R. SARANGI, J.***

The petitioner, who was working as Area Manager for Sambalpur under Orissa State Co-operative Marketing Federation Ltd. (OSCMFL), has filed this application seeking to quash the order dated 05.05.2000 at Annexure-23, whereby following a disciplinary proceeding he has been imposed with measure penalty of reverting from the post of Area Manager to Godown Manager, as well as the judgment and order dated 18.09.2002 at Annexure-27 passed in Service Dispute Case No.11 of 2000, by which the learned Member, Co-operative Tribunal, Orissa has confirmed the order of punishment at Annexure-23.

2. Shorn off unnecessary details, the factual matrix of the case is that the petitioner, while working under OSCMFL as Area Manager for Samabalpur, misconducted himself. Accordingly, on 02.08.1999, charges were framed on four heads, namely, (1) misappropriation of stock and cash; (2) manipulation of accounts and breach of trust; (3) negligence in duty and misconduct; and (4) disobedience of office orders and dishonesty. After receipt of charge sheet, the petitioner requested the disciplinary authority to supply necessary documents, including reconciliation statement, but the same were not supplied to him. Consequentially, the petitioner submitted his explanation on 30.8.1999 denying the charges, in absence of relevant documents.

3. On 18.09.1991, one B.K. Panigrahi, Chief Engineer, Electrical (Retd.), who is not an employee of opposite party-OSCMFL, was appointed as inquiry officer in proceeding no.3394 dated 02.08.1999. He conducted enquiry and after its completion, finding the petitioner guilty of charges, submitted his report on 31.01.2000 (Annexure-12) recommending major penalty of dismissal from service. The disciplinary authority, on receipt of the inquiry report, on 04.02.2000 asked the petitioner to submit his explanation to the inquiry report. Accordingly, the petitioner submitted his explanation on 11.02.2000. On consideration of the explanation submitted by the petitioner, the disciplinary authority directed for fresh enquiry. Consequentially, the very same inquiry officer submitted his second inquiry report dated 27.03.2000 (Annexure-19) with the finding that Pitabasa Jena and Balakrushna Sahoo are the real culprits behind the charges. But, however, without trying them, suggested major punishment against the petitioner for demoting him to the next lower rank. The petitioner, on being called upon, submitted his explanation to the second enquiry report on 17.04.2000 (Annexure-20). In pursuance of second enquiry report dated 27.03.2000 (Annexure-19), the disciplinary authority on 24.04.2000 framed charges against Pitabas Jena and Balakrushna Sahu and asked for explanation for the charges framed against them vide Annexures-21 and 22 respectively. Even though for the selfsame allegation of misappropriation, charges were framed against Pitabas Jena and Balakrushna Sahu, the disciplinary authority on 05.05.2000 vide Annexure-23 held the petitioner alone responsible for misappropriation and demoted/reverted him from the post of Area Manager to Godown Manager. Challenging the said order of reversion dated 05.05.2000 (Annexure-23), the petitioner preferred an appeal/dispute case before the learned Member, Co-operative Tribunal, Orissa which was registered as Service Dispute Case No.11 of 2000 and vide judgment dated 18.09.2000, the learned Member, Co-operative Tribunal confirmed the order of punishment imposed by the disciplinary authority reverting the petitioner from the post of Area Manager to Godown Manager. Hence, this writ application.

4. While entertaining this writ application, this Court vide order dated 10.03.2003 in Misc. Case No. 176 of 2003 passed an interim order to the effect that if the petitioner had not been reverted pursuant to the impugned order, he should not be reverted without leave of this court. Consequentially, the petitioner continued in the post and, during pendency of this writ application, he has been retired from service on attaining the age of superannuation.

5. Mr. N.C. Panigrahi, learned Sr. Counsel appearing along with Mr. N.K. Tripathy, learned counsel for the petitioner calls in question the legality and propriety of appointment of the inquiry officer in the disciplinary proceeding initiated against the petitioner and contended that in view of the Note-2(a) of Rule-84 of the Orissa State Co-operative Marketing Federation Employees Recruitment Classification, Control and Appeal Rules, 1990 (for short "the 1990 Rules"), an outsider cannot be appointed as an inquiry officer and, as such, the retired Chief Engineer, Electrical Mr. B.K. Panigrahi, being an outsider, is not competent to cause enquiry. Therefore, the report so submitted by him and consequential action taken thereof by the disciplinary authority and confirmation made by the appellate authority, cannot sustain in the eye of law. To substantiate his contention, he has relied upon the judgment of this Court in Siba Kishore Pattnaik v. Chief Engineer, Paradeep Port Trust and another, 1992 LAB. I.C. 2012.

6. Mr. S. Rath appearing on behalf of Mr. Ganeswar Rath, learned Senior Counsel for opposite party no.2 argues with vehemence that as the petitioner was indulged in misappropriation of the corporation fund and misconducted himself, the action taken by the disciplinary authority pursuant to the enquiry report submitted by the inquiry officer imposing major penalty of reversion from the post of Area Manager to Godown Manager is wholly and fully justified and, as such, the confirmation made thereof by the appellate authority cannot be faulted with so as to warrant interference by this Court. More particularly, if the fact finding courts have come to a definite finding concurrently, this Court should be slow to interfere with the same, unless some gross illegality or irregularity is found.

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

8. The undisputed fact being that the petitioner, who was working as an Area Manager under the opposite party- OSCMFL, was subjected to a disciplinary proceeding and faced major penalty of reversion from the post of Area Manager to Godown Manager by the disciplinary authority, which was confirmed by the appellate authority. But, the sole question, which was raised in course of hearing, is that whether the inquiry officer, on whose inquiry report the punishment was imposed on the petitioner, is competent to conduct the inquiry, being not a cadre person and an outsider to the organization. The

answer to the question revolves around the interpretation of sub-clause 2(a) to the Note of Rule 84 of the 1990 Rules, which is quoted hereunder:-

> *"84. Procedure for imposing penalties:*
>
> *2. (a) On receipt of the written statement of defence, the disciplinary authority, may itself enquiry into the such articles of charge as are not admitted, or if he considers it necessary to do so, appoint an inquiring authority for the purpose, and where all the articles of charges have been admitted by the employee/workman in his written statement of defence, the disciplinary authority shall record its findings on such charge after taking such evidence as it may deem fit." (Emphasis supplied)*

A bare reading of the above provision would make it amply clear that in a departmental proceeding of OSCMFL, on receipt of written statement, the disciplinary authority, may itself enquire into the charges, or appoint an inquiring authority for the purpose.

9. On perusal of the office order dated 18.09.1999 at Annexure-10, it is found that one B.K. Panigrahi, Retired Chief Engineer, Electrical was appointed as inquiry officer to cause enquiry into the charges framed against the petitioner in the disciplinary proceeding drawn up vide office order no.3394 dated 02.08.1999. The petitioner questioned appointment of B.K. Panigrahi on the ground that he was not an "authority" under the OSCMFL Regulation and, therefore, could not have been appointed as inquiry officer to conduct enquiry in view of the provision quoted above.

10. In ***Black's Law Dictionary 7th Edn.***, "Authority" means the right or permission to act legally on another's behalf; the power delegated by a principal to an agent e.g. authority to sign the contract.

11. In ***Merriam Webster's Law Dictionary***, "Authority" means a government agency or public office responsible for an area of regulation. Example: should apply for a permit to the permitting authority.

12. ***Farlex free Dictionary***, states that 'Authority' permission, a right coupled with the power to do an act or order others to act. Often one person gives another authority to act, often one person gives another authority to act, as an employer to an employee, a principal to an agent, a corporation to its officers, or governmental empowerment to perform certain functions.

13. The word 'authority' is derived from the Latin word auctoritas, means intention, advice, opinion, influence or command which originate from an

author, indicating that the authority originates from a master, leader or author, and essentially is imposed by a superior upon an inferior either by force of law.

14. In common parlance, the word authority is understood to be, power to exercise and perform certain duties or functions in accordance with law. "Authority" may vest in an individual or a person by itself or even as a delegate. It is the right to exercise power or permission to exercise power.

In Union of India v. Alok Kumar, (2010) 5 SCC 349, the meaning of "authority" has been discussed by the apex Court elaborately.

15. In Som Prakash Rekki v. Union of India, AIR 1981 SC 212, the apex Court held that the dictionary meaning of the word 'authority' is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions.

16. In Rajasthan State Electricity Board v. Mohan Lal, AIR 1967 SC 1857, the apex Court held that the meaning of the word 'authority' given in Webster's Third New International Dictionary, which can be applicable is 'a public administrative agency or corporation having quasi-governmental power and authorized to administer a revenue-producing public enterprise. The dictionary meaning of the word 'authority' is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out government or quasi-governmental functions.

17. Similar question had come up for consideration by a Division Bench of this Court in ***Siba Kishore Pattnaik*** (supra) in which Regulation 10(2) of Paradeep Port Employees (Classification, Control and Appeal) Regulations, 1967 was under consideration and this Court considering the word "authority" as provided under Regulation 10(2) has interpreted the same in paragraph-4 of the said judgment, which is extracted below:-

> *"The word 'authority' has not been defined in the Regulations. It is, however, relevant that the 'appointing authority', 'disciplinary authority' are defined in Regulation 2 (b) and 2 (d) of the Regulations respectively. 'Authority', in our view means a person deriving power from office or character or prestige. It means a person or body exercising a power or having a legal right to command and be obeyed. The meaning ascribed to the word in the Webster's Universal Dictionary is 'person or body of persons possessing authority' having right to govern, direct, control affairs,*

*make laws etc. Authority is the power, the legal right to command and to enforce obedience. A person who is relied upon, by reasons of his special knowledge, experience, study, to give trustworthy testimony or a weighty and credible opinion on particular facts and events is an 'authority'. Authority is the power conferred by law to do something backed by an implied threat of some legal sanction, if the exercise of the power is impaded. If the interpretation given to the word by the Port Authorities is accepted, the use of the expression 'person' would have been sufficient. The use of the expression 'authority' cannot be said to be purposeless. It is not in dispute and is accepted that the disciplinary authority cannot be any person other than an official of the Paradeep Port Trust. Therefore, in our considered opinion, it is not open to the Paradeep Port authorities to appoint any person other than any of its functionaries as the Inquiry Officer. In view of the analysis made by us, the guidelines indicated by the Ministry of personnel, Public Grievances and Pensions are of no consequences."*

18. Considering the meaning of "authority" as discussed above, this Court is of the considered view that use of expression "authority" cannot be said to be a purposeless, as the disciplinary authority cannot be a person other than the official of OSCMFL. Therefore, it is not open to the OSCMFL to appoint any person other than any of its functionary as the inquiry officer. The judgment of this Court mentioned supra has neither been challenged nor set aside by the higher forum, as is stated by learned counsel for the parties. Therefore, the principles laid down in the said judgment still hold good and are governing the field. Consequentially, the appointment of B.K. Panigrahi, Retired Chief Engineer, Electrical as inquiry officer, who is an outsider to the Federation, cannot sustain in the eye of law.

19. In view of the analysis made in the foregoing paragraphs, if the appointment of the inquiry officer is bad in law, any consequential action taken on its report cannot sustain. As a result, the order dated 05.05.2000 (Annexure-23) passed by the disciplinary authority and consequential order of confirmation made by the learned Member, Co-operative Tribunal, Orissa vide Annexure-27 dated 18.09.2002 in Service Dispute Case No.11 of 2000, are hereby quashed. It is open to the OSCMFL to appoint an inquiry officer in accordance its Regulation and proceed with the matter afresh from that stage.

20. The writ petition is allowed to the extent indicated above. No order as to cost.

Writ petition allowed.

**2017 (I) ILR - CUT- 826**

**D. DASH, J.**

O.J.C. NO. 11924 OF 1996

**TULASI BIBI** ……..Petitioner

*.Vrs.*

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

**CONSTITUTION OF INDIA, 1950 – ART. 226**

**Medical negligence – Premature death of petitioner's son while he was prosecuting his post graduation – Claim for compensation – Enquiry conducted by RDC confirmed that the death of the deceased occurred due to negligence of the doctor and the nursing student who administered "Rubiquin" injection directly in the vein without knowing specification of the medicine – Doctrine of res ipsa loquitur applies with full force – No explanation by the Opp. Parties – Accident was due to lack of care by the doctor and nurse – State can not shift the responsibility in compensating the petitioner – Held, state is liable to pay compensation of Rs. 3,00,000/- to the petitioner within three months, failing which the same will carry interest at the rate of 6% P.A.**

**Case Law Referred to** :-

1. 1909 AC 229 : Cooke v. Midland Great Western Railway.
2. (1922) 1 AC 44 : Glasgow Corporation v. Taylor.
3. (1995) 2 SCC 150 : Consumer Unity & Trust Society v. Bank of Baroda.
4. (1995) 5 SCC 659 : AIR 1995 SC 2499 : State of Maharastra v. Kanchanmala Vijaysing Shirke.
5. AIR 1996 SC 2111 : (1996) 4 SCC 332 : Poonam Verma v. Ashwin Patel.
6. (2001) 8 SCC 151 :AIR 2001 SC 3660 : M.S.Greval v. Deep Chand Sood.
7. (2009) 9 SCC 221 : Malay Kumar Ganguly v. Dr., Sukumar Mukherjee.
8. (2010) 3 SCC 480 : Kusum Sharma v. Batra Hospital.

For Petitioner : M/s. S.Palit, L.Jena, S.Sen, M.K.Mallik, B.S.Das & P.K.Majhee

For Opp. Parties : M/s. B.H.Mohanty, D.P.Mohanty, R.K.Nayak & B.Das.

Date of hearing : 15.03.2017
Date of judgment : 18.04.2017

**JUDGMENT**

***D. DASH, J.***

The petitioner who is the mother of deceased Sudhir Kumar Singh has field this writ application praying for a direction of this Court to the opposite parties for payment of compensation of Rupees ten lakh on account of death of her son in course of treatment in SCB Medical College & Hospital alleging gross negligence on the part of all those in-charge of the treatment. She has further prayed for a direction to the opposite parties for payment of Rupees five lakh for the mental pain and agony as well as for the damage suffered by her.

2. Petitioner's case is that:-

Sudhir Kumar Singh was admitted in Bed No. 16 of SCB Medical College and Hospital in the Medicine Ward on 03.07.1995. The treatment being given after admission, his condition began improving. It is said that on 05.07.1995, Sudhir was feeling well enough to talk.

On that day around 3.15 p.m., one Jyotirmayee Nayak who was then a first year nursing student came and administered the fatal doses injections of "Rubiqin" intravenous. It is stated that within ten minutes of said administration of injection, Sudhir died. In view of said death of Sudhir immediately after the administration of the fatal doses as above by a first year nursing student, there was lot of hue and cry.

The State Government then caused an enquiry into the incident by the Revenue Divisional Commissioner with direction to submit the report.

Pursuant to the said direction, the Commissioner conducted a detail inquiry and submitted the report. As stated by the petitioner, the conclusions stand that the death of Sudhir occurred due to negligence of the doctors and the said nursing student in administering the doses of 'Rubiquin' injection directly in the vein without following the prescription and for the in experience . The State Government in view of a said report paid a sum of Rupees one lakh to the bereaved family of Sudhir as ex-gratia. It is further stated that the nursing student who administered the dose was in experienced and ignorant to the extent that she did not even know the specification of the medicine as also the required dose so as to be given at a time. Therefore, while already 600 mg of 'Rubiquin' had been administered on the patient, she

further administered two more doses of Rubiquin injection of 600 mg each to the patient in vein directly which lead to the instantaneous death of Sudhir. It is next stated that when such injections were pushed, no doctor was present and the department was then being manned by one Post Graduate Student doctor.

With the above, attributing gross negligence on the part of all the persons in-charge of the treatment of the deceased in SCB Medical College and Hospital; compensation has been claimed.

3. Opposite party no. 1 to 3 in the counter have stated that:-

In the instant case, the staff of the Medical College and Hospital while treating the petitioner's son had made all endeavours in the direction, so that he would be brought to normal condition early and for his recovery. The doctors took all steps to treat the suffering patient for recovery. The death is said to be due to cardiac respiratory failure which is the medical phenomenon that can happen at any the stage of distress. It is next stated that deceased was seriously ill when was admitted on 03.07.1995. So, immediately, he was given necessary treatment being diagonised to be a case of cerebral malaria. Rubiquin injection being the best medicine which is usually administered intravenously with quinine dextrose being the right choice, and had therefore been prescribed. It has been averred that introquinine dextrose is given in the hospital by trained persons and that was also so done in the instant case. It is stated that although after initial treatment, the patient showed some improvement yet he was not out of danger. It is only when a patient is felt out of danger, the quinine tablet is orally administered. It is stated that removal of feeding tube has nothing to do with the administration of quinine as it was the stage for trial feeding. It is stated that the deceased could not have been administered quinine orally as he had not recovered fully.

On the faithfully night when the routine hour was over, the in-service Post Graduate student who was a senior doctor was on his duty. There was trained staff at his disposal. The attending staff had all the instructions with regard to the administration of medicines. Therefore, it is said that there was no negligence and no such dereliction of duty. The cardiac respiratory failure resulting death can take place even if the quinine is given directly or intravenously. It is said to be an occasional phenomenon which unfortunately happened in case of the petitioner's son. The allegation that death was due to direct intravenous administration of quinine is denied as cardiac failure could have been caused even without such administration. It is next however said that the persons responsible for administering 'fatal' injection have been duly

proceeded with. It is stated that after the enquiry by the Commissioner and or receipt of the report, necessary actions have been taken after due consideration including payment of ex-gratia to the members of the bereaved family.

4. The position of law has been clearly expressed in case of Common Cause, A Regd. Society v. Union of India and others, AIR 1999 (SC) 2979; wherein it has been observed that under Article 226 of the Constitution, the High Court has been given the power and jurisdiction to issue appropriate Writs in the nature of Mandamus, Certiorari, Prohibition, Quo-Warranto and Habeas Corpus for the enforcement of Fundamental Rights or for any other purpose. Thus, the High Court has jurisdiction not only to grant relief for the enforcement of Fundamental Rights but also for "any other purpose" which would include the enforcement of public duties by public bodies.

Essentially, under public law, it is the dispute between the citizen or a group of citizens on the one hand and the State or other public bodies on the other, which is resolved. This is done to maintain the rule of law and to prevent the State or the public bodies from acting in an arbitrary manner or in violation of that rule. The exercise of constitutional powers by the High Court and the Supreme Court under Article 226 or 32 has been categorized as power of "judicial review". Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution. With the expanding horizon of Article 14 read with other Articles dealing with Fundamental Rights, every executive action of the Government or other public bodies, including Instrumentalities of the Government, or those which can be legally treated as "Authority" within the meaning of Article 12, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of Supreme Court under Article 32 or the High Courts under Article 226 and can be validly scrutinized on the touchstone of the Constitutional mandates."

5. In the earlier decision, in case of, Life Insurance Corporation of India v. Escorts Limited & Ors, AIR 1986 SC 1370 it has been held that:

> "Broadly speaking, the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in

> demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances".

6. Many aspects of the Public Law concept being considered, it has been held that in view of the law undergoing a change by subsequent decisions even though the petition relates to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226. The Public Law remedies have also been extended to the realm of tort. In various decisions, the courts have entertained petitions under Article 226 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Government. The causing of injuries, which amounted to tortuous act, was compensated by the Hon'ble Supreme Court in many of its decisions, beginning from *Rudul Sah v. State of Bihar*; AIR 1983 SC 1086, also *Bhim Singh v. State of Jammu & Kashmir*; AIR 1986 SC 494, *People's Union for Democratic Rights v. State of Bihar*; AIR 1987 SC 355, *People's Union for Democratic Rights Thru. Its Secy v. Police Commissioner; Delhi Police Headquarters; (1989) 4 SCC 730, Saheli, A Woman's Resources Centre v. Commissioner of Police*, *Delhi; AIR 1990 SC 513, Arvinder Singh Bagga v. State of U.P.*;AIR 1995 SC 117, *P.Rathinam v. Union of India; (1989) Supp. 2 SCC 716, In* Re: Death of *Sawinder Singh Grower*; (1995) Suppl.(4) SCC 450, *Inder Singh v. State of Punjab*; AIR 1995 SC 1949, *D.K.Basu v. State of West Bengal; AIR 1997 SC 610.*

7. Concerning cases of custodial death and those relating to medical negligence, the Hon'ble Apex Court awarded compensation under *Public Law domain in Nilabati Behera v. State of Orissa;AIR 1993 SC 1960, State of M.P. v. Shyam Sunder Trivedi*; (1995) 4 SCC 262, *People's Union for Civil Liberties v. Union of India; AIR 1997 SC 1203,* and *Kaushalya v. State of Punjab*; (1996) 7 SCALE (SP) 13, *Supreme Court Legal Aid Committee v. State of Bihar*; (1991) 3 SCC 482, *Dr. Jacob George v. State of Kerala*; (1994) 3 SCC 430, *Paschim Bangal Khet Mazdoor Samity v. State of West Bengal & others; AIR 1998 SC 223,* and *Mr. Manju Bhatia v. N.D.M.C*; (1996) 1 SCC 490.

8. In view of the above settled position of law as propounded by the Apex Court, a petition under Article 226 of the Constitution still stands for consideration where pubic functionaries were involved and the matters relate to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the law not withstanding that a suit would be filed for damages under Private Law.

9. The instant case relates to medical negligence in course of treatment of the deceased in the hospital when it is said that there has not been negligence in the discharge of the duties in utter disregard in the line of treatment prescribed for the deceased and inaction and ignorance of the staffs of the hospital on duty at the time by not taking the minimum care.

10. Thus it stands to consider where there was negligence on the part of the staffs of the hospital which was the proximate cause of the death of the petitioner's son.

From the report of the Commissioner it is quite evident that the enquiry was extensive one and long exercise by recording the statements of the witnesses and collection of all those documents and upon their analysis at length.

The important part to be gone through for the purpose concerns the points formulated by the Commissioner regarding the circumstances leading to the death of Mr. Sudhir Singh in the hospital on 05.07.1995 and negligence in the treatment, if any caused, followed by the point no.1 the adequacy of attendance at the time of occurrence including paramedical and other staff.

Very rightly two items have been dwelt upon together. The relations of the deceased patient has been examined. The Professor and the Head of Department of Medicine has also given his statement in the matter saying that he had examined the patient. The relations have stated the facts projected in the petition.

