SUPREME COURT OF INDIA

KURIAN JOSEPH, J. & A.M.KHANWILKAR J.

CIVIL APPEAL NOS. 1398 -1399 OF 2011

MEHMOODA GULSHAN ……..Appellant

.Vrs.

JAVAID HUSSAIN MUNGLOO ……..Respondent

JAMMU & KASHMIR HOUSES & SHOPS RENT CONTROL ACT, 1966 – S.11(1)(h)

Whether the requirement of the landlord for own occupation could also mean occupation by a member of the family, in this case, the son ? Held, yes.

The need of the landlord must be real and a pressing one – He must have a "reasonable requirement" of the premises in question but it should not be a mere desire – If the need is otherwise established as genuine, non-examination of the son, for whose benefit the premises is sought to be vacated, is not material – High Court has missed all these crucial aspects – The appellant having established the reasonable requirement of the tenanted premises for own occupation, is entitled to succeed – Held, the impugned judgement of the learned Single Judge in first appeal and confirmed in intra Court appeal by the Division Bench is set aside – The judgment and decree of the trial court is restored – The respondent is granted three months time to surrender vacant possession of the premises. (Paras 21, 22)

Case Laws Referred to :-

1. (1979) 1 SCC 273 : Bega Begum and others v. Abdul Ahad Khan (dead) by Lrs. and Ors.[1]
2. (2002) 5 SCC 397 : Joginder Pal v. Naval Kishore Behal[2]
3. (2008) 9 SCC 699 : Ajit Singh and another v. Jit Ram and another[3]
4. Civil Appeal No. 2773: C. Karunkaran (dead) by Lrs. v. T. Meenakshi[4]
5. (1993) 2 SCC 68 : Gulraj Singh Grewal v. Dr. Harbans Singh & Anr.[5]

Appellant : Mr. Jogy Scaria
Respondents : Ms. Diksha Rai

Date pf judgment : 17. 02 2017

JUDGMENT

KURIAN, J.

1. Whether the requirement of the landlord for own occupation could also mean occupation by a member of the family, in this case, the son, is the short question arising for consideration.

2. Appellant filed Civil Suit No. 42 of 2000 seeking eviction of the respondent from the premises let out to him on 15.11.1997 for a period of eleven months. The said tenancy was verbally extended for a further period of eleven months though it was the contention of the respondent that the said extension was for eleven years. Since, the premises was not vacated after the extended period of eleven months, the suit was filed for eviction.

3. Besides the ground on expiry of the period, it was the case of the appellant that the premises was required for her own use. To quote from paragraph-5 of the plaint:

> "5. xxx xxx xxx xxx xxx
>
> i. That the plaintiff has been deserted by her husband namely : Ch. Mohd Khatai who has arranged 2nd marriage in the state of Bangalore, leaving behind the plaintiff and two sons namely Shujat Huyder aged 27 years unemployed and Waseem Hyder aged 5 years, presently reading in 9th class.
>
> ii. That the plaintiff has no source of ncome after the desertion by her husband nd elder sons being of 27 years old is still nemployed because of the fact, that the son f the plaintiff namely Shujat Hyder is simply a matriculate.
>
> iii. That the plaintiff being a house lady and intends to use the rental premises by observing his elder son to start his own business as such the plaintiff requires the rental premises for her son who can support the family in the long run.
>
> iv. That the plaintiff has no other source of income except to use the rental premises by observing her elder son for starting his own business in the rental premises.
>
> v. That the son of the plaintiff cannot claim any Govt. service because of the fact he is simply a matriculate and he is at the verge of crossing the age limit.
>
> vi. That the plaintiff cannot absorb her son in any private institution, he only alternative is to start his business in the rental premises.
>
> vii. That the plaintiff requires the rental property for her personal use, enabling her elder son to establish the business therein.
>
> viii. That the plaintiff has a liability of her sons, as such requires the rented property for establishing own business therein."

4. The following issues were framed by the trial court:

> "1. Whether the defendant was bound to hand over the possession of the suit premises to the plaintiff after the period of tenancy was over on 13.11.1999? OPP.
>
> 2. Whether the plaintiff requires the suit premises for her unemployed son?... OPP
>
> 3. Whether the plaintiff has rented the premises for period of 11 years, as such is stopped from claiming the eviction before the stipulated period?... OPD
>
> 4. What is the comparative advantage and disadvantage of the parties?... OPP/OPD
>
> 5. Whether the requirement of the plaintiff will be satisfied by partially affecting the defendant from suit premises?... OPD
>
> 6. To what relief the plaintiff is entitled to?"

5. Since we are concerned mainly with the requirement on the ground of own occupation, we confine references only to the consideration of issues 2 and 4.

> "Issue No.2: With regard to issue no.2 whether the plaintiff require the premises for her unemployed son.
>
> There is ample evidence on the file lead by the plaintiff as well as admitted in cross examination by the defendant that the husband of plaintiff has married with a Hindu girl at Cochin and he is residing with his second wife there. The plaintiff has two sons both of them are idle. The elder one being of the aged of about 30 years is not doing any work and that way is idle. It is also on the record that he is not qualified so that he may aspire for any government job nor has it been proved by the defendant that he is associated with the business of his father at Kochin. Every parent has a cherished desire to get his or her ward settled in some job so that he can have a sustenance in his life. The plaintiff does not possess any commercial building other than the suit premises where her son could start any business for his sustenance. Though it is settled law on the subject that there is a difference between desire and requirement. Requirement means when objectively seen there must be the necessity with the party to require

the premises for his own use. It is not a sheer desire only whether the landlord may show his intent to occupy the premises. So there is a difference between the two situations and while differentiating the two situations the evidences on the file is sufficient to prove that the son of the plaintiff is in his 30s and is still idle. In these hard times, the family requirements cannot be met by mere rent of Rs.5000/- which defendant is paying. So in the given circumstances, it has been proved by the plaintiff that plaintiff requires the suit premises for her unemployed son. The defendant has though tried to controvert this position but have not been able to convince the court that the son of the plaintiff is in any manner associated with the business of his father at Cochin. So this issue is also decided in favour of the plaintiff.

Issue No.4: With regard to issue no.4 of comparative advantage and disadvantage of the parties, the law on the subject is very clear that we have to take into account while comparing the advantages and disadvantages of the respective parties the interests of the person for whose benefit the house and shop is held whether he being landlord or the tenant. The explanation to clause (h) of the J&K Houses and Shop Rent Control Act contains specific provisions regarding the weighing and measuring the relative hardship which may be caused to the tenant or landlord in case of granting or refusing a decree for eviction. The principle of law enacted with the expansion is to the effect that the law will lean in favour of the person to whom the greater inconvenience and hardship is caused and would grant the relief to the landlord only when his hardships are likely to exceed the hardships which may be caused to the tenant. Thus, the question of comparative advantage and disadvantage has an important bearing on the question of granting or refusing the relief. The question of balance of convenience or principle of comparative advantage and disadvantage will come up only when the court is satisfied that the premises are reasonably required by the landlord or any person for whose behalf the house or shop is held. But before this is to be decided, the court has to find and determine two things i.e. I) reasonable requirements of the landlord or the person for whose benefit the house or shop is held; II) comparative advantage and disadvantage of the landlord or any person and the tenant and these two ingredients must coexist. So what is to be seen while comparing these two aspects, we have to consider the reasonable requirement of the landlord or ejectment of his tenant.

> The question of requirement always differs from case to case depending on the facts of its own. While comparing advantages and disadvantages of the parties, we have to apply our mind objectively firstly to this aspect whether requirement of the landlord is real and is only not a desire, but there is some compulsion that he requires the premises for his own use and it is also to be seen whether by eviction the defendant may not be put to such a disadvantage in which he cannot be compensated. So, the need of the landlord must be pressing one and real. Applying this test to the facts of the instant case and taking stock of the evidence recorded by the defendant as well as by the plaintiff, it is not disputed. It is also in the evidence that the landlords is not having any source of income other than the rent received through Rent controller and naturally speaking the amount of Rs.5000/- per month is so paltry amount in these hard times when every item of the day to day needs is so costly that hardly she cannot sustain her family. Thus in the given situation it is the landlord whose need is more pressing and real an is put to disadvantage in comparison to the disadvantage which would be caused to the defendant by eviction because the machinery installed can be removed with much case and he can get on rent any other alternative premises in the vicinity and that will not put to jeopardy the interests of the defendant. Therefore, the comparative advantage and disadvantage is also in favour of the landlord. Hence, this issue is also decided in favour of the plaintiff."

6. Issue No. 5, on partial eviction, was also answered in favour of the plaintiff. Thus, by judgment dated 12.12.2007, the suit was decreed.

7. Aggrieved, the respondent filed Civil First Appeal No. 228 of 2007 before the High Court of Jammu and Kashmir at Srinagar.

The learned Single Judge, by judgment dated 04.08.2009, allowed the appeal. According to the learned Single Judge:

> "From the pleadings it would appear that the premises is required for the son of the respondent. The respondent's case before the trial court was that her son was unemployed and that the suit premise was required for him. The trial Court, as noticed above, found that the respondent has two sons both of them are alive. The elder one of the age of 30 years, is not doing any work and that way is idle. The trial Court has further found that the son of the respondent is not qualified

so that he may aspire for any government job. On going through the evidence it would, however, appear that the findings are based on either the statement of the plaintiff or her witnesses. The best witness in these circumstances, to depose on the personal requirement was the son of the respondent himself but he has not been examined as witness before the trial Court. No explanation has been given for his non examination."

8. It was also held that:

"There is nothing in the statement of the respondent which could even indirectly suggest the nature of the business that her son intends to carry on this property, his resources to carry on the business and his aptitude and physical strength and other facts requisite for such a purpose. Thus the evidence is so vague that no reliance can be placed on it.

Reasonable requirement is a question of law but whether the landlord has, in a suit for eviction under Section 11 (h) of the J&K Houses and Shops Rent Control Act, proved it or not is essentially a question of fact. Onus to prove is on the plaintiff. While judging the requirement of a landlord (or the person for whose use the shop is required), the court has to take into account a variety of factors such as the social status of the concerned person, the standard of his living, his habits, his comforts, the state of his health, the number of his family members, the nature of business he intends to start and the suitability of the property for such business, the resources he has got to run the business and the like. If the very person who needs the shop for his use is reluctant to appear before the Court, the Court would not extend any help to him and would not grant any relief in his favour."

9. Aggrieved, the appellant filed intra-court appeal as Letters Patent Appeal No. 175 of 2009 leading to the impugned judgment dated 23.10.2009. The Division Bench concurred with the learned Single Judge and held that the appellant has failed to prove that the premises was required for own occupation, and hence, the appeal.

10. Heard Mr. V. Giri, learned Senior Counsel appearing for the appellant and Ms. Diksha Rai, learned Counsel appearing for the respondent.

11. Section 11(1)(h) of the Jammu and Kashmir Houses and Shop Rent Control Act, 1966 (hereinafter referred to as "the Act"), is the relevant provision:

> "Section 11(1)(h) "… where the house or shop is reasonably required by the landlord either for the purposes of building or re-building, or for his own occupation or for the occupation of any person for whose benefit the house or shop is held;"

12. The main ground on which the appellant was non-suited in the first appeal and the intra-court appeal is that the appellant has failed to establish her reasonable requirement for own occupation. Having not examined the son who intends to do the business, according to the High Court, the requirement of own occupation was not established.

13. We fail to understand the approach made by the High Court. It has clearly come in evidence of the appellant that her one son is unemployed and in view of unemployment, he was frustrated. The appellant's husband had contracted second marriage and he had deserted the appellant. The appellant herself was unemployed with no source of income. The appellant, hence, prayed that the property be returned to her so that her son can look after the family. In cross-examination, she denied the suggestion that the son was doing business with his father. It had also been stated further that "except the premises and the residential house, the plaintiff has no other property". The trial court has meticulously analyzed and appreciated the reasonable requirement of the premises for the business to be managed by the son of the appellant especially in her peculiar family circumstances. In our view, trial court has appreciated the evidence in the right perspective and held that it is not mere desire but genuine need. The finding of the trial court was challenged mainly on the ground that the son, for whose benefit the eviction is sought, has not been examined.

14. Mere non-examination of the family member who intends to do the business cannot be taken as a ground for repelling the reasonable requirement of the landlord. Under the Act, the landlord needs to establish only a reasonable requirement. No doubt, it is not a simple desire. It must be a genuine need. Whether the requirement is based on a desire or need, will depend on the facts of each case.

15. In **Bega Begum and others v. Abdul Ahad Khan (dead) by Lrs. and Ors.**[1], this Court has taken the view that the requirement only connotes an element of genuine need. To quote from paragraph-13:

> "**13.** Moreover, Section 11(*h*) of the Act uses the words "reasonable requirement" which undoubtedly postulate that there must be an

[1] (1979) 1 SCC 273

element of need as opposed to a mere desire or wish. The distinction between desire and need should doubtless be kept in mind but not so as to make even the genuine need as nothing but a desire as the High Court has done in this case. It seems to us that the connotation of the term "need" or "requirement" should not be artificially extended nor its language so unduly stretched or strained as to make it impossible or extremely difficult for the landlord to get a decree for eviction. Such a course would defeat the very purpose of the Act which affords the facility of eviction of the tenant to the landlord on certain specified grounds. This appears to us to be the general scheme of all the Rent Control Acts prevalent in other States in the country. This Court has considered the import of the word "requirement" and pointed out that it merely connotes that there should be an element of need."

16. **Bega Begum** (supra) has also considered the scope and ambit of the expression "reasonable requirement" at paragraph-17:

"**17.** This brings us to the next limb of the argument of the learned Counsel for the respondents regarding the interpretation of Section 11(1)(*h*) of the Act. Section 11(1)(*h*) of the Act runs thus:

"11(1)(*h*… where the house or shop is reasonably required by the landlord either for purposes of building or rebuilding, or for his own occupation or for the occupation of any person for whose benefit the house or shop is held;

Explanation.—The Court in determining the reasonableness of requirement for purposes of building or rebuilding shall have regard to the comparative public benefit or disadvantage by extending or diminishing accommodation, and in determining reasonableness of requirement for occupation shall have regard to the comparative advantage or disadvantage of the landlord or the person for whose benefit the house or shop is held and of the tenant."

It was submitted by Mr Andley, learned Counsel for the respondents that the words used in Section 11(1)(*h*) are "that the house should be required by the landlord for his own occupation or for the occupation of any person for whose benefit the house or shop is held". It was argued that the words "own occupation" clearly postulate that the landlord must require it for his personal residence and not for starting

any business in the house. We are, however, unable to agree with this argument. The provision is meant for the benefit of the landlord and, therefore, it must be so construed as to advance the object of the Act. The word "occupation" does not exclude the possibility of the landlord starting a business or running a hotel in the shop which also would amount to personal occupation by the landlord. In our opinion, the section con-templates the actual possession of the landlord, whether for his own residence or for his business. It is manifest that even if the landlord is running a hotel in the house, he is undoubtedly in possession or occupation of the house in the legal sense of the term. Furthermore, the section is wide enough to include the necessity of not only the landlord but also of the persons who are living with him as members of the same family."

17. In **Joginder Pal v. Naval Kishore Behal** [2], after extensively referring to all the decisions of this Court and some other High Courts, it was held that in interpreting "own use", the court should adopt a practical and meaningful approach guided by realities of life. The guidelines are being summarized at paragraph-33:

"**33.** Our conclusions are crystallised as under:

(*i*) The words "for his own use" as occurring in Section 13(3)(*a*)(*ii*) of the East Punjab Urban Rent Restriction Act, 1949 must receive a wide, liberal and useful meaning rather than a strict or narrow construction.

(*ii*) The expression — landlord requires for "his own use", is not confined in its meaning to actual physical user by the landlord personally. The requirement not only of the landlord himself but also of the normal "emanations" of the landlord is included therein. All the cases and circumstances in which actual physical occupation or user by someone else, would amount to occupation or user by the landlord himself, cannot be exhaustively enumerated. It will depend on a variety of factors such as interrelationship and interdependence — economic or otherwise, between the landlord and such person in the background of social, socio-religious and local customs and obligations of the society or region to which they belong.

(*iii*) The tests to be applied are: (*i*) whether the requirement pleaded and proved may properly be regarded as the landlord's own requirement; and,

[2] (2002) 5 SCC 397

(*ii*) whether on the facts and in the circumstances of a given case, actual occupation and user by a person other than the landlord would be deemed by the landlord as "his own" occupation or user. The answer would, in its turn, depend on (*i*) the nature and degree of relationship and/or dependence between the landlord pleading the requirement as "his own" and the person who would actually use the premises; (*ii*) the circumstances in which the claim arises and is put forward; and (*iii*) the intrinsic tenability of the claim. The court on being satisfied of the reasonability and genuineness of claim, as distinguished from a mere ruse to get rid of the tenant, will uphold the landlord's claim.

(*iv*) While casting its judicial verdict, the court shall adopt a practical and meaningful approach guided by the realities of life.

(*v*) In the present case, the requirement of the landlord of the suit premises for user as office of his chartered accountant son is the requirement of landlord "for his own use" within the meaning of Section 13(3)(*a*)(*ii*)."

18. **Joginder Pal** (supra) was followed in many subsequent decisions and one close to the dispute in the instant case is **Ajit Singh and another v. Jit Ram and another**[3]. It has been held at paragraph-19:

"**19.** From the aforesaid decision of this Court (in *Joginder Pal case*), it is therefore clear that this Court has laid down authoritatively that a non-residential premises, if required by a son for user by him would cover the requirement of the words used in the section i.e. "for his own use" in reference to a landlord. …"

19. In **C. Karunkaran (dead) by Lrs. v. T. Meenakshi** [4], one issue which arose for consideration was whether non-examination of the person for whose need the building was required was fatal. It was held that "mere non-examination of the person for whose need the building was required by itself was no ground to non-suit the landlady". To quote:

"… Mere non-examination of the person for whose need the building was required by itself was no ground to non-suit the landlady. In a number of decisions, [this fact is acknowledged by the first appellate court also], it has been held that it is not necessary to examine the person for whose need the premises are required. It depends on the facts and circumstances of each case. …".

[3] (2008) 9 SCC 699 [4] Civil Appeal No. 2773 of 2002 decided on 06.10.2005

20. In **Gulraj Singh Grewal v. Dr. Harbans Singh and another** [5], this Court had an occasion to see whether a landlord can be non-suited on the ground of non-examination of the son for whose benefit the premises is sought to be vacated. This Court held that in case the need has otherwise been established in evidence, the non-examination is not material. At the best, it is only a matter of appreciation of evidence. To the extent relevant, paragraph-8 reads as follows:

> "**8.** Learned counsel for the appellant submitted that the personal need found proved is only of respondent 2, son of respondent 1, who did not enter the witness-box and, as stated in an affidavit filed in this Court, even he is carrying on his profession at a place about 25 kms. Away from Ludhiana, in our opinion, this finding of fact is unassailable. The High Court has clearly observed that no meaningful argument could be advanced on behalf of the appellant to challenge this finding of the appellate authority. Respondent 1 who is the father of respondent 2, has supported and proved the need of respondent 2, who also is a landlord. The fact that for want of suitable accommodation in the city of Ludhiana, respondent 2 is at present carrying on his profession at some distance from Ludhiana is not sufficient to negative the landlord's need. In these circumstances, the non-examination of respondent 2 also, when respondent 1 has examined himself and proved the need of the landlord, is immaterial and, at best, a matter re- lating only to appreciation of evidence, on which ground this finding of fact cannot be reopened. … ."

21. Thus, the question is whether there is a reasonable requirement by the landlord of the premises. This would depend on whether the landlord has been able to establish a genuine element of need for the premises. What is a genuine need would depend on the facts and circumstances of each case. Merely because the landlord has not examined the member of the family who intends to do business in the premises, he cannot be non-suited in case he has otherwise established a genuine need. The need is a matter of appreciation of evidence, and once there is no perversity in the appreciation of evidence on the need, the said finding of fact cannot be reopened. It may be crucially relevant to note that the eviction is not sought on the last limb of Section 11(1)(h) of the Act namely, "for the occupation of any person for whose benefit the house or shop is held". The premises sought to be evicted is not held for the benefit of the son alone; but the whole family. It is for the own

[5] (1993) 2 SCC 68

occupation of the landlord. It has been established in the facts of this case that the landlord was not happy and content with the paltry rent received from the premises. The landlord intended to engage her son in the business at the premises. It is for the landlord to decide as to the best use the premises should be put to. There is nothing wrong on the part of a landlord in making plans for a better living by doing business engaging her son. Having regard to the background of the son who is unemployed and undereducated, the appellant was able to establish that business was the available option and the tenanted premises was the only space available. Thus, the genuine need for the premises has been established. Unfortunately, the High Court has missed these crucial aspects.

22. The appellant having established a reasonable requirement of the tenanted premises for own occupation, is entitled to succeed. Therefore, the appeals are allowed. The judgment of the learned Single Judge in the first appeal and confirmed in the intra-court appeal by the Division Bench, which is impugned in these appeals, is set aside. The judgment and decree of the trial court is restored. The respondent is granted a period of three months to surrender vacant possession.

23. There shall be no order as to costs.

Appeals allowed.

2017 (I) ILR - CUT- 562

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

W.P.(C) NO. 19122 OF 2015

NAGARJUNA CONSTRUCTION COMPANY LTD. .....Petitioner

.Vrs.

BHUBANESWAR DEVELOPMENT AUTHORITY & ORS. .....Opp. Parties

Tender – Cancellation of concluded contact – Order passed without assigning any reason and without complying with the principles of natural justice – Action challenged – Held, once a contract or an agreement is concluded, the same can be cancelled or withdrawn only after affording the affected party an opportunity of hearing by giving/issuing a show cause notice, considering its reply and also by assigning reasons.

In this case the impugned order was passed canceling the concluded contract without following the established procedure of law – Held, the impugned order is liable to be quashed.