11. The Professor and the Head of Department of Medicine has stated to have diagnosed to be a case of Cerebral Malaria and to have advised administration of Rubiquin injection to the patient in 10% dextrose drip as well as other injections like Cephaxone, Epsolin and Rantac.. This Rubiquin is said to be quinine the specific medicine of choice for Cerebral Malaria. The Doctor has stated that these are the standard treatments for a case of Cerebral Malaria. He had examined the deceased at 9.00 PM on 03.07.1995. At 11.00 PM the patient since had fall of blood pressure, he was given

Dopamin injection in the drip to keep the blood pressure normal. He again examined the patient on 04.07.1995 around 10 AM when the patient was still serious and the blood pressure then continued to be low and therefore was given with the Dopamin injection. According to him, on 05.07.1995 around 11 'O' Clock, when he examined the patient again, he marked improvement in the condition of the patient and then his blood pressure was stable. He was also having no fever then. The patient was responding to the treatment and the doctor was convinced on that though his mental condition was not very clear. The treatment therefore continued as before. According to him, he had advised to administer Rubinquin injection (600 mg.) -1 amp.-Inter Venous 8 hourly with 10% Dextrose solution. He has further stated that the standard method of administration of Rubiquin injection is through drip intravenously and that the same being cardio-toxic, if given directly in the vein, the patient may get visited with fatal consequence. However, he has reiterated the stand that the Cerebral Malaria is a high risk disease and it carries very high rate of mortality.

The Assistant Professor of Medicine had also gone to examine the patient in the evening of 03.07.1995 He had last gone to the patient on 05.07.1995 around 2 PM. Then he having found the patient's condition to be unexpectedly good had thus the hope for recovery of patient. The patient then although was conscious still had some objective signs of brain dysfunction. He of course has stated that Rubiquin injection if given directly in the vein may cause hypotension and cardiovascular collapse.

The Post Graduate Student of the Medicine Department on duty in the casualty on 05.07.1995 in the afternoon has stated that having received information about serious condition of the patient when he rushed down to the bed, he found one lady House Surgeon attending the patient. The blood pressure then was not recordable and his pulse was very feeble. Then he applied Cardio-resuscitation measures, which did not yield any such positive result and went in vain.

The uncle of the deceased has stated that on 05.07.1995 around 3 PM a student nurse wrote down a small note for getting 3 injections, i.e. Rubiquin, Epsolin and Ranitin. The student nurse getting those, stopped the regulator of the drip which was running at that time and started to administer Rubiquin injection directly in the vein. It is stated that after taking the Rubiquin injection, the patient became uncomfortable, passed stool on the bed and became stiff. This uncle of the deceased had in fact no idea about the complications likely to arise in the event of direct push of the said Rubiquin

injection in the vein. Moreover, his version about the immediate after affects under no circumstance can be said to be exaggerated or improved as other staff including the attending P.G. Student have corroborated about the deterioration of the patient's condition then and the time gap is very little.

12. The Commissioner has gone for further enquiry relating to purchase of Rubiquin injections and their use. The conclusion has been that there was no negligence on the part of the doctors and the supervision of the patient from time to time have been established. However, going to examine the medicine chart and upon critical examination of the statements of the staffs, then on duty, he has arrived at the conclusion that there has been negligence in administering the injections.

13. The following part of the report very much relevant for the purpose needs mention which is reproduced hereunder:

> " It has been stated by the student nurse that since one ampule of 300 mg. of Rubiquin injection was available, she asked the attendant to get another ampule of 300 mg. Rubiquin. She also wrote a note to this effect and this version of her is corroborated by the attendant also. But from the evidence collected from the District Sales Officer of P.C.I., it is clear that their Company manufactures and markets Rubiquin injection only in 2 ml. ampoules containing 600 mg. of quinine dehydrochloride. It has been specifically stated that the Company is the sole manufacturer of Rubiquin and has never manufactured 1 ml. ampule at any time. It is, therefore, very strange that the student nurse asked the attendant of the patient to get one ampule of 300 mg. of Rubiquin so that 2 such ampoules can be added to administer a dose of 600 mg of Rubiquin to the patient according to the doctors' prescription. Miss. Binati Das, staff nurse was also examined again on this point since she had administered the Rubiquin injections earlier to the patient. She categorically stated that she had injected one ampule of Rubiquin containing 600 mg each time to the patient in 10% Doxtrose solution. I, therefore find the action of the student nurse Miss Naik very strange in this regard and it also reveals her ignorance about the specification of this injection. Dr. Sabyaschi Das has clearly stated that only 600 mg. of Rubiquin injection was prescribed and it is also clear that Miss. Binati Das, staff nurse had earlier administered only 600 mg. of Rubiquin. Therefore, the question of adding 2 ampules does not arise. Considering th e above discrepancies, the

statement made by Miss. Naik, student nurse that she kept the Rubiquin ampules in her pocket without administration and later she handed over the same to the Principal of the Nursing School appears to be shrouded in doubt and mystery. The most important issue that emerges is whether the student nurse had administered the Rubiquin injection directly in the vein of the patient as alleged by the attendants in spite of protest from them. The student nurse has taken a stand that she did not administer Rubiquin injection although she administered other 2 injections and made entry in the medicine chart of all three injections. She also has mentioned in her statement regarding deposit of the 2 unused Rubiquin ampoules with the Principal of the Nursing School. Miss. Nilima Kar, Sister-Tutor has stated that Miss. Naik gave the ampules to the principal but Miss Kar, sister Tutor was not present at that time. That means the student nurse handed over the Rubiquin ampules to the Principal of the Nursing School at a time when no one else was present. However, the Sister-Tutor stated that she had earlier been shown the two ampoules of Rubiquin injection by Miss Naik. The ampule purchased on 5.7.1995 from Remedy Medical Store bearing batch No.5002 Q was not among the ampules allegedly handed over to the Principal of Nursing School by Miss. Naik, student nurse. The various statements made by the Principal of the Nursing School, the Sister Tutors and the Nursing student, Miss. Naik with regard to deposit of the ampules do not appear very credible or convincing. Question arises as to where was the Rubiquin ampule bearing batch No.5002Q which was purchased on 5.7.95 from Remedy Medical Store, which should have been available with the student nurse, if her statement is to be believed that she kept the ampules in her apron pocket without administering the injection.

The analysis of the evidence, and the various gaps and discrepancies in the statements as discussed *lead me to a presumption that all the injections as mentioned in the Medicine chart were actually administered by the student nurse to the patient. From the entry made in the medicine chart it is also clear that the injections were given intravenously*.

One important thing however is that it appears from the evidence that the staff nurse Smt. Panchali Dei was available on duty in the Ward when the injections were administered. According to her statement she came at 2.25 PM on 5.7.95 to the ward although her duty hours started at 2 PM. She had

not enquired about the administration of the injections to the patient. She also denies to have knowledge about administration of the injections by the student nurse. This is quite unusual since the staff nurse did not take the responsibility of administration of the injection particularly when it relates to such a serious patient. According to the statement of one of the sister Tutors of the Nursing School, Ist Year nursing students are not allowed to give intravenous injections. Since the student nurse concerned was a student of Ist year Nursing course, she should not have been allowed to administer the injections all by herself as it also appears from the evidence that while she was administering the injections, the nursing sister Nishamani Devi and staff nurse Panchali Dei were available in their seats. The student nurse also says that she administered the injections with the advice of the staff nurse. However, it is very strange that the staff nurse expressed her complete ignorance about the administration of the injections. The student nurses are learners and they have to be guided properly in doing their job. The prescription was clear that Rubiquin injection was to be given with 10% Dextrose solution. Even if the work of giving injections is given to the student nurses, that has to be done under close supervision to ensure that the proper method is being followed".

14. "At the time of administration of the injections, Nishamani Devi, nursing sister was present in the Ward although her duty was already over since 2 PM. The staff nurse, Panchali Dei who admittedly came at 2.25 PM to duty was very much available on duty at that point of time. But she stated that she did not even enquire whether injections were given to the patient since she came late. The duty of the staff nurse was to immediately supervise the administration of drugs and injections to the patient and that was even more necessary when she had admittedly come to duty late. On the other hand a careless and casual approach has been adopted in this matter and a student nurse has been allowed to handle a very important duty. Later on the staff nurse has expressed her complete ignorance about the administration of the injections by the student nurse".

15. "Dr. Sabyasachi Das, Prof. of Medicine has stated in his evidence that direct administration of Rubiquin in the vein can be fatal since quinine is a cardio-toxic drug. Therefore, his advice was to give quinine injection in the drip and his presumption was that it was being administered in the drip. Dr. Das has also given some literature of the World Health Organization regarding the management and treatment of uncomplicated Malaria which mentions that quinine remains the preferred treatment for chloroquine-

resistant malaria. However, the need for prolonged courses, which give rise to high frequency side effect (some potentially dangerous) and consequently to poor compliance, suggests that it should, whenever possible, be used under supervision in hospital or where out-patients, can be monitored. It is further mentioned that since rapid intravenous push or bolus injections of quinine can cause severe or even fatal cardio-vascular toxicity, the drug should never be given in this way. Ideally, quinine should be given by slow, constant, controlled rate intravenous infusion diluted in isotonic fluid (5 to 10 ml. per kg. of body weight depending on the patient's over-all fluid balance). Dr. Das has also given extracts from the Book-"Pharmacological basis of Therapeutics" by Goodman and Gillman which mentions that therapeutic doses of quinine have little if any effect on the normal heart or blood pressure in man. When given intravenously, quinine causes a definite and sometimes alarming hypotension particularly when the injection is made rapidly. From the extract given by Dr. Das and on the basis of the effects cited by him one can safely conclude that direct intravenous administration of quinine injection in considerable dose may lead to Cardio-vascular failure".

16. Carefully going through the report of the Revenue Divisional Commissioner submitted before the opposite party no.1 after holding detail and thorough enquiry and reading the statements of the doctors and other staff of the hospital as well as relatives of the deceased the death in the case is found to be on account of happening of cardio-vascular failure. It is also seen from the materials available at galore that no sooner the Rubiquin injection was directly given intravenously the patient became serious and died instantaneously. Therefore, this Court is persuaded to accept that the death as has occurred could not have been so happened then without the negligence on the part of the personnels in-charge of administration of the medicine and injections to the patient by scrupulously not following the advice of the doctor and the prescription relating to those time gap, mode etc. etc.

17. In ***Cooke v. Midland Great Western Railway***, 1909 AC 229 and ***Glasgow Corporation v. Taylor***, (1922) 1 AC 44, the meaning of word 'Negligence' is stated as follows:-

> "Acting carelessly, a question of law or factor of mixed fact and law, depending entirely upon the nature of a duty, which the person charged with negligence has failed to comply with or perform in the particular circumstance of each case. A very convenient classification has been formulated corresponding to the degree of negligence

> entailing liability measured by the degree of care undertaken or required in each case, i.e. (1) ordinary, which is the want of ordinary diligence; (2) slight, the want of great diligence; and (3) gross, the want of slight diligence. A smaller degree of negligence will render a person liable for injury to infants than in the case of adults."

In ***Consumer Unity & Trust Society v. Bank of Baroda***, (1995) 2 SCC 150, the apex Court held that "Negligence" is absence of reasonable or prudent care which a reasonable person is expected to observe in a given set of circumstances.

In ***State of Maharastra v. Kanchanmala Vijaysing Shirke***, (1995) 5 SCC 659 : AIR 1995 SC 2499, the apex Court held that "Negligence" is the omission to do something which a reasonable man is expected to do or a prudent man is expected to do so.

In ***Poonam Verma v. Ashwin Patel***, AIR 1996 SC 2111; (1996) 4 SCC 332, the apex Court a tort is the breach of a duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do.

In ***M.S.Greval v. Deep Chand Sood***, (2001) 8 SCC 151' AIR 2001 SC 3660, the apex Court held as follows:

> "Negligence in common parlance means and imply failure to exercise due care, expected of a reasonable prudent person. It is a breach of duty and negligence in law ranging from inadvertence to shameful disregard of safety of others. It is caused by heedlessness or inadvertence by with the negligent party is unaware of the results which may follow from his act negligence is thus a breach of duty or lack of proper care in doing something, in short, it is want of attention and doing of something which a prudent and a reasonable man would not do."

18. In ***Malay Kumar Ganguly v. Dr., Sukumar Mukherjee***, (2009) 9 SCC 221, the apex Court held that "negligence", is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence means either subjectively a careless state of mind, or objectively careless conduct. It is not an absolute term but is a relative term. Negligence is strictly nonfeasance and not malfeasance. It is the omission to do what the law requires, or the failure to do anything in a manner prescribed

by law. It is the act of which can be treated as negligence without any proof as to the surrounding circumstances, because it is in violation of statute or is contrary to the dictates of ordinary prudence.

In ***Kusum Sharma v. Batra Hospital***, (2010) 3 SCC 480, the apex Court held that negligence is the breach of a duty exercised by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

19. This being the meaning attached to the word "negligence" as held by the Apex Court time and again, applying the same to the present context, it is made clear that the staffs have acted in breach of their duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do. Thereby negligence in common parlance means and imply failure to exercise due care, expected of a reasonable prudent person.

Therefore, in the facts and circumstances of the case in hand as it reveals from the available records and as also emanate from the rival case projected before this Court on being tested in touchstone of the settled law, the negligence on the part of the personnel in-charge of the treatment of the deceased at the relevant point of time clearly gets attributed as proximate cause of the death at that point of time and under no circumstance, the death would have occurred at that time either due to cardio-vascular failure or because of the Cerebral Malaria which had been so diagnosed and even though said to have been the disease with high rate of mortality.

Furthermore, the facts and circumstances of the case and the sequence of events right from the time of admission till death of the patient along with the treatment when are viewed in the cumulative, in my considered opinion the negligence clearly gets attributed to those on duty at that time in not following the prescription of the doctors in administering the injection as stated with due care which was so required to be taken with utmost sincerity in view of the serious disease that the patient was suffering from and more so when there had been quite improvement in the patient's condition. These factors being taken together grater care and attention of all those being the need of the hour, there appears on element of lack on that score. All these rather leads one to say that in view of the manner of dealing with the patients, the doctrine of res pisa loquitur does come into play with full force.

20. The principle of res ipsa loquitur is well known. It is explained in a very illustrative passage in *Clerk & Lindsell on Torts*, 16th Edn., pp. 568-569, which reads as follows:

"Doctrine of res ipsa loquitur. The onus of proof, which lies on a party alleging negligence is, as pointed out, that he should establish his case by a pre-ponderance of probabilities. This he will normally have to do by proving that the other party acted carelessly. Such evidence is not always forthcoming. It is possible, however, in certain cases for him to rely on the mere fact that something happened as affording prima facie evidence of want of due care on the other's part' res ipsa loquitur is a principle which helps him to do so'. In effect, therefore, reliance on it is a confession by the plaintiff that he has no affirmative evidence of negligence. The classic statement of the circumstances in which he is able to do so is by Erle, C.J..

'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of thigs does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.'

It is no more than a rule of evidence and states no principle of law. "This convenient and succinct formula", said *Morris*, L.J., "possesses no magic qualities; nor has, it any added virtue, other than that of brevity, merely because it is expressed in Latin". It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. The court hears only the plaintiff's side of the story, and if this makes it more probable than not that the occurrence was caused by the negligence of the defendant, the doctrine *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability. It is not necessary for *res ipsa loquitur* to be specifically pleaded".

21. On the anvil of the aforesaid, the death having taken place shortly after the Rubiquin injections were pushed intravenously without following the procedure prescribed by the doctor for administration of the same with 10% Dextrose solution, the conclusion also stands in that way that the death was due to negligence in the treatment. No such explanation is offered except

merely stating that the death is due to cardio-vascular failure which can happen at any stage of distress and showing the position that Cerebral Malaria is a high risk disease carrying very high rate of mortality; when there remains the clear version of the expert doctors who had the occasion to treat the patient that the Rubiquin injection given directly in the vein may cause Hypotension and Cardio-vascular collapse since it is cardio toxic and thus is always advised to be given in 10% dextrose solution which is definitely to avoid such toxic effect so as to create further complication leaving no other better choice in treatment of a patient as in the case. The personnel in-charge of the treatment of the patient of such serious disease having done the job at the initial stage when had found the improvement in the condition of the patient with the decision to go for direct feeding for test shake by removing feeding pipe, much more care was needed and expected as of duty when the patient was found to be conscious as stated by the doctor. The medical care in all respect from that point of time ought to have been with more care and ought to have been with much more vigilance lest no such slight mistake takes place, so as to stand in the way of the patient's improvement or to cause any deterioration which is clearly found to be lacking in this case.

22. For the aforesaid discussion and reasons, the State cannot shift the responsibility in compensating the petitioner, who is the mother of the deceased-patient for the untimely death of her son at such prime age when he was prosecuting his studies in Post Graduate level in History with good academic record.

In view of the above, taking all the relevant factors into consideration, this Court holds that the State is liable to pay the compensation of Rs,3,00,000/- (three lakh) to the petitioner.

23. The writ application is accordingly disposed of directing the opposite party no.1 to pay a sum of Rs.3,00,000/- (three lakh) towards compensation on account of death of the petitioner's son within a period of three months hence, failing which it would carry interest at the rate of 6% per annum with effect from today till payment.

Writ application disposed of.

**2017 (I) ILR - CUT- 841**

**SATRUGHANA PUJAHARI, J.**

CRA NO. 162 OF 1992

**SHANKARLAL AGRAWALA** ……..Appellant

*.Vrs.*

**STATE OF ORISSA** ……Respondent

**CRIMINAL PROCEDURE CODE, 1973 – S.313**

**Conviction of the accused U/s. 7(1)(a)(ii) of the E.C. Act, 1955 – Non-examination of the accused U/s. 313 Cr.P.C. – No opportunity given to the accused to know the incriminating circumstances against him and to explain the same – Hence the appeal – It is not the case that personal appearance of the accused was dispensed with either U/s. 205 Cr.P.C. or U/s. 317 Cr.P.C. for a considerable period – But on the very day as the accused remained absent, a petition U/s. 317 Cr.P.C. was filed on his behalf and the learned court below without assigning any reason dispensed with examination of the accused U/s. 313 Cr.P.C. – Since examination of the accused U/s. 313 Cr.P.C. is not a mere formality, his non-examination has definitely caused prejudice to him – Moreover, he having applied for the license, even to a wrong authority, he had no *mens rea* to commit the offence – Held, the impugned judgement of conviction is set aside.**

**Case Laws Referred to** :-

1. AIR 1973 SC 2622 : Shivji Saheb Rao -V- State of Maharashtra
2. 1976 CRI.L.J. 1629 : Mazahar Ali -V- State
3. 1978 CRI.L.J. 544 : Ram Lochan -V- State
4. 71(1991) C.L.T.582 : Raghunath Panigrahi -V- State of Orissa

For Appellant : Mr. N.C.Pati & Associates
For Respondent : Addl. Govt. Adv.

Date of Hearing : 17.11.2016
Date of Judgment : 17.11.2016

**JUDGMENT**

***S.PUJAHARI, J.***

The appellant herein calls in question the judgment of conviction and order of sentence passed against him in II(C) C.C. No.5 of 1990 on the file of the Special Judge-cum- Sessions Judge, Balangir. The learned trial court vide the impugned judgment and order held the appellant (hereinafter referred to as "the accused") guilty of the charge under Section 7(1)(a)(ii) of the

Essential Commodities Act, 1955 (hereinafter referred to as "the Act") and sentenced him to undergo imprisonment for a period of three months for contravention of Clause-3(ii) of the Orissa Food Grains Dealers' Licensing Order, 1964 (hereinafter referred to as the "Licensing Order").

2. The accused allegedly being found in possession of 13.50 quintals of 'Gurji' without any licence, i.e., having stored more than 10 quintals of 'Gurji' he deemed to be a dealer within the meaning of the aforesaid Licensing Order. That being the allegation, the accused was prosecuted. To substantiate the allegation, prosecution had examined two witnesses, of whom, P.W.1 is the then Marketing Intelligence Inspector. His evidence reveals that on 06.09.1989 he had inspected the business premises of the accused in the name and style "Balaji Trading". His evidence further reveals that he found stock of 13.50 quintals of 'Gurji', but the accused could not produce any licence for doing business of 'Gurji' in such quantity. Since the accused had no dealership licence for doing business in 'Gurji', P.W.1 seized the stock under seizure list (Ext.1). This witness denies suggestion that on 18.08.1989 the accused had applied for licence, the Collector being the Licensing authority. P.W.2, a Clerk attached to the Office of P.W.1 had accompanied the P.W.1 to the business premises of the accused on 06.09.1989 where they found the accused had stored 13.50 quintals of 'Gurji' having no licence required under Licensing Order. This witness was not subjected to any cross-examination. P.Ws.1 and 2 having deposed that accused was found transacting business in 'Gurji' in his business premises on 06.09.1989 to an extent of 13.50 quintals, but could not produce any licence on demand as required under the aforesaid Licensing Order. Even there was no suggestion that the accused is not related with the questioned business premises searched on 06.09.1989 by P.W.1 nor there is even any suggestion that he was not found in possession of 'Gurji' to an extent of 13.450 quintals. This being the nature of the evidence, there is overwhelming evidence on record that on 06.09.1989 the accused was doing business in his firm "Balaji Trading" in 'Gurji' to an extent of 13.50 quintals having no licence. This is the essence of the evidence brought on record.

3. Assailing the conviction, the learned counsel representing the accused would contend that the accused by 18.08.1989 having applied for licence and no opportunity being afforded to him to produce that licence, the accused was highly prejudiced in his trial. To make it more explicit, the learned counsel for the accused submits that no statement of the accused under the mandatory provisions of Section 313 of the Code of Criminal Procedure, 1973 (for short

"Cr.P.C.") being recorded, the accused was prejudiced in his defence. Hence, he having given no opportunity to know the incriminating circumstances brought against him and to explain the same, the impugned judgment of conviction and order of sentence are unsustainable.

4. Per contra, the learned counsel appearing for the State would submit that no document being produced by the accused in course of trial and when personal appearance of the accused was dispensed with in such summery trial, his examination under Section 313(1) of Cr.P.C. was dispensed with in terms of proviso to Section 313(1)(b) of Cr.P.C.

5. The moot question that needs decision is whether no examination of the accused under Section 313(1) of Cr.P.C. in the facts and circumstances is fatal to the prosecution ?

6. A scrutiny of lower Court records, Order No.13 dated 25.03.1992 reveals that since the personal appearance of the accused was dispensed with for that date in terms of Section 317 of Cr.P.C. and when the accused remained absent on that date, the learned lower Court dispensed with examination of accused as required under the proviso to Section 313(1)(b) of Cr.P.C. At this juncture, it is pertinent to quote the provisions of Section 313 of Cr.P.C. which reads as thus :-

> "313. **Power to examine the accused** – (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court –
>
> (a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;
>
> (b) Shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:
>
> Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b)."