(Paras 9 to 19)

Case Laws Referred to :-

1. AIR 1967 SC 1269 : State of Orissa v. Dr. (Miss) Binapani Dei
2. AIR 1970 SC 150 : A.K. Kraipak v. Union of India
3. A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602
4. AIR 1989 SC 1038 : R.B. Shreeram Durga Prasad and Fatechand Nursing Das v. Settlement Commission (I.T. & W.T.)
5. AIR 1978 SC 597 : Smt. Menaka Gandhi v. Union of India.
6. 2017 (I) ILR –CUT- 252 : 2017 (I) OLR-439 :Bijay Kumar Paikaray v. State of Odisha and others
7. (1980)2 All ER 634 (HL) : Racal Communications Ltd.
8. (1968) 1 All E.R. 694 : Padfield v. Minister of Agriculture, Fisheries and Food
9. AIR 1974 SC 87 : Union of India v. Mohan Lal Capoor.
10. AIR 1981 SC 1915 : Uma Charan v. State of Madhya Pradesh.

For Petitioner : Mr. Pradipta Kumar Mohanty (Sr. Adv), D.N Mohapatra, J. Mohanty, P.K. Nayak, A. Das.& P.K. Pasayat

For Opp. Parties : M/s. Dayananda Mohapatra, M.Mohapatra, G.R.Mohapata & A.Das
Mr. Ramakanta Mohapatra (Govt. Adv.)

Decided on : 15.03.2017

JUDGMENT

VINEET SARAN, C.J.

The Bhubaneswar Development Authority (BDA) had, on 05.11.2013, invited Expression of Interest (EOI) for the selection of executants for the work, namely, 'Construction of Affordable Housing (LIG)' at Subudhipur, Bhubaneswar. In response to the same, five participants had submitted their bids, out of which four were found to be technically qualified, which included the petitioner. After complying with all the formalities, the petitioner was found to be the lowest bidder in the financial bid and hence the bid of the petitioner was accepted on 02.05.2014. Pursuant thereto, on 16.05.2014, a bid contract/agreement was executed between the petitioner and the BDA. There were certain formalities which were to be complied,

which included the environment clearance, as well as interest free mobilization advance, which all were complied with by the petitioner.

2. The record shows that after execution of the contract on 16.05.2014, on 25.08.2014, the Vice Chairman of BDA wrote to the Commissioner-cum-Secretary, Housing and Urban Development Department, Government of Odisha intimating the Government of the entire sequence of events which led to the acceptance of the bid of the petitioner and the execution of the contract. In the said letter, it was also mentioned that the budget estimate was duly approved by the authority and the administrative approval for the said project was also given by the Government of Odisha.

3. The case of the petitioner is that it had completed all formalities for execution of the work. But all on a sudden, on 05.08.2015, the petitioner received an order from the Chief Engineer-cum-Engineering Member, BDA, Bhubaneswar intimating that the agreement executed with the petitioner has been cancelled. Challenging the same, this writ petition has been filed.

4. Along with the counter affidavit, the opposite party-BDA justified the passing of the said order stating that the same was based on the report of the Tender Committee dated 11.06.2015, which was enclosed with the counter affidavit as Annexure-C. After receiving the counter affidavit, the petitioner filed an amendment application, by which it challenged the said report of the Tender Committee dated 11.06.2015 also.

5. We have heard Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. P.K. Pasayat, learned counsel for the petitioner, as well as Mr. D. Mohapatra, learned counsel appearing for the contesting opposite party-BDA, and also Mr. Ramakanta Mohapatra, learned Government Advocate appearing for the State-opposite party no.5. Pleadings between the parties have been exchanged and with the consent of learned counsel for the parties, this petition is disposed of at the stage of admission.

6. The submission of Mr. P.K. Mohanty, learned Senior Counsel appearing for the petitioner is that the impugned order dated 05.08.2015, whereby the concluded contract has been cancelled, is devoid of reasons and has been passed without affording the petitioner any opportunity of hearing and as such, the same is liable to be quashed. It is contended that no reason can be added or substituted by way of filing a counter affidavit or annexing some report of the Committee along with the counter affidavit, and as such, the reasons given in the report of the Tender Committee dated 11.06.2015 cannot justify the passing of the impugned order dated 05.08.2015. In the

alternative, it is submitted that the report of the Tender Committee does not, in any case, recommend, suggest or direct the cancellation of the contract, and on the contrary, it has been mentioned in the said report that the proposal of the BDA does not come under the purview of the Tender Committee of the department, and that the Committee was not in favour of considering the proposal of the BDA. It is thus urged that the cancellation of the concluded contract in the manner, as has been done, is wholly unjustified and liable to be quashed.

7. Sri D. Mohapatra, learned counsel appearing for the contesting opposite party- BDA has, on the contrary, submitted that since the contract was of a value of over rupees one crore, before execution of the agreement, approval of the State Government was necessary, which had not been obtained in the present case, and as such, for this reason the contract/agreement executed between the petitioner and the opposite party-BDA on 16.05.2014 was cancelled.

8. Mr. R. Mohapatra, learned Government Advocate appearing for the State-opposite party no.5 has adopted the submission made by Mr. D. Mohapatra, learned counsel for opposite party-BDA.

9. From the record it does not transpire that the order dated 05.08.2015, cancelling the contract already executed in favour of the petitioner, was done for the reason that approval for the same had not been obtained from the State Government. The short order, by which contract has been cancelled, is reproduced below:

> "*The Agreement bearing No. P-1/of 01-2014-15 for the work "Construction of affordable housing (LIG) at Subudhipur (7 Acre site)" is hereby cancelled on administrative ground with no financial liabilities on either side."*

All that has been stated in the said order is that the agreement is being cancelled on administrative ground. It is well settled law that once a contract or an agreement is concluded, the same can be cancelled or withdrawn only after affording the affected party opportunity of hearing by giving a show cause notice, and considering its reply, and also by assigning reasons for passing such order.

10. The apex Court in ***State of Orissa v. Dr. (Miss) Binapani Dei***, AIR 1967 SC 1269 held that if there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a

person is made, the order is a nullity. Similar view has also been taken in ***A.K. Kraipak v. Union of India,*** AIR 1970 SC 150, ***A.R. Antulay v. R.S. Nayak,*** (1988) 2 SCC 602, ***R.B. Shreeram Durga Prasad and Fatechand Nursing Das v. Settlement Commission (I.T. & W.T.),*** AIR 1989 SC 1038.

Thus, even though the said provision may not provide for notice to be given to the party affected before issuance of any order, but the same has to be read down in the said provision.

In ***Smt. Menaka Gandhi v. Union of India***, AIR 1978 SC 597, the Constitution Bench of the apex Court held as follows:-

> *"Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The principle of audi alteram partem, which mandates that no one shall be condemned unheard, is part of the rules of natural justice."*

Similar view has also been taken by this Court in ***Bijay Kumar Paikaray v. State of Odisha and others,*** 2017 (I) ILR –CUT- 252 : 2017 (I) OLR-439.

11. Reasons being a necessary concomitant to passing an order, the appellate authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority.

12. "***Nihil quod est contra rationem est licitum***"means as follows:

> *"nothing is permitted which is contrary to reason. It is the life of the law. Law is nothing but experience developed by reason and applied continually to further experience. What is inconsistent with and contrary to reason is not permitted in law and reason alone can make the laws obligatory and lasting."*

Therefore, recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is pertinent to note that a decision is apt to be better if the reasons for it are set out in writing because the reasons are then more likely to have been properly thought out. It is vital for the purpose of showing a person that he is receiving justice.

In *Re*: ***Racal Communications Ltd. (1980)2 All ER 634 (HL)***, it has been held that the giving of reasons facilitates the detection of errors of law by the court.

In ***Padfield v. Minister of Agriculture, Fisheries and Food*** (1968) 1 All E.R. 694, it has been held that a failure to give reasons may permit the Court to infer that the decision was reached by the reasons of an error in law.

13. In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87 it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915.

14. In the present case, the order dated 05.08.2015 is devoid of any reason and admittedly the same has been passed without complying with the principle of natural justice, as the opposite party-BDA has accepted that no show cause notice or opportunity of any kind was afforded to the petitioner prior to passing of the impugned order. On this sole ground, the writ petition deserves to the allowed.

15. Further, the justification given by the opposite party- BDA in the counter affidavit, that the impugned order dated 05.08.2015 was passed on the basis of the report of the Tender Committee dated 11.06.2015, also does not have much force. The contention of the learned counsel for the petitioner appears to be correct that such report of the Tender Committee has nothing to do with the proposal of the BDA as the Committee itself accepted that the same does not come within the purview of the Tender Committee of the Department and that the Committee was not in favour of considering the proposal of the BDA. As such, the justification given by the opposite party-BDA in the counter affidavit for passing the impugned order dated 05.08.2015 is also not tenable.

16. We may here draw attention to the observations of Bose J. in ***Gordhandas Bhanji,*** AIR 1952 SC 16 (at page. 18):

> *"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public*

authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

17. The Constitution Bench of the apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi,*** AIR 1978 SC 851, the apex Court held :

" …… when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

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

18. Applying the above principles of law laid down by the apex Court to the present case, it is clear that the impugned order has been passed without any basis, and without following the established procedure of law.

19. Accordingly, for the reasons given hereinabove, this writ petition stands allowed. The order dated 05.08.2015 is quashed. No order to cost.

Writ petition allowed.

2017 (I) ILR - CUT- 568

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

W.A. No. 556 OF 2016

CUTTACK MUNICIPAL CORPORATION ……..Appellant

.Vrs.

STATE OF ODISHA & ORS. …….Respondents

Letters patent Appeal – Respondent-No 5 filed writ petition with a prayer to remove the private hostel run by respondent No 4 in the residential area of CDA, which is in gross violation of the conditions of allotment – Learned single Judge in the common judgment , while

allowing the prayer, directed the commissioner of police (Respondent No 3) to take steps for plying the City/Town Buses in the Ring Road, without entering into the residential area of CDA, though no such relief sought for in the writ petition – Hence this appeal – Since earlier, Division Bench of this Court i.e. PIL Bench allowed plying of Town Buses within the CDA area, the direction given by the learned single Judge is contrary to the order passed by the Division Bench – Respondent Nos. 4 and 5 have no objection for plying of Town buses in CDA area for the greater interest of the public – Held, the impugned direction contained in paragraph 11 of the judgment Dt 24.06.2016 in W.P.(C) No. 17960/2015 directing respondent No. 3 to take steps so that the City Buses/Town Buses plying in the area and creating nuisance should ply at a suitable distance from the residential area, i.e. in the Ring Road area only, which was at a walkable distance from any side of the residential area, is quashed. Paras 18,19)

For Petitioners : M/s. J. Pal , R.K. Samal, B.K. Mishra , A. Dash, (Miss) N. Behera and L. Dash.

For Respondents : Mr. P. K.Muduli (Addl. Govt. Adv.), Mr. D. Mohapatra, M/s. G. Acharya (Sr. Adv), R. Ch. Lyer, T.P. Acharya , S.K.Behera, A Panda, P.K. Naik,D.P.Mishra and Mr. Patitapaban Panda.

Date of judgment : 09.03.2017

JUDGMENT

VINEET SARAN, J.

The Cuttack Municipal Corporation, opposite party no.3 in the writ petition, has filed this intra-Court appeal challenging a part of the direction contained in the common judgment dated 24.06.2016 passed by the learned Single Judge in W.P.(C) No. 17960/2015, W.P.(C) No.23245/2015, W.P.(C) No.227/2016, W.P.(C) No.1334/2016 and W.P.(C) No.1425/2016, by which direction has been issued to the Commissioner of Police (respondent no.3 herein) to take steps for plying the City buses/Town buses at a suitable distance from the residential area, i.e., in the Ring Road area only, which is at a walkable distance from any side of the residential area and that the said buses should not enter into the residential areas.

2. The factual matrix of the case in hand is that Cuttack Development Authority (CDA), which has been created under Orissa Development

Authority Act, 1982 (hereinafter referred to as 'the Act'), had launched residential plotted scheme, being commonly known as 'Abhinab Bidanasi Project Area, Cuttack' in order to cater to the needs of residential houses in Cuttack city. Under the said scheme, various plots were created in a phased manner having different sectors. Plots were allotted on long term lease basis for residential purposes only. As per the conditions stipulated in the allotment order, as well as in application brochure, the allotted plots should be used only for residential purposes with certain terms and conditions under the Act. The said location/area is coming under the Cuttack Municipal Corporation, and as such the Orissa Municipal Corporation Act, 2003 (for short "the Municipal Act") and the Rules framed thereunder are also applicable, and for any violation thereof, stringent actions have been provided in the Municipal Act.

3. The petitioner in W.P.(C) No.17960/2015 (respondent no.5 in this appeal), who is a practicing lawyer of this Court, has been allotted by the CDA a plot bearing no.1499/C measuring (60' x 40') 2400 Sft. of category 'C' under the aforesaid project for domestic purpose, and is residing there permanently by constructing a house. Respondent no.4-Debendra Hazra, being the owner of plot no.1498/C, Sector-10 measuring an area 60' x 40', has also constructed a three storied (G+2) building, which is adjacent to Plot No. 1499/C. It was alleged that respondent no4, by allowing to run a hostel in the building in question, utilized the same for commercial purpose. That is to say, respondent no.4 utilized the residential plot for purpose other than for which it had been allotted, which was in gross violation of conditions of allotment. For violation of any of the conditions stipulated in the allotment order, the authority can cancel the allotment and resume the possession of the property. By utilizing the building constructed over plot No.1498/C, respondent no.4 created nuisance and caused noise, air and water pollution, which grossly affected the privacy of neighbouring plot owners. Furthermore, since for picking up the students of the hostel many buses were plying, an unhygienic situation was created in the area. Hence, respondent no.5, as petitioner in W.P.(C) No.17960/2015 approached this Court seeking for direction to remove the hostel from the residential area.

4. After hearing the said writ petition, along with W.P.(C) No.23245/2015, W.P.(C) No.227/2016, W.P.(C) No.1334/2016 and W.P.(C) No.1425/2016, learned Single Judge by the common judgment dated 24.06.2016 disposed of the writ petition directing the CDA to take a decision on the notices issued to the allottees, who had deviated the approved plan and

the terms and conditions of the allotment order, as expeditiously as possible, preferably within a period of two months from the date of production of certified copy of the judgment, after giving opportunity of hearing to the parties, and also directed respondent no.3 to take steps so that the City buses/Town buses, which were plying in the area and creating nuisance, should ply at a suitable distance from the residential area, i.e., in the Ring Road area only, which was at a walkable distance from any side of the residential area. The appellant, being aggrieved by the latter part of the direction given by the learned Single Judge imposing restriction on plying of City/Town buses, has preferred this appeal.

5. Mr. J. Pal, learned counsel for the appellant stated that the City/Town buses had been plying in CDA area pursuant to the order dated 07.01.2005 passed by a Division Bench of this Court in a Public Interest Litigation (PIL), i.e. OJC No.6721 of 1999 keeping in view the interest and convenience of the travelling public and residents of CDA area. Therefore, the part of the impugned order, aggrieved by which this intra-Court appeal has been filed, has been passed in oblivious of the order dated 07.01.2005 passed by the Division of this Court in O.J.C. No.6721 of 1999. It is further contended that no relief was sought for in W.P.(C) 17960 of 2015 with regard to plying of City/Town buses in CDA area, thereby the direction so given was in excess of the relief sought in the said writ petition. Along with O.J.C. No.6721 of 1999 (PIL), another writ petition [W.P.(C) No.11744 of 2010] was filed by a practicing lawyer of this Court, wherein prayer was made to issue direction to include Cuttack City for plying buses and include the concerned authorities to ply buses on the specific route. In the said writ petition, it was disclosed by the State Government that on the basis of communication dated 03.01.2012 of the Director (U.T.), Ministry of Urban Development, Government of India made to the Commissioner-cum-Secretary to Government, Housing & Urban Development Department, Odisha that the Government of India in the Ministry of Urban Development agreed to the proposal of the State Government for extending the JnNURM buses to run from Bhubaneswar to Cuttack in its 93rd and 94th meeting held on 17th, 18th and 25th of February, 2011. It is further contended that the PIL Bench of this Court had also directed the Traffic Management Committee to prepare a route chart for 30 vehicles, which were to be plied, connecting Cuttack and Bhubaneswar. Keeping in view the interest of general public, the Traffic Management Committee had constituted a Sub-Committee for preparing the route chart. Accordingly, a route chart was prepared and on that basis, if the City/Town

buses were plying, the direction given by the learned Single Judge is virtually contrary to the direction given by the PIL Bench of this Court in O.J.C. No.6721 of 1999 vide order dated 07.01.2005. Therefore, the appellant seeks for quashing of that part of the direction contained in the judgment dated 24.06.2016 of the learned Single Judge in W.P.(C) No.17960/2015.

6. Learned Additional Government Advocate appearing for respondent nos.1 and 3 stated that the authorities have only complied the direction given by this Court permitting the City/Town buses to move through the Ring Road, without allowing them entering into the CDA area.

7. Mr. D. Mohapatra, learned counsel appearing for respondent no.2 submitted that in view of the order passed by the learned Single Judge, the City/Town buses are not being allowed to enter into CDA area.

8. Mr. R.C. Iyar, learned counsel for respondent no.4 stated that the authorities have complied with the direction issued by the learned Single Judge and respondent no.4 has no role to play for stoppage of plying of City/Town buses within Cuttack town and CDA area.

9. Mr. Patitapaban Panda-respondent no.5 appearing in person contended that in W.P.(C) No.17960 of 2015, which was filed by him, no prayer was made for stoppage of plying of City/Town buses in Cuttack town and CDA area. He has no objection if the said buses ply as before in CDA area for greater interest of public at large. It is further contended that the first part of the direction contained in the judgment dated 24.06.2016 passed by the learned Single Judge in W.P.(C) No.17960 of 2015, along with connected matters, was challenged by respondent no.4 before this Court in W.A. No.333 of 2016 and this Court, while dismissing the writ appeal, confirmed the same. Therefore, any order passed in this case may cause prejudice to him so far as it relates to the direction given with regard to taking decision on the notices issued to the allottees, who have deviated the terms and conditions of the allotment order.

10. We have heard learned counsel for the respective parties, as well as respondent no.5 in person, and perused the records.

11. The undisputed facts are that both respondents no.4 and no.5 are allottees of plots no.1498/C and no.1499/C respectively in Sector 10, CDA, Cuttack, which are adjacent to each others. Respondent no.4, having constructed a three floor (G+2) building over his plot, has been utilizing the same for commercial purpose by running a private hostel. The same was objected to by respondent no.5 contending that even though the land was

allotted for residential purpose, instead of utilizing the same for the purpose for which it was allotted, the respondent no.4 utilized the same for commercial purpose, which is not permissible, either in the allotment order or under the provisions of law governing the field. The matter, having not been decided by the statutory authority, was carried to the High Court in WP(C) No.17960 of 2015. The learned Single Judge, while deciding such question inter alia directed that, since the City/Town buses plying in the CDA area were creating nuisance, respondent no.3 should take steps for plying the said buses at a suitable distance from the residential area, i.e., in the Ring Road area only, which is at a walkable distance from any side of the residential area, and that the said buses should not enter into the residential area.

12. In the instant writ appeal, we have been called upon to examine whether the above noted direction is in consonance with the relief sought in W.P.(C) No.17960 of 2015. A perusal of the said writ petition would show that the writ petitioner in paragraph-9 thereof pleaded to the following effect.

> *"9. xxxx It is further to be noted here that there are minimum 15 to 20 times heavy buses are plying every day for the hostel purpose, minimum 20 buses are parking everyday on the road apart from other four wheelers light vehicles whose numbers are not less than 30 to 40. Small children of the locality are afraid of playing in the residential area. Many a times school going children are facing accident due to plying of heavy vehicles each and every day including Sunday. The traffic problems are being created in and around the residential area. The area is being fully polluted due to unhygienic situation created by boys and girls hostels run by some private persons for commercial gain and thereby the peaceful life of the inhabitants has been seriously affected."*

And in the prayer portion the relief to the following effect has been sought for:

> *"The petitioner therefore, most humbly prays you're your Lordship may be graciously pleased to issue Rule NISI to the Opp. Parties calling upon them as to why the private hostels running particularly in Plot No.1498/C and Plot No.1008/C, Sector-10 shall not be removed from the residential area, failing to show cause or show insufficient cause make the said rule absolute and further be pleased to direct the private hostels running in the residential area under C.D.A. shall be removed including Plot No.11498/C and Plot No.1008/C, Sector-10 within a stipulated time."*

13. On perusal of the pleadings mentioned above, nowhere the petitioner has claimed for taking any steps with regard to plying of City/Town buses at a suitable distance from the residential area of the CDA, and that the said buses should not enter into the residential area of CDA. Even if no relief was sought for to that extent, learned Single Judge extended its jurisdiction in granting such relief, which was not asked for in the writ petition. May it be that the learned Single Judge has exercised its power under Article 226 of Constitution of India, but that does not empower the writ Court to pass an order beyond the scope of relief sought for in the writ petition. As such, the relief granted to a party should be in consonance with the prayer made in the writ petition itself, more particularly, when the City/Town buses were allowed to ply pursuant to the order passed by a Division Bench of this Court and the scheme framed by the Government and monitored by Traffic Management Committee constituted by this Court. In our view, the learned Single Judge ought not to have passed an order to that extent, which is beyond its scope, causing inconvenience to the general public.

14. A Division Bench of this Court in O.J.C. No.6721 of 1999 passed an order on 07.01.2005, the relevant portion of which runs as follows:

> *"In our considered opinion, issuance of V.C.Rs. is not enough. The R.T.O. should be vigilant and strict enough to see that town-buses ply in terms of the permits issued and the orders passed by this Court on earlier occasions. The R.T.O. is directed to submit a report regarding the steps taken for plying the buses by the next date.*
>
> *The Vice-Chairman of the C.D.A., who is also present in Court, submits that the C.D.A. has already taken steps for running its own town buses via-Bidanasi and Biju Patnaik Park (C.D.A.). The Municipal Commissioner submits that the C.M.C. has applied for issue of necessary permit to operate town-buses in and around C.D.A. areas including the areas of Biju Patnaik Park. The Collector submits that if any application of the C.M.C. is pending for grant of permit, steps shall be taken for grant of such permit soon. In or opinion, it is the bounden duty of the C.M.C. and C.D.A. to see that their town-buses ply in the newly developed areas in Cuttack City one of which is C.D.A. which has been developed by the C.D.A. so that it will cater to the needs of the residents of those areas as well as other general public. The Municipal Commissioner, who is present, is directed to see that the C.M.C. town-buses touch the last point of*

Bidanasi and C.D.A. Abhinaba Bidanasi Complex. Any violation in this regard shall be viewed seriously as we are of the opinion that in spite of our previous direction the C.M.C. has not taken any step for plying of town-buses in the newly developed township of Cuttack City. The statement made by the Municipal Commissioner in paragraph 8 of his affidavit that the condition of the town-buses of the C.M.C. is very bad for which the said town-buses could not ply in the entire areas covered under the permits is totally evasive. Such statement is not at all appreciated by this Court. Our directions in this regard should be complied with. The town-buses of the C.M.C. must touch Biju Patnaik Park areas, since those areas are otherwise not provided with any other mode of communication."

The aforementioned order, having been passed by the PIL Bench of this Court, has to be complied with by allowing City/Town buses to ply within CDA area.

15. Subsequently, in a writ application filed by Sri P.K. Mohapatra (W.P.(C) No.11744/2010), this Court directed to ply the buses in the concerned routes connecting Cuttack and Bhubaneswar. Keeping in view the interest of the general public, the Traffic Management Committee constituted a Sub-Committee for preparing a route chart. As per the report of the Sub-Committee and keeping in view the interest of the travelling public, the City/Town buses had been plying in the routes prescribed therein in consonance with the orders passed by the Division Bench of this Court.

16. Subsequently, on 13.01.2011, the Division Bench of this Court (PIL Bench) passed orders to the following effect:

"In terms of the order dated 06.01.2011, learned Addl. Standing Counsel for the State has filed the Govt. of India Guidelines for purchase of buses for urban transport system under the JnNURM and the route chart/map along with a memo. But the notification declaring Cuttack-Bhubaneswar as Twin City has not been filed.

Learned counsel for the State submits that the city bus service provided to Bhubaneswar-Puri under the JnNURM scheme cannot be extended to Cuttack City as the said scheme is applicable only to Bhubaneswar and Puri towns. We are not concerned whether the JnNURM scheme introduced for Bhubaneswar and Puri will be applicable to Cuttack or not. This Court has in the past passed orders directing the State Govt. for providing adequate number of town

buses to the city but the same is yet to be complied with. It is stated by the learned counsel for the State, and we have already indicated in our order, that off late Cuttack City has been included under the JnNURM but the proposal is yet to be materialized.

Considering the plight of the commuters on account of lack of adequate town bus service in the city and the apathetic attitude of the State Govt. towards the commuters of the city, even after several years of declaration of this city as a twin city along with Bhubaneswar, we direct the Secretary, Transport Department, as well as the Secretary Housing & Urban Development Department of the State, to take steps for providing at least fifteen town buses over and above the existing town buses for plying as town bus in Cuttack city by end of March, 2011."

17. Meanwhile, in order to mitigate such direction and considering the plight of the commuters, the Government of Odisha in Housing & Urban Development Department vide its notification dated 22.07.2013 set up a Special Purpose Vehicle (SPV) Company in the name of "Cuttack Urban Transport Service Limited" (CUTSL). For smooth management of the company, a Board of Directors was constituted comprising various authorities, wherein the Mayor, Cuttack Municipal Corporation was designated as the Chairperson. The said Company was registered on 21.05.2015 under the Companies Act, 2013. It was also decided by the Government to provide 50 buses to the said SPV Company, i.e., Cuttack Urban Transport Service Limited (CUTSL). Out of the same, in the meantime, 30 buses have already been provided for the said purpose, and supply of rest 20 buses are under active consideration of the Government. In our considered opinion, the direction given by the learned Single Judge, aggrieved by which this writ appeal has been filed, is contrary to the orders passed by the Division Bench of this Court (PIL Bench).

18. Reliance was placed by respondent no.5 on the judgment dated 12.09.2016 passed by this Court in W.A. No.333 of 2016, wherein the very same judgment dated 24.06.2016 passed by the learned Single Judge in W.P.(C) No.17960 of 2015 was under challenge. The said writ appeal preferred by Respondent no.4 has been dismissed by this Court by judgment dated 12.09.2016. On careful perusal of the judgment passed by this Court in W.A. No.333 of 2016 and also pleadings available in the said appeal, it appears that there was no whisper about the plying of City/Town buses and as

such, the relief sought for was confined to the direction given to the CDA to consider and take a decision on the notices issued to the allottees in the interest of justice, equity and fair play. Therefore, no discussion has been made in the said judgment with regard to the subject-matter of dispute raised in the present appeal. The judgment in W.A. No.333 of 2016, having been passed on the pleadings available on records of the said writ appeal, and no finding having been arrived at by this Court on plying of City/Town buses in the CDA area, the apprehension of respondent no.5, that any order passed in this appeal may cause prejudice to him, is unfounded. Law is fairly settled that each case has to be considered on the facts pleaded therein. Learned counsel appearing on behalf of respondent no.4, as well as respondent no.5 appearing in person unequivocally urged before this Court that they do not have any objection if City/Town buses will ply within the CDA area to cater the public needs in the greater interest. In course of hearing, on being confronted by this Court, they candidly stated that no claim with regard to plying of City/Town buses was made before the learned Single Judge.

19. In the conspectus of facts and circumstances, discussed above, we are of the considered view that the direction of the learned Single Judge, contained in paragraph-11 of the judgment dated 24.06.2016 passed in W.P.(C) No. 17960/2015, to the extent, that respondent no.3 herein should take steps so that the City buses/Town buses, which were plying in the area and creating nuisance, should ply at a suitable distance from the residential area, i.e., in the Ring Road area only, which was at a walkable distance from any side of the residential area, is liable to be quashed. Accordingly, the writ appeal is allowed to the extent that the aforesaid part of the direction contained in the judgment dated 24.06.2016 passed by the learned Single Judge in W.P.(C) No.17960/2015 is quashed. No order as to cost.

Appeal allowed.

2017 (I) ILR - CUT- 578

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

W.P.(C) NO. 11576 OF 2016

M/S. KUKUMINA CONSTRUCTIONS PVT. LTD. …….Petitioner

.Vrs.

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

TENDER – Auction of mining lease by O.P.NO 5 – Six bidders participated – The highest bidder offered Rs. 401/- per cum, second highest bidder- O.P.No 4 had offered Rs. 351- 91 per cum, third highest bidder expired and the petitioner offered Rs. 337/- per cum being the fourth highest bidder – Since the 1st highest bidder became disqualified the second highest bidder-O.P.No 4 was asked to match the highest bid i.e. Rs. 401/- per cum – Since O.P.No 4 accepted it, the lease was granted in his favour – Petitioner challenged the bid in favour of O.P.No 4 as he had not given his solvency certificate but that of his wife which could not have been accepted – In course of hearing petitioner made an offer to pay higher price of Rs. 451/- per cum – Since augmentation of revenue for O.P. NO 5 is of prime consideration for the Court, it called upon O.P.No 4 to match with the price quoted by the petitioner – However at this stage, learned counsel for the parties agreed for a fresh auction giving opportunity to all the bidders fixing the base price at Rs. 451/- per cum – Held, the impugned auction is quashed – Direction issued to Collector-cum-Authorised Officer, Khurda to hold fresh auction within ten weeks from today fixing minimum price at Rs. 451/ per cum by affording opportunity to other bidders to participate and may offer better price than that of the minimum price fixed by this Court – The amount of Rs. 5, 00,000/- which has been deposited by the petitioner in this Court be kept till the auction is over – However, in case there is no offer made higher than Rs. 451/- per cum, the petitioner shall be bound by its offer for Rs. 451/- per cum and in case the petitioner refuses to accept the same the above amount shall be forfeited and transferred to the account of O.P.No 5 – Shri Jagannath Temple Administration. (Paras 10 to 14)

For Petitioner : M/s. P.K. Rath, R.N. Parija, A.K. Rout, S.K. Singh, S.K. Pattnaik, A.K. Behera & P.K. Sahoo.

For Opp. Parties : Mr. B.P.Pradhan (Addl.Govt.Adv.)
Mr. A.Parija, Sr. Adv.
M/s.S. Pattnaik ,N.K.Deo, H.S.Deo & D.R Bebsa.
M/s. Subrat Satpathy, S,Mishra L.N Rayatsingh & M.L.Mishra

Date of Judgment : 23.03.2017

JUDGMENT

VINEET SARAN, C.J.

The petitioner, a private limited company represented through its Managing Director, participated in an auction proceeding pursuant to notice dated 29.07.2015 issued by the Sub-Collector-cum-Authorised Officer, Khurda for grant of long term lease in respect of different Sairat sources. The Sairat source with which the petitioner is concerned is mentioned at serial no. 14 of the tender notice dated 29.03.2015 under Annexure-2, i.e., Chhatrama Kabar building stone quarry "Kha" in the district of Khurda. Apart from all other statutory requirements, it was expressly provided that the bidder was to submit solvency certificate obtained from the Revenue Authorities. In the tender process, altogether six bidders, including the petitioner, participated by submitting their respective bids. As would be evident from the bid sheet dated 14.08.2015, the rates quoted by the bidders were as follows:

"Radhakanta Mishra .... Rs.401.00/CuM –Rejected due to fake Solvency.
Pradipta Kumar Jena .... Rs.351.91/CuM – No Solvency of the Bidder.
Rohit Kumar Barik .... Rs.343.00/CuM – Dead.
Kukumina Constructions Pvt. Ltd Rs.337.00/CuM
MSL Pvt. Ltd. …. Rs.189.00/CuM
Krishna Das ..... Rs.120.00/CuM"

2. As would be clear from the above, the auction for a long term lease of the mines in question belonging to opposite party no.5-Shri Jagannath Temple Administration, Puri was held in August, 2015. The highest bidder had offered a price of Rs.401/- per Cum, the second highest bidder-opposite party no.4 had offered Rs.351.91 per Cum, the third highest bidder had died, and the petitioner, who was the fourth highest bidder, had offered Rs. 337/- per Cum. Since the highest bidder was disqualified, the second highest bidder, being opposite party no.4 was asked to match the highest bid, which was for Rs.401/- per Cum. Since opposite party no.4 accepted the same, approval for mining lease was granted in his favour vide order dated 15.3.2016.

3. Challenging the same, this writ petition has been filed, primarily on the ground that opposite party no.4 was not qualified, as he had not given his solvency certificate but that of his wife, which could not have been accepted.

4. Mr. P.K. Rath, learned counsel for the petitioner has submitted that opposite party no.4 incurred disqualification from participating in the auction in view of the fact that solvency certificate submitted does not belong to him and therefore, the auction bid submitted by him could not have been opened by the authority for consideration. The consideration having been made beyond the scope of the tender notice and acceptance thereof being made contrary to the conditions stipulated in the auction notice, the same should be quashed.

5. Mr. B.P. Pradhan, leaned Addl. Government Advocate appearing for the State-opposite party has submitted that in view of Section 37 of the Orissa Land Reforms Act, 1960 a "person" would include a family and further a "family" in relation to an individual would mean individual, as well as the husband or wife. Relying on that Section, learned Addl. Government Advocate states that solvency certificate issued in favour of wife of opposite party no.4 would be sufficient for opposite party no.4 to participate and to be qualified in the auction.

6. Mr. S. Pattnaik, learned counsel appearing for opposite party no.4 also adopted the arguments advanced by learned Addl. Government Advocate.

7. Mr. S. Satpathy, learned counsel appearing for opposite party no.5 states that since the auction has been held by Sub-Collector-cum-Authorized Officer for and on behalf of opposite party no.5, in terms of the auction notice issued in Annexure-2, it has no role to play so far as auction is concerned, but augmentation of revenue being the prime consideration, the opposite party no.5 is interested that the source should be settled in favour of the person, who can bid a better price.

8. On 22.07.2016, this Court issued notice to the opposite parties and passed an interim order in Misc. Case no. 10815 of 2016 to the following effect:

> "*In the meanwhile, opposite party shall not execute any lease deed/agreement in favour of opposite party no.4 and if executed, the opposite party shall not permit the said opposite party no.4 to operate the mines, provided the petitioner deposits a sum of Rs.5,00,000/- (Rupees Five Lakhs) with the Registrar (Judicial) of the Court on or before 26.07.2016. On such deposit being made, the Registrar (Judicial) shall keep the same in the fixed deposit scheme of a Nationalized Bank.*"

In compliance of order passed by this Court, as quoted above, the petitioner deposited the said amount of Rs.5.00 lakhs. The auction proceeding in favour of opposite party no.4 has thus not been concluded. On perusal of the auction notice for long term lease of minor minerals cum stone quarry issued by opposite party no.5 dated 29.07.2015 (in Annexure-2) under the heading "documents to be submitted along with the lease application", it stipulates in clause-5 as follows:

"A solvency certificate and a list of immovable properties from the Revenue authority. (Not less than the Required amount)"

In compliance of such condition stipulated in clause-5, the opposite party no.4 submitted the solvency certificate of his wife, which could not have been accepted by the authority. Strictly in law, solvency certificate of the wife of opposite party no.4 cannot be accepted in an auction in which opposite party no.4 participates.

9. The arguments advanced by learned Addl. Government Advocate cannot sustain in view of the fact that the definition of 'family', as mentioned in Section 37 of the Orissa Land Reforms Act, 1960, is applicable with regard to ceiling and disposal of the surplus land, but not with regard to the auction proceeding. As such, the definition has been given relying upon the scheme of the Act itself, which may not have any application to the present context.

10. In course of hearing, leaned counsel for the petitioner made an offer that it would be prepared to pay higher price @ 451 per cum. Since the augmentation of revenue for opposite party no.5 is of prime consideration for the Court, it called upon opposite party no.4 to match with the highest price offered by the petitioner. At this stage, learned counsel for the parties have agreed that in view of the facts and circumstances of the case, if a fresh auction would be held giving opportunity to all the bidders fixing the base price at Rs.451 per cum, which has been offered by the petitioner in Court today, there may be a possibility of getting higher offer than the fresh offer made by the petitioner.

11. In view of such position, we are of the considered opinion that the auction already held on 14.08.2015 pursuant to notice issued Annexure-2 deserves to be quashed, and is hereby quashed. The Sub-Collector -cum-Authorised Officer, Khurda is directed to hold fresh auction within a period of ten weeks from today, fixing the minimum price at Rs.451 per Cum, which has been offered by the petitioner, by affording opportunity to other similarly

situated bidders to participate in the fresh bid, who can also offer better price than that of the minimum price fixed by this Court.

12. The amount of Rs. 5,00,000/-, which has been kept in the account of the Registrar(Judicial) of the Court, shall remain so till the auction is held and in case, auction is successful, the same shall be released in favour of the petitioner.

13. It is further made clear that in case there is no offer made which is higher than Rs.451/- per Cum, the petitioner shall be bound by its offer of Rs.451/- per Cum and, in case the petitioner refuses to accept the same, the amount of Rs.5,00,000/- kept in deposit with the Registrar(Judicial) of the Court shall be forfeited and transferred to the account of opposite party no.5-Shri Jagannath Temple Administration, Puri.

14. Needless to say, any amount already deposited by opposite party no.4 for grant of mining lease in terms of the earlier auction held, shall be refunded to him forthwith.

15. With the aforesaid observations/directions, the writ petition stands disposed of.

Writ petition disposed of.

2017 (I) ILR - CUT- 582

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

W.P.(C) NO. 4398 OF 2017

SUKHALAL MUNDA .....Petitioner

.Vrs.

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

ODISHA ZILLA PARISHAD ACT, 1991 – S. 51 (1)

Odisha state Election Commission by notification Dt 27.12.2016 fixed Zilla Parishad election for the post of president and vice-president to 12.03.2017 and 24.03.2017 respectively – During continuation of the election process, state Government, in exercise of power U/s 51 of the Act issued notification Dt 08.03.2017 amending Odisha Zilla Parishad Election Rules, 1994 by inserting Rule 51 A vide Odisha Zilla Parished Election (Amendment) Rules, 2017 – Amending

Rule 51A (2) shows that when an elector being a member of a political party records his vote on a ballot paper and before such elector inserts that ballot paper into the ballot box, allowed the authorized agent of that political party to verify as to whom such elector has cast his vote – Hence the writ petition challenging the notification Dt. 08.03.2017 as Ultra vires to section 51 (1) of the Act.

Whether, previous publication, inviting suggestions and objections as required U/s 51 (1) of the OZP Act, 1991 is necessary for amendment of the Rules ? Held, yes

The word may used in section 51 (1) of the Act should be read as "shall" and to be considered as mandatory requiring previous publication before amending the Rules – Held, the notification Dt. 08. 03.2017 issued by the state authority during the continuance of the process of election suffers from lack of Jurisdiction of the said authority as provisions contained U/s 51(1) of the Act have not been followed and as such the impugned notification being ultra vires to the said provision is liable to be quashed. (Paras 16,17,24,34)

Case Laws Referred to :-

1. AIR 2009 SC 2946 : Smt. Rekha Rana v. Jaipal Sharma.
2. AIR 2014 SC 1290 : Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari.
3. AIR 2015 SC 1921 : Krishnamoorthy v. Sivakumar.
4. AIR 1958 SC 296 : State of Kerala v. P.J. Joseph.
5. AIR 1976 SC 263 : Govind Lal Chaggan Lal Patel v. The Agriculture Produce Market Committee.
6. AIR 1979 SC 888 : State of Madhya Paradesh v. Ram Ragubir Prasad Agarwal.
7. AIR 1963 SC 1618 : State of Uttar Pradesh v. Jogendra Singh.
8. AIR 1977 SC 740 : The Official Liquidator v. Dharti Dhan (P) Ltd.
9. (2008) 3 SCC 512 : K. Manjusree v. State of Andhra Pradesh.
10. (1998) 1 SCC 318 : State of Tamilnadu v. K. Sabanayagam.
11. (1978) 1 SCC 405 : AIR 1978 SC 815 (CB) : Mohinder Sing Gill v. The Chief Election Commissioner, New Delhi.
12. (2006) 8 SCC 353 : Kishansing Tomar v. Municipal Corporation of the City of Ahmedabad.
13. AIR 1961 Cal. 217 : Brojendra Kumar Saha v. Union of India.
14. AIR 1995 Cal. 451 : Munna Lal Tewari v. H.R. Scott.
15. AIR 1962 Raj. 24 : Automobile Transport, Rajasthan (P) Ltd. v. State of Rajasthan.
16. AIR 1963 SC 1618 : State of U.P. V. Jogendra Singh.
17. AIR 1957 SC 912 : State of U.P. V. Manbodhan Lal Shrivastava.

18. (2000) 7 SCC 372 : State of M.P. V. Pradeep Kumar.
19. (2009) 7 SCC 658 : Sarka Goel v. Krishanchand.
20. AIR 1961 SC 751 : State of U.P. V. Babu Ram Upadhya.

For Petitioner : M/s. Dr. A.K. Mohapatra, Sr. Advocate
M/s. Alok Ku. Mohapatra B. Panda, S.P. Mangaraj, T. Dash S. Nath, B. Subudhi & A. Mohapatra

For opp. Parties : Mr. S.P. Mishra, Advocate General
Mr. P. Acharya, Sr. Advocate
M/s. S. Rath, D. Panigrahy G. Patra, A. Satpathy, N. Jena & S.P. Behera

Date of argument :22.03.2017
Date of judgment :30.03.2017

JUDGMENT

DR. B.R.SARANGI, J.

Part-IX has been added to the Constitution consisting of Articles 243 to 243-O and a new Schedule, *viz.,* Eleventh Schedule has also been added by the Constitution (Seventy-third Amendment) Act, 1992 with effect from 24.04.1993. The amendment is intended to give effect to Article 40 of the Directive Principles of State Policy. Article 40 directs the State to take steps to organize Village Panchayats and vest them with such powers and authority and may be necessary to enable them to function as units to self-Government. The object of Part IX was to introduce the panchayat system at grass root level. As panchayat systems were based on State Legislation, and their functioning was unsatisfactory, the amendment to the Constitution sought to strengthen the panchayat system by giving a uniform Constitutional base, so that the panchayats became vibrant unit of administration in rural area by establishing strong, effective and democratic local administration, so that there can be rapid implementation of rural development programmes. A uniform three-tier system of Panchayats, i.e., at village, intermediate and district level, has been created throughout the country. Their term is fixed for five years and new elections are to be held before the period expires. There is reservation for scheduled castes/scheduled tribes and women for the post of members, as well as chairperson. It is also provided that all the reserved seats are to be allotted by rotation of different constituents in a Panchayat. The aim of rotation may be to draw into political process, members of vulnerable groups in all areas. The State Government is

empowered to confer upon Panchayat institution the right to implement schemes relating to twenty-six subjects inserted in the Eleventh Schedule.

2. To achieve those avowed objectives, after completion of five years tenure, the Government of Odisha in Panchayati Raj Department vide notification issued under sub-rule (2) of Rule 3 of the Odisha Zilla Parishad Election Rules, 1994 published in Official Gazette on 23.12.2016, called upon all the Parishad Constituencies in the State to elect their Members for the purpose of constituting the Zilla Parishads. Consequentially, in exercise of power conferred under Article 243-K of the Constitution of India and sub-rule (1) of Rule 4 read with Rules 20, 36 and 47 of the aforesaid Rules, the State Election Commission, by the notification dated 27.12.2016, appointed the date and time with respect to conduct of election. From the date of notification, i.e. 27.12.2016, the election process was to continue till the date of publication of names of duly elected Vice-President by the Commission i.e., 27.03.2017. As such, the model code of conduct issued by the Commission would remain in force from the date of issuance of notification till the final publication of the results. During continuation of the election process, a notification was issued on 08.03.2017 by the State Government, in exercise of power conferred by Section-51 of the Odisha Zilla Parishad Act, 1991 (Odisha Act 17 of 1991) amending the Odisha Zilla Parishad Election Rules, 1994 by inserting Rule 51A after the Rule 51 of the existing Rules, which is the subject-matter of challenge in this application.