7. On the plain language of Section 313 of Cr.P.C., it is evident that in a summons-case, when the personal appearance of the accused has been dispensed with under Section 205 of Cr.P.C. or Section 317 of Cr.P.C., the discretion is vested on the Magistrate to dispense with the rigor of personal examination of the accused under Section 313 of Cr.P.C. But, the examination of accused under the aforesaid provisions is not a mere

formality. It aims at affording opportunity to the accused to explain the incriminating circumstances brought out against him in the prosecution evidence before he is called upon to enter his defence. In this regard, reliance may be made in a decision of the Apex Court in the case of ***Shivaji Saheb Rao vrs. State of Maharashtra,*** **AIR 1973 S.C. 2622** and in the case of ***Mazahar Ali vrs. State,*** **1976 CRI.L.J. 1629**. It is trite law, nevertheless fundamental that the accused's attention should be drawn to every inculpating material so as to enable him to explain him, where such an omission has occurred. It is also settled law that when a circumstance was not put to the accused in examination under Section 313 of Cr.P.C., the said circumstance could not be used against him. It is also settled law that non-examination of the accused under Section 313 of Cr.P.C. is not such an irregularity which stood cured under Section 465 of Cr.P.C., but it is illegality which went to the root of the case. By not examining the accused under the aforesaid section, opportunity is not given to the accused to explain the incriminating circumstances against him. The accused has successfully established how he was prejudiced for such non-examination. **[*See 1978 CRI.L.J. 544 (Ram Lochan vrs. State)*].** In the instant case, accused remained absent on that fateful day and a petition under Section 317 of Cr.P.C. was filed on his behalf. The learned lower court without assigning any reason whatsoever dispensed with examination of the accused under Section 313(1) of Cr.P.C. It is not a case where the personal appearance of the accused was dispensed with either under Section 205 of Cr.P.C. or under Section 317 of Cr.P.C. for a considerable period. Only because the accused remained absent on that particular day, dispensing with examination of the accused in a case of this nature has definitely caused prejudice to him. Apparently, he being under impression that he having applied for licence though to a wrong authority he had no *mens rea* to commit the offence as held in the case of ***Raghunatha Panigrahi vrs. State of Orissa,*** **71 (1991) C.L.T**. 582. Consequently, when the accused was not provided with an opportunity to explain the circumstances in which he was indicted in the offence alleged against him, this Court is of the view that a prejudice was caused to the accused.

8. In view of the aforesaid, this Court is of the view that the conviction of the accused, as such, is indefensible and, accordingly, the same cannot be sustained. I would, therefore, allow this criminal appeal and set-aside the impugned judgment of conviction and order of sentence. Accordingly, the

accused is acquitted of the offence charged. L.C.R. received be sent back forthwith along with a copy of this Judgment.

Appeal allowed.

**2017 (I) ILR - CUT- 845**

**S. K. SAHOO, J.**

CRLREV NO. 137 OF 2000

**RANJAN KUMAR SENAPATI** ……..Petitioner

*.Vrs.*

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

**NIGOTIABLE INSTRUMENTS ACT, 1881 – S. 138**

**Whether a complaint is maintainable against the drawer of the cheque/ accused before expiry of 15 days from the date of receipt of notice under clause (c) of the proviso to section 138 of the N.I. Act. ? Held, No.**

**In this case, the petitioner-accused received legal notice on 31.01.1996 and O.P.No2-complainant filed complaint petition on 05.02.1996 – However the learned trial Court took cognizance of the offence and passed order of conviction which was confirmed by the learned appellate Court – Hence this revision – Held, since the complaint petition was premature being not maintainable, the impugned judgment and order of conviction is setaside**. (Para 6)

**NIGOTIABLE INSTRUMENTS ACT, 1881 – Ss 138,142**

**When a complaint petition is filed before expiry of 15 days from the date of receipt of notice under clause (c) of the proviso to section 138 N.I. Act is held to be not maintainable, whether the complainant can be permitted to present such complaint petition again as the period of one month provided U/s 142 (b) of the Act for filing of such complaint has expired ?**

**Held, the complainant can not be permitted to present the very same complaint at any later stage but can file a fresh complaint within one month from the date of decision in the criminal case and in that**

**event delay in filing the complaint will be condoned under the proviso to Clause (b) of section 142 of the Act.**

**In this case if O.P.No2 files a fresh complaint before the competent Court within one month from today the concerned Court shall proceed with the case in view of the ratio decided in the case reported in (2014) 59 OCR (SC) 577.** (Paras 5,6)

**Case Law Relied on** :-

1. (2014) 59 OCR (SC) 577 : Yogendra Pratap Singh -V- Savitri Pandey & Anr.

For Petitioner : Mr. Santanu Kumar Sarangi & Tarashankar Senapati

For Opp. Parties : Mr, Deepak Kumar, (ASC) & Miss Savitri Ratho

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Date of Hearing : 05.01.2017

Date of Judgment: 05.01.2017

## JUDGMENT

***S. K. SAHOO, J.***

This revision petition has been filed by the petitioner Ranjan Kumar Senapati challenging the impugned judgment and order dated 09.09.1998 of the learned J.M.F.C., Balasore passed in I.C.C. No.45 of 1996 (Trial No.328 of 1998) in convicting the petitioner under section 138 of the Negotiable Instruments Act, 1881 (hereafter "N.I. Act") and sentencing him to undergo simple imprisonment for three months.The order of conviction was confirmed in appeal by the learned Sessions Judge, Balasore-Bhadrak, Balasore in Criminal Appeal No. 59 of 1998 vide impugned judgment and order dated 21.01.2000 but the sentence was reduced from simple imprisonment for three months to simple imprisonment for one month.

2. The prosecution case, in short, is that the complainant-opposite party no.2 deals with shoe business in the name and style as Raj Enterprises at Khalasimahala, Balasore and the petitioner was having a shoe shop at Proof Road, Balasore namely Subhadra Fancy Shoe Store. The opposite party no.2 supplied shoes worth of Rs.23,945/- on credit basis to the petitioner and the petitioner had signed on the credit bill in acknowledgement of the debt. Later on 30.10.1995 the petitioner issued two cheques valuing Rs.20,000/- bearing cheque nos.7252385 and 7252386 upon his account at Union Bank, Balasore in favour of the opposite party no.2. The opposite party no.2 presented those two cheques in his current account at Andhra Bank, Balasore for collection of

the amount on 31.10.1995 but the Union Bank, Balasore dishonoured the two cheques with endorsement "INSUFFICIENT FUNDS" in the account. The opposite party no.2 again presented those two cheques on the request of the petitioner on 20.01.1996 before Andhra Bank, Balasore and again those cheques were returned on 22.01.1996 with endorsement "INSUFFICIENT FUNDS". The opposite party no.2 issued a legal notice (Ext.10) on 27.01.1996 by registered post with A.D. which was received by the petitioner on 31.01.1996. Since the petitioner failed to pay the cheque amount to the opposite party no.2, the complaint petition was filed before the learned S.D.J.M., Balasore on 05.02.1996. The initial statement of the complainant was recorded and on 12.08.1996 the learned Magistrate took cognizance of offence under section 138 of N.I.Act and issued process against the petitioner.

3. During course of trial, the complainant examined three witnesses and proved ten documents. The petitioner examined one witness. On consideration of the available materials on record, the learned Trial Court held the petitioner guilty under section 138 of the N.I. Act and sentenced him to undergo simple imprisonment for three months while maintaining the order of conviction under section 138 of the N.I. Act. The learned Appellate Court while maintaining the order of conviction reduced the sentence from simple imprisonment for three months to simple imprisonment for one month.

4. The learned counsel for the petitioner Mr. Santanu Kumar Sarangi contended that the impugned judgment and order of conviction of the Courts below is not sustainable in the eye of law inasmuch as the complaint petition is a pre-mature one. He drew the attention of this Court to the provision under section 138 of the N.I. Act as was prevailing at the time of commission of offence and contended that in view of the proviso to section 138 of the N.I. Act, the cheque has to be presented to the bank within a period of six months from the date on which it was drawn or within the period of its validity, whichever is earlier and the payee or the holder in due course of the cheque, as the case may be, must make a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within *fifteen days* of the receipt of the information by him from the bank regarding the return of the cheque as unpaid and if the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within *fifteen days* of the receipt of the said notice, the cause of action will arise.

Learned counsel for the petitioner further contended that since the notice was received by the petitioner on 31.01.1996 as per the complaint petition and since fifteen days as stipulated under clause (c) of the proviso to section 138 of the N.I. Act has not expired at the time of filing of the complaint petition on 05.02.1996, the complaint petition is not a valid one in the eye of law. He further contended that only after the expiry of fifteen days of the date of receipt of the notice by the drawer, the cause of action would start and the complaint petition can be filed within a month of the date on which the cause of action arises in view of section 142(b) of the N.I. Act.

Learned counsel for the petitioner further contended that the provision is mandatory in nature and giving fifteen days time to the drawer of the cheque is to make payment of the cheque amount for the purpose of not proceeding with any complaint case and therefore, if the complaint petition is filed before the date of commencement of the cause of action then the drawer of the cheque would be deprived in making payment of the amount within prescribed time and the whole purpose of enactment of such a provision would be frustrated.

Learned counsel for the petitioner drew the attention of this Court to the decision of the Hon'ble Supreme Court in the case of **Yogendra Pratap Singh -Vrs.- Savitri Pandey & another reported in (2014) 59 Orissa Criminal Reports (SC) 577** to substantiate his argument and contended that since in view of the ratio decided by the Hon'ble Supreme Court, the complaint petition filed by the opposite party no.2 is no complaint at all in the eye of law, the order of cognizance as well as the consequential order of conviction passed by the learned Trial Court which was confirmed by the Appellate Court is also vitiated in the eye of law and therefore, it should be set aside.

Learned counsel for the opposite party no.2 Miss Savitri Ratho on the other hand supported the impugned judgment and order of conviction of the Courts below and contended that there is no illegality or infirmity in the same and the revision petition should be dismissed as such point was never raised before both the learned Courts below.

The learned counsel for the petitioner contended that a legal point can be raised at any stage of the proceeding and this Court is not precluded to consider such point merely because it was not raised in the Trial Court as well as in the Appellate Court and since the decision of the Hon'ble Apex Court in the case of **Yogendra Pratap Singh (supra)** was pronounced on

19.09.2014 much after the pronouncement of the judgments of the Courts below, therefore, the question of raising such contention before those Courts does not arise.

5. In case of **Yogendra Pratap Singh (supra)** the questions were formulated as follows:-

> (i) Can cognizance of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 be taken on the basis of a complaint filed before the expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of Section 138 (c) of the Act aforementioned? And,
>
> (ii) If answer to question No.1 is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142 (b) for the filing of such a complaint has expired?
>
> The Hon'ble Supreme Court answered the questions as follows:-
>
> "36. Can an offence under Section 138 of the N.I. Act be said to have been committed when the period provided in clause (c) of the proviso has not expired? Section 2(d) of the Code defines 'complaint'. According to this definition, complaint means any allegation made orally or in writing to a Magistrate with a view to taking his action against a person who has committed an offence. Commission of an offence is a sine qua non for filing a complaint and for taking cognizance of such offence. A bare reading of the provision contained in clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the N.I. Act unless the period of 15 days has elapsed. Any complaint before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of law. It is not the question of prematurity of the complaint where it is filed before expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law. As a matter of fact, Section 142 of the N.I. Act, inter alia, creates a legal bar on the Court from taking cognizance of an offence under Section 138 except upon a written complaint. Since a complaint filed under Section 138 of the N.I. Act before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint in the eye of law, obviously, no cognizance of an offence can be taken on

the basis of such complaint. Merely because at the time of taking cognizance by the Court, the period of 15 days has expired from the date on which notice has been served on the drawer/accused, the Court is not clothed with the jurisdiction to take cognizance of an offence under Section 138 on a complaint filed before the expiry of 15 days from the date of receipt of notice by the drawer of the cheque.

37. A complaint filed before expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to disclose the cause of action in terms of clause (c) of the proviso to Section 138 and upon such complaint which does not disclose the cause of action, the Court is not competent to take cognizance. A conjoint reading of Section 138, which defines as to when and under what circumstances an offence can be said to have been committed, with Section 142(b) of the N.I. Act, that reiterates the position of the point of time when the cause of action has arisen, leaves no manner of doubt that no offence can be said to have been committed unless and until the period of 15 days, as prescribed under clause (c) of the proviso to Section 138, has, in fact, elapsed. Therefore, a Court is barred in law from taking cognizance of such complaint. It is not open to the Court to take cognizance of such a complaint merely because on the date of consideration or taking cognizance thereof a period of 15 days from the date on which the notice has been served on the drawer/accused has elapsed. We have no doubt that all the five essential features of Section 138 of the N.I. Act, as noted in the judgment of this Court in **Kusum Ingots & Alloys Ltd.; AIR 2000 SC 954** and which we have approved, must be satisfied for a complaint to be filed under Section 138. If the period prescribed in clause (c) of the proviso to Section 138 has not expired, there is no commission of an offence nor accrual of cause of action for filing of complaint under Section 138 of the N.I. Act.

38. We, therefore, do not approve the view taken by this Court in **Narsingh Das Tapadia; (2000) 7 SCC 183** and so also the judgments of various High Courts following Narsingh Das Tapadia that if the complaint under Section 138 is filed before expiry of 15 days from the date on which notice has been served on the drawer/accused, the same is premature and if on the date of taking cognizance a period of 15 days from the date of service of notice on the drawer/accused has

expired, such complaint was legally maintainable and, hence, the same is overruled.

39. Rather, the view taken by this Court in **Sarav Investment & Financial Consultancy; (2007)14 SCC 753** wherein this Court held that service of notice in terms of Section 138 proviso (b) of the N.I. Act was a part of the cause of action for lodging the complaint and communication to the accused about the fact of dishonouring of the cheque and calling upon to pay the amount within 15 days was imperative in character, commends itself to us. As noticed by us earlier, no complaint can be maintained against the drawer of the cheque before the expiry of 15 days from the date of receipt of notice because the drawer/accused cannot be said to have committed any offence until then. We approve the decision of this Court in Sarav Investment & Financial Consultancy and also the judgments of the High Courts which have taken the view following this judgment that the complaint under Section 138 of the N.I. Act filed before the expiry of 15 days of service of notice could not be treated as a complaint in the eye of law and criminal proceedings initiated on such complaint are liable to be quashed.

40. Our answer to question (i) is, therefore, in the negative.

41. The other question is that if the answer to question (i) is in the negative, can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under Section 142(b) for the filing of such a complaint has expired.

42. Section 142 of the N.I. Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the N.I. Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period. Now, since our answer to question (i) is in the negative, we observe that the payee or the holder in due

course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and, in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of Section 142 of the N.I. Act. This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to question (i). As we have already held that a complaint filed before the expiry of 15 days from the date of receipt of notice issued under clause (c) of the proviso to Section 138 is not maintainable, the complainant cannot be permitted to present the very same complaint at any later stage. His remedy is only to file a fresh complaint; and if the same could not be filed within the time prescribed under Section 142(b), his recourse is to seek the benefit of the proviso, satisfying the Court of sufficient cause. Question (ii) is answered accordingly".

6. In view of the decision of the Hon'ble Supreme Court in the case of **Yogendra Pratap Singh (supra),** it is very clear that the complaint petition which was filed on 05.02.1996 by the opposite party no.2 after receipt of the legal notice by the petitioner on 31.01.1996 is a pre-mature complaint. An opportunity has been given by the legislature itself by providing a notice to the drawer and for payment of the amount within fifteen days of the receipt of the said notice and if he fails to comply with clause (c) of section 138 of the N.I. Act, filing of a complaint within one month from the date of cause of action is also provided under sub-section (b) of section 142 of the N.I. Act. The drawer of the cheque has got an opportunity to know in advance before filing the complaint that the cheque was dishonoured for a particular reason upon receipt of the notice from the payee or the holder of the cheque and thereby making payment of the cheque amount to the payee so as to prevent initiation of any complaint case proceeding against him. The penal provisions have to construed strictly and not liberally. A pre-mature complaint cannot be the foundation of a valid prosecution.

Therefore, I am of the view that complaint petition filed by the opposite party no.2 was not legally maintainable and the order of cognizance taken by the learned Magistrate under section 138 of the N.I. Act as well as the impugned judgment and order of conviction passed by the learned Trial Court which was confirmed by the learned Appellate Court is also not sustainable in the eye of law and therefore, revision petition is allowed. The impugned judgment and order of conviction of the petitioner is set aside and he is acquitted of the offence under section 138 of the N.I. Act.

However, in view of the judgment of the Hon'ble Supreme Court in the case of **Yogendra Pratap Singh (supra)** in case the opposite party no.2 files a fresh complaint before the competent Court within one month from today, the concerned Court shall take into account the ratio decided in the aforesaid case and proceed accordingly. With the aforesaid observation, the criminal revision petition is allowed.

Revision allowed.

**2017 (I) ILR - CUT- 853**

**S. K. SAHOO, J.**

CRLREV NO. 635 OF 2016

**VINAY GUPTA** .....Petitioner

*.Vrs.*

**SAVERI NAYAK** .....Opp. Party

**(A) PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – S 28 (I)** R/w Sections 397,401,482 Cr P.C.

**Whether this revision petition is maintainable when there is no specific provision in P.W.D.V. Act for filing of revision against the judgment and order passed by the appellate Court ?**

**Where there is grave miscarriage of Justice or abuse of the process of the Courts or there is failure of Justice by passing the order, the High Court can entertain a revision petition in order to meet the ends of Justice – Held, the revision petition is maintainable.**

(Para,8)

(B) **PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Ss 21,23(2),25(2)**

**Exparte interim custody of girl child – When passed – Where an urgent interim order is absolutely necessary either to protect the aggrieved person or to prevent any domestic violence and delay would defeat the purpose, the Magistrate can pass such order exparte under sections 21 and 23(2) of the Act.**

**In this case the Court while dismissing the revision petition handed over the girl child to the custody of the Opp. Party and directed the Magistrate to dispose of the application U/s 25 (2) of the Act filed by the petitioner within two weeks and application U/s 12 of the Act within sixty days from the date of its first hearing.** (Paras 9 &10)

**Case Laws Referred to** :-

1. (1997) 13 OCR (SC) 41 : Krishnan -Vrs.- Krishnaveni
2. (2006) 34 OCR (SC) 749 : Popular Muthiah -Vrs.- State of Tamil Nadu
3. (2013) 2 Madras Law Journal 406 : K. Rajendran -Vrs.- Ambikavathy
4. 2011 (3) KHC 15 : Harshakumar -Vrs.- State of Kerala.
5. ILR 2010 (1) Kerala 663: 2010 (1) Kerala Law Times 454 : Dr. Preceline George -Vrs.- State of Kerala.
6. (1994) 1 SCC 1 : S.P. Chengalvaraya Naidu -Vrs.- Jagannath
7. (2007) 4 SCC 221 : A.V. Papayya Sastry -Vrs.- Govt. of A.P.
8. (2010) 2 SCC114 : Dalip Singh -Vrs.- State of Uttar Pradesh
9. (2008) 7 SCC 673 : Mausami Moitra Ganguli -Vrs.- Jayant Ganguli
10. (2005) 5 SCC359 : Rajesh K. Gupta -Vrs.- Ram Gopal Agarwala

For Petitioners : Mr. Raghu Tandan,Gyanloka Mohanty & Divya Bansal

For Opp. Party : Mr.Sourya Sundar Das (Senior Adv.) Suman Modi , Byomokesh Sahu & Shalaka Das

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Date of Hearing :01.11.2016
Date of Judgment:28.11.2016

**JUDGMENT**

***S. K. SAHOO, J.***

The little angel 'Sadhika' came to see the beauty of this wonderful world with an honest face, simple looks and heart touching smiles. She was full of expectations that her parents would be her role models and would shoulder all the responsibilities to give her the wings of independence and allow her to grow of in an atmosphere of unselfishness. She wanted to prove herself to be the greatest gift of God with the divine love of her parents. Time rolled on. With the passage of time, her dream started shattering. She kept on wondering, fearing and doubting her peaceful existence. She saw her parents fighting for their ego forgetting all ethics of domestic discipline. She started crying, "Please Papa Mama! Don't spoil your tiny creation. Be magnanimous in forgiving each other. Don't fight for my custody. I can't be happy with one without the other. Come together. I am waiting for both of you with open arms. Hold my hands from both the sides. Lead me ahead. With all your brilliancy, we can recreate a heavenly home and prove ourselves to be the best family in the world."

The petitioner Vinay Gupta has filed this criminal revision petition challenging the impugned order dated 02.08.2016 passed by the learned

Sessions Judge, Cuttack in Criminal Appeal No. 70 of 2016 in dismissing his criminal appeal and thereby upholding the order dated 18.07.2016 passed by the learned S.D.J.M.(Sadar), Cuttack in D.V. CRLMC No. 179 of 2016 in allowing the petition filed by the opposite party Saveri Nayak under section 23(2) of the Protection of Women from Domestic Violence Act, 2005 (hereafter 'P.W.D.V. Act') for ex-parte order of interim custody of the minor girl child of the parties namely, Sadhika Gupta in favour of the opposite party and directing District Protection Officer (D.P.O.), Cuttack for the production of the girl child from the custody of the petitioner on or before 08.08.2016 in his Court.

2. On 01.07.2016 the opposite party filed an application under sections 12, 18 and 21 of P.W.D.V. Act against the petitioner in the Court of learned S.D.J.M. (Sadar), Cuttack which was registered as D.V. CRLMC No. 179 of 2016.