Rule 51A of Odisha Zilla Parishad Election (Amendment) Rules, 2017 is extracted hereunder:

> *"51A. (1) Every political party, whose member as an elector casts a vote for the purpose of election to the office of the President, or as the case may be, the Vice- President, may appoint one authorized agent and the President or the General Secretary of the State Level Political Party/State unit of the National Political Party shall, in writing, inform the same to the Election Officer with full details of the authorized agent proposed to be so engaged for the said election prior to the scheduled date of election.*
>
> *(2) Notwithstanding anything contained in Rules 50 and 51, the Election Officer shall, between the period, when an elector being a member of a political party records his vote on a ballot paper and before such elector inserts that ballot paper into the ballot box, allow the authorized agent of that political party to verify as to whom such elector has cast his vote."*

3. The petitioner is a Social activist and is an active member of Bharatiya Janata Party (BJP). He has been elected as Zilla Parishad Member of Sundargarh District as a candidate of BJP. The petitioner is affected and prejudiced by the Odisha Zilla Parishad Election (Amendment) Rules, 2017 notified on 08.03.2017, when the Zilla Parishad Election for the posts of President and Vice-President was fixed to 12.03.2017 and 24.03.2017 respectively. Takeover

4. Dr. A.K. Mohapatra, learned Senior Counsel appearing along with Mr. S.P. Mangaraj, learned counsel for the petitioner strenuously urged before this Court that such notification dated 08.03.2017 (Annexure-1) issued by the State Government inserting Rule 51A after Rule 51 of Odisha Zilla Parishad Election Rules, 1994, by way of amendment, is without jurisdiction, meaning thereby the State Government lacked jurisdiction to add Rule 51A as it was violative of Article 243K(4) read with Section 51 of the Odisha Zilla Parishad Act, 1991. Further, the notification dated 08.03.2017 suffers from the procedure as envisaged under Section 51(1) of the Odisha Zilla Parishad Act, 1991, where the previous publication is a pre-requisite to make Rules consistent with the provisions of the Act. The same having not been complied with, the amendment made by inserting Rule 51A is *ultra vires* the provisions contained in Section 51(1) of the Odisha Zilla Parishad Act, 1991. It is contended that a bare look at the provisions contained in amending Rule 51A(2), wherein it has been stated that when an elector being a member of a political party records his vote on a ballot paper and before such elector inserts that ballot paper into the ballot box, allow the authorized agent of that political party to verify as to whom such elector has cast his vote, would show that the very sanctity of 'secrecy of ballots', which is the paramount consideration under the provisions of the Odisha Zilla Parishad Act, 1991 vis-à-vis the Representation of the People Act, 1950, has been infringed. Therefore, such provision is *ultra vires* the statute and the mandate of free and fair election is grossly affected by such amendment, which is not permissible under law. To substantiate his contention, he has relied upon the judgments of the apex Court in ***Smt. Rekha Rana v. Jaipal Sharma***, AIR 2009 SC 2946; ***Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari***, AIR 2014 SC 1290; ***Krishnamoorthy v. Sivakumar,*** AIR 2015 SC 1921; ***State of Kerala v. P.J. Joseph***, AIR 1958 SC 296; ***Govind Lal Chaggan Lal Patel v. The Agriculture Produce Market Committee***, AIR 1976 SC 263; ***State of Madhya Paradesh v. Ram Ragubir Prasad Agarwal***, AIR 1979 SC 888; ***State of Uttar Pradesh v. Jogendra Singh,*** AIR 1963 SC

1618; ***The Official Liquidator v. Dharti Dhan (P) Ltd.*** AIR 1977 SC 740 and ***K. Manjusree v. State of Andhra Pradesh,*** (2008) 3 SCC 512.

5. Mr. S.P. Mishra, learned Advocate General appearing along with Mr. P.K. Rath, learned counsel for the State opposite parties contended that Rule 51A, which has been inserted by way of amendment to the Rules, 1994, is well within the competence of the authority concerned. In order to give effect to the provisions contained in Section 33B of the Odisha Zilla Parishad (Amendment) Act, 2015, which came into effect from 10.12.2015, the Rule-51A has been inserted by issuing impugned notification to implement and give effect to the said provision of the Act. The Odisha Zilla Parishad Election Rules, 1994, which is in existence, having been framed by following due procedure envisaged under Section 51 of the Odisha Zilla Parishad Act, by issuing previous publication, the amending Rules which have been notified inserting Rule 51A does not require to follow the principles of previous publication, as it is in addition to the Rules already in existence and provisions contained in section 33B of the Act. It is further contended that Section 51(1) is directory in nature and not mandatory, because of use of the word 'may' in the said provision and the said word 'may' cannot be construed as 'shall'. Therefore, it gives discretion to the authority in making Rules to implement and to give effect to the provisions contained in Section 33B, as nothing new has been added in the Rule. Further, it is contended that Section 23 of the General Clauses Act is to be followed only when it is mandatory. As such, when a specific procedure has been prescribed under Odisha Zilla Parishad Act in Section 51(1), the principle of General Clauses Act may not apply in the present context. By incorporating such amending Rule 51A, it does not affect the secrecy of ballots by disclosing the same to the agent. As such, this has been done keeping in view the similar notification issued for conducting election for Rajya Sabha. Thereby, no illegality or irregularity has been committed by the State authority by issuing such notification. In support of his contention, he placed reliance on the judgment of the apex Court in ***State of Tamilnadu v. K. Sabanayagam,*** (1998) 1 SCC 318.

6. Mr. P. Acharya, learned Senior Counsel appearing along with Mr. A. Satpathy, learned counsel for the State Election Commission contended that the notification for conducting Zilla Parishad Election was issued under Rule 3 of the Odisha Zilla Parishad Rules, 1994. The date of election has been fixed as per Rule 4, which is *pari materia* to the provisions contained in Article 243E of the Constitution. As such, the notification having been

issued by the Election Commissioner on 27.12.2016, the election process started from that date till the results are published, i.e., 27.03.2017. When the election process is continuing, State Election Commission is the only competent authority, and not the State, to issue instructions or guidelines for free and fair election, as contemplated under the Constitution, read with respective Acts and Rules governing the field. It is emphatically contended that during the poll process, even the legislature cannot make any change in Election Laws, and more so once the election process has been started, the Supreme Court under Article 32 and the High Court under Article 226 of the Constitution of India, though have got jurisdiction, will not interfere during such election process, even if law is changed during continuation of such poll process. It has been further urged with vehemence that the notification dated 08.03.2017 so issued by the State Government, which is under challenge, should not have been issued during continuation of election process. More particularly, the law cannot also be changed, what to speak of Rules governing the field. Once the election process starts, the State Government lacks jurisdiction to issue such notification by inserting Rule 51A to the Odisha Zilla Parishad Election Rules, 1994. More so, the provisions contained in the Representation of the People Act, 1950 being *mutatis mutandis* applicable to the election to the Zilla Parishads, the secrecy of vote is not to be infringed as per Section 94 of the Representation of the People Act, 1950. Though the expression has been used as open ballot in the said provision, that ipso facto cannot be incorporated by way of inserting Rule 51A, when the election process is in continuation. To substantiate his contention, he has relied upon the judgment of the apex Court in ***Mohinder Sing Gill v. The Chief Election Commissioner, New Delhi***, (1978) 1 SCC 405: AIR 1978 SC 815 (CB); ***Kishansing Tomar v. Municipal Corporation of the City of Ahmedabad***, (2006) 8 SCC 353; Special Reference No.1 of 2002 (***Gujrat Assembly Election matter***), In Re: (2002) 8 SCC 237; and ***A.C. Jose v. Sivan Pillai***, (1984) 2 SCC 656.

7. We have heard learned counsel for the parties. Pleadings having been exchanged between the parties and on perusal of records, as well as with consent of learned counsel for the parties, the matter is disposed of at the stage of admission.

8. On the basis of the contention raised by learned counsel for the parties three questions are to be considered:-

> (1) Whether the State Government lacks jurisdiction to amend the Odisha Zilla Parishad Election Rules, 1994, when the election process has already been started?

(2) For amendment of the Rules, whether previous publication inviting suggestions and objections is required under Section 51(1) of the Act or not?

(3) Whether such amending Rule 51A affects the secrecy of ballots or not?

9. For framing of Rules including amendment, whether the previous publication inviting objections and suggestions is required under law, is the prime consideration for the case in hand. Therefore, we are considering the question no.(2) first.

To achieve the avowed objective of the Twenty-seventh amendment of the Constitution, the State legislature enacted law called, the Odisha Zilla Parishad Act, 1991 to establish Zilla Parishads in the State of Odisha. Section 2(l) defines "Zilla Parishad" means the body constituted under Sub-Section (1) of Section (3). The Government may, by notification constitute a Parishad for every district. It is profitable to refer Section 6 (1) and (2) of Odisha Zilla Parishad Act, 1991, which reads as under :

"**6. Members of Parishad**-

(1) The Parishad shall consist of the following members namely :
(a) one member elected directly on the basis of adult suffrage from every constituency within the Parishad area.
(b) Chairman of each Samiti situated within the district.
(c) every member of the House of the People and of the State Legislative Assembly representing constituencies which comprise wholly or partly the area of the Parishad;
(d) members of the Council of States who are registered as electors within the area of the Parishad.

xx xx xx

(*4)(a) The election of members specified in clause (a) of sub-section (1) shall be held in the prescribed manner.*

Provided that where such election is contested on political party basis, the candidate contesting such election shall use their respective party symbols.

(b)In the absence of any provision in this Act or the rules, the provisions of the Representation of the People Act, 1950 and Representation of the People Act, 1951 shall mutatis mutandis apply

for the purposes of election to Parishads in the following matters, namely :-

(i) preparation, revision and updating of electoral rolls;

(ii) appointment of Electoral Registration Officers, Presiding Officers and Polling Officers;

(iii)qualifications and disqualifications for registration as voter;

(iv)such other matters which have to be, or may be required to be, dealt with for the purpose of conducting free and fair election.

(c) Unless the Election Commission, by order published in the Gazette directs otherwise, so much of the electoral roll of the Assembly Constituency for the time being in force as relates to a Parishad Constituency shall, subject to such revision or updating as may be necessary, by the electoral roll of the Parishad Constituency for the purpose of election to the Parishad.

Section 6-A states that superintendence, direction and control of elections shall be vested in State Election Commission. Section 8 deals with election of President and Vice-President. Sub-section (1)(a) of Section 8 is reproduced below:

"Section 8:

(1)(*a) at its first meeting which shall be convened within twenty-two days, but not before the expiry of seven days, from the date of publication of the names under sub-section (2) of Section 6, elect in the prescribed manner a President from among them."*

Section 51 deals with power to make Rules, which is reproduced herein below:

*"**51. Power to make rules –** (1) The Government may, after previous publication, make rules consistent with the provisions of this Act to carry out all or any of the purposes of this Act and prescribe forms for any matter which they consider that a form should be provided.*

(2) In particular and without prejudice to the generality of the foregoing powers such rules may provide for-

(i) the conditions subject to which property may be acquire or transferred by sale, mortgage, lease, exchange or otherwise by a Parishad;

(ii) regulating the duties, functions and powers of a Parishad;

(iii) generally determining the relations between Grama Panchayat Samitis and the Parishad for the guidance of Parishads in all matter connected with the carrying out of the Provisions of this Act;

(iv) regulation of all elections under this Act, including deposits to be made by candidates at an election to the office of the President, the conditions for forfeiture of refund of such deposit and the qualifications of a proposer or seconder;

(v) specifying the responsibility of the District Level Officers of the Government to the Parishads;

(vi) any other matter which has to be, or may be, prescribed under this Act." (Emphasis supplied)

10. On perusal of the provision contained under sub-section(1) of Section 51 the Government may, after previous publication, make Rules consistent with the provisions of this Act, to carry out all or any of the purposes of the Act with regard to regulation of all elections under this Act. Following the aforesaid provisions of sub-section(1) of Section 51, different Rules have been framed, namely, the Orissa Zilla Parishad Election Rules, 1994, the Orissa Zilla Parishad (Conduct of Business) Rules, 1996, the Orissa Zilla Parishad (Division and Reservation of Constituencies) Rules, 1995 and the Orissa Zilla Parishad (Constitution of Standing Committees) Rules, 2000. For better appreciation, the preambles of these rules are reproduced below:

"The Orissa Zilla Parishad Election Rules, 1994
The 31st August, 1994

S.R.O. No. 796/94- *Whereas the draft of certain rules was published as required under Sub-section (1) of Section 51 of the Orissa Zilla Parishad Act, 1991 (Orissa Act 17 of 1991) in the extraordinary issue No. 630, dated the 31st May 1994 of the Orissa Gazette under the notification of the Government of Orissa in the Panchayati Raj (Grama Panchayat) Department No. 8581-G.P. dated the 25th May 1994, bearing S.R.O. No. 523/94, inviting objections and suggestions from all persons likely to be affected thereby till the expiry of a period of fifteen days from the date of Publication of the said notification in the Orissa Gazette.*

And whereas no objection or suggestion has been received by the State Government; (Emphasis supplied)

The Orissa Zilla Parishad (Conduct of Business) Rules, 1996

The 19th July, 1996

S.R.O. No.459/96- *Whereas the draft of certain rules was published as required under Sub-section (1) of Section 51 of the Orissa Zilla Parishad Act, 1991 (Orissa Act 17 of 1991) in the extraordinary issue No. 1429 of the Orissa Gazette, dated the 19th December, 1955, under the notification of the Government of Orissa in the Panchayati Raj (Grama Panchayat) Department No.26266/G.P. dated the 18th December 1995, as S.R.O. No.1446/95, inviting objections and suggestions from all persons likely to be affected thereby till the expiry of a period of fifteen days from the date of Publication of the said notification in the Orissa Gazette.*

And whereas no objection or suggestion has been received by the State Government;

(Emphasis supplied)

The Orissa Zilla Parishad (Division and Reservation of Constituencies) Rules, 1995

The 30th October, 1995

S.R.O. No.1166/95- *Whereas the draft of certain rules was published as required under Sub-section (1) of Section 51 of the Orissa Zilla Parishad Act, 1991 (Orissa Act 17 of 1991) in the extraordinary issue No. 1110, dated the 29th September 1994 of the Orissa Gazette, under the notification of the Government of Orissa in the Panchayati Raj (Grama Panchayat) Department No. 19263 G.P., dated the 29th September 1995, bearing S.R.O. No. 1059/95, inviting objections and suggestions from all persons likely to be affected thereby till the expiry of a period of fifteen days from the date of Publication of the said notification in the Orissa Gazette.*

And whereas no objection or suggestion has been received by the State Government;

(Emphasis supplied)

The Orissa Zilla Parishad (Constitution of Standing Committees) Rules, 2000

The 25th September, 2000

> ***S.R.O. No. 641/2000-*** *Whereas the draft of the Orissa Zilla Parishad (Constitution of Standing Committees) Rules, 1999 was published as required under Sub-Section (1) of Section 51 of the Orissa Zilla Parishad Act, 1991 (Orissa Act 17 of 1991), in the extraordinary issue No. 887 of the Orissa Gazette, dated the 20th June 2000 under the notification of the Government of Orissa in the Panchayati Raj (Grama Panchayat) Department No. 9082-G.P., dated the 19th June 2000 as S.R.O. No. 422/2000, inviting objections and suggestions from all persons likely to be affected thereby till the expiry of a period of thirty days from the date of Publication of the said notification in the Orissa Gazette.*
>
> *AND WHEREAS no objection or suggestion has been received by the State Government;" (Emphasis supplied)*

All the above Rules clearly indicate that the same have been framed under Sub-Section(1) of Section 51 of the Orissa Zilla Parishad Act, 1991 published in official gazette by inviting objections and suggestions from all persons likely to be affected thereby within a period of fifteen days/thirty days, as the case may be, from the date of publication of the said notification in the Orissa Gazette. Therefore, all these Rules have followed the mandate put in Sub-Section(1) of Section 51 of making previous publication by giving time for inviting objection and suggestions from all likely to be affected. The amending Rules, which are notified on 8th March, 2017, the preamble is as follows:

> *"S.R.O. No. 95/2017- In exercise of the powers conferred by section - 51 of the Odisha Zilla Parishad Act, 1991 (Odisha Act 17 of 1991), the State Government do hereby make the following rules further to amend the Odisha Zilla Parishad Election Rules, 1994 namely:- ……"*

On perusal of the aforesaid provision, it clearly indicates that no previous publication has been given as required under Sub-Section(1) of Section 51 of the Orissa Zilla Parishad Act, 1991 by inviting objections and suggestions from the persons likely to be affected by the said notification published in the official gazette.

11. Section 23 of the General Clauses Act, 1897 states as follows:

> *"**23. Provisions applicable to making of rules or bye-laws after previous publication***

Where, by any Central Act or Regulation, a power to make rules or bye-laws is expressed to be given subject to the condition of the rules or bye-laws being made after previous publication, then the following provisions shall apply, namely,-

(1) the authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby;

(2) the publication shall be made in such manner as that authority deems to be sufficient or if the condition with respect to previous publication so requires, in such manner as the government concerned prescribes;

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(4) the authority having power to make the rules or bye-laws, and, where the rules, or bye- laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye-laws from any person with respect to the draft before the date so specified;

(5) the publication in the Official Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye-laws after previous publication shall be conclusive proof that the rule or bye-law has been duly made."

The aforementioned provision clearly puts a mandate that whereby any Central Act or Regulation, a power to make Rules or bye-laws is expressed to be given subject to the condition of the Rules or bye-laws being made after previous publication, then it has to follow the provisions as envisaged under sub-section(1) to sub-section(5). Similarly, Orissa General Clauses Act, 1937, Section 24 also provides such previous publication, which quoted below:

***24. Provisions applicable to making of rules or bye-laws after previous publication**.- Where, by any Orissa Act, a power to make rules or by-laws is expressed to be given, subject to the condition of the rules or by-laws being made after previous publication, then the following provisions shall apply:-*

(1) the authority having power to make the rules or by-laws shall, before making them, publish a draft of the proposed rules or by-laws for the information of persons likely to be affected thereby;

(2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires in such manner as the Central Government or as the case may be, the State Government prescribes;

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(4) the authority having power to make the rules or by-laws, and, where the rules or by-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the roles or by-laws from any person with respect to the draft before the date so specified;

(5) the publication in the Gazette of a rule or by-law purporting to have been made in exercise of a power to make rules or by-laws after previous publication shall be conclusive proof that the rule or by-law has been duly made.

Both, under the Central Act as well as State Act, as mentioned above, Sections 23 and 24 respectively envisaged that the power to make Rules or bye-laws is expressed to be given, subject to the condition of the Rules or bye-laws being made after *previous publication*.

12. The meaning of '*previous publication'* had come up for consideration by Culcutta High Court in ***Brojendra Kumar Saha v. Union of India,*** AIR 1961 Cal. 217 it was held as follows :

"***"Previous Publication" –Meaning of.-*** *Previous publication means-*

(i) the authority concerned must public a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby;

(ii) the manner of publication is left to the authority concerned unless it has been otherwise prescribed by the Government;

(iii) alongwith the draft rules, a notice must also be published specifying a date on or after which the draft is to come up for consideration;

(iv) the said authority must then consider any objections or suggestions which may have been received before the specified date; and

(v) then after all these requirements have been fulfilled, the rule or the bye-laws, as the case may be, as finalized, must be published in the Official Gazette and a certain presumption then arises under Section 23(5) that the rule of bye-laws have been duly made."

Similar view has also been taken in ***Munna Lal Tewari v. H.R. Scott,*** AIR 1995 Cal. 451 and in ***Automobile Transport, Rajasthan (P) Ltd. v. State of Rajasthan,*** AIR 1962 Raj. 24

13. The word 'ultra' means 'beyond' and 'vires' means 'powers'. A simple meaning of the term is "beyond powers"; in a strict sense, therefore, the expression is used to mean any act performed in excess of powers of the authority or the person who performs the act.

14. **Prof. H.W.R. Wade** in his book **'Administrative Law'** observed:

"The ultra vires doctrine is, therefore, not confined to cases to plain excess or power; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by the wrong procedure. In law the consequences are exactly the same; an improper motive or a false step in procedure makes an administrative act just an illegal as does a flagrant excess of authority. Unless the Courts are able to develop doctrines of this kind, and to apply them energetically, they cannot impose limits on the administrative powers which Parliament confers so freely, often in almost unrestricted language."

The term 'ultra vires,' therefore, not only means 'beyond powers' but also "wholly unauthorized by law" and, thus void.

15. Basically *ultra vires* character of an Act may be two-fold, (i) simple *ultra vires*, and (ii) procedural *ultra vires*.

(i) *Simple ultra vires*- An act may be said to acquire the character of simple ultra vires when the person does the act in excess of the power conferred on him.

(ii) *Procedural ultra vires*- Procedural ultra vires may happen when there is a failure to comply with mandatory procedural requirements. All procedural requirements as laid down by statute should be complied with.

The doctrine now refers to not only the lack of power to do any act but also to any situation like improper or unauthorized procedure, purpose or violation of the law of natural justice in exercising the power that is lawfully conferred on the authority concerned.

In ***Shri Sitaram Sugar Company Ltd. v. Union of India***, (1990) 3 SCC 223 : AIR 1990 SC 1277, the apex Court held:

> *"A repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or by acting in bad faith or for an inadmissible purpose or for irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. Any act of the repository of power, whether legislative, administrative or quasi-judicial, is open to challenge if it violates the provisions of the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it."*

The doctrine of *ultra vires* can cover virtually all situations where statutory power is exercised contrary some legal principles.

16. Considering the language 'employed' in section 51(1) of the Orissa Zilla Parishad Act, 1994 read with Section 23 of General Clauses Act, 1897 and Section 24 of the Orissa General Clauses Act, 1937, it puts a mandate to have a previous publication before the rule is enacted, which come under the procedural ultra vires. If the procedure envisaged therein has not been followed, then the notification issued on 08.03.2017 is to be construed *ultra vires* the provisions of the Act itself.

17. In view of provisions contained in Section 51(1) of Odisha Zilla Parishad Act, 1991 by using of word 'may' should be read as 'shall' is to be considered as mandatory for requiring the *previous publication* for enacting the amending the Rules.

18. In ***State of Kerala v. P.J. Joseph,*** AIR 1958 SC 296, the Constitution Bench of the apex Court held:

"All the licenses issued to the respondent were in Form F. L. 1 and he paid Rs. 2,000 for each of them. The imposition of a further duty under S. 17 read with S. 18 by way of fees on licenses for sale would obviously, therefore, amount to an amendment of the provisions of R. 7 of the Cochin Abkari Rules under which the licenses had been issued. Section 69 of the Act requires that all rules made or notifications issued under this Act shall be made and issued by publication in the Cochin Sarkar Gazette. The section further provides that all such rules and notifications so published shall thereupon have the force of law and be read as part of this Act and might in like manner be varied, suspended and annulled. The rules, which included R. 7 under which the licenses in question had been issued, have been published in Cochin Sarkar Gazette and those rules have the force of law and have to be read as part of the Act and can only be varied, suspended or annulled in like manner, i.e., by a rule or notification similarly published. It is conceded that the endorsement at the foot of the Exb. (1), which is said to be a statutory order made under S. 17 and which obviously varied the provisions of R. 7 by enhancing the fee on licences by adding a 20% commission to the fee already paid was not published in the Cochin Sarkar Gazette. It follows, therefore, that even if the endorsement could be regarded as a rule or notification prescribing the levy of duty, not having been published in the manner aforesaid, the same cannot be regarded as a valid order having the force of law and, therefore, the impost cannot be said to be supported by authority of any law. Learned counsel faintly suggested that the endorsement in question was neither a rule nor a notification but was an order and was, therefore, not governed by S. 69. Section 18 being the machinery section for working out S. 17, and the alleged order not being in terms or form an imposition of a fee on license for sale, under S. 18 Cl. (d) learned counsel could not refer us to any other section in the Act under which an order of the kind appearing at the foot of Exb. (1) could be made or show us under what provision of law could such an order have legal effect without its publication in the official Gazette. Assuming the endorsement at the foot of Exb. (1) was an order, not having been published in the official Gazette, it cannot, by reason of S. 69, in any way vary R. 7 which fixes the fee on licenses in Form F. L. 1 at Rs. 2,000 per annum. The fact of the matter is that the impost was nothing but an executive order, if an order it was, which had no

authority of law to support it and was, therefore, an illegal imposition."

19. In ***Govind Lal Chaggan Lal Patel v. The Agriculture Produce Market Committee,*** AIR 1976 SC 263 the apex Court in paragraphs 16 and 18 held as follows:

> ***"16****. The object of these requirements is quite clear. The fresh notification can be issued only after considering the objections and suggestions which the Director receives within the specified time. In fact, the initial notification has to state expressly that the Director shall consider the objections and suggestions received by him within the stated period. Publication of the notification in the Official Gazette was evidently thought by the legislature not an adequate means of communicating the Director's intention to those who would be vitally affected by the proposed declaration and who would therefore be interested in offering their objections and suggestions. It is a matter of common knowledge that publication in a newspaper attracts greater public attention than publication in the Official Gazette. That is why the legislature has taken care to direct that the notification shall also be published in Gujarati in a newspaper. A violation of this requirement is likely to affect valuable rights of traders and agriculturists because in the absence of proper and adequate publicity, their right of trade and business shall have been hampered without affording to them an opportunity to offer objections and suggestions, an opportunity which the statute clearly deems so desirable. By Section 6(2), once an area is declared to be a market area, no place in the said area can be used for the purchase or sale of any agricultural produce specified in the notification except in accordance with the provisions of the Act. By S. 8 no person can operate in the market area or any part there of except under and in accordance with the conditions of a licence granted under the Act. A violation of these provisions attracts penal consequences under Section 36 of the Act. It is therefore vital from the point of view of the citizens' right to carry on trade or business, no less than for the consideration that violation of the Act leads to penal consequences, that the notification must receive due publicity. As the statute itself has devised an adequate means of such publicity, there is no reason to permit a departure from that mode…."*

xx xx xx

> ***"18****. We are therefore of the opinion that the notification issued under Section 6(5) of the Act like that under Section 6 (1), must also be published in Gujarati in a newspaper having circulation in the particular area. This requirement is mandatory and must be fulfilled. Admittedly, the notification (Ex. 10) issued under Section 6(5) on February 16, 1968 was not published in a newspaper at all, much less in Gujarati. Accordingly, the inclusion of new varieties of agricultural produce in that notification lacks legal validity and no prosecution can be founded upon its breach."*

20. In ***State of U.P. V. Jogendra Singh,*** AIR 1963 SC 1618 the apex Court in paragraph-8 held as follows:

> *"The word "'may" generally does not mean "must" or "shall". But it is well-settled that the word "may" is capable of meaning "must" or "'shall" in the light of the context. Where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command. Sometimes, the legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed."*

21. In ***State of U.P. V. Manbodhan Lal Shrivastava,*** AIR 1957 SC 912, the apex Court held as follows:

> *"The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other."*

Similar view has also been taken by the apex Court in ***State of M.P. V. Pradeep Kumar,*** (2000) 7 SCC 372 and ***Sarka Goel v. Krishanchand,*** (2009) 7 SCC 658.

22. In ***State of U.P. V. Babu Ram Upadhya,*** AIR 1961 SC 751, at page 765 the apex Court held as follows:

> *" the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provision in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered."*

Similar view has also been taken by the apex Court in ***Rubber House v. Excellsior Needle Industries Pvt. Ltd.,*** AIR 1989 SC 1160.

23. In ***Bhikraj Jaipuria v. Union of India,*** AIR 1962 SC 113 the apex Court held that if object of the enactment will be defeated by holding the same directory, it will be construed as mandatory. The same view has also been followed in ***Raja Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur,*** AIR 1965 SC 895.

24. Even though the word 'may' used in Section 51(1) of the Odisha Zilla Parishad Act, 1991 under the Rule making power of the Government, but the irresistible conclusion can be drawn on the basis of the Rules, which have been framed under the said provisions, preambles of which have been mentioned above, the word 'may' has been used as 'shall' by making it mandatory to have the previous publication inviting objections and suggestions from the affected parties. In such view of the matter, the contention raised by the learned Advocate General, that the provision is directory one, is not tenable in the eye of law. Rather, by conduct, if the provisions have been given effect to by inviting objections and suggestions from the affected parties by making previous publication, as required under the Act and the provisions contained in General Clauses Act, the same has to be followed scrupulously. Non-observance of the provisions contained in Section 51(1) of the Odisha Zilla Parishad Act, 1991 read with Section 23 of the General Clauses Act (Central Act) and Section 24 of Orissa General Clauses Act, 1937, the amendment made to the Odisha Zilla Parishad Rules by inserting Rule 51A in the impugned notification dated 08.03.2017 during the election process cannot sustain in the eye of law. Thereby, the question no.2 is answered in affirmative.

25. As regards question no.1, by virtue of the notification issued by the Election Commission dated 27.12.2016, the election process started from that date and it will continue till 27.03.2017 by publication of names of the

duly elected Vice-president by the Commission. When the election process is continuing, the State Government in exercise of power under Section 51 of the Act issued the notification dated 08.03.2017 in Annexure-1 by amending Odisha Zilla Parishad Election Rules, 1994 inserting Rule 51A after Rule 51. The contention of learned Advocate General is that such notification has been issued only to implement and give effect to the provisions contained in Section 33B of the Act and nothing new has been added in the Rules itself. Since Section 51(1) is directory one but not mandatory, by using the word 'may' no illegality has been committed by issuance of such notification.

26. No doubt Section 33B has been inserted by way of amendment in December, 2015, pursuant to which the notification was issued on 04.01.2016. Section 33B deals with disqualification on the ground of defection, which is reproduced below:

> *"**33-B.** Subject to the provisions of Section 33-C,-*
>
> *(i) if an elected member of the Parishad belonging to any political party voluntarily gives up his membership of such political party, or if such member, contrary to any direction issued by the political party to which he belongs or by a person or authority authorized by it in this behalf, votes or abstains from voting, without obtaining prior permission of such political party, person or authority, in a meeting of the Parishad, in an election of its President, Vice-President, a member of a Standing Committee, or the Chairman of a Standing Committee, or in a voting on a no confidence motion against any one of them; and*
>
> *(ii) if an independent member joins any political party after becoming a member of the Parishad; he shall be disqualified for being a member of that Parishad.*
>
> *Explanation.- For the purpose of this section an elected member or an independent member of the Parishad shall be deemed to be the member referred to in Clause (a) of sub-section (1) of Section 6."*

The amending Rules dated 08.03.2017 have been issued to implement and to give effect to the said provisions of the Act. As such, nothing new has been added.

27. May it be that nothing new has been added under the Amending Rules, the question remains whether the State Government can issue such notification once the election process starts?

28. It is profitable to quote Articles 324 and 243K of the Constitution:

> ***"324. Superintendence, direction and control of elections to be vested in an Election Commission****.—(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).*
>
> *(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.*
>
> *(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.*
>
> *(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).*
>
> *(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine: Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner*

shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1)."

"***243K. Elections to the Panchayats.—****(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.*

(2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:

Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1).

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats."

29. The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Panchayats shall be vested in the Election Commission consisting of Chief Election Commissioner to be appointed by the Governor. Since all the elections to Panchayats shall be vest in the State Election Commission, once the notification has been issued on 27.12.2016 declaring the election process which is to continue till 27.03.2017, all the powers had been vested with the State Election Commissioner. Once the election process starts, the State

Government is denuded with power of issuing any instruction, direction for conduct of election, unless the process is over. There is a bar under Article 243O to interference by Court in electoral matter.

30. In ***Mohinder Singh Gill*** (supra), the Constitution Bench of the apex Court in paragraphs 36 to 40 and 92 held as follows:

> *36. Having held against the maintainability of the writ petition, we should have parted with the case finally. But counsel for both the candidates and, more particularly, the learned Additional Solicitor General, appearing for the Election Commission, submitted that the breadth, amplitude and implications, the direction and depth of Article 324 and, equally important, the question of natural justice raised under Article 324 are of such public importance and largely fallow field going by prior pronouncements, and so strategic for our democracy and its power process that this Court must decide the issue here and now. Article 141 empowers and obligates this Court to declare the law for the country when the occasion asks for it. Counsel, otherwise opposing one another, insistently concurred in their request that, for the working of the electoral machinery and understanding of the powers and duties vested in the functionaries constituting the infrastructure, it is essential to sketch the ambit and import of Art. 324. This point undoubtedly arises before us even in considering the prohibition under Art. 329 and has been argued fully. In any view, the Election Triburial will be faced with this issue and the law must be laid down so that there may be no future error while disposing of the election petition or when the Commission is called upon to act on later occasion. This is the particular reason for our proceeding to decide what the content and parameters of Art. 324 are, contextually limited to situations analogous to the present.*
>
> *37. We decide two questions under the relevant article, not argued, but as substantive pronouncements on the subject. They are :*
>
> *"(a) What, in its comprehensive connotation, does the 'conduct' of elections mean or, for that matter, the 'superintendence, direction and control' of elections ?*
>
> *(b) Since the text of the provision is silent about hearing before acting, is it permissible to import into Art. 324(1) an obligation to act in accord with natural justice ?"*

38. Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function. It is true that Art. 324 has to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualized in Article 327 the Commission cannot shake itself free from the enacted prescriptions. After all, as Mathew, J. has observed in Indira Gandhi : (supra)

"In the opinion of some of the judges constituting the majority in Bharati's case (supra), Rule of Law is a basic structure of the Constitution apart from democracy.

The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere."

And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Art. 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.

39. Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Art. 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism--instances of such phenomena are the tears of history. To

that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in Virendra and Harishankar discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud.J.

"But the electorate lives in the hope that a sacred power will not so flagrantly be abused-and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power."

40. The learned Additional Solicitor General brought to our notice rulings of this Court and of the High Courts which have held that Art. 324 was a plenary power which enabled the Commission to act even in the absence of specific legislation though not contrary to valid legislation. Ordering a re-poll for a whole constituency under compulsion of circumstances may be directed for the conduct of elections and can be saved by Art. 324-provided it is bona fide necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll was because it failed to achieve that goal. While we repel Sri Rao's broadside attack on Art. 324 as confined to what the Act has conferred, we concede that even Art. 324 does not exalt the Commission into a law unto itself. Broad authority does not bar scrutiny into specific validity of the particular order.

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92. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsize the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or

attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings :

(1) (a) Art. 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate..

(2) (a) The Constitution, contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law, relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of such provisions but where such law is silent Art. 324 is a reservoir of power to act for the avowed purpose of, not divorced from pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections. Fairness does import an obligation to see that no wrongdoer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of order for total repoll, although. not in full penoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

(3). The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage and procedure as predicated in Art. 329(b) and the 1951 Act. The Election Tribunal has, under the

various provisions of the Act, large enough powers to give relief to an injured candidates if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law."

31. After considering the law laid down by the Constitution Bench of the apex Court mentioned supra, in the midst of election process the impugned notification was issued, which should not be introduced during the continuance of the poll process, when the State Election Commission is in complete control over the entire election process. Needless to say that even during poll process legislature cannot make any change in the election law, as discussed by the Constitution Bench of the apex Court mentioned supra. More so, the Court will not interfere during the election process even if the law is changed during the continuance of the poll process. Consequentially, the impugned notification issued, could not, and should not have been issued, when the election process was continuing, and more so, when the legislature have been denuded of the power not to frame any law, then what to talk of inserting the Amending Rules under the Rules**.** Mr. S.P. Mishra learned Advocate General relied upon the similar notification in order to conduct election to Rajya Sabha. But on query made by the Court it is candidly stated that such notification has not been issued during the poll process. So far as previous publication is concerned, nothing has been elucidated before us to satisfy with regard non-observance of the provision of law. Thereby, this Court is not inclined to accept the contention of the learned Advocate General. Therefore, we are of the view that the State authority has lacked jurisdiction to issue such notification dated 08.03.2017 in Annexure-1, when the election process is continuing. May it be, to implement or to give effect to the provisions of the Act itself, but that notification could not have been issued during the poll process. In such view of the matter, question no.1 is also answered in affirmative.

32. So far as question no.3 is concerned, we are of the considered opinion that we are not making any observation and discussion in the present context and the same can be done in a suitable case, if any occasion arises in future.

33. All other judgments referred to by the learned counsel for the parties, being not germen to be considered for just and proper adjudication of the case, have not been dealt in this case.

34. In view of the aforesaid fact and circumstances, as well as the settled position of law discussed above, we hold that the notification issued by the State authority in Annexure-1 dated 08.03.2017 during continuance of the process of election suffers from lack of jurisdiction by the authority concerned, more particularly when the provisions contained in Section 51(1) of the Odisha Zilla Parishad Act have not been followed, and as such notification being *ultra vires* to the said provision, is liable to be quashed and is hereby quashed.

35. The writ application is allowed. No order to cost.

Writ application allowed.

2017 (I) ILR - CUT- 610

INDRAJIT MAHANTY, J & BISWAJIT MOHANTY, J.

W.A . NO. 156 OF 2016

DIVISIONAL RAILWAY MANAGER SOUTH EASTERN RAILWAY & ORS. .....Appellants

.Vrs.

BHABANI SANKAR MISHRA .....Respondent

ADMINISTRATIVE TRIBUNALS ACT, 1985 – S. 14

Notification for recruitment to fill up Group 'C' posts under the Railways – Writ petition filed to quash the notification – Maintainability – Tribunals constituted under the Administrative Tribunals Act shall act like Courts of 'first instance' in respect of areas of law for which they have been constituted and it will not be open for the litigants to directly approach the High Court by overlooking the jurisdiction of the concerned Tribunal – Since the present Case comes within the exclusive Jurisdiction of the central Administrative Tribunal, the writ petition is clearly not maintainable before this Court – Held, the writ appeal is allowed – Impugned judgment of the learned single Judge is set aside – The writ petition be transferred to CAT, Cuttack Bench, Cuttack to dispose of the same after registering it as a Transfer Application.

(Paras 5,6,7)

Case Laws Referred to :-

1. AIR 1997 SC 1125 : L.Chandra Kumar v. Union of India and Ors.
2. 1989 (4) SLR 360 : Tirath Raj, H.P.S.E.B., Ridge (E) Sub Division & Ors. v. H.P.State Electricity Board & Ors.
3. 2013 (I) OLR 71 : Sarada Bindhani v. Tahasildar, Nilagiri, Balasore & three Ors.
4. 2013 (II) OLR 314 : Lala Sachikanta Chand v. State of Orissa and Ors.

For appellants : M/s Sabita Ranjan Pattnaik
For respondent : M/s. Prasanta Ku.Mishra & Prativa Mishra

Date of order : 21.03.2017

ORDER

I. MAHANTY, J.

In this Writ Appeal, the appellants have prayed for setting aside the judgment dated 21.01.2016 passed by the Hon'ble Single Judge in OJC No.15595 of 1998.

2. Mr. Pattnaik, learned counsel for the appellants submitted that OJC No.15595 of 1998 was filed by the respondent with a prayer to quash the notification under Annexure-2 attached to the said writ petition. In the alternative, the respondent had prayed therein to declare the respondent as qualified in the written test for Grade 'C' category post. Annexure-2 attached to OJC No.15595 of 1998 clearly revealed that it dealt with the subject-matter of recruitment of physically handicapped persons to Group-'C' category posts under Railways. The appellants filed a counter on 26.7.1999 taking a plea that since the case revolved around recruitment to civil services under the Union of India, it came under the exclusive jurisdiction under the Central Administrative Tribunal. The appellants accordingly took the stand in Paragraph-9 of the counter filed in OJC No.15595 of 1998 that since the respondent had approached the wrong forum, the said writ application was liable to be dismissed. Mr. S.R.Pattnaik, learned counsel for the appellants further submitted that though the Hon'ble Single Judge at Paragraph-4 of the judgment noted about such submissions made on behalf of the appellants, however, the Hon'ble Single Judge without deciding such issue as to maintainability of the above noted writ petition has disposed of the said writ petition with certain directions. In such background, he prayed that the order of Hon'ble Single Judge ought to be set aside on this short point.

In this context, Mr. Pattnaik, learned counsel for the appellants relied on the judgment of the Constitution Bench of Hon'ble Supreme Court in

L.Chandra Kumar v. Union of India and others as reported in AIR 1997 SC 1125.

3. On the other hand, Ms.Prativa Mishra, learned counsel for the respondent defended the impugned judgment of the Hon'ble Single Judge and submitted that no illegality has been committed by the Hon'ble Single Judge in the facts and circumstances of the case and further submitted that non-availing of alternative remedy by way of approaching the Central Administrative Tribunal cannot be held out as against the respondent as notwithstanding such remedy the respondent can always approach the High Court under Article 226 of the Constitution of India in appropriate cases. Thus, she submitted that the respondent has done no wrong in approaching the High Court directly even if an alternative efficacious remedy is available. She further relied on the judgment of Himachal Pradesh High Court in ***Tirath Raj, H.P.S.E.B., Ridge (E) Sub Division and others v. H.P.State Electricity Board and others*** reported in 1989 (4) SLR 360 and judgments of this Court pronounced in ***Sarada Bindhani v. Tahasildar, Nilagiri, Balasore and three others*** reported in 2013 (I) OLR 71 in ***Lala Sachikanta Chand v. State of Orissa and others*** reported in 2013 (II) OLR 314.

Ms. Prativa Mishra, learned counsel for the respondent further submitted that instead of setting aside the judgment of the Hon'ble Single Judge, the respondent may be allowed the benefits of the order passed in one case filed by one Meena

Mohanty, i.e., OJC No.9290 of 1997 against the Railways vis-à-vis self same recruitment process flowing from Annexure-2 attached to OJC No.15595 of 1998.

4. Heard learned counsel for the respective parties.

5. The Hon'ble Supreme Court in the case of L.Chandra Kumar (supra) has clearly laid down that the Tribunals constituted under Administrative Tribunal Act, 1985 shall act like Courts of 'first instance" in respect of areas of law for which they have been constituted and it will not be open for the litigants to directly approach the High Court by overlooking the jurisdiction of the concerned Tribunal. Here, a perusal of Annexure-2 attached to OJC No.15595 of 1998 clearly shows that the subject-matter of the case relates to recruitment to Group 'C' category of posts under the Railways. Further in a case where casual typists employed on daily wage basis under the Central Railways approached the Madhya Pradesh High Court by filing writ petitions challenging termination of their services and when such writ petitions were

allowed by the High Court; the said judgment of Madhya Pradesh High Court was set aside by the Hon'ble Supreme Court in ***Union of India and others v. Deep Chand Pandey and another*** reported in AIR 1993 SC 382 holding that the remedy of such casual typists employed on daily wage basis lied before the Central Administrative Tribunal and not before the High Court in the background of provisions of the Administrative Tribunals Act, 1985. There, the Hon'ble Supreme Court held that the High Court has no jurisdiction to entertain the claim of such employees. Admittedly, in the present case, the subject matter revolved around recruitment to fill up of group 'C' posts under the Railways. As per Section 14 of the Administrative Tribunal Act, 1985, it is clear that Central Administrative Tribunal has all the jurisdictions to decide the matters relating to recruitment to any civil services of the Union and to any civil posts under the Union. There is no dispute that the posts for which the recruitment was advertised under Annexure-2 attached to OJC No.15595 of 1998 were/are civil posts under the Union. Keeping in mind the dictum of Hon'ble Supreme Court as reported above, we are of the opinion that OJC No.15595 of 1998 was clearly not maintainable before this Court. It may be noted that the Constitution Bench of the Hon'ble Supreme Court rendered its decision in ***L.Chandra Kumar (supra)*** on 18.3.1997 and OJC No.15595 of 1998 was filed on 12.11.1998 before this Court. Therefore, we are of the view that OJC No.15595 of 1998 was clearly not maintainable before this Court. With regard to submission of Ms.Prativa Mishra, learned counsel for the respondent that existence of alternative remedy is no bar for this Court to entertain an application under Article 226 of the Constitution of India, we can only say that such submission has no legs to stand in the background of the authoritative pronouncement of the Constitution Bench of the Hon'ble Supreme Court in ***L.Chandra Kumar (supra)*** which clearly debars the litigants from directly approaching this Court. With regard to the judgment of Himachal Pradesh High Court in ***Tirath Raj, H.P.S.E.B., Ridge (E) Sub Division and others v. H.P.State Electricity Board and others*** reported in 1989 (4) SLR 360, we can only say with great respect that the position of law has completely changed after authoritative pronouncement by the Hon'ble Supreme Court in ***Deep Chand Pandey and another (supra)*** and ***L.Chandra Kumar (supra)*** as discussed earlier. Now, the position is no litigant would be allowed to approach the High Court directly over-looking Central Administrative Tribunal established under the Administrative Tribunal Act, 1985 when the subject matter is covered under the said Act. Therefore, the decision relied in the case of ***Tirath Raj, H.P.S.E.B., Ridge (E) Sub Division (supra)*** is of no help to the respondent. With regard to the decision rendered

by this Court in ***Sarada Bindhani (supra)*** and **Lala Sachikanta Chand (supra),** it can only be said that the factual scenario in both the cases are completely different and those do not pertain to recruitment to civil posts under the Indian Railways/Union of India. Further, in the background of the decision of the Hon'ble Supreme Court in **Deep Chand Pandey and another *(supra) and L.Chandra Kumar (supra),*** we are of the opinion that the respondent cannot derive any benefit from the above noted two decisions of this Court. Further, in those cases administrative remedy by way of appeal was available, but here a quasi judicial remedy is available before the Central Administrative Tribunal.