It is the case of the opposite party that she is the legally married wife of the petitioner and their marriage was solemnized on 23rd February 2003 at Ludhiana in accordance with Hindu rites and customs and both of them are software professionals working in Multi National Company. After marriage, both the petitioner and the opposite party stayed at Noida, U.P. till December 2003 and then they shifted to Gurgoan, Haryana in January 2004 and stayed till 2010. During this period, it is the case of the opposite party that the petitioner tortured her both physically and mentally and one year after marriage, the petitioner and his family members started demanding dowry and the petitioner did not even hesitate to assault the opposite party demanding a son. In May 2007 when the opposite party had to undergo surgery for the removal of her right ovary, neither the petitioner nor his parents took care of her. In December 2007 when the opposite party met with an accident and sustained injury on her spinal cord and after surgery, the doctor advised her to take complete bed rest for three months, the petitioner and his family members created an unhealthy atmosphere for which the opposite party had to undergo a state of depression, leading to migraine and was often in a state of anxiety. In January 2011, the opposite party became pregnant but the petitioner and his parents did not cooperate with the opposite party. They were expecting a male child. The opposite party came to her native place at Cuttack where she gave birth to a girl child namely Mehr @ Sadhika Gupta in the month of August 2011. The petitioner did not spend any amount towards the delivery and upbringing of the girl child and everything was managed by the opposite party with a lot of hardship and

agony. As a girl child was born, the petitioner and his parents cursed the child and the opposite party was not provided with any kind of care and affection. During the 21st day celebration of the girl child at Cuttack, the petitioner created a lot of nuisance for which the opposite party had to undergo further depression and agony. By the time the girl child was born, both the petitioner and the opposite party had been transferred to Bengaluru for which the opposite party left the girl child in the care of her parents at Cuttack and she was frequently visiting her. The petitioner never accompanied the opposite party to Cuttack or enquiring about the well being of the child. The opposite party was trying her best to convince the petitioner to show fatherly love, affection and inclination towards the child but she had to face the anger and merciless beating in the hands of the petitioner. When both the petitioner and the opposite party were transferred to Noida, the opposite party was subjected to continuous torture for which in November 2015, she left Noida with her four years girl child and came to her father's place at Cuttack. Both the petitioner and his parents were hurling abusive words at the opposite party, her parents and her daughter over telephone. The girl child was admitted in a school in C.D.A., Cuttack. Due to physical and mental torture, the opposite party went on depression for which in the 1st week of June 2016, the opposite party and her mother came to Bengaluru for medical checkup. The girl child had also accompanied them. The opposite party informed the petitioner about her visit to Bengaluru for medical checkup. After five days, the petitioner came to the hotel where the opposite party was staying and on 14th June 2016 when the opposite party was in deep sleep, the petitioner took away the sleeping child without intimating the opposite party and left the hotel and nobody in the hotel could guess the foul play of the petitioner. The CCTV footage of the hotel confirmed that it was around 7.40 a.m. when the petitioner left with the girl child. The petitioner switched off his mobile phone for which the whereabouts of the girl child could not be known. The opposite party lodged an F.I.R. against the petitioner on 15th June 2016 for which a case under section 363 of the Indian Penal Code was registered. The petitioner travelled via road from Bengaluru to Chennai and then he took a flight from Chennai to Delhi and after reaching at Delhi, the petitioner answered to the call of the opposite party. The girl child also talked with the opposite party and she was desperate to come back to the opposite party.

It is further case of the opposite party that the conduct of the petitioner towards her and her child amounts to domestic violence and the

girl child who was below the age of five years is under illegal/unlawful confinement of the parents of the petitioner. It is stated that the girl child needed the company, love and affection of the opposite party and that the opposite party is entitled to the custody of the child.

It was prayed for by the opposite party in her application that the petitioner be directed not to cause any domestic violence to the opposite party and her daughter and to further handover the daughter to the opposite party forthwith.

3. On 04.07.2016 the opposite party filed an application under section 23 of the P.W.D.V. Act before the learned S.D.J.M.(Sadar), Cuttack in the aforesaid D.V. CRLMC No.179 of 2016 praying for ex parte interim custody of the daughter and for a direction to the petitioner to hand over the girl child to the opposite party forthwith. It is stated in the application that the petitioner is working at New Delhi and he was spending fourteen to sixteen hours in his office and leaving no time to spend with the girl child and therefore, it is difficult to conceive that the child would be living in any kind of congenial atmosphere and accordingly, ex-parte order of interim custody of the girl child was prayed for.

4. The learned Magistrate vide order dated 11.07.2016 after hearing the learned counsel for the opposite party was of the view that the domestic incident report indicates the age of the girl child to be four years. It was held that the petitioner had not provided the address where the girl child was kept. The opposite party had given four addresses of the petitioner and accordingly, the Court gave opportunity to the opposite party to clarify regarding the complete address of the petitioner so that it can be disposed of. In pursuance of such order, the learned counsel for the opposite party filed a memo before the Magistrate with complete address of the petitioner.

5. The learned Magistrate passed the impugned order on 18.07.2016 wherein he has been pleased to observe that as per the domestic incident report, the petitioner subjected the opposite party to domestic violence and the age of the daughter of the parties is about four years. The learned Magistrate allowed the prayer made in the petition under section 23(2) of the P.W.D.V. Act regarding ex parte order for interim custody of the girl child in favour of the opposite party and directed the District Protection Officer (DPO), Cuttack to take necessary assistance from DCP, Cuttack regarding proper implementation of the order and to produce the girl child from the custody of the petitioner on or before 08.08.2016 in his Court.

6. The petitioner challenged the impugned order dated 18.07.2016 of the learned S.D.J.M.(Sadar), Cuttack before the learned Sessions Judge, Cuttack in Criminal Appeal No. 70 of 2016 and the learned Appellate Court vide impugned order dated 02.08.2016 has been pleased to observe that the petitioner is yet to make his appearance before the learned Magistrate who is competent to pass custody order in regard to the girl child under section 21 of the P.W.D.V. Act and section 25(2) of the P.W.D.V. Act gives a scope to the Court for alteration, modification or revocation of any order passed under the P.W.D.V. Act. While dismissing the Criminal Appeal, liberty was granted to the petitioner to approach the learned Magistrate, in the event of which it was directed that the learned Magistrate shall give opportunity of hearing to the petitioner on the question of custody of the child and to pass necessary order.

7. Mr. Raghu Tandan, learned counsel for the petitioner emphatically contended that passing of an ex-parte interim order regarding custody of the child in favour of the opposite party is not permissible under section 23(2) of P.W.D.V. Act and therefore, the learned Magistrate has exceeded his jurisdiction while passing the impugned order dated 18.07.2016. He further contended that the impugned order is in the nature of final relief at the interim stage which should not have been passed. He submitted that the opposite party is suffering from obsessive compulsive disorder (OCD) since 1997 and she had suffered three episodes of depression and also suffered suicidal ideations and she is still undergoing periodic treatment at NIMHANS, Bengaluru and she has suppressed all these aspects of her psychiatric disorder in her application filed before the Magistrate which amounts to playing fraud upon the Court and therefore, the interim order should be set aside. It was further contended that the welfare of the child is of paramount consideration and the Court should not have hastily passed the impugned order without considering such vital aspect and without hearing the petitioner in absence of any irreparable or irretrievable situation. It was further contended that a father cannot be said to have kidnapped his own child and a false case has been foisted by the opposite party with an oblique motive. While concluding his arguments, Mr. Tandan submitted that even though as per the Hindu Minority and Guardianship Act, ordinarily the custody of a minor child below the age of five years should be with the mother but if in the interest of the child, custody of the mother is not beneficial then the Court is not bound to give such custody to the mother. It was urged that since in the main application, the petitioner has already filed

his reply so also an application under section 25(2) of the P.W.D.V. Act before the Magistrate for keeping the impugned order dated 18.07.2016 in abeyance and for revocation of the impugned order, necessary direction be given to the Magistrate to dispose of the proceeding in accordance with law expeditiously without disturbing the custody of the girl child with the petitioner.

Mr. Sourya Sundar Das, learned Senior Advocate on the other hand in his inimitable style, forcefully but elegantly urged that the combined reading of the provisions under sections 21 and 23 of the P.W.D.V. Act clearly envisage that an ex parte order relating to interim custody of the child can be passed on the basis of the affidavit filed by the aggrieved party if the Magistrate is satisfied that the application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is likelihood that the respondent might commit an act of domestic violence. Though the word 'may' has been used for granting ex parte order on the basis of the affidavit in sub-section (2) of section 23 of the P.W.D.V. Act but looking at the purpose the Act seeks to achieve, the expression 'may' is to be construed as 'shall'. The learned counsel placed sub-section (2) of section 28 of the P.W.D.V. Act which permits the Court in laying down its own procedure for disposal of the application under sub-section (2) of section 23 of the P.W.D.V. Act. It was contended that on a conjoint reading of sections 21, 23(2) and 28(2) of the P.W.D.V. Act, it can be safely inferred that the Magistrate has got ample jurisdiction to pass ex parte interim orders with regard to the custody of child in favour of the aggrieved party. The learned counsel further urged that the conduct of the petitioner in taking away the minor child from Bengaluru hotel while the opposite party was sleeping coupled with the fact that the petitioner had never taken any responsibility of the child at any point of time earlier, it can be said to be a rare and exceptional case where the Court passed the ex parte interim order and no fault can be found with the same. It was contended that the opposite party has made categorical assertions in the application filed before the Magistrate that the petitioner subjected her to physical assault and mental harassment and she has further stated that because of the conduct of the petitioner, the opposite party was going into mental depression and therefore, there was no suppression of facts as contended by the learned counsel for the petitioner. It is further contended that section 6 of the Hindu Minority and Guardianship Act provides that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. It was urged that a mother would be in the best position to communicate with the

daughter with regard to biological changes happening to her which due to shyness, she might not disclose the same to her father. The learned counsel emphasized that obsessive compulsive disorder (OCD) cannot be construed as a psychological disorder like schizophrenia. He submitted that the petitioner who is remaining busy in his official works for about fourteen hours a day cannot take care of the child's mental, physical and emotional needs rather the opposite party who is a successful software professional for nearly sixteen years and is financially independent and was taking all the care of the child single handedly is the best person in the circumstances to get the custody of the child for the welfare of the child which is of paramount consideration. It was urged that the child has been deprived of motherly love and affection due to highhandedness of the petitioner for which a criminal case of kidnapping has already been initiated against him. The learned counsel further submitted that P.W.D.V. Act does not provide a revision petition against the order of the Appellate Court and since in view of section 12(5) of the P.W.D.V. Act, the Magistrate has to make every endeavour to dispose of the application under section 12 within a period of sixty days, it would not be proper to interfere with the concurrent findings of the Courts below and therefore, the revision petition should be dismissed.

**Maintainability of the revision petition**

8. There is no dispute that there is no specific provision in P.W.D.V. Act for filing any revision against the judgment and order passed by the Appellate Court.

Section 29 of the P.W.D.V. Act indicates that an appeal to the Court of Session is maintainable against the order passed by the Magistrate. The Act empowers the Magistrate to pass different orders like protection orders (section 18), residence orders (section 19), monetary reliefs (section 20), custody orders (section 21) and compensation orders (section 22). The Act also empowers the Magistrate to pass interim orders and even ex parte orders in view of section 23. If either the aggrieved person or the respondent is aggrieved by any of the aforesaid orders, the remedy lies with her/him to challenge the same by filing an appeal under section 29 of the P.W.D.V. Act before the Court of Session.

Section 28(1) of the P.W.D.V. Act indicates that all the proceedings under sections 12, 18, 19, 20, 21, 22 and 23 so also the offences under section 31 of the P.W.D.V. Act shall be governed by the provisions of the Code of Criminal Procedure, if it is not otherwise provided in the Act. The

Code of Criminal Procedure under section 397 of Cr.P.C. which deals with exercise of power of revision empowers the High Court to call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying himself about the correctness, legality or propriety of any finding or order or sentence passed and also to verify the regularity of any proceeding of such inferior Court. Section 401 of Cr.P.C. deals with powers of revision of the High Court. Sub-section (4) of section 401 of Cr.P.C. states that under the Code, if an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. Therefore, a party aggrieved by an order passed by the Magistrate under a P.W.D.V. Act proceeding cannot challenge the order directly before the High Court in a revision petition nor even the Court of Session is empowered to entertain a revision petition. So far as the other Acts are concerned, in absence of any specific provision in those Acts, against the order of the Magistrate, a revision petition is maintainable either to the Court of Session or to the High Court but if a revision application has been made either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them in view of the bar under sub-section (3) of section 397 of Cr.P.C. Second revision application by the same party to the High Court after the dismissal of the first revision application by the Sessions Judge is not ordinarily maintainable even under the garb of section 482 of Cr.P.C. The whole idea is to prevent unnecessary delay and multiplicity of the proceedings. However in case of **Krishnan -Vrs.- Krishnaveni reported in (1997) 13 Orissa Criminal Reports (SC) 41**, the Hon'ble Supreme Court held that when the High Court on examination of record finds that there is grave miscarriage of justice or abuse of process of the Courts or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensure. It is, therefore, to meet ends of justice or to prevent abuse of process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under section 397(1) read with section 401 of the Code. It was further held that though revision before the High Court under sub-section (1) of section 397 is prohibited by sub-section (3) thereof, inherent power of the High Court is still available under section 482 of the Code. In case of **Popular Muthiah -Vrs.- State of Tamil Nadu reported in (2006) 34 Orissa Criminal Reports (SC) 749**, it is held

that the High Court while exercising its revisional or appellate power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive so also procedural matters.

In case of **Harshakumar -Vrs.- State of Kerala reported in 2011 (3) KHC 15**, it was held that judgment of the Court of Session in an appeal though preferred under Section 29 of the Act being of an inferior Criminal Court, is revisable by the High Court in exercise of its power under Sections 397(1) and 401 of the Code.

In case of **K. Rajendran -Vrs.- Ambikavathy reported in (2013) 2 Madras Law Journal 406**, it is held as follows:-

> "45. As far as the present case is concerned, as against the impugned order dated 21.9.2012 passed in D.V.O.P. No. 29 of 2012, the Revision Petitioners are to prefer only Statutory Appeal as per Section 29 of the Act. It is a viable efficacious, effective and alternative remedy, as opined by this Court. In the instant case, obviously, the Petitioners have not filed any petition seeking alteration, modification or revocation of the order passed by the Learned Judicial Magistrate in D.V.O.P. No. 29 of 2012 dated 21.9.2012. Without seeking alteration, modification or revocation of the order so passed in D.V.O.P. No. 29 of 2012 dated 21.9.2012 by the Learned Judicial Magistrate and also not filing the Statutory Appeal under Section 29 of the Act, the Petitioners have directly approached this Court by filing the instant Criminal Revision petition under Section 397 and Section 401 of Cr.P.C. *Only when a Revision is filed as against the judgment or order passed by the Court of Session in Appeal as per Section 29 of the Act, then only, the right of availing the procedural facility of filing the Revision is available to the Petitioners, in the considered opinion of this Court.* When a statutory right of filing an Appeal is provided to the Petitioners (as per Section 29 of the Act), then this Court is of the considered view that the Petitioners cannot invoke the Revisional Jurisdiction of this Court under Section 397 read with 401 of Cr.P.C. In the result, it is held by this Court that the present Criminal Revision Petition filed by the Petitioners before this Court will not lie in the eye of Law."

Even though there is no specific provision relating to preferring a revision petition in the High Court against the order of the Appellate Court in a P.W.D.V. Act proceeding, I am of the view where there is grave

miscarriage of justice or abuse of process of the Courts or there is failure of justice by passing the order, in order to meet ends of justice, the High Court can entertain a revision petition. Accordingly, I do not find any force in the contention raised by the learned counsel for the opposite party that the revision petition is not maintainable in the eye of law.

**Whether the Magistrate is competent to pass ex parte order of interim custody of girl child?**

9. Section 21 of the P.W.D.V. Act empowers the Magistrate to grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf, at any stage of the hearing of the application for protection order or for any other relief under the Act.

Section 21 of the P.W.D.V. Act further empowers the Magistrate to make arrangements for visit of the child or children by the respondent, if necessary. However, the Magistrate can refuse to allow the respondent to visit the child or children if he is of the opinion that any such visit would be harmful to the interests of the child or children.

The section starts with non-obstante clause. A non-obstante clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over any other law in force as is mentioned in the non-obstante clause. It is a legislative device which is usually implied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation of all contrary provisions. The provision in which the non-obstante clause occurs would wholly prevail over any other law for the time being in force and it removes all obstructions which might arise out of the provisions of any other law in the way of the operation of the principal enacting provision to which the non-obstante clause is attached.

Section 23(1) of the P.W.D.V. Act empowers the Magistrate to pass an interim order as he deems just and proper while adjudicating any proceeding before him. Section 23(2) of the P.W.D.V. Act empowers the Magistrate to grant an ex parte order on the basis of affidavit filed by the aggrieved person under sections 18, 19, 20, 21 and 22 against the respondent if he is satisfied that the application filed by the aggrieved party prima facie discloses that the respondent is committing or has committed an act of domestic violence or there is a likelihood that the respondent might commit an act of domestic violence.

In view of the conjoint reading of section 21 and section 23(2) of the P.W.D.V. Act, it is very clear that the Magistrate is empowered to pass an ex parte order in granting interim/temporary custody of any child or children to the aggrieved party even basing on the affidavit filed by such aggrieved party without notice to the respondent. The only criteria for passing such ex parte order must be a case of exigency under the facts and circumstances of each case which can only be considered if the application prima facie discloses regarding commission of domestic violence or likelihood of commission of such domestic violence on the aggrieved person. There must be sufficient and compelling reasons to persuade the Court to pass such ex parte interim/temporary custody order of the child. For example, if the Magistrate is prima facie satisfied that the minor child of tender age has been separated from the mother forcibly or custody of the child with the respondent is harmful and against the interest of the child and further custody with the respondent is likely to aggravate the situation, the Magistrate can certainly pass ex parte interim order relating to grant of interim/temporary custody of the child or children in favour of the aggrieved person basing on the affidavit in asmuch as if prompt action at that stage is not taken then the legislative intent of making such a provision would be frustrated. At a later stage, the Magistrate being satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order passed then he can entertain the application filed on that behalf by either of the parties and can pass appropriate order recording his reasons. The Magistrate has got the power to revoke the ex parte order if he is satisfied that the order has been obtained by the aggrieved person by suppression of material facts or misrepresentation or by playing fraud upon the Court.

The learned counsel for the petitioner placed reliance in case of **Dr. Preceline George -Vrs.- State of Kerala reported in ILR 2010 (1) Kerala 663: 2010 (1) Kerala Law Times 454**, wherein it was held that the Magistrate can pass ex parte ad interim order without notice to the respondent as provided under section 23 (2) and on the appearance of the respondent, after granting an opportunity to the respondent to object the claim and on hearing the applicant and the respondent, a final interim order under section 23 (1) is to be passed with or without modification of the ad interim order. It was further held that such relief under section 23 (2) can be granted only if urgent orders are warranted on the facts and circumstances of the case and delay would defeat the purpose or where an interim order is absolutely necessary either to protect the aggrieved person or to prevent any domestic violence or to preserve the then existing position.

In case of **Anvarbhai Rasulbhai Sanghvani -Vrs.- Mumtazben**, a single Bench of Gujarat High Court in Special Criminal Application No.2410 of 2009 vide judgment and order dated 08.12.2009 held that under section 23 (2) of P.W.D.V. Act, the Magistrate is empowered to pass any order under section 21 not only as an interim order, but also as an ex parte ad-interim order. A woman who is fighting against domestic violence, faces number of hurdles. The mother whose minor child is separated from her forcibly that too at a young age, would be left distressed and her resistance against domestic violence would break down. Magistrates, therefore, while dealing with the applications of an aggrieved person seeking custody of minor children who may have been forcibly separated from the mother should be prompt and considered to give effect to the legislative intent.

In view of the above discussions, I am of the view that the learned Magistrate has got the jurisdiction to entertain an application under section 23(2) of the P.W.D.V. Act relating to passing an ex parte order for grant of interim custody of the child in favour of the aggrieved person.

Though it was urged by the learned counsel for the petitioner that the impugned order of the Magistrate is in the nature of final relief at the interim stage, I do not consider it to be so. In fact, the petitioner has already filed an application before the learned Magistrate under section 25 (2) of the P.W.D.V. Act which will be considered in accordance with law after hearing both the parties.

**Playing fraud on the Court by suppression of facts**

10. It is contended by the learned counsel for the petitioner that the opposite party has concealed the aspect of her psychiatric disorder which amounts to playing fraud upon the Court and therefore, the interim order needs to be set aside.

The learned counsel for the opposite party on the other hand contended that there are not only categorical assertions regarding physical assault and mental harassment in the application but also about the mental depression of the opposite party due to the conduct of the petitioner and his family members.

In case of **S.P. Chengalvaraya Naidu -Vrs.- Jagannath reported in (1994) 1 Supreme Court Cases 1**, it is held that the Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. A person, whose case is based on falsehood, has no

right to approach the Court. He can be summarily thrown out at any stage of the litigation.

In Case of **A.V. Papayya Sastry -Vrs.- Govt. of A.P. reported in (2007) 4 Supreme Court Cases 221**, it is held that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or authority is a nullity and non est in the eye of law. Such a judgment, decree or order either by the 1st Court or by the final Court has to be treated as nullity by every Court superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. Fraud is an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam.

In case of **Dalip Singh -Vrs.- State of Uttar Pradesh reported in (2010) 2 Supreme Court Cases 114**, it is held that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

On perusal of the application filed under section 12 of the P.W.D.V. Act, I find that not only there are specific averments relating to domestic violence committed on the opposite party by the petitioner and his family members but also it is mentioned that the opposite party went into a state of depression, leading to migraine and was often in a state of anxiety due to continuous ill treatment by the petitioner and his parents. It is further mentioned that because of the petitioner and his family members playing foul with the opposite party, both mentally and physically, the petitioner went into further depression for which in the 1st week of June 2016, the opposite party along with her mother had been to Bengaluru for a Medical checkup.

Though the learned counsel for the petitioner produced certain medical documents of the opposite party relating to her suffering from obsessive compulsive disorder (OCD) so also doctor's reports on the girl child but it is the contention of the learned counsel for the opposite party that the medical documents have been created with an oblique motive. Since the documents require proof in accordance with law and it can be considered by the Magistrate at the appropriate stage, I am not expressing any opinion on such medical documents in this revision petition.

In view of the above discussions, I am of the view that the contentions raised by the learned counsel for the petitioner that the opposite party has suppressed material aspect relating to her psychiatric disorder and thereby played fraud on the Court is not acceptable.

**Whether any illegality committed by passing the impugned order?**

The application under section 12 of the P.W.D.V. Act along with affidavit was filed by the opposite party on 01.07.2016 which was registered and the learned S.D.J.M. (Sadar), Cuttack called for the domestic incident report from the Protection Officer which was received on 04.07.2016. Such report supports the averments made in the application filed by the opposite party regarding domestic violence. The learned Magistrate specifically observed that after perusal of the domestic incident report (DIR), it prima facie reveals that the aggrieved person was subjected to domestic violence by her husband and the age of the daughter of the aggrieved person is about four years. The learned Magistrate further held that it is the bounden duty upon the Court to see the welfare of the child which is always paramount consideration.

In case of **Mausami Moitra Ganguli -Vrs.- Jayant Ganguli reported in (2008) 7 Supreme Court Cases 673**, it is held that while determining the question as to which parent the care and control of a child should be committed, the first and paramount consideration is the welfare and interest of the child and not the rights of the parents under a statue. The question of welfare of the minor child has to be considered in the background of relevant facts and circumstances. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. The stability and security of the child is an essential ingredient for a full development of child's talent and personality.