6. With regard to submission of the learned counsel for the respondent that the respondent be allowed the benefits of the order passed in OJC No.9290 of 1997 filed by one Meena Mohanty; on calling for records from Registry, we found that the said writ petition was filed by one Akshaya Kumar Kar for allowing him to attend the interview for being appointed as Primary School Teacher. However, it has been found out by the Registry that Meena Mohanty had filed OJC No.15564 of 1998 involving Annexure-2 attached to OJC No.15595 of 1998. The same was disposed of on 25.8.1999 granting her liberty to move Central Administrative Tribunal as the subject matter of dispute came within the jurisdiction of the said Tribunal.

7. For all these reasons the Writ Appeal is allowed and the judgment of the Hon'ble Single Judge dated 21.01.2016 rendered in OJC No.15595 of 1998 is set aside. However, in the peculiar facts and circumstances of the case, we direct that the entire case records in OJC No.15595 of 1998 be transferred to Central Administrative Tribunal, Cuttack Bench, Cuttack and we request the learned Tribunal to dispose of the said case after registering the same as a Transfer Application, preferably, within a period of three months from the date of receipt of the case record.

Writ appeal allowed.

2017 (I) ILR - CUT- 615

INDRAJIT MAHANTY, J & DR. D.P.CHOUDHURY, J.

STREV NO. 101 OF 2011

WITH BATCH

STATE OF ORISSA, REPRESENTED BY COMMISSIONER OF SALES TAX, ORISSA ……Petitioner

.Vrs.

M/S. D.K. CONSTRUCTION …….Opp. Party

(A) ODISHA SALES TAX ACT, 1947 – S.12(4)

Whether the ballast or boulder or chips is exigible to tax at the rate of 4% or 12% of the taxable list ? Held, ballasts, boulders or chips are nothing but "mineral" under the sales Tax Act exigible to tax at the rate of 4% as per Entry 117 of the taxable list. (Paras 38, 43)

(B) ODISHA SALES TAX ACT, 1947 – S.23

Whether a fresh plea can be raised in the second appeal without the same being raised before the Assessing Authority as well as the First Appellate Authority ? Held, yes.

In this case, question raised as to whether ballasts or boulders or chips are exigible to tax at the rate of 4% or 12% of the taxable list in the schedule attached to the Act being a question of law, it can be raised at any stage, even in second appeal. (Para 42)

Case Laws Referred to :-

1. 40 STC 246 : Union of India -V- The Central Indian Machinery Manufacturing Co. Limited and others
2. 16 STC 364 : Patnaik & Company -V- State of Orissa
3. 42 STC 409 : Sentinel Rolling Shutters and Engineering Company Pvt. Ltd –V- the Commissioner of Sales Tax
4. AIR 1976 SC 1393 : Bhagwan Dass v. State of Uttar Pradesh
5. AIR 1978 SC 1587 : Banarasi Dass Chadha and others -V- L.T. Governor, Delhi Administration and others
6. (1999) 237 ITR 131 SC : Stonecraft Enterprises –V- Commissioner of Income Tax
7. AIR 1979 SC 300 : Porritts & Spencer (Asia) Ltd -V- State of Haryana
8. 2012 (286) E.L.T. 321 (S.C.) : Commissioner of Central Excise, New Delhi -V- Connaught Plaza Restaurant (P) Ltd .
9. (1962) 1 SCR 279 : Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Aloka

10. (1967) 2 SCR 720 : Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh
11. (1976) 2 SCC 24 : Dunlop India Ltd. Vs. Union of India & Ors.
12. 1992 Suppl. (1) SCC 298 : Shri Bharuch Coconut Trading Co. and Ors. Vs. Municipal Corporation of the City of Ahmedabad & Ors.
13. 1985) 3 SCC 284 : Indian Aluminium Cables Ltd. Vs. Union of India & Ors.
14. (1989) 1 SCC 150 : Collector of Central Excise, Kanpur Vs. Krishna Carbon Paper Co;
15. (1997) 6 SCC 464 : Reliance Cellulose Products Ltd., Hyderabad Vs. Collector of Central Excise, Hyderabad-I Division, Hyderabad.
16. (1969) 9 SCC 402 : Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur.
17. (2004) 9 SCC 136 : Naturalle Health Products (P) Ltd. Vs. Collector of Central Excise, Hyderabad.
18. (1995) Suppl. (3) SCC 1. : B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara.

For Petitioners : Mr. R.P.Kar, Standing Counsel (CT)
Mr. M.S.Raman, Addl. Standing Counsel (CT)
M/s. Damodar Pati, S.K.Mishra & P.Panigrahi
S.N.Sharma

For Opp. Party : M/s. A.K.Roy & C.R.Das and S.C.Bairiganjan.
M/s. Satyajit Nanda & G.R.Verma

Date of judgment: 01.03.2017

JUDGMENT

DR. D.P.CHOUDHURY, J.

Challenge has been made in all these revisions to the order of the Orissa Sales Tax Tribunal (hereinafter called "the Tribunal") for reversing the concurrent order passed by the First Appellate Authority and the Assessing Officer under the provision of Section 12(4) of the Orissa Sales Tax Act, 1947 (hereinafter called "the Act") read with Orissa Sales Tax Rules, 1947 (hereafter called "the Rules"). Since common question of law arose in all these revisions, they are being disposed of by this common judgment.

FACTS

2. The factual matrix leading to filing of STREV No.101 of 2011 is that the opposite party is the assessee and it has entered into an agreement with the South Eastern Railway for supply of machine crushed track ballast for laying the same on both the sides of railway track in different locations as per the tender call notice. The tender schedule specifies loading of ballast into any type of railway wagon/hopper with contractor's own arrangements including all lead lift crossing of railway line as per the direction of the Engineer-in-charge of the work.

3. During the assessment year 2001-2002, the Assessing Officer demanded under Section 12(4) of the Act for Rs.36,15,448/- on 31.3.2003. The Assessing Officer has treated the entire receipt by the opposite party to be sale of chattel qua chattel and made the same exigible to tax at the rate of 12% of the taxable list. Challenging the assessment order, the opposite party preferred First Appeal before the concerned Assistant Commissioner of Sales Tax on the ground that the supply of machine crushed track ballast would come within the fold of works contract and accordingly claimed 85% deduction towards labour and service charges and the rest was claimed to be taxed at the rate of 8% as tax under works contract. The First Appellate Authority disposed of the First Appeal keeping in view the order of this Court passed in P.K.Satapathy –V- State of Orissa, reported in (1999) 116 STC 494 (Ori) with the observation that the scope of contract, being supply of machine crushed ballasts, would be liable to be exigible to tax at the rate of 12%. So, the First Appellate Authority confirmed the order of the Assessing Officer.

4. Against the order passed by the First Appellate Authority, the opposite party carried Second Appeal before the Tribunal in the year 2005-2006. The State did not file any cross-objection before the Tribunal as the order of the Assessing Officer has been confirmed by the First Appellate Authority. The Tribunal, after hearing both the parties, allowed the Second Appeal preferred by the opposite party by holding that supply of ballast to the Railway in question is sale falling within the scope of Section 2(g) of the Act and "ballast" supplied to the Railway falls within the ambit of "mineral" for which it is exigible to tax at the rate of 4% as per Entry 117 of the taxable list by not agreeing to make same exigible at the rate of 12% under Entry 189 of the taxable list. Challenging such order of the Tribunal, the State-petitioner has preferred revisions on various grounds.

5. Likewise in STREV Nos.41, 98, 131 and 132 of 2011 and STREV Nos.49 and 50 of 2013, opposite parties-assessees in different years of

assessment have supplied ballasts and delivered ballasts to S.E.Railway and accordingly, the Assessing Authority and First Appellate Authority made the sale of those materials of these assessees exigible to tax at the rate of 12% whereas the Tribunal decided the same exigible to at the rate of 4% of taxable list.

6. Similarly, in STREV No.458 of 2008, STREV Nos.37, 38, 41, 42, 43 and 44 of 2010, STREV Nos.42, 80, 83, 84 and 95 of 2011 and STREV No.47 of 2013, the opposite parties-assessees have purchased the ballast and after crushing the same, made boulders and chips and accordingly they are engaged in selling those products to different buyers. But the Assessing Authority demanded sales tax by taking such materials exigible to tax at the rate of 12% of taxable list and the First Appellate Authority also confirmed such order of the Assessing Authority. Again on the intervention in the Second Appeals, the Tribunal decided said material as "minor mineral", being exigible to tax at the rate of 4% in the taxable list.

7. **SUBMISSIONS**

Mr.R.P.Kar, learned Standing Counsel for the Revenue in all the revisions submitted that the Tribunal has committed gross irregularity by reversing the concurrent finding and conclusion arrived at by both First Appellate Authority as well as the Assessing Authority by erroneously deciding the question of law as borne out from the facts available on record. The Tribunal committed allowing deduction of amount received by the opposite parties in respect of loading of the supplied ballasts from the gross receipts because without analyzing the convenants of contracts, the Tribunal jumped to the conclusion on the basis of schedule of rates and fact that the loading charges of supplied ballasts into Railway wagons would be deducted from assessment under the Act as the same is purely labour work. The Tribunal ought to have considered all clauses of the contract. The Tribunal, being the final fact finding authority, should have taken into consideration the relevant statutory provisions along with the convenants of the contract in order to independently arrive at the conclusion whether the loading charges would form part of the consideration so that the sales tax could be levied on taxable turnover.

8. Mr.Kar, learned Standing Counsel for the Revenue further submitted that the Tribunal erred by considering the claim of the opposite parties that the ballast supplied by it to the Railway is "mineral" which is exigible to tax at the rate of 4% as per Entry 117 of the taxable list because the Tribunal has transgressed its jurisdiction and authority by deciding the facts which has

never before any of the authorities below raised. The Tribunal should not have considered such plea of the opposite parties as the Department was not given any chance to lead evidence in the forums. Thus, the Tribunal has violated the principles of natural justice by deciding such issue. According to him, when the intention of both the parties was to treat the goods in question as "ballast" qua "ballast" which being separate, distinctly identifiable commodity having marketability and not as "minerals", the opposite parties-assessees cannot claim the same to be falling within the scope of Entry 117 of the taxable list, but it being not in any other list, could have been chargeable to tax at the rate of 12% of the taxable list as there was no contract between the parties to buy and sell the goods as minerals, but "ballast" simpliciter. The Tribunal has traversed its jurisdiction by holding that ballasts are minerals. He further submitted that the Tribunal went wrong to conclude that ballast obtained from spalls would be minerals inasmuch as the basis of such conclusion being the definitions contained in the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter called as "the Act, 1957") and the Orissa Minor Mineral Concession Rules, 2004 (in short "the Rules, 2004"). The Tribunal erred in law by taking the aid of definition contained in another statute which has no nexus with the Act.

9. Mr.Kar, learned Standing Counsel for the Revenue submitted that since the ballast in no way is connected with the minerals but it is a specific material in the process as known to the commercial world, the same has been wrongly interpreted by the Tribunal being exigible to tax at the rate of 4% of the taxable list. Further, the Tribunal has erred in law by admitting the Second Appeal which has been filed beyond the period of limitation contemplated under Section 23 of the Act. The Tribunal has also acted with material irregularity by coming to the wrong conclusion without proper independent application of mind for which the same should be quashed and the order passed by the First Appellate Authority and Assessing Officer should be restored.

10. Per contra, Mr.Damodar Pati, learned counsel for the opposite party submitted that the order of the Tribunal is legal and correct because the agreement between the parties is to supply and delivery in stacks of machine crushed track ballast and laying the same into both sides of track in different locations and the opposite party has received the gross bill, which has been treated as contract for sale as against works contract as per agreement for which the works contract tax has been deducted at source by the Railways. He further contended that the "ballast" being the material and the same

having been deduced from the quarry which is made out of minerals, the ballast qua ballast is a mineral, the same has been specifically exigible under the Entry 117 of taxable list. As the ballast is deducible like boulder and other material from the quarry by using the dynamite and specifically processed through machine or by manual work, the same is rightly observed by the Tribunal to be classified as minerals being exigible to tax at the rate of 4% of taxable list.

11. Mr.Pati, learned counsel for the opposite parties submitted that the Tribunal, in its Full Bench, has considered that the opposite parties have supplied ballast made out of spall to the Railways and the ballast being the material used as to the bed of a road or a Railways with specific size, the same cannot be a stone as pointed out by the State. The Tribunal, after analyzing in detail under the Act, 1957, has rightly held that the ballast or boulder or chips are minerals and the Tribunal has also considered the dictionary meaning of such mineral which is a solid homogenous crystalline chemicals element or compound that results from inorganic process of nature and it has a characterstic crystal structure, chemicals composition and rational or composition.

12. Mr.Pati, learned counsel for the opposite party further contended that since ballasts or boulder or chips are prepared from quarry and ballasts being crushed to prepare size ballast and then supplies to Railways, the same being "minor mineral" as defined in Section 2(jj) of the Mines Act, 1952 read with Section 3(a) of the Act, 1957, the Tribunal justified in charging the ballast or boulder or chips exigible to tax at the rate of 4% of the taxable list. He further submitted that the Tribunal, being the second appellate authority, has got powers to decide the facts and law for which there is no bar for the Department to adduce evidence when plea of the opposite party was raised before it that the material, i.e, ballast or boulder or chips is exigible to tax at the rate of 4% of the taxable list but not at the rate of 12% of tax list. According to him, the plea of the State that the arguments advanced by the opposite party for the first time as to the plea that the ballast as mineral is a misnomer and there is no bar for the State to produce evidence contrary to the plea taken by the opposite parties. On the other hand, whether ballast or its different size is exigible to 12% tax or 4% being a question of law can be raised at any stage before any forum. Be that as it may, according to the learned counsel for the opposite parties that the contention of the learned counsel for the petitioner would not stand in the eye of law on this score. He further submitted that the appeal has been admitted by the Tribunal being

filed within time and contention of learned Standing Counsel for the Revenue is untenable. So, he supported the impugned judgment of the Tribunal and prayed for a direction to implement the judgment by the State.

13. POINTS FOR DETERMINATION

After going through the contentions of both the parties, it appears that the question of law has not been formulated but the same is being formulated now for discussion as the revisions can be allowed on the question of law raised. So, in these revisions, the questions of law are formulated as under:

> "(1) Whether the ballast or boulder or chips is exigible to tax at the rate of 4% or 12% of the taxable list?
>
> (2) Whether such fresh plea can be raised in the second appeal without the same being raised in the forums below."

14. DISCUSSIONS

Point No.(1)

It is not in dispute that the opposite party in STREV No.101 of 2011 is an assessee having undertaken the work of supplying, delivering, stacking and loading of one lakh Cum of machine crushed track ballast to Railways. It is also not in dispute that there was an agreement between the opposite parties and the S.E.Railways for supply and delivery in stacks of machine crushed track ballast and laying the same into both side of track in different locations at Balangir Depot including all costs of materials, loading, unloading, handling, transportation including crossing of Railway lines, if required and royalty, octroi, sales taxes, cess charges and any taxes imposed by the Central/State Government and local bodies on one lakh Cum of loading of ballast supplied into any type of Railway wagons/hoppers with contractor's own loading arrangements including all lead lift cross of Railway lines. Similarly, it is not in dispute that the opposite party in other revisions have been dealing with ballast or boulder of chips by selling the same to Railway and other private parties.

15. On going through the assessment order, it appears that the Assessing Authority has gone through the deed of agreement executed between the parties and come to a conclusion that the payment received by the dealer is inclusive of charges like cost of materials, loading, unloading, handling, transportation charges, royalty, octroi, sale taxes, cess charges and any other taxes to be imposed by different authorities from time to time and the dealer has not been given any charge/responsibility of spreading machine-crushed

track ballast in any place under the S.E.Railway. Accordingly, the Assessing Officer held that the delivery of ballast is purely a sale and not a works contract as pleaded by the petitioner. The Assessing Officer has also found that there was no evidence adduced by the opposite parties to show that there was a express stipulation between the parties that freight and other charges were to be borne by the purchaser and since the opposite party has got received the gross payment which is inclusive of all cost of materials, loading, unloading and transporting including crossing of Railway line, he considered the same amount to be entire sale which is liable to be taxed at the rate of 12% of the taxable list. In other revision cases, the Assessing Authority has taken the rates by assessing of boulder, chips and ballasts and made them exigible to tax at the rate of 12% of the taxable list.

16. The First Appellate Authority in STREV No.101/2011, after hearing both parties, came to the conclusion that the contract between the parties should be interpreted whether it is a sale of good or for work or labour basically. According to him, to constitute sale, there must be an agreement express or implied relating to sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold. He has referred to the tender schedule, which is reproduced as under:

"SOUTH EASTERN RAILWAY
TENDER SCHEDULE
SCHEDULE OF RATES AND QUANTITIES

(East No.(1)33/SBP/97), (2) 34/SBP/97 (3) 35/SBP/96 (4) 34/SBP/96 (5) 30/SBP/97, (6) 35/SBP/97			
Sl. No	Description of work	Approximate Qnty.	Rate accepted both in Figures & in words
	Supply and delivery in stacks of machine crushed track ballast and laying the same into both side of track in different locations. (as per RDSO's specifications Jan-99) at Balangir Depot including all costs of materials loading, unloading, handling, transportation including crossing of Railway lines if required and royalty, actroi, sales taxes, cess charges and any other taxes imposed by Central/State Govt. and local bodies including all other incidental charges with all lead, lift, etc. complete as per the directions of the Engineer-in-charge of the work.	1,00,000 Cum	Rs567/- (Rupees five hundred & sixty seven only) per cum.
	Loading of ballast, supplied vide Srl. No.1 above into any type of Railway Wagons/hoppers with contractor/s own loading arrangements including all lead lift crossing of Railway lines etc. complete as per the directions of the Engineer-in-charge of the work.	1,00,000 cum	Rs.54/- (Rupees fifty four only) per cum.

Schedule of rates & conditions accepted for the work of "Supply, delivery, stacking and loading of 1,00,000 cum of machine crushed track ballast (as per RDSO's specifications-January-99) of BALANGIR DEPOT in Sambalpur Division".

NOTE.1. The entire work is to be completed within a period of 24 (twenty four months from the date of issue of acceptance letter as per the under mentioned programme.

2. The contractor will be required to strictly adhered to "QUARTERLY SCHEDULE OF SUPPLY" failing which the penalty as per clause-09 of "Special condition for supply and loading of ballast Annexure-IV" shall be recovered. The "QUARTERLY SCHEDULE OF SUPPLY" is indicated below:-

1st Quarter	10,000 cum	5th quarter	15,000 cum
2nd Quarter	10,000 cum	6th quarter	15,000 cum
3rd Quarter	15,000 cum	7th quarter	15,000 cum
4th Quarter	15,000 cum	8th quarter	05,000 cum

Total =1,00,000 cum

Sd/- Sd/-

K.C. Agrawal Additional Divl. Railway Manager

Notary, Balangir S.E. Railways, Sambalpur"

17. After going through the agreement and discussing various judgments of the Hon'ble Supreme Court and High Courts including of this Court, the First Appellate Authority reached at a conclusion that the rates stipulated in the agreement were inclusive of all charges incurred by the opposite party and were paid after the supply and delivery of the stacks. He found that the contract is for supply of ballast and amount received is to be taxed at rate of 12% but not to be treated as works contract for which he entirely agreed with the finding of the learned Assessing Officer. In other revision cases, the First Appellate Authority has confirmed the order of the Assessing Officer as ballast, boulder and chips are exigible to the tax at the rate of 12% of the taxable list.

18. On perusal of the order of the Second Appeal, it appears that the Full Bench of the Tribunal has considered the argument of both parties. After going through the contract executed between the parties, Tribunal found that the present opposite party has received Rs.54/- per Cum towards loading charges of the supplied ballast into any type of Railway wagons as per his own loading arrangement, which is purely a labour work and hence directed to deduct the loading of supplied ballast from the total amount of computation of sales t ax liability of the opposite party. Moreover, the

Tribunal went on discussion whether the ballast is a mineral exigible to sales tax at the rate of 4% of the taxable list. The Tribunal has discussed about the dictionary meaning of mineral and has also considered the definition of minor mineral under the Act, 1957 and Rules made thereunder. According to Section 2(jj) of the Mines Act, 1952, mineral means all substance which can be obtained from earth by mining, digging, drilling, dredging, laying, draulicing, quarrying or by any other operation and includes mineral oil which in term included defines minerals include all minerals except mineral oils which in term included natural gas and petroleum. But, as per the Act, 1957, the mineral is defined under Section 3(a) which includes all minerals except mineral oil. Similarly, Section 3(e) of the said Act, 1957 defines minor minerals means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purpose and any other mineral which the Central Government, may by notification, declare the same to be a minor mineral.

19. The Tribunal has opined that according to Orissa Minor Minerals Concession Rules, 2004 (in short "the Rules, 2004") which provides for granting quarry lease by the Government for extraction, collection or removal of minor minerals. The learned Assessing Officer in his order categorically has mentioned that appellant took quarry located at Basupali on lease from the Tahasildar, Balangir on payment of royalty and extracted spalls from that quarry and crushed those spalls into ballasts and supplied the same to S.E.Railways. These facts led to the Tribunal to come to a conclusion that the ballast is nothing but a mineral. The Tribunal opined that since the ballasts are obtained by quarrying from the earth and its minerals according to the Act, 1957, which found the same to be exigible to tax as per Entry No.117 of the taxable list and accordingly exgible to tax at the rate of 4% of the taxable list. Thus, the Tribunal allowed the appeal in part by directing the learned Assessing Officer to reassess the sales tax liability accordingly after deducting the amount received by the opposite parties towards loading charges from the payment received by it and to refund rest of the amount according to the provisions of law.

20. In other revisions, the Tribunal has simply arrayed the boulder, ballast, stone chips as minor mineral under the Act, 1957 and Rules made thereunder.

21. In the case of ***Union of India –V- The Central Indian Machinery Manufacturing Co. Limited and others; 40 STC*** **246,** the Hon'ble Supreme Court has observed in the following manner:

> "The question, whether a contract is one for sale of goods or for executing works or rendering services is largely one of the fact, depending upon the terms of the contract, including the nature of the obligations to be discharged thereudner and the surrounding circumstances."

22. The Hon'ble Supreme Court, in the case of ***Patnaik & Company –V- State of Orissa; 16 STC 364,*** has observed as follows:

> "The primary difference between a contact for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or ever the whole of the materials used by him may have been his property. In the case of a contract for sale, there is in the first instance a chattel which belongs exclusively to a party and under the contract property therein passes for money consideration."

23. Further, the Hon'ble Supreme Court, in the case if ***Sentinel Rolling Shutters and Engineering Company Pvt. Ltd –V- the Commissioner of Sales Tax; 42 STC 409,*** has observed as follows:

> "To distinguish between a contract for sale and contract for work and labour there is no rigid or inflexible rule applicable alike to all transactions. They do not give any magic formula by the application of which one can say in every case whether a contract is a contract for sale or a contract for work and labour. They merely focus on one or the other aspect of the transaction and afford some guidance in determining the question."

24. From a perusal of the aforesaid decisions with due regard, it appears that whether a contract is one for the sale of goods or for executing works or rendering services are all questions of fact which depend on the terms of the contract including the nature of work discharging. Moreover, in case of contract for works or services, the person performing work or rendering services has no property produced whereas for contract of sale in the first instance a chattel which belongs exclusively to a party and under the agreement, it passes for money consideration. The sole idea to distinguish between the contract for sale and contract for work or labour is to find out the same from the transactions to determine the questions. Keeping in mind these principles, the present case is to be scrutinized with reference to the agreement made between the parties.

25. In the aforesaid paragraphs, the tender schedule clearly shows that for supply and delivery of stacks of machine crushed track ballast and laying the same into both side of track in different locations at Balangir Depot including all costs of materials, loading, unloading, handling transportation including crossing of Railway lines if required and royalty, octroi, sales taxes, cess charges and any other taxes imposed by Central/State Government and local bodies including all other incidental charges with all lead, lift or complete as per the direction of the Engineer-in-charge for one lakh Cum of ballasts at the rate of Rs.567 per Cum. Similarly, for loading of the said quantity of ballasts into any type of Railway wagons/hoppers with contractor's own loading arrangements including all lead lift cross of Railway lines etc. complete as per the direction of the Engineer-in-chief, the rate will be Rs.54 per Cum of ballasts. Thus, the agreement is very defensible as to all charges as per Serial No.1, i.e, Rs.567/- per Cum for supply and delivery and for loading and unloading of ballasts has different charges and the same is not included with the rate as specified in Serial No.1 although the ballasts supplied at Serial No.1 are also required to be loaded to the Railway wagons. It is needless to opine that the loading of ballasts supplied is a labour charge and the same cannot be termed as a sale after going through the contents of the deed of contract. On the other hand, the supply and delivery of stacks including all other nature of works as agreed to between the parties as per Serial No.1 is a sale. The order of the Tribunal is correct for deducting the loading charges while computing the sales tax.

26. Next question comes in all revisions as to whether the sale of ballasts or boulders or chips including all incidental charges as per Serial No.1 of the tender schedule stated above "mineral" or not. Under the Act, OST schedule as amended vide Finance Department Notification dated 31.3.2001 is as follows:

"**Under the Orissa Sales Tax (OST) Act, 1947**

OST Schedule (Ad amended vide Finance Department Notification dated 31.3.2001)

Sl. No.	Description of Goods	Rate of tax
1	2	3
117	Ores and minerals	4%
189	All other goods	12%"

27. It appears from the aforesaid table that ores and minerals as per Entry No.117 is exigible to 4% tax whereas all other goods which are not mentioned in the schedule is exigible to 12% of tax. Now, both learned Assessing Officer and First Appellate Authority have placed the ballasts as exigible to 12% of tax but the Tribunal after taking the cue from the fact that the ballasts being prepared from the spalls which are stones being quarried from the mines Basupali in the district of Balangir is a mineral liable to 4% sales tax. Similarly, the Tribunal in other cases came to a conclusion that boulder, chips prepared from spalls which are quarried from mines also mineral by making the same exigible to tax at the rate of 4% of taxable list.

28. In the Assessment Order, the learned Assessing Officer admitted that the present opposite party in STREV No.101 of 2011 has taken a quarry located at Basupali on lease from the Tahasildar, Balangir on payment of royalty and extracted the spalls from the quarry and then crushed same into ballasts as per the specification and then supplied to the Railways. Of course, the learned Assessing Officer has mentioned that except payment of royalty, the ballasts supplied have not suffered any tax under the provisions of the Act. Even if it had not suffered from any tax, the fact remains that the ballasts have been extracted from the quarry if it had not suffered any tax, definitely it would be chargeable but question arises as to what is the rate of tax? So, the conclusion of the learned Assessing Officer that since it had not suffered from payment of sales tax, it should be treated as entire sale exigible to 12% of tax is not correct.

29. Similarly in other cases, boulder, chips having not suffered from payment of sales tax must be at the rate of 12% of taxable list under the Act as observed by Assessing Officer is not correct because they are made extracted from quarry even if purchased from M/s.OCL.

30. The First Appellate Authority, without going to the facts but by only relying upon the decisions of the Courts, agreed with the view of the learned Assessing Officer that same are to be taxed at the rate of 12% under the Act. Thus, the concurrent finding of the fact by the learned Assessing Officer as well as by the First Appellate Authority that the ballasts supplied to S.E.Railway or chips, boulders supplied to Railway or private parties are nothing but extracted from the quarry which was leased out to the opposite party and in other cases to their vendors. Of course, the Tribunal has taken aid of the Act, 1957 because of the fact that the ballasts or boulders or chips supplied spalls being cut to size and spalls have been extracted from quarry. It is a fact that the ballasts, boulders and chips are to be interpreted under the

Act but by not taking aid of any other Act. The ballasts, boulders and chips have not been defined under the Act. The question of taking aid of other Act will only arise if there is no use of the same on common parlance.

31. It is reported in the case of ***Banarasi Dass Chadha and others –V- L.T. Governor, Delhi Administration and others; AIR 1978 SC 1587*** where Their Lordships at paragraphs 4 to 7, have observed as follows:

> "4.We agree with the learned Counsel that a substance must first be a mineral before it can be notified as a minor mineral pursuant to the power vested in the Central Government under Section 3(e) of the Act. The question, therefore, is whether brick-earth is a mineral. The expression "Minor Mineral" as defined in Section 3(e) includes 'ordinary clay' and 'ordinary sand'. If the expression "minor mineral" as defined in Section 3(e) of the Act includes 'ordinary clay' and `ordinary sand', there is no reason why earth used for the purpose of making bricks should not be comprehended within the meaning of the word "any other mineral" which may be declared as a "minor mineral" by the Government. The word "mineral" is not a term of art. It is a word of common parlance, capable of a multiplicity of meaning depending upon the context. For example the word is occasionally used in a very wide sense to denote any substance that is neither animal nor vegetable. Sometimes it is used in a narrow sense to mean no more than precious metalls like gold and silver. Again, the word "minerals" is often used to indicate substances obtained from underneath the surface of the earth by digging or quarrying. But this is not always so as pointed out by Chandrachud, J (as he then was) in **Bhagwan Dass v. State of Uttar Pradesh, AIR 1976 SC 1393** where the learned judge said (at p.1397):
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> ''It was urged that the sand and gravel are deposited on the surface of the land and not under the surface of the soil and therefore they cannot be called minerals and equally so, any operation by which they are collected or gathered cannot properly be called a mining operation. It is in the first place wrong to assume that mines and minerals must always be sub-soil and that there can be no minerals on the surface of the earth. Such an assumption is contrary to informed experience. In any case, the definition of mining operations and minor minerals in section 3(d) and (e) of the Act of 1957 and Rule 2(5) and (7) of the Rules of 1963 shows that minerals need not be

subterranean and that mining operations cover every operation undertaken for the purpose of "Winning" any minor mineral. "Winning" does not imply a hazardous or perilous activity. The word simply means extracting a mineral" and is used generally to indicate any activity by which a mineral is secured. "Extracting" in turn means drawing out or obtaining. A tooth is 'extracted' as much as the fruit juice and as much as a mineral. Only that the effort varies from tooth to tooth, from fruit to fruit and from mineral to mineral".

5. We may also refer to **Northern Pacific Railway Company v. John A. Sedrbarg; (1902) 47 Law Ed 575)** where the Supreme Court of United States observed as follows (at page 581):

"The word 'mineral' is used in so many senses, dependant upon the context, that the ordinary definitions of the dictionary throw but little light upon its significance in a given case. Thus, the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore, could not be excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals-gold and silver-would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary: as "any constituent of the earth's crust" ; and that of Beinbridge on Mines: "All the Sub- stances that now form, or which once formed, a part of the solid body of the earth". Nor do we approximate much more closely to the meaning of the word by treating minerals as substances which are “”mined”” as distinguished from those are "quarried", since many valuable deposits of gold, copper, iron, and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such for instance, as the Caen stone in France, is excavated from mines running far beneath the surface. This distinction between under ground mines and open workings was expressly repudiated in **Midland C. v. Haunchwood Brick & Tile Co. ((1882) 20 Ch Div 552)** and in **Hext v. Gill ((1872) 7 Ch 699)”**

6.The Supreme Court of United States also referred to several English cases where stone for road making or paving was held to be 'minerals' as also granite, sandstone, flint stone, gravel, marble, fire clay, brick

clay, and the like. It is clear that the word 'mineral' has no fixed but a contextual connotation.

7. xxx xxx xxx

That is why we say the word mineral has no definite meaning but has a variety of meanings, depending on the context of its use. In the context of the Mines and Minerals (Regulation & Development) Act, we have no doubt that the word 'mineral' is of sufficient amplitude to include 'brick-earth'. As already observed by us, if the expression 'minor mineral' as defined in the Act includes 'ordinary clay' and 'ordinary sand', there is no earthly reason why 'brick-earth' should not be held to be 'any other mineral' which may be declared as 'minor mineral. We do not think it necessary to pursue the matter further except to say that this was the view taken in **Laddu Mal v. State of Bihar; AIR 1965 PAT 491, Amar Singh Modilal v. State of Haryana; AIR 1972 PUNJ & HAR 356 (FB) and Sharma & Co. v. State of U.P.; AIR 1975 ALL 386.**

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32. With due regard to the aforesaid decision, it appears that the mineral not necessary to be viewed with reference to the provisions of the Act but it depends on the use of the same on different context. Although the minerals under the Act, 1957 is discussed in the aforesaid judgment, but Their Lordships took "brick earth" to be any other mineral. The aforesaid decision has also been followed in the decision rendered in the case of ***Stonecraft Enterprises –V- Commissioner of Income Tax; (1999) 237 ITR 131 SC*** where Their Lordships have observed as follows:

"It is necessary immediately to note that the Mines and Minerals (Regulation and Development) Act covers granite as a minor mineral. This Court in the **State of Mysore vs. Swamy Satyanand Saraswati; AIR 1971 SC 1569** has held that granite is a mineral. The Court quoted Habbury Laws of England, thus (page 1575):

'"The test of what is a mineral is what, at the date of instrument in question, the word meant in the vernacular of the mining world, the commercial world, and among land owners, and in case of conflict this meaning must prevail over the purely scientific meaning."

No material was laid by the assessee before the Tribunal to suggest that in the export world granite was treated as anything but a mineral.

Reference was made to the judgment of this Court in **Banarsi Dass Chadha & Bros. –V- Lt. Governor. Delhi Administration AIR 1978 1587; (1979) 1 SCR 271**. It was there held that the word 'mineral' is a word of common parlance, capable of a multiplicity of meanings depending upon the context. For example, the word is occasionally used in a very wide sense to denote any substance that is neither animal or vegetable. Sometimes it is used in a narrow sense to mean no more than precious metals like gold and silver. Again, the word 'minerals' is often used to indicate substances obtained from underneath the surface of the earth by digging or quarrying.

It is at this stage appropriate to refer to the argument of learned counsel for the assessee based upon the doctrine of noscitur a sociis which as he submitted, has been explained by this Court in Pardeep Aggarbatti –V- State of State of Punjab & Ors. (1997) 107 STC 567' (1997) 8 SCC 511 (pages 565 of 107 STC):

"Entries in the Schedules of sales tax and excise statutes list some articles separately and some articles are grouped together. When they are grouped together, each word in the entry draws colour from the other words therein. This is the principle of noscitur a sociis."

33. With due regard to the said decision, it appears that the word "mineral" is a word of common parlance used in various way but cannot be used in narrow sense. Similarly, it appears from the aforesaid decision that entries in the schedules of sales tax and excise statutes draws colour from the other words therein because of the principle of noscitur a sociis. Thus depending on the aforesaid doctrine in the present context, we have to see whether the ballast is a mineral even if it is not to be defined as mineral under the Act, 1957 or Rules made thereunder. Since the facts are clear in this case to show that the ballast has been prepared from the spalls which are extracted from the quarry taken by the opposite parties on payment of royalty and it has not been defined separately in the tax list, it is to be understood with common parlance.

34. It is reported in the case of ***Porritts & Spencer (Asia) Ltd –V- State of Haryana; AIR 1979 SC 300*** where Their Lordships have decided as to whether "Dryer felts" are "textiles" within the meaning of that expression in Item 30 of Schedule 'B' to the Punjab General Sales Tax, 1948. In that judgment, Their Lordships have considered the meaning of "Common parlance" in the following manner:

"1. 'Dryer felts' are 'textiles' within the meaning of that expression in Item 30 of Schedule 'B' to the Punjab General Sales Tax Act, 1948.
2. In a taxing statute words of everyday use must be construed not in their scientific or technical sense but as understood in common parlance, meaning "that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it."

Ramavatar Budhaiprasad V. Assistant Sales Tax Officer, Akola, IR 1961 SC 1325, M/s.Motipur JamindaryCo. Ltd. V/ State of Bihar, AIR 1962 SC 660, State of Ramavtar Bhudhaiprasad etc. V Assistant Sales Tax Officer, Akola and another; AIR 1961 SC 1325, M/s.Motipur Zamindary Co. (Pvt) Ltd and another V Superintendent of Taxes, Muzafarpur and another; AIR 1962 SC 660, State of West Bengal and others V Washi Ahmed etc. (1977) 3 SCR 149 and **Madhya Pradesh Pan Merchant's Association, Santara Market, Nagpur V State of Madhya Pradesh (Sales Tax Department) and others, 7 STC 99 at 102 referred (1 to E Gretfell V IR.C. (1876) I Ex. D. 242 at 248, Planters Nut and Choco Co. Ltd V. The Kind (1951) 1 DLH 385 and 200 Chest of Tec (1824) 9 Wheaton (U.S.) 430 at 438; quoted with approval.**

Where a word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention us clearly expressed by the Legislature. The reason is that the Legislature does not suppose our merchants to be 'naturalists, or geologists, or botanists". In the instant case the word 'textiles' is not sought by the assessee to be given ascientific in preference to its popular meaning. It has only one meaning name namely a woven fabric and that is the meaning or technical meaning which it bears in ordinary parlance.

3. The concept of 'textiles' is not a static concept. It has, having regard to newly developing materials, methods techniques and processes, a continually expanding content and new kinds of fabric may be invented which may legitimately, without doing any violence to the language be regarded as textiles.

The word 'textiles' is derived from Latin 'texere' which means 'to weave' and it means woven fabric. When yarn, whether cotton, silk. woollen rayon, nylon or of any other description or made out

> of any other material is woven into a fabric, what comes into being is a 'textile' and is known as such. Whatever be the mode of weaving employed, woven fabric would be 'textile'. What is necessary is no more than meaning of yarn and weaving would mean binding or putting together by some process so as to form a fabric. A textile need not be of any particular size or strength or weight. The use to which it may be put is also immaterial and does not bear on its character as a textile. The fact that the 'dryer felts' are used only as absorbents of moisture in the process of manufacture in a paper manufacturing unit, cannot militate against 'dryer felts' falling within category of textiles, if otherwise they satisfy the description of textiles. The Customs, Tariff Act, 1975 refers to textile fabrics in this sense."

35. With due respect to the aforesaid decision, it is clearly observed that whether the word has a scientific and technical meaning and also it is in the later sense that in a taxing statute, the word must be held to have been used unless contrary intention is expressed by the legislature. Similarly, it is reported in the case of ***Commissioner of Central Excise, New Delhi –V- Connaught Plaza Restaurant (P) Ltd; 2012 (286) E.L.T. 321 (S.C.)*** where a similar question arose and Their Lordships, at paragraphs 18, 19 and 31, have observed as under:

> "18. Time and again, the principle of common parlance as the standard for interpreting terms in the taxing statutes, albeit subject to certain exceptions, where the statutory context runs to the contrary, has been reiterated. The application of the common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law maker; "it is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts."
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> 19. A classic example on the concept of common parlance is the decision of the Exchequer Court of Canada in **The King Vs. Planter Nut and Chocolate Company Ltd; (1951) CLR (Ex. Court) 122**. The question involved in the said decision was whether salted peanuts and cashew nuts could be considered to be "fruit" or "vegetable" within the meaning of the Excise Tax Act. Cameron J., delivering the judgment, posed the question as follows:

> "...would a householder when asked to bring home fruit or vegetables for the evening meal bring home salted peanuts, cashew or nuts of any sort? The answer is obviously `no'." Applying the test, the Court held that the words "fruit" and "vegetable" are not defined in the Act or any of the Acts in pari materia. They are ordinary words in every-day use and are therefore, to be construed according to their popular sense.
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> xx xx xx xx
>
> 31. Therefore, what flows from a reading of the afore-mentioned decisions is that in the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it. Resort to rigid interpretation in terms of scientific and technical meanings should be avoided in such circumstances. This, however, is by no means an absolute rule. When the legislature has expressed a contrary intention, such as by providing a statutory definition of the particular entry, word or item in specific, scientific or technical terms, then, interpretation ought to be in accordance with the scientific and technical meaning and not according to common parlance understanding."

36. In the aforesaid decision, Their Lordships have also relied on the decisions in the case of **Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Aloka (1962) 1 SCR 279, Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh; (1967) 2 SCR 720, Dunlop India Ltd. Vs. Union of India & Ors; (1976) 2 SCC 241, Shri Bharuch Coconut Trading Co. and Ors. Vs. Municipal Corporation of the City of Ahmedabad & Ors: 1992 Suppl. (1) SCC 298, Indian Aluminium Cables Ltd. Vs. Union of India & Ors; (1985) 3 SCC 284, Collector of Central Excise, Kanpur Vs. Krishna Carbon Paper Co; (1989) 1 SCC 150, Reliance Cellulose Products Ltd., Hyderabad Vs. Collector of Central Excise, Hyderabad-I Division, Hyderabad; (1997) 6 SCC 464, Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur, (1969) 9 SCC 402, Naturalle Health Products (P) Ltd. Vs. Collector of Central Excise, Hyderabad**; **(2004) 9 SCC 136 and B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara**; **(1995) Suppl. (3) SCC 1.**

37. After analyzing all the above decisions, Their Lordships have made it clear as to what is "Common Parlance Test". Thus, in the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it.

38. Now adverting to the present cases, the ballasts are deduced from the spalls which are extracted from quarry. The ballasts may be different size to make it boulder or chips. Neither ballasts nor chips or boulders are found in the taxable list but in ordinary sense, one can understand that it is nothing but the mineral as in the aforesaid paragraphs, the meaning of mineral has been well decided in the case of ***Banarasi Dass Chadha and others –V- L.T. Governor, Delhi Administration and others (Supra).*** When the ballasts, boulders and chips have got "common parlance" with the minerals as available in Entry 117 even without taking the aid of the Act, 1957 or Rules made thereunder, the facts remain that the quarry leased out to opposite party in STREV No.101 of 2011 or the chips or boulders purchased by other opposite parties from the M/s.OCL who have also got the same from quarry by taking the mining of the same on "common parlance" is nothing but "mineral". It is, therefore, the opinion of the Tribunal in this regard in all the revisions that they are all mineral cannot be said to be incorrect. Of course, the finding of the Tribunal is based on the definition of mineral in the Act, 1957 or Rules made thereunder. Even if taking the "common parlance test" without going to the reasons by the Tribunal, the result is same to the effect that the ballasts, boulders or chips are nothing but "mineral" under Sales Tax Act exigible to tax at the rate of 4% as per Entry 117 of the taxable list. The Point No.(1) is answered accordingly.