In case of **Rajesh K. Gupta -Vrs.- Ram Gopal Agarwala reported in (2005) 5 Supreme Court Cases 359**, it was held that in an application seeking writ of habeas corpus for custody of a minor child, the principal consideration for the Court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties. Since according to the appellant Rajesh K. Gupta, Smt. Aruna Gupta is a case of paranoid schizophrenia and not any kind of serious mental ailment, Hon'ble Court did not find any ground to take a contrary view and disturb the custody of Rose Mala with the mother and give her in the custody of the appellant.

In the present case, it is specifically averred in the application filed under section 12 of the P.W.D.V. Act that while the opposite party was in deep sleep, the petitioner got control of the child forcibly as she was in a sleeping state and went out of the hotel very politely and in a casual manner so that nobody in the hotel would ever smell/suspect his foul play and criminal act. The CCTV Camera footage of the hotel according to the opposite party confirms her averments that the petitioner had parted with the sleeping child around 7.40 a.m. An FIR has also been lodged under section 363 of the Indian Penal Code against the petitioner. Whether the criminal proceeding against the petitioner who is the father and natural guardian of the girl child for an offence of kidnapping is maintainable or not is a complete different matter but it can be said that on the basis of the averments made in the application supported by affidavit coupled with the domestic incident report which was called for by the Magistrate, it prima facie appears that the petitioner has committed an act of domestic violence on the opposite party and the manner in which the girl child of less than five years was allegedly separated from her mother, I am of the view that considering the welfare of the child, the learned Magistrate has rightly passed the ex parte interim order of granting interim custody of the girl child in favour of the opposite party. The petitioner is at liberty to establish before the Magistrate at appropriate stage that the psychological disorder of the opposite party, if any, is of such a nature that it would be harmful for the girl child to stay in the company of the opposite party. The Magistrate can duly consider the same and give his findings thereon at the time disposal of the application under sections 25 (2) and 12 of the P.W.D.V. Act filed by the petitioner and the opposite party respectively.

I shall be failing in my duty if I do not record here the impression that I have formed during the pendency of the proceeding before this Court. When this Court directed the petitioner to produce the girl child on different dates, in compliance to the orders, the petitioner produced the girl child and she was allowed to remain in the company of the opposite party till the end of Court hours. During Durga Puja holidays, as per the order of this Court, the girl child remained in the custody of the opposite party from 8th October 2016 to 14th October 2016. It was marked that though the girl child was initially reluctant and hesitant to come to the opposite party on each date but after few hours, she was found happy in the company of her mother. Whether the girl child was tutored by the petitioner and his family members against the opposite party as alleged by the learned counsel for the opposite party has to be ascertained at appropriate stage by the Magistrate.

Having bestowed my anxious consideration to the materials available on record and the observations made by the Courts below, I am of the view that there is no illegality or infirmity in the impugned orders and therefore, the revision petition filed by the petitioner being devoid of merits, stands dismissed.

The girl child Mehr @ Sadhika Gupta who is produced today in Court by the petitioner Vinay Gupta be handed over to the opposite party Saveri Nayak immediately. The opposite party shall allow the petitioner to talk every day preferably in the evening hours with the girl child and shall allow the opposite party to visit the girl child during holidays and she will be allowed to stay in the company of her father for about four hours on those days. The venue of their meeting shall be decided by the parties. This arrangement is purely interim in nature which will be decided finally by the Magistrate while considering the application filed under section 25 (2) of the P.W.D.V. Act filed by the petitioner or while disposing of the application under section 12 of the P.W.D.V. Act. In the meantime, the girl child has completed the age of five years. The Magistrate is at liberty to consider the custody of the girl child as provided under section 21 of the P.W.D.V. Act in accordance with law along with other reliefs sought for by the opposite party without being influenced by any observation made in this judgment. The learned Magistrate shall make endeavour to dispose of the application under section 25 (2) of the P.W.D.V. Act filed by the petitioner within a period of two weeks from the date of receipt of this judgment along with the L.C.R. and the application under section 12 of the P.W.D.V. Act within a period of sixty days from the date of its first hearing. L.C.R. be sent back immediately.

Revision dismissed.

**2017 (I) ILR - CUT- 870**

**S. K. SAHOO, J.**

CRLMC NO. 1741 OF 2010

**RAMA CHANDRA BEHERA** .....Petitioner

*.Vrs.*

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

**CRIMINAL PROCEDURE CODE, 1973 – S.482**

**Quashing of criminal proceeding – Offence U/ss. 409, 420, 167, 218 read with Section 120-B I.P.C. – Twenty six years elapsed after presentation of the F.I.R. – Even Police papers could not be supplied to the petitioner within ten years when asked for – Deliberate delay at the instance of the Court and the petitioner is in no way responsible for the same – Petitioner suffered serious prejudice – He deprived of his Constitutional right of speedy trial guaranteed under Article 21 of the Constitution of India – Held, in order to prevent miscarriage of justice the impugned criminal proceeding against the petitioner is quashed.**

(Para 9)

**Case Laws Referred to** :-

1. 2006 (II) OLR 67 : Maheswar Mohanty -Vrs.- State of Orissa.
2. (2012) 53 OCR (SC) 428 : Ranjan Dwivedi -Vrs.- C.B.I. through the Director General.
3. (2010) 47 OCR (SC) 650 : Sajjan Kumar -Vrs.- Central Bureau of Investigation.
4. AIR 2002 SC 1856 : P. Ramachandra Rao -Vrs.- State of Karnataka
5. 1990(1) SCALE 63 : Mangilal Vyas -Vrs.- State of Rajasthan
6. AIR 2009 SCC 1822 : Vakil Prasad Singh -Vrs.- State of Bihar
7. 2010 (1) RCR (Criminal) 566 : Dalip Singh alias Deepa -Vrs.- State of Punjab.
8. (2013) 4 SCC 642 : Niranjan Hemchandra Sashittal -Vrs.- State of Maharashtra.

For Petitioner : Mr. Karunakar Jena
For Opp. Parties : Mr. Tusar Ku. Mishra, A.S.C.
Mr. Sanjit Mohanty, Sr. Adv.

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Date of Hearing : 05.12.2016
Date of Judgment: 05.12.2016

**JUDGMENT**

***S. K. SAHOO, J.***

The petitioner Rama Chandra Behera has filed this application under section 482 of the Cr.P.C. for quashing the criminal proceeding in G.R. Case

No. 567 of 1991 in which he has been charge sheeted under sections 409, 420, 167, 218 read with section 120-B of the Indian Penal Code pending in the Court of learned S.D.J.M., Bhubaneswar. The said case arises out of Capital P.S. Case No. 114 of 1991.

2. The main contentions raised by the learned counsel for the petitioner Mr. Karunakar Jena is that the criminal proceeding has been initiated in the year 1990 and in the meantime twenty six years have passed and the delay in disposal of the criminal case is in no way attributable to the petitioner and whatever delay has occasioned, it was due to the lackadaisical attitude of the investigating agency in submitting the charge sheet at a belated stage and then for non-supply of police papers by the Court . It is further contended that in the meantime, the petitioner has been superannuated/retired from his service and the petitioner faced a departmental proceeding and he has been found not guilty by the appellate authority. It is further contended that no useful purpose would be served in allowing the criminal proceeding to continue against the petitioner.

3. Mr. Tusar Kumar Mishra, learned Addl. Standing Counsel for the State on the other hand contended that the delay cannot be a sole factor to quash the criminal proceeding in all the cases and the allegations against the petitioner and other co-accused persons are very serious in nature and they have misappropriated the contributory provident fund amount and sufficient materials are available on record against the petitioner and therefore, it is not a fit case to invoke the inherent power to quash the criminal proceeding.

4. Considering the submissions made by the learned counsels for the respective parties and on perusal of the materials available on record, it appears that one Mr. N. K. Behera, Secretary (C.P.F.) submitted the First Information Report on 26.06.1990 before the Officer in charge, Capital Police Station, Bhubaneswar alleging therein that there has been misappropriation of substantial amount of public money and malpractices done in the Contributory Provident Fund Trust Section by some employees including the petitioner who was working as Senior Accountant in falsely recording that there has been no outstanding against some members of the Trust Fund in the concerned loan files put up to A.A.O. (C.P.F.) in recommending sanction.

It appears that though the first information report dated 26.06.1990 submitted by the Secretary (CPF) was received on the very next day i.e. on 27.06.1990 by the Officer in charge of the Capital Police Station but he did

not register the First Information Report and made a station diary entry bearing SDE No.1885 dated 27.06.1990 and subsequently on 23.02.1991, the F.I.R. was registered as Capital P.S. Case No. 114 of 1991 under sections 408/34 of the Indian Penal Code against four persons including the petitioner who was the Senior Accountant in the CPF Section of Orissa Mining Corporation Limited at the relevant point of time i.e. January 1990 to May 1990.

After completion of investigation, charge sheet was submitted in Court on 23.10.1998 under sections 409/420/167/218/120-B of the Indian Penal Code against five accused persons including the petitioner. Though it is mentioned in the charge sheet that it is dated 27.12.1994 but since it was submitted on 23.10.1998, the learned S.D.J.M., Bhubaneswar directed the matter relating to suppression of police report for about four years to be brought to the notice of learned C.J.M., Khurda, Superintendent of Police, Khurda and Additional D.G. (P), Circle, Cuttack.

After submission of charge sheet, the learned S.D.J.M., Bhubaneswar on the very same day i.e. on 26.10.1990 took cognizance of offences under sections 409/420/167/218/120-B of the Indian Penal Code and issued process against the accused persons including the petitioner who appeared and released on bail. From the certified copy of the order sheet which has been filed by the learned counsel for the petitioner, it shows the position of the case from 20.11.1992 to 15.02.2010. It reveals that the case was adjourned from time to time right from 07.10.1999 for supply of the police papers to the accused persons and even the last order dated 15.02.2010 indicates that the police papers have not been supplied.

5. Learned counsel for the petitioner submitted that till date no police papers have been supplied to the petitioner.

Learned counsel for the State on the other hand submitted that since the petitioner approached this Court on 22.06.2010 by filing this Criminal Misc. Case and thereafter, vide order dated 27.06.2011 in Misc. Case No.1201 of 2010, this Court granted interim stay of further proceeding in G.R. Case No.567 of 1991 pending before the Court of learned S.D.J.M., Bhubaneswar, that might be the reason for non-supply of the police papers to the petitioner.

6. Be that as it may, it appears that even though the F.I.R. was submitted before the Officer in charge, Capital Police Station, Bhubaneswar on

26.06.1990, the F.I.R. was registered only on 23.02.1991. Similarly though it is shown in the charge sheet that it was ready by 27.12.1994 but it was submitted in Court only on 23.10.1998. The order sheet indicates that the case was posted from 07.10.1999 onwards for supply of police papers and yet it was not supplied for more than ten years till the petitioner approached this Court for quashing the criminal proceeding on the ground of inordinate delay.

On perusal of the materials available on record and also scanning the certified copy of the order sheet produced by the learned counsel for the petitioner, it is very clear that the delay which has been caused in the case right from the submission of the F.I.R. by the Secretary C.P.F., Mr. N. K. Behera to the Officer in charge Capital Police Station, Bhubaneswar is no way attributable to the petitioner.

The submission made by the learned counsel for the petitioner has got substantial force that the delay has occasioned mainly for submitting the charge sheet before the Court about eight years after the presentation of the F.I.R. and also for more than ten years thereafter for non-supply of police papers to the petitioner before the petitioner approached this Court for quashing the criminal proceeding.

7. On perusal of the order dated 12.10.2009 issued by Managing Director, Orissa Mining Corporation Ltd., it appears that the Board of Directors, the Appellate Authority has found the petitioner not guilty of the charges framed against him vide order No.15078 dated 14.06.1991 and the punishment imposed on him vide order No.7148 dated 25.02.1995 was withdrawn and the petitioner was deemed to have continued in the post of Senior Accountant till the date to his retirement. There is also no dispute that in the meantime the petitioner has been superannuated and he is now aged about 67 years.

8. Learned counsel for the petitioner relied upon the decision of this Court in the case of Maheswar Mohanty -Vrs.- State of Orissa reported in 2006 (II) Orissa Law Reviews 67, wherein this Court has held that the two criminal cases were registered relating to the occurrences which occurred twenty two years back and no fruitful purpose would be served in keeping the criminal cases pending and accordingly, quashed the proceeding of the two cases.

Learned Addl. Standing Counsel for the State Mr. Tusar Kumar Mishra on the other hand placed reliance in the case of Ranjan Dwivedi –

Vrs.- C.B.I. through the Director General reported in (2012) 53 Orissa Criminal Reports (SC) 428, wherein it is held as follows:-

> "20. Second limb of the argument of the learned Senior Counsel Shri Andhyarujina is that the failure of completion of trial has not only caused great prejudice to the petitioners but also their family members. Presumptive prejudice is not an alone dispositive of speedy trial claim and must be balanced against other factors. The accused has the burden to make some showing of prejudice, although a showing of actual prejudice is not required. When the accused makes a prima-facie showing of prejudice, the burden shifts on the prosecution to show that the accused suffered no serious prejudice. The question of how great lapse it is, consistent with the guarantee of a speedy trial, will depend on the facts and circumstances of each case. There is no basis for holding that the right to speedy trial can be quantified into specified number of days, months or years. The mere passage of time is not sufficient to establish denial of a right to a speedy trial, but a lengthy delay, which is presumptively prejudicial, triggers the examination of other factors to determine whether the rights have been violated.
>
> 21. The length of the delay is not sufficient in itself to warrant a finding that the accused was deprived of the right to a speedy trial. Rather, it is only one of the factors to be considered, and must be weighed against other factors. Moreover, among factors to be considered in determining whether the right to speedy trial of the accused is violated, the length of delay is least conclusive. While there is authority that even very lengthy delays do not give rise to a per se conclusion of violation of constitutional rights, there is also authority that long enough delay could constitute per se violation of right to speedy trial. In our considered view, the delay tolerated varies with the complexity of the case, the manner of proof as well as gravity of the alleged crime. This, again, depends on case to case basis. There cannot be universal rule in this regard. It is a balancing process while determining as to whether the accused's right to speedy trial has been violated or not. The length of delay in and itself, is not a weighty factor.
>
> 22. In the present case, the delay is occasional by exceptional circumstances. It may not be due to failure of the prosecution or by

the systemic failure but we can only say that there is a good cause for the failure to complete the trial and in our view, such delay is not violative of the right of the accused for speedy trial.

23. Prescribing a time limit for the Trial Court to terminate the proceedings or, at the end thereof, to acquit or discharge the accused in all cases will amount to legislation, which cannot be done by judicial directives within the arena of judicial law making power available to constitutional courts; however, liberally the courts may interpret Articles 21, 32, 141 and 142. (**Ramchandra Rao P. -Vrs.- State of Karnataka, (2002) 4 SCC 578**). The Seven Judges Bench overruled four earlier decision of this Court on this point: **Raj Deo (II) -Vrs.- State of Bihar, (1999) 7 SCC 604, Raj Deo Sharma -Vrs.- State of Bihar, (1998) 7 SCC 507; Common Cause, A Registered Society -Vrs.- Union of India, (1996) 4 SCC 33**. The time limit in these four cases was contrary to the observations of the Five Judges Bench in *A.R. Antulay* (Supra). The Seven Judges Bench in **Ramchandra Rao P. -Vrs.- State of Karnataka**, (Supra) has been followed in **State through CBI -Vrs.- Dr. Narayan Waman Nerukar, (2002) 7 SCC 6 and State of Rajasthan -Vrs.- Ikbal Hussen, (2004) 12 SCC 499**. It was further observed that it is neither advisable, feasible nor judicially permissible to prescribe an outer limit for the conclusion of all criminal proceedings. It is for the criminal Court to exercise powers under sections 258, 309 and 311 of the Cr.P.C. to effectuate the right to a speedy trial. In an appropriate case, directions from the High Court under Section 482 Cr.P.C. and Article 226/227 can be invoked to seek appropriate relief.

24. In view of the settled position of law and particularly in the facts of the present case, we are not in agreement with the submissions made by learned Senior Counsel, Shri. T.R. Andhyarujina. Before we conclude, we intend to say, particularly, looking into long adjournments sought by the accused persons, who are seven in number, that accused cannot take advantage or the benefit of the right of speedy trial by causing the delay and then use that delay in order to assert their rights."

He further placed reliance in case of Sajjan Kumar -Vrs.- Central Bureau of Investigation reported in (2010) 47 Orissa Criminal Reports (SC) 650, wherein it is held as follows:-

"24. Though delay is also a relevant factor and every accused is entitled to speedy justice in view of Article 21 of the Constitution, ultimately it depends upon various factors/reasons and materials placed by the prosecution. Though Mr. Lalit heavily relied on paragraph 20 of the decision of this Court in *Vakil Prasad Singh's case* (supra), the learned Additional Solicitor General, by drawing our attention to the subsequent paragraphs i.e., 21, 23, 24, 27 and 29 pointed out that the principles enunciated in *A.R. Antulay's case* (supra) are only illustrative and merely because of long delay the case of the prosecution cannot be closed.

25. Mr. Dave, learned senior counsel appearing for the intervenor has pointed out that in criminal justice "a crime never dies" for which he relied on the decision of this Court in **Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC 394**. In para-14, C.K. Thakker, J. speaking for the Bench has observed:

"It is settled law that a criminal offence is considered as a wrong against the State and the society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a Court of law has no power to throw away prosecution solely on the ground of delay."

In the case on hand, though delay may be a relevant ground, in the light of the materials which are available before the Court through CBI, without testing the same at the trial, the proceedings cannot be quashed merely on the ground of delay. As stated earlier, those materials have to be tested in the context of prejudice to the accused only at the trial."

He further placed reliance in case of P. Ramachandra Rao -Vrs.- State of Karnataka reported in AIR 2002 Supreme Court 1856, wherein it is held as follows:-

"30. For all the foregoing reasons, we are of the opinion that in **Common Cause case (I) AIR 1996 SC 1619** as modified in **Common Cause (II) AIR 1997 SC 1539** and **Raj Deo Sharma (I) and (II) AIR 1999 SC 3524**, the Court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:-

(1) The dictum in A.R. Antulay's case is correct and still holds the field.

(2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A.R. Antulay's case, adequately take care of right to speedy trial. We uphold and re-affirm the said propositions.

(3) The guidelines laid down in A.R. Antulay's case are not exhaustive but only illustrative. They are not intended to operate as hard and fast rules or to be applied like a strait-jacket formula. Their applicability would depend on the fact-situation of each case. It is difficult to foresee all situations and no generalization can be made.

(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I), Raj Deo Sharma (I) and Raj Deo Sharma (II) could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in common Cause Case (I), Raj Deo Sharma case (I) and (II) . At the most the periods of time We do not consider it necessary to narrate the detailed facts leading to the present appeals except to state that the trial in the pending cases have been unduly protracted due to various causes. It is no doubt regrettable feature, but having regard to the nature of the allegations made and the availability of evidence in support of the prosecution, it is not expedient to terminate the proceedings at this stage, on account of lapse of time alone, by invoking the inherent power of the Court. We think that the circumstances of the case only call for appropriate directions for the expeditious disposal of the pending proceedings prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A.R. Antulay's case and decided whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any Court as a bar to further

continuance of the trial or proceedings and a mandatorily obliging the Court of terminate the same and acquit or discharge the accused.

(5) The Criminal Courts should exercise their available powers, such as those under Sections 309, 311 and 258 of Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be better protector of such right than any guidelines. In appropriate cases jurisdiction of High Court under Section 482 of Cr.P.C. and Articles 226 and 227 of Constitution can be invoked seeking appropriate relief or suitable directions.

(6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary-quantitatively and qualitatively-by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act."

He further placed reliance in case of Mangilal Vyas -Vrs.- State of Rajasthan reported in 1990(1) SCALE 63, wherein it is held as follows:-

"3. The learned Counsel for the appellant submitted that the appellant had been prosecuted in 11 criminal cases for offences under section 408 or 409 IPC, that the proceedings are pending for over 25 years, the prolongation of the trial without any fault on the part of the appellant amounts to persecution of the appellant and, therefore, the proceedings should have been quashed by the High Court. It is maintained that in spite of passage of several years, no evidence worth the name has been recorded by the prosecutor. We have been taken though the various steps taken in each case and the nature of the evidence purported to have been collected.

4. and the law has to be allowed to take its own course to prevent miscarriage of justice."

He further placed reliance in case of Vakil Prasad Singh -Vrs.- State of Bihar reported in AIR 2009 Supreme Court Cases 1822, wherein it is held as follows:-

"9. Before adverting to the core issue, viz. whether under the given circumstances the appellant was entitled to approach the High Court for getting the entire criminal proceedings against him quashed, it would be appropriate to notice the circumstances and the parameters enunciated and reiterated by this Court in a series of decisions under

which the High Court can exercise its inherent powers under section 482 Cr.P.C. to prevent abuse of process of any Court or otherwise to secure the ends of justice. The power possessed by the High Court under the said provision is undoubtedly very wide but it has to be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. The inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. It is trite to state that the said powers have to be exercised sparingly and with circumspection only where the Court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to be quashed.

x x x x x

13. The exposition of Article 21 in Hussainara Khatoon's case (supra) was exhaustively considered afresh by the Constitution Bench in **Abdul Rehman Antulay and Ors. v. R.S. Nayak and Anr. 1992 AIR SCW 1872**. Referring to a number of decisions of this Court and the American precedents on the Sixth Amendment of their Constitution, making the right to a speedy and public trial a constitutional guarantee, the Court formulated as many as eleven propositions with a note of caution that these were not exhaustive and were meant only to serve as guidelines. For the sake of brevity, we do not propose to reproduce all the said propositions and it would suffice to note the gist thereof. These are: (i) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily; (ii) right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial; (iii) in every case where the speedy trial is alleged to have been infringed, the first question to be put and answered is - who is responsible for the delay?; (iv) while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work-load of the Court concerned, prevailing local conditions and so on-what is called, the systemic delays; (v) each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of

prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case; (vi) ultimately, the Court has to balance and weigh several relevant factors- 'balancing test' or 'balancing process' -and determine in each case whether the right to speedy trial has been denied; (vii) Ordinarily speaking, where the Court comes to a conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open and having regard to the nature of offence and other circumstances when the Court feels that quashing of proceedings cannot be in the interest of justice, it is open to the Court to make appropriate orders, including fixing the period for completion of trial; (viii) it is neither advisable nor feasible to prescribe any outer time-limit for conclusion of all criminal proceedings. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the Court to weigh all the circumstances of a given case before pronouncing upon the complaint; (ix) an objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in the High Court must, however, be disposed of on a priority basis.

x x x x x

15. It is, therefore, well settled that the right to speedy trial in all criminal persecutions is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in Court but also includes within its sweep the preceding police investigations as well. The right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the Court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case. Where the Court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the

case may be, may be quashed unless the Court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the Court to make an appropriate order as it may deem just and equitable including fixation of time frame for conclusion of trial."

He further placed reliance on a Full Bench decision of Punjab and Haryana High Court in the case of Dalip Singh alias Deepa -Vrs.- State of Punjab reported in 2010 (1) RCR (Criminal) 566, wherein it is held as follows:-

"26. Therefore, in every case where the right to speedy trial is alleged to have been infringed, the first question to be necessarily put is: who is responsible for the delay? Besides, each and every delay does not necessarily prejudice the case. Some delays may indeed work to the advantage of the accused. Inordinate long delay may be taken as presumptive proof of prejudice. In this context, incarceration of the accused will also be a relevant fact. Prosecution should not be reduced to persecution. But when does prosecution become persecution, depends upon the facts of a given case. Ultimately, the Court has to balance and weigh the several relevant factors- through a `balancing test' or `balancing process' to determine in each case whether the right to speedy trial has been denied. It is neither advisable nor practical to fix any time-frame for trials. Any such rule is bound to be a qualified one. Such a rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution."

He further placed reliance in case of Niranjan Hemchandra Sashittal -Vrs.- State of Maharashtra reported in (2013) 4 Supreme Court Cases 642, wherein it is held as follows:-

"24. It is to be kept in mind that on one hand, the right of the accused is to have a speedy trial and on the other, the quashment of the indictment or the acquittal or refusal for sending the matter for re-trial has to be weighed, regard being had to the impact of the crime on the society and the confidence of the people in the judicial system. There cannot be a mechanical approach. From the principles laid down in many an authority of this Court, it is clear as crystal that no time-limit can be stipulated for disposal of the criminal trial. The

delay caused has to be weighed on the factual score, regard being had to the nature of the offence and the concept of social justice and the cry of the collective."

9. Considering the submissions made by the learned counsels for the respective parties and the citations placed by the learned counsels for both the sides, it is very clear that the delay which has occasioned by action or inaction in the prosecution is one of the main features which are to be taken note of by the Court. A deliberate attempt to delay the trial in order to hamper the accused is weighed heavily against the prosecution inasmuch as such delay violates the constitutional rights to speedy trial of the accused. The Court while deciding the case has to see whether there is unreasonable and unexplained delay which has resulted in causing serious prejudice to the accused. There is no dispute that there cannot be any straight jacket formula in a particular case to quash the criminal proceeding if the trial is not concluded within a particular time limit. The nature and gravity of the accusation, the qualitative and quantitative materials collected during course of investigation, the conduct of the accused in causing the delay are also to be considered by the Court.

Coming to the case in hand, I find that not only it took about eight months for the Officer in charge of Capital Police Station to register the F.I.R. but for best reason known to the investigating agency, even though the case records indicates that the charge sheet was made ready by 27.12.1994 but it was withheld from the Court and submitted only on 23.10.1998 and thereafter, till this case was filed in this Court, the case was adjourned by the learned Magistrate from time to time since 07.10.1999 onwards for supply of police papers. It is regrettable that when few hours would have been sufficient to prepare xerox copies of the police papers and then supply it to the accused, the same could not be done even after passage of more than ten years. One after the other Magistrates mechanically and without application of mind went on putting their signatures in the order sheet in adjourning the case from time to time for supply of police papers even without asking the registry to prepare it at an earliest. It was also the joint responsibility and duty of the prosecutor to point out the inordinate delay caused to the notice of the Court to pass appropriate order in that respect. It is for the laches of both that the petitioner against whom serious charges of public nature have been brought could not be proceeded with. More than twenty six years have passed in the meantime since the date of presentation of the F.I.R. The petitioner has not only retired from his service but the Board of Directors, the

appellate authority has given a clean chit to the petitioner while rehearing the appeal against the punishment imposed on him in the disciplinary proceeding as per the direction of this Court in O.J.C. No. 5415 of 1995 dated 16.03.2009. There is no gainsaying that exoneration in the departmental proceeding ipso facto would not result in the quashing of the criminal prosecution but in view of long lapse of time passed since the presentation of the F.I.R. and non-supply of copies of police statements and other relevant documents and uncertainty of the memory of 141 charge sheeted witnesses, assuming that they are still available to prove the accusations, it would not be fair and just to allow the case to proceed against the petitioner.

In view of exceptional circumstances in this case in favour of the petitioner, I am of the considered view that the petitioner has been deprived of his constitutional right of speedy trial guaranteed under Article 21 of the Constitution of India. The fact that he is in no way responsible for the inordinate delay caused in the proceeding and has suffered serious prejudice, in order to prevent miscarriage of justice and in the interest of justice, invoking my inherent power under section 482 of Cr.P.C., I am of the view that the proceeding against the petitioner in connection with Capital P.S. Case No.114 of 1991 which corresponds to G.R. Case No.567 of 1991 pending in the Court of learned S.D.J.M., Bhubaneswar should be quashed.

Accordingly, the CRLMC application is allowed and the criminal proceeding in G.R. Case No.567 of 1991 pending in the Court of learned S.D.J.M., Bhubaneswar stands quashed.

Application allowed.

**2017 (I) ILR - CUT- 883**

**BISWANATH RATH, J.**

W.P.(C) . NO. 15067 OF 2016

**THE MANAGER, BAJAJ ALLIANZ GENERAL INSURANCE COMPANY LTD., BBSR.** ……..Petitioner

*.Vrs.*

**THE CHAIRPERSON, PERMANENT LOK ADALAT , GANJAM & ANR.** ……..Opp. Parties

**CONSUMER PROTECTION ACT, 1986 – Ss 2 (1) (g), 12**

**Insurance policy – Vehicle in question insured – Theft of vehicle – Complaint for compensation – Delay in lodging F.I.R. and reporting the matter to the insurer – Non-submission of original documents and ignition keys as required by the Insurance Company – Violation of condition Nos. 1 and 5 of the Insurance policy – Held, conditions in the policy being binding in nature, the complaint for compensation is liable to be dismissed.**

**In this case the vehicle in question belongs to O.P.No. 2 which was insured with the petitioner-company from 29.03.2014 till 28.03.2015 –Though the vehicle was stolen on 26.01.2015, F.I.R. lodged on 28.01.2015 and intimation made to the insured on 11.02.2015, causing loss of valuable time to trace the vehicle – However when O.P.No. 2 made claim for compensation the petitioner-Company asked him to submit original documents and ignition keys of the vehicle and asked him to show cause as to why the claim shall not be repudiated for violation of the conditions in the policy – Looking at the negative attitude of the petitioner-company, O.P.No.2 approached the permanent Lok Adalat for compensation, who passed the award directing the petitioner to pay ¾th of the cost of the vehicle as compensation – Hence the writ petition – Learned permanent Lok Adalat failed to consider that there was gross violation of condition Nos. 1 and 5 of the Insurance Policy – Held, the impugned award passed by the permanent Lok Adalat is quashed.** (Paras 6,7,8)

**Case Law Referred to** :-

1. 2014 (2) CRP 623 (NC) : ICICI Lombard General Insurance Co.Ltd. & Ors v. Sh.Pawan Kumar.
2. 2014(4) CPR 454 (NC) : Branch Manager, United India Insurance Company Limited v. Mr.Jogendra Singh.
3. 2016 (1) CPR 141 (NC) : Cholamandalam Ms.General Insurance Company Ltd. v. Mahesh Kumar & Anr.
4. 2016 (3) CPR 502 (NC) : Reliance General Insurance Company Limited v.Vinod Kumar.
5. I (2009) CPJ 6 : Amar Singh v. National Insurance Company Limited.
6. 2007 STPL 17937 NC : United India Insurance Co. Ltd. & Anr. v. Ravikant Gopalka.

For Petitioner : M/s. Adam Ali Khan, S.K.Mishra, S.Ganesh & S.K.Sahoo.

For Opp. Parties : M/s.Ashok Das, P.Sethy & N.Nayak.

Date of Hearing :15.03. 2017
Date of Judgment:28.03.2017

**JUDGMENT**

***BISWANATH RATH, J.***

This writ petition has been filed assailing the award dated 30.6.2016 find place at Annexure-4 where the Permanent Lok Adalat allowed the application filed by the opposite party no.2 under Annexure-1 directing therein the present petitioner to pay 3/4$^{th}$ of Rs.11,25,162/- as compensation to the opposite party no.2 for loss of his vehicle under insurance cover of the present petitioner.

Short back ground involved in the case is that the opposite party no.2 is the registered owner of TATA TIPPER bearing Registration No.OR-07-Z-7677 being insured with the present petitioner-company under Commercial Vehicle Package Policy bearing No.OG-14-2413-1803-00001426 remaining valid from 29.3.2014 till 28.3.2015 mid night. It appears, during validity of the Insurance Policy, indicated hereinabove, the vehicle of the opposite party no.2 was stolen in the night of 26$^{th}$ January 2015 on which a F.I.R. was lodged with B.N.Pur Police Station in the district of Ganjam on 28.1.2015. Subsequently, on 11.2.2015 the opposite party no.2 also informed the petitioner-Insurance Company in writing regarding the loss of the vehicle and making thereby a claim for the value of the vehicle being covered under the policy stated hereinabove. Upon receipt of the claim, the petitioner-Insurance Company requested the opposite party no.2 for submission of original documents involving the truck for surrendering of two number of ignition keys and further asked the opposite party no.2 to submit an explanation as to why the claim will not be repudiated for violation of conditions contained in the Insurance Policy, particularly, keeping in view the violation of condition no.5 of the Insurance Policy. It is that finding the negative attitude of the Insurance Company, the petitioner approached the Permanent Lok Adalat under the provision of Legal Services Authority Act, 1987 for appropriate compensation. The proceeding was registered as P.L.A. Case No.8 of 2015. The proceeding was disposed of on contest of the parties but with an order in favour of the opposite party no.2 thereby directing the present petitioner to pay 3/4$^{th}$ of the value of the TATA TIPPER of Rs.11,25,162/- involving Insurance Policy No.OG-14-2413-1803-00001426 towards loss of the insured vehicle. While declining to grant any interest on compensation, the Permanent Lok Adalat also further directed if the amount, as directed, is not

paid within a period of two months, the opposite party no.2 shall be entitled to get interest @ 9% per annum from the date of filing of the application till the date or release of the amount. Being aggrieved by the award passed by the Permanent Lok Adalat involving P.L.A. Case No.8 of 2015, this writ petition is filed in this Court assailing the impugned order.

The petitioner has contended that there has been gross violation of the condition no.5 of the Insurance Policy as both the ignition keys of the vehicle could not be surrendered to the Insurance Company as a matter of specific condition in the policy. Further, for keeping the ignition keys of the vehicle as well as the original papers of the vehicle inside the cabin, which are all being taken away along with vehicle, violation of condition no.5 of the Insurance Policy is well established leaving any scope in entertaining the claim of the petitioner. It is further contended by Sri Adam Ali Khan, learned counsel appearing for the petitioner-Insurance Company that apart from violation of condition no.5, the petitioner has also violated the condition no.1 of the Insurance Policy by not lodging F.I.R. as well as giving intimation to the Insurance Company immediately after the loss of the vehicle. Sri Khan, learned counsel for the Insurance company-petitioner taking help of the decisions rendered in the cases of ICICI Lombard General Insurance Co.Ltd. & Ors v. Sh.Pawan Kumar, 2014 (2) CRP 623 (NC), Branch Manager, United India Insurance Company Limited v. Mr.Jogendra Singh, 2014(4) CPR 454 (NC), Cholamandalam Ms.General Insurance Company Ltd. v. Mahesh Kumar & Anr., 2016 (1) CPR 141 (NC) as well as in the case of Reliance General Insurance Company Limited v. Vinod Kumar, 2016 (3) CPR 502 (NC) requested this Court for interference in the award passed by the Permanent Lok Adalat and settlement of the issue.

Sri Ashok Das, learned counsel appearing for the opposite party no.2-registered owner of the vehicle on the other hand submitted that the delay in lodging the F.I.R. as well as the complaint before the Police and the Insurance Authority was bonafide. Justifying the delay, Sri Das submitted that after the delivery of goods on the particular date, the vehicle was kept inside the boundary i.e. in the premises of Sri Aurobinda Ashram, Ankoli, Berhampur. The vehicle was stolen in the night of 26.1.2015 where after initially searching for the vehicle here and there though submitted the F.I.R. on 27.1.2015 but the Police registered the same on 28.1.2015. As per the practice the driver of the opposite party no.2, the driver used to sleep in the cabin of the vehicle. So, as a normal practice, the key and original documents were kept in the Fast Aid Box placed inside the cabin behind the driver seat.

Due to ill health, the driver of the vehicle on the said night slept in the Guest House of the Ashram and could not notice the theft of the vehicle. Justifying the delay in making the complaint to the Insurance Company, Sri Das, learned counsel for the opposite party no.2 submitted that since the Police was investigating the matter, the opposite party no.2 could not feel it necessary to report the matter to the Insurance Company immediately and when he found that the Police is unable to track the TIPPER, the stolen vehicle, he was forced to inform the Insurance Company though at a belated stage and thus contended that the delay is bona fide and his claim shall not be turned down on mere ground of delay. Referring to the decision rendered in the cases of Amar Singh v. National Insurance Company Limited, I (2009) CPJ 6 and United India Insurance Co. Ltd. & Anr. v. Ravikant Gopalka, 2007 STPL 17937 NC, Sri Das, learned counsel appearing for the opposite party no.2 submitted that the decisions have the support to the case of the opposite party no.2 and justifies the award passed by the Permanent Lok Adalat. Accordingly, he claimed for not interfering in the award passed by the Permanent Lok Adalat and dismissing the writ petition.

Admitted fact involved in the matter is that the opposite party no.2 is the owner of the TATA TIPPER bearing Registration No.OR-07-Z-7677 and the petitioner is the insurer of the vehicle owned by the opposite party no.2 indicated hereinabove. There is also no dispute with regard to the fact that the vehicle was stolen on the night of 26.1.2015. F.I.R. was lodged on 28.1.2015 and a written complaint was made to the Insurance Company on 11.2.2015. Sole question arise here for determination is as to whether there is violation of condition contained in the Policy involving the TIPPER and thereby if the Permanent Lok Adalat is justified in passing the award in favour of the opposite party no.2? Before proceeding to decide other aspects, it is now necessary to deal with the condition in the Insurance Police involving the vehicle stolen. Annexure-5 to the writ petition is a standard form of Commercial Vehicle Package Policy to have been attached to the Insurance Policy appended as Annexure-A in the trial court proceeding. Conditions available at page 32 therein, particularly, the condition no.1 and condition no.5 therein read as follows:

> "1.Notice shall be given in writing to the Company immediately upon the occurrence of any accidental loss or damage and in the event of any claim and thereafter the insured shall give all such information and assistance as the Company shall require. Every letter claim writ summons and/or process or copy thereof shall be forwarded to the

Company immediately on receipt by the insured. Notice shall also be given in writing to the company immediately the insured shall have knowledge of any impending prosecution inquest or Fatal Inquiry in respect of any occurrence which may give rise to a claim under this policy. In case of theft or criminal act which may be the subject of a claim under this policy the insured shall give immediate notice to the police and co-operate with the company in securing the conviction of the offender."

5. The Insured shall take all reasonable steps to safeguard the vehicle insured from loss or damage and to maintain it in efficient condition and the Company shall have at all times free and full access to examine the vehicle insured or any part thereof or any driver or employee of the insured. In the event of any accident or breakdown, the vehicle insured shall not be left unattended without proper precautions being taken to prevent further damage or loss and if the vehicle insured be driven before the necessary repairs are effected, any extension of the damage or any further damage to the vehicle shall be entirely at the insured's own risk.

Reading of the aforesaid two conditions, it became crystal clear that not only a notice is required to be given to the Insurance company in writing on the theft of the vehicle or damage of the vehicle but it also mandates that such intimation should be made to the company immediately after the occurrence of any accidental loss of damage or in the event of any other claim with further attachment of further notice to the Police by the insurer itself. From the facts scenario narrated hereinabove, since the theft took place on 26.1.2015 and theft F.I.R. being lodged on 28.1.2015 and also the intimation to the Insurance Company being made on 11.2.2015,it is apparent that there has been violation of the condition no.1 contained in the Insurance Policy. Now coming to the condition attached to condition no.5, reading of the condition quoted hereinabove it becomes apparent that it is also the duty of the owner of the vehicle, who should take all reasonable steps to safeguard the vehicle from loss or damage. The facts narrated hereinabove clearly reveal that the opposite party no.2 remain careless in leaving the key as well as the original documents of the TIPPER inside the vehicle even when the vehicle remain totally idle and thereby failed to safeguard the vehicle insured from loss or damage. The plea of the opposite party no.2 that one of the key of the vehicle was damaged and he left the only key inside the vehicle is a clear admission that the opposite party no.2 did not take sufficient measures to safeguard the vehicle insured from loss. Conditions in the policy are

binding in nature on both the sides and violation of the binding condition debars a person from being entitled to compensation on account of loss of the vehicle. Even though the parties have referred to several decisions in their favour, this Court finds no necessity for referring to those decisions for difference in the factual scenario therein on the position of law, this Court finds the Hon'ble Apex Court in the case of Oriental Insurance company Limited v. Parvesh Chander Chadha, Civil Appeal No.6739 of 2010 decided on 17.8.2010, held as follows:

> "12. Since the terms and conditions of the insurance policy, which the insured had issued to the complainant in Parvesh Chander (supra), had not been reproduced in the order of the Hon'ble Supreme Court, we perused the order passed by this Commission in the above referred case. However, the terms and conditions of the policy were not reproduced even in the judgment of this Commission. It however, became evident from a perusal of the judgment that the insurance policy was issued for the period from 17.1.1995 to 16.01.1996. On further examination of the issue, we found that standard form for private car policy was prescribed by the Tariff Advisory Committee from time to time, which is binding upon all the insurance companies. The relevant clause of the insurance policy, applicable at the time the complainant in Parvesh Chander (supra) took the insurance policy, reads as under:
>
> "Notice shall be given in writing to the company immediately upon the occurrence of any accident or loss or damage and in the event of any claim and thereafter the insured shall give all such information and assistance as the Company shall require. Every letter, claim, writ, summons and/or process or a copy thereof shall be forwarded to the Company immediately on receipt of the insured. Notice shall also be given in writing to the company immediately the insured shall have knowledge of any impending prosecution, Inquest or Fatal Inquiry in respect of any occurrence which may give rise to a claim under this policy. In case of theft or criminal act which may be the subject of a claim under this policy the insured shall give immediate notice to the police and cooperate with the company in securing the conviction of the offender".

This Court finds the case at hand has the full support of the decision referred to hereinabove and thus finds there is force in the submission of Sri Khan, learned counsel appearing for the petitioner-Insurance Company.

7. Considering the rival contention and taking into consideration the decision of the Hon'ble Apex Court referred to hereinabove and also on perusal of the impugned order, this Court finds the award passed by the Permanent Lok Adalat is wrong not only for improper appreciation of the binding conditions involved in the insurance policy but also contrary to the decision of the Hon'ble Apex Court.

8. Under the circumstance, this Court has no hesitation in interfering in the impugned award of the Permanent Lok Adalat passed in P.L.A. Case No.8 of 2016 appearing at Annexure-4 and quash the same. In the result the writ petition stands allowed. No order as to cost.

Writ petition allowed.

**2017 (I) ILR - CUT- 890**

**DR. D.P.CHOUDHURY, J.**

W.P.(C) NO. 5265 OF 2009

**MAMATA SATPATHY** ……..Petitioner

*.Vrs.*

**THE ZONAL MANAGER, LIC OF INDIA & ORS.** ……..Opp. Parties

**INSURANCE ACT, 1938 – S. 45**

**Policy of life insurance – Repudiation of policy should be made with extreme care and caution when a fraudulent act is discovered but not in a mechanical and routine manner – It is incumbent on the part of the corporation to lead evidence and to prove conditions of section 45 of the Act.**

**In this case petitioner's husband assured his life under the LIC of India – After the death of her husband she made an application before the Insurance Company to settle the claim – Company repudiated the claim on the ground that the deceased policy holder made deliberate misstatements relating to health condition at the time of making the proposal – Petitioner made complaint before the Insurance ombudsman and the same was also rejected – Hence the writ petition – Record shows that the deceased policy holder has neither made any fraudulent suppression of material facts nor made any statement falsely relating to his health – Held, the impugned findings of the learned Insurance ombudsman, not being based on**

**evidence, is quashed – Direction issued to the corporation to release the claim amount under the policies of the deceased policy holder with 9 % interest P.A, from 03.11. 2005 when the corporation repudiated the claim, till actual payment to the petitioner within three months, failing which the O.P.No.1-Corporation shall pay 12% interest P.A. till actual payment.** (Para 27)

**Case Laws Referred to** :-

1. AIR 1962 SC 814 : Mithoolal Nayak -V- Life Insurance Corporation of India.
2. AIR 1991 SC 392 : Life Insurance Corporation of India –V- Smt. G.M.
3. AIR 2001 SC 549 : Channabasemma. Life Insurance Corporation of India and others -V- Smt. Asha Goel and another.
4. AIR 2008 SC 424 : P.C. Chacko and another -V- Chairman, LIC of India and others.

For Petitioner : M/s. D.K. Dwibedi, B Guin, S.Mishra, G.M.Rath & S.S.Padhi

For Opp. Party : M/s. G.D.Kar, A.Mohanty, J.Behera & P.K.Mallik

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Date of hearing :25.11.2016
Date of judgment:16.01.2017

**JUDGMENT**

***DR. D.P.CHOUDHURY, J.***

Challenge has been made to the order dated 27.8.2008 passed by the learned Insurance Ombudsman in Complaint No.21-001-0235 vide Annexure-12 under which the learned Insurance Ombudsman accepted the submissions of the insurer-opposite parties.

**2.** The unshorn details of the case of the petitioner is that the late husband of the petitioner was the policy-holder and the deceased policy holder has assured his life under the Life Insurance Corporation of India (hereinafter called as "the Corporation") vide Policy Nos.580631663, 580631960, 584766253 and 585424076 commencing from 28.9.1992, 28.11.1992, 28.8.2002 and 28.3.2004 respectively. Be it stated, the deceased policy-holder was working as Joint Managing Partner of M/s.Durga Construction. During the year 2000 to 2002, due to illness of the mother of the deceased policy-holder, there was financial crunch for which the petitioner could not deposit the premium amount for the policy Nos.580631663 and 580631960. In the year 2004, the Corporation floated an

intensive revival campaign wherein on payment of interest at a reduced rate along with unpaid premium, the lapse policies can be revived. Since the financial condition of the deceased policy-holder improved by then, said two policies were revived on 20.5.2004. On 22.8.2004, the deceased policy-holder fell ill and while being treated in SCB Medical College and Hospital, Cuttack, he expired on 26.8.2004 and the primary cause of death was diagnosed by the doctors to be "Septicaemia" and secondary cause as "Drug Rash". After the death of the deceased policy-holder, the petitioner obtained the legal heir certificate and made representation to the opposite parties 2 to 5 for settlement of the claims. But, the opposite parties, without settling the claim of the petitioner, repudiated the same under flimsy grounds vide Annexure-8 series stating that the deceased policy-holder had made deliberate mis-statements and withheld material information to the Corporation about the reasons of his health condition at the time of proposing his policies revived.

**3.** It is the further case of the petitioner that being aggrieved by the repudiation letters (Annexure-8 series), the petitioner made representation to the learned Insurance Ombudsman on 26.9.2006 for settlement of the claims and the Secretary of the learned Insurance Ombudsman, on receipt of the same, directed the petitioner to file a detailed complaint in the prescribed format. Accordingly, the petitioner, on 21.12.2006 filed a complaint before the learned Insurance Ombudsman, but the learned Insurance Ombudsman, without appreciating the materials, rejected the complaint filed by the petitioner. Learned Insurance Ombudsman relied upon the bed-head ticket of the deceased policy-holder wherein the doctor has observed that the deceased policy-holder had undertaken treatment for "Seizure Disorder" since 1995 and as such, he has suppressed material facts and since he has suppressed the material facts, learned Insurance Ombudsman rejected the claim of the present petitioner holding that she is not entitled to the claim amount as the deceased policy-holder has suppressed the material facts at the time of proposal made in the year 2002 and 2004. It is the further case of the petitioner that as Section 45 of the Insurance Act, 1938 (in short "the Act") has not been properly followed by the opposite parties, the petitioner is bound to knock the door of this Court under Articles 226 and 227 of the Constitution of India for the reliefs, as prayed for.

**SUBMISSIONS**

**4.** Mr.Dwibedi, learned counsel for the petitioner submitted that the deceased husband of the petitioner was admitted in SCB Medical College and

Hospital, Cuttack on 26.8.2004 at 10:00 AM and died on the same day at 2:05 PM due to ”Septicaemia” but not due to “Seizure Disorder”. The claim of the petitioner was repudiated by the Corporation and the learned Insurance Ombudsman illegally rejected the complaint basing on no material on record. He referred to Annexure-3, the form to be used in every case of hospital death and it has been mentioned therein that the deceased policy-holder died due to suffering from “Septicaemia”. He further submitted that the deceased policy-holder was examined medically at the time of taking the policies by the doctor of the Corporation and at that point of time, the doctor has certified him healthy and basing on the report of the doctor, the policies have been issued to the deceased policy-holder. Therefore, there was no suppression of material facts while his policies were revived. He further submitted that the order of the learned Insurance Ombudsman rejecting the claim of the petitioner is based on no evidence and he has erred in law by relying on the submission of the Corporation inasmuch as the bed-head ticket cannot be final opinion of the doctor whereas the discharge certificate shows that the deceased policy-holder died having suffered from “Septicaemia” and “Drug Rash” which are also evident from Annexure-7 wherein the medical attendant has replied negative about any other disease the deceased policy-holder suffered being diagnosized in the hospital.

**5.** Learned counsel for the petitioner further submitted that the order of the learned Insurance Ombudsman suffers from material irregularity as there is no document of treatment to show that the deceased policy holder was being treated for Seizure Disorder from 1995 and stopped medication in 2001 and the finding of the learned Insurance Ombudsman, basing on the endorsement of the doctor in the bed-head ticket on this score, as a wrong finding in absence of the examination of the concerned doctor to prove the basis of his information or diagnosis made to prove the same. On the other hand, he submitted that the finding of the learned Insurance Ombudsman is based on no evidence for which it is illegal and improper.

**6.** Mr.Dwibedi, learned counsel for the petitioner, referring to the provisions of Section 45 of the Act, further contended that the pre-condition for refusing the claim as required being not met by the insurer, the order of the learned Insurance Ombudsman is otherwise illegal and in-intelligible. In support of his contention, he relied upon the decision rendered in the case of ***Mithoolal Nayak –V- Life Insurance Corporation of India; AIR 1962 SC 814.*** So, he submitted to quash the order passed by the learned Insurance Ombudsman and to direct the Corporation to allow the claim made by the petitioner.

**7.** Mr.Kar, learned counsel for the Corporation submitted that since the deceased policy-holder has suppressed the material facts with regard to his health while giving answers to the necessary questions regarding the disease, the concerned authorities are justified in refuting the claim of the petitioner. He further submitted that on 28.9.1992, the deceased policy-holder proposed the policies which are lapsed and subsequently revived in the year 2002. Since there is suppression of material facts by the deceased policy-holder at the time of taking policies and made misstatement, the Corporation was correct in its approach to stop the settlement of the claim under Section 45 of the Act. He submitted that the order of the learned Insurance Ombudsman, being proper and legal, should be upheld.

## POINTS FOR DISCUSSION

**8.** The main points for consideration are as to whether (i) the deceased policy-holder had fraudulently suppressed any material facts with regard to his health condition at the time of proposal/revival in the year 2002 and 2004 by making misstatement; and (ii) whether the petitioner is entitled to any claim made in the writ petition?

## DISCUSSIONS

**9.** It is admitted fact that the deceased policy-holder had two policies originally and revived the same in 2002 and 2004. It is admitted fact that the insurer has refuted the claim in respect of Policy Nos.584766253 and 585424076 wherein the present petitioner is the nominee. It is not in dispute that revived Policy No.584766253 commenced on 28.8.2002 and revived Policy No.585424076 commenced on 28.3.2004. It is also not in dispute that the deceased policy-holder died on 26.8.2004 and the learned Insurance Ombudsman has rejected the claim of the present petitioner by observing that the insurer has established that there was material suppression by the deceased policy-holder at the time of proposal.

**10.** Before proceeding further, it is relevant to go through the provisions of law governing the field on the issue in question. Section 45 of the Act states as follows:

> **"45. Policy not to be called in question on ground of mis-statement after two years.**
>
> No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected

after the coming into force of this Act shall after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose:

Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal."

**11.** The aforesaid provisions of law is well discussed in the decision reported in the case of **Mithoolal Nayak vs Life Insurance Corporation Of India; AIR 1962 SC 814** and at paragraphs-7 and 8, Their Lordships, have observed as follows

"7.
Xx xx xx xx
It would be noticed that the operating part of Section 45 states in effect (so far as it is relevant for our purpose) that no policy of life insurance effected after the coming into force of the Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false; the second part of the section is in the nature of a proviso which creates an exception. It says in effect that if the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose, then the insurer can call in question the policy effected as a result of such inaccurate or false statement. In the case before us th e policy was

issued on March 13, 1945, and it was to come into effect from January 15, 1945. The amount insured was payable after January 15, 1968, or at the death of the insured, if earlier. The respondent company repudiated the claim by its letter dated October 10, 1947. Obviously, therefore, two years had expired from the date on which the policy was effected. We are clearly of the opinion that section 45 of the Insurance Act applies in the present case in view of the clear terms in which the section is worded, though learned counsel for the respondent company sought, at one stage, to argue that the revival of the policy some time in July, 1946, constituted in law a new contract between the parties and if two years were to be counted from July, 1946, then the period of two years had not expired from the date of the revival. Whether the revival of a lapsed policy constitutes a new contract or not for other purposes, it is clear from the wording of the operative part of section 45 that the period of two years for the purpose of the section has to be calculated from the date on which the policy was originally effected; in the present case this can only mean the date on which the policy (Ex. P-2) was effected. From that date a period of two years had clearly expired when the respondent company repudiated the claim. As we think that section 45 of the Insurance Act applies in the present case, we are relieved of the task of examining the legal position that would follow as a result of inaccurate statements made by the insured in the proposal form or the personal statement etc. in a case where section 45 does not apply and where the averments made in the proposal form and in the personal statement are made the basis of the contract.

8. The three conditions for the application of the second part of section 45 are-

(a) the statement must be on a material matter or must suppress facts which it was material to disclose;

(b) the suppression must be fraudulently made by the policy-holder; and

(c) the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose."

**12.** With due regard to the above decision, it appears that second part is exception to first part of Section 45 of the Act. On the other hand, if the three

conditions as discussed above at paragraph-8 of the judgment are proved, then the claim can be repudiated by the insurer and the onus lies on the insurer to prove the above three pre-conditions for the application of the second part of Section 45 of the Act.

**13.** It is reported in the case of ***Life Insurance Corporation of India –V- Smt. G.M. Channabasemma; AIR 1991 SC* 392** and at paragraph-7 of the said judgment, Their Lordships have held in the following manner:

> "**7.**xx xx xx xx
>
> It is well settled that a contract of insurance is contract uberrim fides and there must be complete good faith on the part of the assured. The assured is thus under a solemn obligation to make full disclosure of material facts which may be relevant for the insurer to take into account while deciding whether the proposal should be accepted or not. While making a disclosure of the relevant facts, the duty of the insured state them correctly cannot be diluted. Section 45 of the Act has made special provisions for a life insurance policy if it is called in question by the insurer after the expiry of two years from the date on which it was effected. Having regard to the facts of the present case, learned Counsel for the parties have rightly stated that this distinction is not material in the present appeal. If the allegations of fact made oh behalf of the appellant Company are found to be correct, all the three conditions mentioned in the section and discussed in **Mithoolal Nayak v. Life Insurance Corporation of India (1962) Supp. 2 SCR 571**, must be held to have been satisfied. We must, therefore, proceed to examine the evidence led by the parties in the case."

**14.** With due respect to the aforesaid decision, it is clear that Section 45 of the Act has made special provision for a life insurance policy if it is called in question by the insurer after expiry of two years from the date on which it was effected. Moreover, all the three conditions as mentioned in the Section as discussed above in the case of **Mithoolal Nayak vs Life Insurance Corporation Of India (Supra)**are proved by the Corporation by leading evidence. So, it is for the insurer to prove the facts in issue by leading the evidence. As such, the aforesaid decision has been well followed in the decision reported in the case of **Life Insurance Corporation of India and others –V- Smt. Asha Goel and another; AIR 2001 SC 549.** Moreover, Their Lordship in the said case, at paragraph-16, have observed as follows:

> "**16.**In course of time the Corporation has grown in size and at present it is one of the largest public sector financial undertakings. The public in general and crores of policy-holders in particular look forward to prompt and efficient service from the Corporation. Therefore the authorities in-charge of management of the affairs of the Corporation should bear in mind that its credibility and reputation depend on its prompt and efficient service. Therefore, the approach of the Corporation in the matter of repudiation of a policy admittedly issued by it should be one of extreme care and caution. It should not be dealt with in a mechanical and routine manner."

**15.** With due respect to the above decision, learned counsel for the petitioner asserted that the approach of the Corporation in the matter of repudiation of a policy should be made with one extreme care and caution and the same should not be dealt with in a mechanical and routine manner.

**16.** Thus, learned counsel for the petitioner, while relying upon the aforesaid decision, submitted that no evidence whatsoever has been led by the present Corporation before the learned Insurance Ombudsman except producing the bed-head tickets to show that deceased policy-holder has suppressed his illness while the insurance policies were taken by him. He further submitted that the pre-conditions of Section 45 have not been proved by evidence by the Corporation for which the conclusion arrived at by the learned Insurance Ombudsman is indefensible. Contravening the contention of the learned counsel for the petitioner, learned counsel for the Corporation has relied upon the decision rendered in the case of **P.C. Chacko and another –V- Chairman, LIC of India and others; AIR 2008 SC 424** and at paragraph-16 of the said judgment, Their Lordships have observed as follows:

> "**16.** The purpose for taking a policy of insurance is not, in our opinion, very material. It may serve the purpose of social security but then the same should not be obtained with a fraudulent act by the insured. Proposal can be repudiated if a fraudulent act is discovered. The proposer must show that his intention was bona fide. It must appear from the face of the record. In a case of this nature it was not necessary for the insurer to establish that the suppression was fraudulently made by the policy-holder or that he must have been aware at the time of making the statement that the same was false or that the fact was suppressed which was material to disclose. A

deliberate wrong answer which has a great bearing on the contract of insurance, if discovered may lead to the policy being vitiated in law."

**17.** Mr.Kar, learned counsel for the Corporation, relying upon the said decision, submitted that it was not necessary for the insurer to establish that suppression was fraudulently made at the time of making proposal statement by assured or the same was false or that the fact suppressed was material one.

**18.** After going through the above decision, with due respect it appears in that case, the deceased policy-holder died within six months from the date of taking the policy and he had undergone major operation of Adenoma Thyroid four years prior to the date of proposal made by him but did not disclose about the same while proposing the insurance policy. Moreover, in the said case, the insured's brother being an agent of the Corporation, was presumed to have got knowledge and mis-statement of facts by the policy-holder for which Their Lordships have observed that in case of such nature, it was not necessary for the insurer to establish the pre-conditions as appears in the second part of Section 45 of the Act.

**19.** From the discussion of the aforesaid decisions, it is settled position of law that the onus always lies on the insurer to prove pre-conditions of second part of Section 45 of the Act but where on the face of the record, it appears that there was suppression of material facts fraudulently, the insurer is relieved of establishing fact of such suppression being made fraudulently by the policy-holder or that he must have aware at the time of making the statement that the same was false or that the fact was suppressed which was material to disclose.

**20.** Now adverting to the case in hand, it appears that the Corporation has not filed the copy of the personal statement of policy-holder regarding his health before the learned Insurance Ombudsman to know about the statement of the policy-holder. So, this Court, vide order dated 25.9.2015, asked the Corporation to file the medical examination report of the policy-holder prepared by the doctors of the Corporation while proposal is made for the insurance policy by the deceased policy-holder, and documents were filed by the Corporation on 20.11.2015 before this Court. On going through the medical examiner's confidential report in respect of Policy No.584766253, the doctor is found to have given the final report in the following manner:

| | | |
|---|---|---|
| "4. | Ascertain from the life to be assured whether at any time in the past he/she<br>i) has been hospitalized?<br>ii) was involved in accident?<br>iii) he undergone any Radiological, Cardiological, Pathological or any other tests?<br>iv) is currently under any treatment/ | <br><br>No<br>No<br>No<br><br>No |
| | IF THE ANSWER TO ANY OF THE NEXT 9 QUESTIONS (QN.5 TO QN.13) IS "YES" PLEASE GIVE FULL DETAILS. | |
| 5. | Is there any abnormality of the Cardiovascular system? | No |
| 6. | Is there any swelling of joints enlargement of thyroid lymphatic, glands or scars (for earlier surgery)? | No |
| 7. | Is any abnormality found on examination of Mouth, Ear, Nose, Throat Eyes? | No |
| 8. | Is there partial total blindness or deafness or any other physical impairment? | No |
| 9. | Are there any symptoms or signs suggesting abnormality or disease of the Respiratory system? | No |
| 10. | Is there any evidence of enlargement of live or spleen ? | No. |
| 11. | Is there any abnormality in abdomen or abnormality of pelvis? | No. |
| 12. | Is Hurnia present? | No |
| 13. | Is there any evidence of disease of Central peripherial Nervous System? | No |
| 14 | Is there any evidence of operation?<br>If so state?<br>a) The year of operation<br>b) Its natue and cause<br>c) Its location, size and condition of scar<br>d) degree of impairment, if an7 | <br><br>No |
| 15. | Is there any evidence of injury due to accident or otherwise?<br>If so, state.<br>i) the year in which the injury occurred<br>ii) nature of injury<br>iii) degree of impairment, if any<br>iv) duration so unconsciousness in the case of head injury | <br><br><br>No |

| | | |
|---|---|---|
| 16. | Is there any other adverse feature in health or habit, past or present, which you consider relevent?<br>If so, give details | No |
| 17. | For female lives only<br>a) Is there any disease of breasts ?<br>b) Is there any evidence of pregnancy ?<br>c) If so, give duration.<br>d) Do you suspect any disease of uterus, cervix or ovaries? | |

I hereby certify that I have, this day examined the above life to be assured personaly, in private and recorded in my own hand (i)the true and correct findings (ii) the answers to Question No.4 as ascertained from the person examined.

I declare that the person examined signed (affixed his/her thumb impression) in the space marked below in my presence and that I am not related to him/her or the Agent or the Development officer.

Dated at Cuttack on the 31st day of (month) Aug., 2002 at 7.00 p.m.

Sd/-Ranjan Kumar Satpathy Sd/-Dr.Sukanta Ku. Nanda"

So far as Policy No.585424076 is concerned, the relevant portion of the medical examiner's confidential report of the Corporation is also produced below:

| | | |
|---|---|---|
| "5. | Ascertain from the L.A. whether at any time in the past he/she | |
| | a) was hospitalized | No |
| | b) was operated | |
| | c) met with accident | |
| | d) has undergone any bio-chemical, radiological, Cardiological or other test. | |
| | e) is currently under any treatment | |
| 6. | Is there any abnormality observed on examination of Eyes (partial/total blindness.) Ears (deafness). Nose, Throat or Mouth or any physical impairment. | No |
| 7. | Is there any externally visible selling of lymph glands joints or other organ | No |

| | | |
|---|---|---|
| 8. | Are there any symptoms and/or signs suggestive of abnormality of | |
| | (a) Cardiovascular system | |
| | (b) Respiratory system | |
| | (c) Central or peripheral nervous system | |
| | (d) Abdomen or pelvis | No |
| 9. | Is there evidence of enlargement of liver or spleen? | No |
| 10 | Is hernia present? | No |
| 11 | **Is there any evidence of operation, if so state-** | |
| | (a) Date of operation | |
| | (b) Nature & Cause | |
| | (c) Location, size & condition of scar | |
| | (d) Degree of impairment. | No |
| 12 | Is there any evidence of injury due to accident or otherwise- | |
| | (a) Date of injury | |
| | (b) Nature of injury | |
| | (c) Degree of impairment. | No |
| | (d) Duration of unconsciousness, if any, | |
| 13 | Are there any other adverse features in habit or health. past or present. Which you consider relevant, if so give detailsj. | No |
| 14 | For female only | |
| | (a) Is there any disease of breasts ? | |
| | (b) Do you suspect any disease of uterus, cervix or ovaries? | |
| | (c) Is there any evidence of pregnancy, if so give duration? | |
| 15. | On examination whether he/she appears health? | Yes |

| | |
|---|---|
| | I certify that I have, this day, examined the above life to be assured personally, in private and recorded in my own hand (i) the true correct findings (ii) the answers to Question No.5 as ascertained from the person examined.<br>I declare that the person examined, signed (affixed his/her thumb impression) in the space ear marked below in my presence and that I am not related to him/her or the Agent or the Development Officer.<br>Dated at Cuttack on the 31st day of March, 2004 at 10 AM<br>Sd/-Ranjan Kumar Satpathy Sd/-Dr.Hemana Ku. Nayak" |

**21.** From the aforesaid material, it appears that except question No.4 in respect of Policy No.584766253 and question no.5 in respect of Policy No. 585424076, all other answers have been prepared by the doctor after examining the deceased policy-holder. With reference to question nos.4 and 5, the questions have been answered in negative by the policy-holder to the doctor for which the same was recorded accordingly. On the other hand, on the date of proposing the policy, the doctor of the Corporation did not find any infirmity with the policy-holder to insure his life under the relevant policy.

**22.** The opposite party-Corporation has taken a plea that the answer given by the deceased policy-holder was not correct and he has fraudulently suppressed the material facts because while he was treated as an indoor patient before his death, there was an endorsement of the doctor to the effect that he was suffering from "Seizure Disorder" since 1995 and stopped medication since 2001. It is not brought out by the learned counsel for the Corporation as to who has made such statement to the doctor of the Corporation and the said endorsement does not disclose that for such disease, he was ever hospitalized. Moreover, such endorsement does not disclose that he has undergone any test for such disease. It may not be out of place to mention here that the Corporation has not examined any doctor to prove such endorsement. It may not be also out of place to mention here that the deceased policy-holder died on 26.9.2004 after remaining for five days as an indoor patient. The deceased policy-holder took the policies in the year 2002 and 2004. Even if assuming that his medication continued up to 2001, obviously on the date of policy undertaken, he was not suffering from any serious illness and Annexure-7, which is the opinion of the treating doctor of SCB Medical College and Hospital, Cuttack shows that the deceased policy-holder died due to "Septicaemia" as primary cause and "Drug Rash" is a

secondary cause. The doctor has not been examined to prove the basic source of information about "Seizure Disorder" the deceased policy-holder was suffering from 1995 till 2001 and thereafter on the date of taking the policies also, the policy-holder was suffering from such disease.

**23.** The form supplied by SCB Medical College and Hospital, Cuttack used in every case of hospital death (Annexure-3) indicates that the deceased policy-holder was suffering from "Septicaemia" has provisional diagnosis as per Column No.6 of that form. In Column Nos.12 and 13, such "Septicaemia" has been also taken as a final diagnosis. It is utter surprise to find out that "Seizure Disorder" and "Drug Rash" have been entered subsequently as clear from the face of the report. Moreover, Annexure-3 shows the provisional diagnosis and final diagnosis relates to "Septicaemia" as observed earlier. Therefore, it cannot be said on the face of the record that the answers made by the deceased policy-holder to the doctor of the Corporation at Column Nos-4 and 5 in the respective policies are false and such misstatement was made fraudulently suppressing the material fact with regard to his health.

**24.** From the foregoing discussions, the opinion of the doctor that the cause of death after diagnosis was due to suffering from "Septeicaemia" and not due to "Seizure Disorder" being proved, it must be held that neither the deceased policy-holder has given any misstatement before the doctor of the Corporation by suppressing any material facts of serious illness nor the doctor, while examining the deceased policy-holder, has given any wrong report. Moreover, this Court is of the view that when there is nothing available from the face of the record that the policy-holder had fraudulently made suppression of material facts while undertaking the policy, it was incumbent on the part of the Corporation to lead evidence to prove the conditions of Section 45 of the Act, but has not done so. Therefore, this Court is of the view that the conclusion arrived at paragraph-15 by the learned Insurance Ombudsman is based on no evidence. On the other hand, the Court is of the view that the deceased policy-holder has not made any misstatement by fraudulently suppressing any material facts with regard to his health while he was insured under the relevant policies. Issue No.1 is answered accordingly.

**ISSUE NO.II**

**25.** Mr.Dwibedi, learned counsel for the petitioner submitted that the present petitioner is the widow and legal heir of the deceased policy-holder as

per the legal heir certificate (Annexure-5) and she has made representation time to time under relevant form but the claim has been repudiated by the Corporation illegally and finally she approached the learned Insurance Ombudsman which created by Grievance Redressal Rules framed under the Act, but the learned Insurance Ombudsman also without appreciating the claim of the petitioner, denied to settle the same in her favour. On the other hand, learned counsel for the Corporation supports the finding given by the learned Insurance Ombudsman.

**26.** It has been already held in the aforesaid paragraphs that the deceased policy-holder has neither made any misstatement nor fraudulently suppressed any material fact of illness while proposing the policies. It has also been observed that the learned Insurance Ombudsman gave the finding in favour of the insurer without appreciating any evidence in its proper perspective. Where there is no fraudulent suppression of material fact by deceased policy-holder or he made statement falsely within his knowledge while making statement with regard to material fact which he was required to disclose at the time of undertaking the policies, the finding of the learned Insurance Ombudsman is otherwise illegal and improper. Thus, the Court is of the opinion that the petitioner, being the widow and legal heir of her deceased husband, is entitled to the claim made by her before the insurer. Issue No.II is answered accordingly.

**CONCLUSION**

**27.** From the foregoing discussions, the Court is of the view that the deceased policy-holder has neither made any fraudulent suppression of material fact nor made any statement falsely as to material fact with regard to his health and he died out of "Septicaemia" only after two years of Policy No.584766253 commenced on 28.8.2002 and after six months from Policy No.585424076 commenced on 28.3.2004. It is also observed above that the finding of the learned Insurance Ombudsman vide Annexure-12 is not based on evidence for which the Court is of the view that the same should be quashed and the Court do so. Since the petitioner, being the widow and legal heir of the deceased policy-holder, is entitled to the claim under said policies as admissible under the provisions of law, the opposite party no.1-Corporation is directed to release the claim amount under the policies of the deceased policy-holder by making payment of money under the respective policies with interest @ 9% per annum from 3.11.2005 when the Corporation repudiated the claim of the petitioner, till actual payment to the petitioner within three months from today failing which, the same shall be payable by

opposite party no.1-Corporation @ 12% interest per annum till actual payment. The writ petition is disposed of accordingly.

Writ petition disposed of.

**2017 (I) ILR - CUT- 906**

**DR. D.P.CHOUDHURY, J.**

W.P.(C) NO. 17402 OF 2013

**KARUNAKAR BEHERA** .....Petitioner

*.Vrs.*

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

**SERVICE LAW – Petitioner was the Head Master of a Grant-in-Aid School – He worked continuously from 20.10.1968 to 25.06.1983 – Due to mental disorder he remained on leave from 21.09.1982 to 17.01.1983 and again remained on leave from 25.06.1983 and there after did not return to the service, though in the meantime his retirement date i.e. 20.01.2001 passed – After recovery he approached the authorities on 20.09.2012 for payment of pension – Prayer not allowed – Hence the writ petition – The petitioner was suffering from Schizophrenia and only could be traced from Baripada in the year, 2012 – It was beyond human control which compelled the petitioner to remain absent – So it cannot be said to be a case of abandonment of service voluntarily – Since the petitioner had worked for more than ten years and no departmental proceeding started against him during his service period, he is entitled to pension and gratuity as per Rule 72 of the Odisha Service Code – Held, direction issued to the opposite parties to regularize the service of the petitioner from 25.06.1983 till the date of his superannuation but he is not entitled to any arrear pay during that period – However he is entitled to pension, gratuity and other pensionary benefits proportionately in accordance with Odisha Aided Educational Institutions Employees Retirement Benefit Rules 1981 and Odisha Civil Services (Pension) Rules, 1992.**

(Paras 19 to 23)

**Case Law Relied on to** :-

1. AIR 1971 SC 1409 : Deokinandan Prasad -V- The State of Bihar & Ors.
2. (2008) 105 CLT 309 : Kishori Dash -V- State of Orissa & Ors.

**Case Laws Referred to** :-

1. *(*2013) 10 SCC 253 (Vijay S. Sathaye v. Indian Airlines Limited & Ors.
2.. AIR 1971 SC 1409 (Deokinandan Prasad v. The State of Bihar & Ors.

For Petitioner : Mr. P.C.Achary

For Opp. Party : Mr. A.K.Mohanty, Standing Counsel (S&ME Dept.)

Date of hearing : 8.12. 2016
Date of Judgment: 09.02.2017

**JUDGMENT**

***DR. D.P. CHOUDHURY, J.***

This writ petition has been filed to direct the opposite parties for grant of pension and other pensionary benefits by regularizing the absence period of the petitioner, i.e., from 25.6.1983 to 2.1.2001 under concerned Leave Rules.

**FACTS**

**2.** The filtering details of the case of the petitioner are that the petitioner was appointed by the Secretary of the opposite party No.4 School vide appointment letter dated 25.10.1968 as Headmaster. The School was under Grant-in-Aid since 1.4.1961. The appointment of the petitioner has been duly approved by the opposite parties. Due to ill health of the petitioner he remained on leave from 21.9.1982 to 17.1.1983 and again remained on leave from 25.6.1983 and did not return to the service due to his acute illness. He was under medical treatment and in the meantime his normal retirement date 2.1.2001 passed. After being recovered, the petitioner approached the opposite party No.3 on 20.9.2012 for payment of pension.

**3.** Be it stated that the pay of the petitioner was fixed by the opposite party No.3 under ORSP Rules, 1974 and ORSP Rules, 1981 vide Annexures-4 and 5, respectively. It is stated that from 28.10.1968 to 24.6.1983 the petitioner remained in regular service but remained absent from 25.6.1983 till his date of superannuation, i.e., 2.1.2001. Since the petitioner has served more than 10 years of service on regular basis, as per Rule 8 (2) of the Orissa Aided Educational Institutions Employees Retirement Benefit Rules 1981 (hereinafter called "Rules 1981"), he is eligible for pension of the period of his qualifying service up to the date of his retirement. In spite of all the efforts by approaching the opposite parties the minimum pension was not

allowed to him and he is suffering with acute financial hardship with his wife. Hence, this writ petition is filed seeking necessary reliefs.

**4.** Contrasting the petition, counter affidavit is filed by the opposite party No.3. It is the case of this opposite party that the writ petition is not maintainable because the petitioner became Government employee when the School was taken over by the Government in the Department of School & Mass Education since 1989 and the matter is to be adjudicated before the State Administrative Tribunal and not before this Court directly. It is the further case of this opposite party that the petitioner has neither produced any leave application nor produced any Medical Certificate to show that he remained on leave from 21.9.1982 to 17.1.1983 and again from 25.6.1983 till the date of retirement. Be it stated that the petitioner remained unauthorisedly absent from 1986 and abandoned his service. Since he has remained absent for more than five years unauthorisedly and as such abandoned his service, he is deemed to have been terminated. Hence, he is not entitled for payment of pensionary benefit.

**SUBMISSIONS**

**5.** Mr. Achary, learned counsel for the petitioner submitted that the petitioner was duly appointed as Headmaster by the then Managing Committee on 25.10.1968 in Bhimda M.E. School, Bhimda, in the district of Mayurbhanj and continuously served the School till 21.9.1982 but remained on leave since 21.9.1982 to 17.1.1983 and again joined the School on 21.1.1983 and for that he has also submitted the leave application which was duly approved. He further submitted that due to acute illness in his brain he did not attend the School from 25.6.1983. Since he became mad, he could be only traced out at Baripada in 2012 and went under treatment. On 20.9.2012 he made application for payment of pension as his normal superannuation was notionally made on 2.1.2001. According to him, the petitioner having served for more than ten years, he is entitled to pensionary benefit proportionately as per Rules, 1981 and the question of abandonment of service by the petitioner does not arise.

**6.** Mr. Achary, relying upon the decision reported in ***AIR 1971 SC 1409 (Deokinandan Prasad v. The State of Bihar and others)*** submitted that the pension being a property, denying the same to receive by the opposite party is violative of the fundamental right available to the citizen under Articles 19(1)(f) and 31(1) of the Constitution. He also relied upon the decision reported in ***AIR 1966 SC 492 (Jai Shanker v. State of Rajasthan)*** where

Their Lordships observed that discharge from service on the ground of absence from service without opportunity of hearing is improper being violative of Clause 2 of Article 311 of the Constitution of India. He also cited the decision of this Court reported in ***(2008) 105 CLT 309 (Kishori Dash v. State of Orissa and others)*** where the Single Bench observed that a conjoint reading of Rule 8 (2) of the Rules, 1981 and Rule 72 of the Orissa Service Code clearly show that when a Primary School Teacher remains absent for more than five years and does not resume his duty after the period of leave, can be removed from service by following the procedures laid down in the Orissa Civil Service (Classification, Control and Appeal) Rules, 1962 and while removing from service, necessary show cause should be issued by initiating Departmental Proceeding, otherwise it would be amount to violation of the principle of natural justice and it would be ultra vires to Article 311 (2) of the Constitution. In that case this Court also quashed the plea of abandonment of service taken by the opposite parties as there is no notice issued during life time of Primary School Teacher in that case affording an opportunity of hearing before passing the order of abandonment of service. Thus, Mr. Achary submitted that following the judgment of the Hon'ble Apex Court and this Court the petitioner is entitled to the pensionary benefits by regularizing leave from 25.6.1983 till date of his retirement to 1.2.2001 with effect from the date of his superannuation.

**7.** On the contrary, Mr. A.K. Mohanty, learned Standing Counsel for the School & Mass Education Department submitted that since the petitioner did not file any application for leave on 25.6.1983 and remained absent unauthorisedly and never returned to service, this would amount to abandonment of service in view of Rule 72 of the Orissa Service Code. He further submitted that abandonment of service amounts to termination of service. So, he submitted that since the petitioner neither applied for leave nor produced any medical documents to show his illness, the petitioner is deemed to have abandoned service and no notice is necessary to be issued to him to resume duty. He relied upon the decision reported in ***(2013) 10 SCC 253 (Vijay S. Sathaye v. Indian Airlines Limited and others)***, where Their Lordships held that absence from duty in beginning may be misconduct, but when such absence is for long period, it may amount to voluntary abandonment of service resulting in termination of service automatically without necessitating any further order from employer. So, he submitted that the petitioner has remained absent unauthorisedly for long period, it would amount to voluntary abandonment of service resulting termination from

service automatically without any order from the State. Since there is abandonment of service by the petitioner, the petitioner is not entitled to any pensionary benefit as his leave period cannot be regularized under the law.

**8. The main points for consideration:-**

**(i)** Whether the petitioner has abandoned his service voluntarily?

**(ii)** Whether the petitioner is entitled to pensionary benefits?

**DISCUSSIONS**

**POINT NO.(i) :**

**9.** It is admitted fact that the petitioner was appointed as Headmaster of Non-Government Grant-in-Aid School, i.e., in Bhimda M.E. School, Bhimda on 25.10.1968. It is not in dispute that the petitioner worked till 21.9.1982 and then went on leave till 17.1.1983 and again went on leave from 25.6.1983. It is also admitted fact that after 25.6.1983 the petitioner did not return to service and his normal retirement date 2.1.2001 passed.

**10.** Learned counsel for the petitioner submitted that after 25.6.1983 the petitioner suffered from acute illness and was in abnormal condition and finally he was found on 20.9.2012 and submitted application for pension. Learned Standing Counsel for the School & Mass Education Department simply submitted that the petitioner neither filed any application for leave nor filed medical certificate to prove treatment for which it is inferred that he has abandoned the service which amounts to termination from service.

**11.** It appears from Annexure-2 that the leave period of the petitioner from 21.9.1982 to 17.1.1983 was regularized by the Authority by directing the concerned Headmaster to draw the leave salary of the petitioner. In the counter the plea is only taken that the petitioner has abandoned the service as he has not reported after 25.6.1983 to service. Learned Standing Counsel relied on Rule 72 of the Odisha Service Code and the decision reported in ***Vijay S. Sathaye (supra).*** Rule 72 of the Odisha Service Code speaks in following manner:-

> "72. Removal of Government servant after remaining leave for a continuous period exceeding five years.
>
> (1) No Government servant shall be granted leave of any kind for a continuous period exceeding five years.
>
> (2) Where a Government servant does not resume duty after remaining on leave for a continuous period of five years, or where a

> government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, he shall unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962."

Referring to the aforesaid Rule, Mr. Mohanty, learned Standing Counsel submitted that since the petitioner has remained on leave for more than five years unauthorisedly, it is inferred that he has abandoned the service as per the decision of the Hon'ble Apex Court as cited above. Perusal of the above provision shows that any Government servant remained on leave continuously for more than five years shall be eligible for removal from service after following the procedure laid down in the Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962. On the other hand, before removal of an employee from service, a Departmental enquiry is imperative. Again also in Sub-Rule (2) of the Rules 72 has given exception to the application of the said provision as it is the Government to take any other view in exceptional circumstances.

**12.** In the decision reported in ***(2013) 10 SCC 253 (Vijay S. Sathaye v. Indian Airlines Limited and others)***, where Their Lordships observed at paragraphs-11 and 12 in the following manner:-

> "11. Even otherwise, the petitioner was asked to continue in service till the decision is taken on his application. However, he did not attend the office of the respondents after 12-11-1994 in view of the above, as the petitioner had voluntarily abandoned the services of the respondents, there was no requirement on the part of the respondents to pass any order whatsoever on his application and it is a clear-cut case of voluntary abandonment of service and the petitions are liable to be dismissed.
>
> 12. It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntary abandonment of service and in that eventuality,

the bonds of service come to an end automatically without requiring any order to be passed by the employer."

**13.** With due regard to the above decision, it appears that in that case the petitioner went on leave but did not return to service for which it was inferred that he has voluntarily abandoned the services for which the bond under which that employee has worked has come to an end automatically. Further in that case the petitioner has asked for voluntary retirement from service and pending the application for consideration, the petitioner went on leave and did not return. Here it is not a case of voluntary retirement and here is also not a case that the petitioner went on leave by filing application and did not return. Here is a case the petitioner having acute illness went on leave and finally became mad for which ten years after being cured he was brought back to the original challenge. This fact has not been denied in the counter. When a person has become mad, any application or the medical certificate to that extent cannot be expected from the petitioner but his family members may file. When there is no family member and a person has become a liability in the society, it is not correct to say that he being in sound mind did not file the application for leave or any medical certificate to that extent. Moreover, when leave application or the medical application are not called for and where no notice is issued to relieve from duty by the authorities, non-filing of same cannot take away the right of the concerned employee to ask for the pensionary benefit. On the other hand, Rule 72 has clearly maintained that in the event of leave more than five years, there has to be disciplinary proceeding to remove him from service. But in the instant case, no proceeding whatsoever has been started.

**14.** When the petitioner became ill and only could be traced out from Baripada in 2012, it cannot be said that he has voluntarily abandoned the services but for circumstances of his acute illness of schizophrenia or psychosis disorder, he remained absent till notional date of retirement and thereafter. So, it is not a case of abandonment of service voluntarily. Hence, the decision of the Hon'ble Apex Court as stated above, is not applicable to this case as the facts and circumstances of the case at hand are different from the facts and circumstances of that case.

**15.** Moreover, it is reported in ***AIR 1971 SC 1409 (Deokinandan Prasad v. The State of Bihar and others)*** where Their Lordships observed at paragraphs-23 to 25 and 34 and 35 in the following manner:-

"23. A contention has been taken by the petitioner that the order dated August 5, 1966 is an order removing him from service and it has been passed in violation of Art. 311 of the Constitution. According to the respondents there is no violation of Art. 311. On the other hand, there is an automatic termination of the petitioner's employment under R. 76 of the Service Code. It may not be necessary to investigate this aspect further because on facts we have found that R. 76 of the Service Code has no application. Even if it is a question of automatic termination of service for being continuously absent for over a period of five years, Art. 311 applies to such cases as is laid down by this Court in Jai Shanker v. State of Rajasthan 1996-1 SCR 825 = (AIR 1966 SC 492). In that decision this Court had to consider Regulation No.13 of the Jodhpur Service Regulations, which is as follows:

"13. An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment and may only be reinstated with the sanction of the competent authority."

24. It was contended on behalf of the State of Rajasthan that the above regulation operated automatically and there was no question of removal from service because the officer ceased to be in the service after the period mentioned in the regulation. This Court rejected the said contention and held that an opportunity must be given to a person against whom such an order was proposed to be passed, no matter how the regulation described it. It was further held to give no opportunity is to go against Art. 311 and this is what has happened here.

25. In the case before us even according to the respondents a continuous absence from duty for over five years, apart from resulting in the forfeiture of the office also amounts to misconduct under Rule 46 of the Pension Rules disentitling the said officer to receive pension. It is admitted by the respondents that no opportunity was given to the petitioner to show cause against the order proposed. Hence there is a clear violation of Art. 311. Therefore, it follows even on this ground the order has to be quashed.

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> 33. This Court in ***State of Madhya Pradesh v. Ranojirao Shinde, 1968-3 SCR 489=(AIR 1968 SC 1053)*** had to consider the question whether a "cash grant" is "property" within the meaning of that expression in Arts. 19(1)(f) and 31(1) of the Constitution. This Court held that it was property, observing "it is obvious that a right to sum of money is property".
>
> 34. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Art. 31 (1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Art. 19(1)(f) and it is not saved by sub-article (5) of Art. 19. Therefore, it follows that the order dated June 12, 1968 denying the petitioner right to receive pension affects the fundamental right of the petitioner under Arts. 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Art. 32 is maintainable. It may be that under the Pensions Act (Act 23 of 1871) there is a bar against a civil Court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of a Writ of Mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law".

**16.** With due respect to the decision, it appears that where there is no procedure followed in accordance with the concerned disciplinary proceeding and the person is removed from service, there is clear violation of the Constitutional Provisions as enshrined in Arts. 19(1)(f) of the Constitution. At the same time Their Lordships have held that there is clear violation of Article 311 of the Constitution for which the entire order of removal was quashed and the pensionary benefits were allowed.

**17.** In the decision reported in ***105 (2008) CLT 309, Kishori Dash v. State of Orissa and others (supra)*** this Court by interpreting Rule 8 (2) of the Rules 1981 read with Rule 72 of the Code observed in the following manner:-

> "12. A conjoint reading of Rule-8 (2) of the Retirement Rules with Rule 72 of the Orissa Service Code clearly shows that when a primary school teacher remains absent for more than five years and does not resume his duty after the period of leave, can be removed from service by following the procedures laid down in the Orissa Civil Service (Classification, Control and Appeal) Rules, 1962. In other words, such a teacher cannot be removed from service without

issuing a show cause notice and initiating a departmental proceeding as otherwise the same would clearly amount to violation of principle of natural justice and in the case of Government servant, it would be ultra vires to Article 311 (2) of the Constitution inasmuch as the same would not be in conformity with the relevant provisions of Orissa Civil Service (Classification, Control & Appeal) Rules, 1962".

**18.** With due regard to the above decision, it appears that this Court has taken view on the line of the decision taken by the Hon'ble Apex Court in the case of ***Deokinandan Prasad (supra)*** and it is aptly observed that in absence of any proceeding under the Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962, a Primary School teacher even if remains for more than five years absent can neither be removed nor his pensionary benefits can be denied without following the due process of law as required under Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962.

**19.** Now adverting to this present case it has already been observed above that the petitioner worked up to 25.6.1983 continuously from 1968 and thereafter did not return to service but it was not within the human control as he suffered from acute illness with regard to his mental disorder or madness. Moreover, it is revealed from the copies of the representations made by the petitioner in 2012 that same have been made for fixation of pay according to Orissa Revised Scale of Pay Rules. Even if the medical certificate is not proved but due to lack of denial of the contents of the petition by the opposite parties-State Government and particularly opposite parties having admitted in counter that since 1986 he has not resumed duty, it must be observed that the petitioner was compelled to remain on leave due to illness which is not within the domain of the human control. So, relying upon the decision reported in the case of ***Deokinandan Prasad (supra)*** and the decision of this Court reported in the case of ***Kishori Dash (supra),*** the Court is of the view that petitioner has not abandoned service voluntarily but due to his acute illness remained away from his service. His non-attendance in the School cannot be said as abandonment of service. On the whole, this Court is of the view that the petitioner in the facts and circumstances has not abandoned the service voluntarily but remained absent from service from 25.6.1983 onwards till the date of his superannuation. Point No.(i) is answered accordingly.

**POINT NO.(ii)**

**20.** It has been observed in the aforesaid paragraphs that petitioner has not abandoned the service voluntarily but for his acute illness remained absent without filing application from 25.6.1983 onwards and long after date of

superannuation he again approached the authority for sanction of pension but the authorities refused to sanction the pension. When he has admittedly worked for more than ten years and no departmental proceeding was started during his service period, as per Rule 72 of the Code read with the decision of the Hon'ble Apex Court in ***Deokinandan Prasad (supra)*** and the decision of this Court, the petitioner is entitled to pension and gratuity.

**21.** Recruitment Rules 1981 read with the Orissa Civil Services (Pension) Rules, 1992 enshrine that if a person has rendered qualifying service for more than ten years, his pension can be fixed proportionately. Similarly under the said rules if an employee has worked for more than five years he is entitled to gratuity.

**22.** In the instant case, undoubtedly petitioner has worked from 1968 to 25.6.1983 continuously and thereby earned more than ten years of qualifying service to receive pension and he is also entitled to receive gratuity. It is needless to say that although the petitioner remained absent without informing the authorities from 25.6.1983 till his notional retirement on 2.1.2001 because of the supervening circumstances which is beyond the human control as stated above, compelling the petitioner to remain on leave, the service of the petitioner is to be regularized till attaining the age of superannuation. Since he has not worked during that period, no arrear pay can be given because of the principle of "no work no pay" but his pay can be revised notionally from time to time keeping in mind the Orissa Revised Scale of Pay Rules applicable from time to time till his date of retirement. The contention of the State that the petitioner being Government servant should have approached the Tribunal instead of this Court is untenable in the facts and circumstances and writ is maintainable. Point No.(ii) is answered accordingly.

**CONCLUSION**

**23.** Considering all such aspects, the writ petition is disposed of with a direction to the opposite parties to sanction pension, gratuity and other pensionary benefits of the petitioner proportionately in accordance with Rules, 1981 and the Orissa Civil Services (Pension) Rules, 1992 after regularizing his service from 25.6.1983 till the date of his superannuation in accordance with law. The entire process must be completed by the opposite parties within a period of three months from today.The writ petition is disposed of accordingly.

Writ pertition disposed of.