39. **POINT No.(2)**

Section 23(3) of the Act states as follows:

> "23.(3)(a) Any dealer or as the case may be, the State Government dissatisfied with an appellate order made under sub-section (2) may within sixty days from the date of receipt of such order prefer an appeal in the prescribed manner to the Tribunal against such order. Provided that an appeal under this clause may be admitted after the aforesaid period of limitation if the Tribunal is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.

(b)The dealer or the State Government as the case may be on receipt of notice that an appeal has been preferred under clause (a) may notwithstanding that the said dealer or the State Government may not have appealed against such order or any part thereof, within sixty days of the service of the notice file a memorandum of cross objections and such memorandum shall be disposed of by the Tribunal as if it were an appeal presented within time under clause (a)

(c) While disposing of an appeal under this sub-section the Tribunal shall have the same powers subject to the same conditions as are enumerated in sub-section (2) and any order passed under this sub-section shall, except as otherwise provided in section 24 be final."

40. Section 23 of the Act speaks about appeal and revision and there is no bar for the party to file cross-objection. In the revision petitions, the State-petitioner admitted that they have not filed any revision as there are concurrent finding in their favour. So, question of giving opportunity to the State-petitioner to file cross-objection by the Tribunal as argued by the petitioner is of no substance.

41. The contention of the learned Standing Counsel for the State-petitioner that the opposite parties raised for the first time about the exigibility of the ballast or boulder or chips under Entry 117 of the tax list has no substance because the Tribunal is a Court of fact and law as per Section 23 of the Act. When such fact is pleaded, there is no bar for the State to rebut the facts by filing cross-objection. Moreover, it appears from the orders of the learned Assessing Officer and First Appellate Authority that the argument as has already been advanced before the forums below that it is a work contract but not a contract for sale and it should be chargeable to 8%.

42. It is further clear from the assessment order and the First Appellate Authority's order that sales tax has been demanded for dealing in ballasts or boulders or chips by the respective opposite parties. So, the question is whether they are to be exigible to tax at the rate of 4% or 12% of taxable list in the schedule attached to the Act is a question of law as per the interpretation made by the parties. It is trite in law that the question of law can be raised at any stage. Moreover, the contention of the State that such plea of exigibility to tax at the rate of 4% of the taxable list before the Tribunal is barred by limitation is not acceptable as the said being question of law can be raised at any stage, as discussed above. Point No.(2) is answered accordingly.

43. CONCLUSION

From the foregoing discussions, we are of the view that ballasts or boulders or chips being mineral as per Entry 117 of the taxable list are exigible to tax at the rate of 4% of taxable list. Moreover, the appeal has been purportedly filed before the Tribunal with proper perspective and there is no defect in raising any such plea before it. It has already been observed that rightly the Tribunal has excluded the loading charges from the computation of the sales tax in STREV No.101 of 2011. Thus, the findings of the Tribunal in all the second appeals are correct and legal and we confirm the said orders of the Tribunal. In the result, these Revisions, being devoid of any merits, stand dismissed.

Revisions dismissed.

2017 (I) ILR - CUT- 638

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

W.P.(C) NO. 5116 OF 2009

THE CHIEF EXECUTIVE,CHILIKA DEVELOPMENT AUTHORITY .....Petitioner

.Vrs.

SRI GIRIJA PRASAD SAHOO .....Opp. Party

LABOUR LAW – Termination of Service – Tribunal found the termination illegal and directed re-instatement with compensation of Rs. 10,000/- towards back wages – Award challenged – Whether the workman is entitled to full back wages ? – Tribunal took cognizance of the fact that the workman was not gainfully employed during the intervening period and the management has not controverted the same – So, denial of back wages would amount to indirectly punishing the workman and awarding the management – Held, the O.P.-workman is entitled to full back wages – Award directing payment of Rs. 10,000/- is modified with all back wages. (Para 13)

Case Laws Relied on :-

1. Tapas Kumar Paul Vrs. BSNL and another, 2014 4 SCR 875

Case Laws Referred to :-

1. AIR 2014 SC 1848 : Hari Nandan Prasad and another v. Employer I/R to Management of FCI & Anr.
2. 1973 Lab IC 461 (SC) : Management of Hindustan Steel Ltd. Vrs. Workmen.
3. (1970) 2 LLJ 429 : Parry & Co. ltd. Vrs. P.C. Pal.
4. (2009) 15 SCC 327 : Jagbir Singh Vrs. Haryana State Agriculture Marketing Board
5. (2006) 1 SCC 479 : U.P. State Brassware Corporation Ltd. Vrs. Uday Narain Pandey.
6. (2007) 9 SCC 353 : Uttaranchal Forest Department Corporation Vrs. M. C. Joshi
7. (2007) 1 SCC 575 : State of M.P. Vrs. Lalit Kumar Verma.
8. (2007) 9 SCC 748 : M.P. Administration Vrs. Tribhuban.
9. (2008) 5 SCC 75 : Sita Ram Vrs. Moti lal Nehru Farmers Training Institute.
10. (2006) 11 SCC 684 : Jaipur Development Authority Vrs. Ramsahai.
11. (2008) 4 SCC 261 : G.D.A. Vrs. Ashok Kumar.
12. (2008) 1 SCC 575. : Mahboob Deepak Vrs. Nagar Panchayat, Gajraula.
13. AIR 2014 SC 1848 : Hari Nandan Prasad Vrs. Employer I/R to Management of F.C.I.
14. (2013) 10 SCC 324 : Deepali Gundu Surwase Vrs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) & Ors.
15. (227) 2 SCC 433 : J.K. Synthetics Ltd. Vrs. K.P. Agarwal.
16. (2009) 4 Mah. L.J. 628 : Zilla Parishad, Gadchiroli Vrs. Prakash.
17. (1979) 2 SCC 80 : Hindustan Tin Works Pvt. Ltd., Vrs. Employees.
18. (1980) 4 SCC 443 : Surendra Kumar Verma Vrs. Central Govt. Industrial Tribunal-cum-Labour Court.
19. (1981) 3 SCC 478 : Mohan lal Vrs. Bharat Electronics Ltd.

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Date of hearing : 16.11.2016
Date of judgment : 16.11.2016

JUDGMENT

S. N. PRASAD, J.

The award dated 02.02.2009 passed by Industrial Tribunal, Bhubaneswar in I.D. case No.26 of 2005 directing the Management to reinstate the workman in service forthwith with a compensation to the tune of Rs.10,000/- towards back wages to be paid in favour of the workman, has been assailed by the Management.

2. The brief facts of the case of the workman is that he was appointed as Scientific Assistant under the Management, namely, Chilika Development Authority (hereinafter referred to as 'the Management') w.e.f. 16.4.1998 on a consolidated salary of Rs.48/- per day which was enhanced to Rs.58/- per day w.e.f. 1.4.99 and thereafter he was being paid Rs.3,000/- per month w.e.f. June, 2000 till 31.3.2004 when his services were illegally and arbitrarily terminated by the Management. It is the further case of the workman that before dispensing with its service, the provision as contained in Section 25F of the Industrial Disputes Act, 1947 (in short the Act, 1947) was not complied with at the time of termination of his service and as such, he is entitled to be reinstated in service with back wages and consequential benefits. Learned counsel representing the workman has relied upon an unreported decision of this Court in W.P.(C) No. 8924 of 2009 and submitted that the facts of this case is similar to that of the instant case and as such, the same order be passed.

3. While on the other hand, the case of the Management as per the written statement filed by it is that the engagement of the workman was a casual daily wage basis w.e.f. 16.04.1998 till December, 1998 and on consolidated remuneration basis from 1999 till February, 2000. It is the specific case of the Management that from June, 2000 till February, 2004 the workman was reengaged in Hydrobiological Monitoring Project on a consolidated remuneration of Rs.3,000/- per month and on completion of the said project all the persons including the workman were disengaged w.e.f. 31.3.2004. It is the further case of the Management that vide notice no.2875(7) dated 31.12.2003, the workman was intimated that the project work was going to be completed on 31.3.2004 and accordingly his service will be discontinued w.e.f. the said date and knowing fully well about the same, the workman has made a false claim arising out of the industrial dispute. The workman against his termination has raised a dispute which ultimately culminated into a reference, i.e., the management being not an

industry as per the provision made U/s.2(j) of the I.D. Act and in order to substantiate his argument he has referred the provision of Sec.2(j) of the I.D. Act, 1947.

4. The Tribunal after taking into consideration the plea taken by the Management in the written statement has framed the following issues :

(i) Whether the action of the Management of Chilika Development Authority in terminating the services of Sri Girija Prasad Sahoo, Scientific Assistant, Chilika Development Authority w.e.f. 1.4.2004 is legal/justified ?

(ii) If not, to what relief Sri Sahoo is entitled to ?

5. To substantiate his claim, the workman examined himself as W.W.1 and filed documents. Similarly, the Management also examined the Scientific Officer of the Authority as MW.1 and relied upon certain documents. The Tribunal on the basis of the material produced before it has answered the reference in the following terms.

The action of the Management in retrenching the workman w.e.f. 01.04.2004, is held to be illegal and unjustified. The Management is directed to re-instate the workman forthwith. As regards back wages, since there is nothing on record to the effect that from the date of termination till today the workman is not gainfully employed elsewhere, a compensation to the tune of Rs.10,000/- is awarded in his favour. However, the Management is directed to carry out the orders within a period of one month from the date of publication of the award in the official Gazette.

6. Learned counsel representing the Management while assailing the award has placed the following grounds :

(i) The Management is not an industry as per the definition as contained in section 2(j) of the Act.

(ii) The provision of section 25F of the Act is not applicable since the workman working under the project was for a specific period and his service was given which was co-terminus with the project.

(iii) The order of re-instatement should not have been passed by the Tribunal as per the decision of the Hon'ble apex court wherein it has been laid down that order of re-instatement in case of violation of provision of section 25F of the Act should not have been passed in a routine manner. But the Tribunal without appreciating t his aspect of

the matter has passed the order of re-instatement which is not sustainable in the eye of law.

(iv) The workman was allowed to participate in the selection process but, however, he was found not to be successful and accordingly not selected, as such the plea taken by the workman that junior to him has been allowed to continue in service, cannot be treated to be a case of discrimination.

7. Learned counsel for the workman has opposed the grounds by submitting that the facts regarding the Management is an industry or not, has never been raised before the Tribunal and as such this point is not available to be raised by the Management before this Court for the first time in writ jurisdiction in which prayer has been made to issue a writ of certiorari.

So far as second ground that there can not be an automatic order of reinstatement, it has been argued that the instant case is falling under exception as has been held by the Hon'ble apex Court in **Hari Nandan Prasad and another v. Employer I/R to Management of FCI and another reported in AIR 2014 SC 1848** and as such the order of reinstatement having been passed by the Tribunal, cannot be said to be in the routine manner.

So far as ground that there cannot be any violation of provision of section 25F of the Act, since appointment on which the workman was engaged was given which was co-terminus with the project, but while rebutting this ground, it has been submitted that the workman was engaged initially to monitor the work in the Chilika Development and subsequently he was engaged as Scientific Assistant in the project, the said project is still going which has been meant for monitoring the development of the Chilika lake and as such it is wrong to say that the work in question is not available with the management.

It has been submitted that the Management has come out with an advertisement for fulfilling the post of Scientific Assistant on contract basis which itself shows that the availability of the post of Scientific Assistant on contractual basis and it is settled that one set of stop gap arrangement cannot be replaced by another set of stop gap arrangement and taking into consideration this aspect of the matter, it cannot be said that the Tribunal while passing the award of reinstatement in service, has committed any error. He has argued that the Tribunal ought to have directed for disbursement of entire back wages instead of awarding Rs.10,000/- only for the reason that

due to illegal action of the Management not only the workman rather his entire family members have put in penury leading to grave financial hardship and as such the Tribunal ought to have directed full back wages and it has been urged that this Court sitting under Article 226 of the Constitution of India, is competent enough to modify that part of the award. He further submits that the writ of certiorari is only to be issued by the High Court under Article 226 of the Constitution of India if the order is without jurisdiction or the finding is perverse or there is error apparent on the face of record.

Learned counsel has relied upon the judgment passed by this Court in W.P.(C) No.8924 of 2009 and has submitted that the case in hand is squarely covered by the judgment rendered in W.P.(C) No.8924 of 2009 and as such similar order is required to be passed by following the principle of equity.

8. Before reaching to the conclusion with respect to the finding given by the Tribunal, it would be relevant to have a discussion regarding the provision which is relevant for the present case, i.e. Section 25F which reads as follows:-

> *"**25F. Conditions precedent to retrenchment of workmen**. – No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-*
>
> *(a) The workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;*
>
> *(b) The workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and*
>
> *(c) Notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette."*

This section was inserted as a part of chapter VA by Section 3 of the Industrial Disputes (Amendment) Act, 1953. The object behind inserting this provision is that an employer could not be expected to carry the economic dead weight of surplussage of labour, the legislature provided for the compensation under this section to soften the rigour of hardship resulting

from an employee being thrown out of employment thought for not fault of his. Reference in this regard may be made to the judgment rendered by Hon'ble Apex Court in the case of **Parry & Co. ltd. Vrs. P.C. Pal,** reported in **(1970) 2 LLJ 429**.

In enacting Section 25F, the legislature has also standardized the payment of compensation to workmen, 'retrenched in normal or ordinary sense in an existing or continuous industry' (reference in this regard may be made to the judgment rendered by Hon'ble Apex Court in the case of **Management of Hindustan Steel Ltd. Vrs. Workmen,** reported in **1973 Lab IC 461 (SC)**.

This section is captioned 'conditions precedent to retrenchment of workmen' and the conditions laid down in it have been preamble with the words, 'no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by the employer until. The postulates of this provision are that the person claiming its protection must be;

(i) Having the relation of employee with the employer,
(ii) He must be a workman within the meaning of Section 2(s) of the Act,
(iii) The establishment in which he is employed must be an industry within the meaning of Sec.2(j) and
(iv) He must have put in not less than one year of continuous service as defined by Section 25B under the employer.

These conditions are cumulative. If any one of these conditions is lacking, the provisions of this section will not be attracted.

9. The next question arises as to whether should an order of reinstatement automatically followed in a case where the engagement of a daily wager has been brought to end in violation of Section 25-F of the Industrial Disputes Act, 1947 and the Hon'ble Apex Court in various decisions was of the opinion that if the termination of an employee was found to be illegal the relief of reinstatement with full back wages would ordinarily follow. Reference in this regard may be made to the judgments rendered by Hon'ble Apex Court in the case of **Jagbir Singh Vrs. Haryana State Agriculture Marketing Board**, reported in (2009) 15 SCC 327, **U.P. State Brassware Corporation Ltd. Vrs. Uday Narain Pandey**, reported in (2006) 1 SCC 479, **Uttaranchal Forest Department Corporation Vrs. M. C. Joshi**, reported in (2007) 9 SCC 353, **State of M.P. Vrs. Lalit Kumar Verma**, reported in (2007) 1 SCC 575, **M.P. Administration Vrs.**

Tribhuban, reported in (2007) 9 SCC 748, **Sita Ram Vrs. Moti lal Nehru Farmers Training Institute**, reported in (2008) 5 SCC 75, **Jaipur Development Authority Vrs. Ramsahai**, reported in (2006) 11 SCC 684, **G.D.A. Vrs. Ashok Kumar**, reported in (2008) 4 SCC 261 and **Mahboob Deepak Vrs. Nagar Panchayat, Gajraula**, reported in (2008) 1 SCC 575.

But the Hon'ble Apex Court in the case of **Hari Nandan Prasad Vrs. Employer I/R to Management of F.C.I.**, reported in AIR 2014 SC 1848 has laid down the proposition differing with the earlier proposition of automatic reinstatement in case of violation of Section 25F of the I.D. Act, 1947 on the analogy and reasons that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation, since such a workman was working on daily wage basis and even after he is reinstated, he has no right to seek regularization in pursuance to the judgment rendered by Hon'ble Apex Court in the case of **State of Karnataka Vrs. Uma Devi,** (2006) 4 SCC 1 and that he cannot claim regularization and when he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

It has been laid that the order of re-instatement can be passed in such a position where the service of a regular / permanent workman are terminated illegally and / or mala fide and / or by way of victimization, unfair labour practice, etc.

10. The Management has raised the dispute regarding the management being not an industry as per the provision made U/s.2(j) of the I.D. Act and in order to substantiate his argument he has referred the provision of Sec.2(j) of the I.D. Act, 1947.

Before answering this issue, we have examined the award, written statement and other documents available on record and found that the management has not raised this point before the Tribunal and as such no finding has been given in this regard. The management is raising this issue for the first time before this court under Article 226 of the Constitution of

India wherein this writ petition has been filed for issuance of writ of certiorari; there is no dispute about the settled position that writ of certiorari can only be issued in case of adverse finding or error apparent on the face of record or the order is without jurisdiction.

Perversity will be said to have been occurred in an order, in case, point / issue having been raised before the administrative authority / quasi judicial authority / judicial authority / before any court of law and if no finding is being given by appreciating the rival submission of the parties based upon the document, it will be said that the finding is perverse, meaning thereby the finding has been given without considering the materials available on record.

There is no dispute about the fact that the award passed by the Labour Court or the Tribunal can be assailed before the High Court for seeking a writ of certiorari on the ground of perversity or error apparent on the face of the record or the order having without jurisdiction, but whether in the case at hand can it be said that the finding is perverse regarding non-framing of issue as to whether the management is an industry within the meaning of Sec.2(j) of the I.D. Act, 1947 or not.

According to us since this point has not been raised before the Tribunal, as such the management cannot be allowed to raise this point for the first time after passing of an award on 31.3.2009, i.e. after lapse of about 8 years before the Writ Court by accepting the argument of the management that it can be raised at any time since it is purely legal issue, but we differ from this submission for the reason that this issue is not a legal issue, rather it is mixed question of law and facts which can only be adjudicated before the Tribunal. It is also not that this point was not available with the management and accordingly on this pretext the finding cannot be said to be perverse and if we will allow this submission of the management, then it will be said to be allowing the management to fill up the lacuna by directing the Tribunal to adjudicate a new issue which has not been raised at any time in course of adjudication of the issue.

We also not thought it proper to remit the matter before the Tribunal for the reason that the dispute is of the year 2004 and since then 12 years have already elapsed and if the matter would be remitted before the Tribunal, it will not only be harsh for the workmen, rather the entire purpose of adjudication of dispute would frustrate and thereby the purpose and intent of the Industrial Disputes Act, 1947 would be frustrated. Since this Act has been legislated by way of a beneficial piece of legislation and perhaps due to

lingering attitude the management has not raised this point before the Tribunal at the initial stage.

11. So far as the fact that there is violation of Sec.25F of the Industrial Dispute Act, 1947, we have gathered from the documents available on record that the petitioner was appointed as Scientific Assistant on 15.4.1998 on a daily wage of Rs.48/- per day and from 2.4.99 daily wage was raised to Rs.58/-. The remuneration was subsequently enhanced to Rs.3,000/- per month till the date of retrenchment i.e. on 31.3.2004.

According to the Management, the workman was engaged on daily wage basis w.e.f. 15.4.1998 and since he was not engaged against sanctioned post, not appointed on regular basis, rather he was engaged on Hydrobiological Monitoring Project and since the project itself has been closed, as such he was disengaged w.e.f. 1.4.2004.

According to the management it is a case U/s.2(oo)(bb) of the I.D. Act, 1947 which contains definition of 'retrenchment' which means termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include termination of service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein, hence the workman will come under the zone of Section 2(oo)(bb), so, there is no question of applicability of Section 25F of the Act, 1947.

The Labour Court after discussing in detail regarding applicability of Section 2(oo)(bb) has taken into consideration various documents and on appreciation of the same it has been held that the respondent employer has failed in alleging and proving the ingredients of sub-clause (bb) and all that has been proved is that the appellants were engaged as casual workers or daily wagers in a project, for want of proof attracting applicability of sub-clause (bb) it has been held that the termination of services of the appellant amounting to retrenchment and thereafter it has been held that since in the present case the management has failed to prove the ingredients of sub-clause (bb) of Section 2(oo) of the Industrial Disputes Act, 1947, hence the termination of services of the workman has been held to be retrenchment. This finding has been given after taking into consideration the deposition of M.W.1 wherein he has stated that the workman was first appointed on 16.4.1998 and continued to work t ill 31.3.2004. He further deposed that the

workman was working on daily wage basis. He was appointed in the post of Scientific Assistant in the Hydrobiological Monitoring Project w.e.f. 20.06.2000 with some terms and conditions. He has also taken note of the fact that while shifting the petitioner in the Hydrobiological Monitoring Project on 20th June, 2000 no intimation has been given to the workman and to that effect management has not produced any document to prove that the workman had knowledge about his engagement in the aforesaid project.

The Labour Court came to finding after taking into consideration Ext.D which is a copy of the letter written by the Chief Executive to Padmashree (Dr.) P. Mohanty Hejmadi wherein the workman has been identified as Scientific Assistant of the management, Ext.4 which is a copy of the letter of training programme of the workman signed by the Chief Executive of the management on 18.12.2000 wherein also the workman has been identified as Scientific Assistant, Ext.5 which is a copy of certificate issued to the workman for participating in a training programme from 19.12.2000 to 22.12.2000 signed by the Chief Engineer, Project Planning & Formulation, Orissa, Secha Sadan, Bhubaneswar, Ext.7 which is a copy of work programme of Scientific Assistants including the workman for the month of August, 2001 issued by the M.W.1, Ext.9 which is a copy of another letter issued by M.W.1 wherein the workman was directed to appear before the Chief Executive of the Management on 4.6.2002 for review of the work, Ext.10 which is copy of minutes of the work review meeting of Scientific Assistants held on 4.6.2002 and Ext.11 which is a copy of direction by the Chief Executive of the management to the workman on 10.10.2002, Ext.13 to 13/g and Ext.14 to 14/b which are the vouchers regarding receipt of salary of the workman, but in none of these aforesaid documents there is mention about engagement of the workman in a project named as Hydrobiological Monitoring Project, rather in all the vouchers marked as Ext.13 series and Ext.14 series it is noted that the workman has received an amount of Rs.3000/- per month towards his consolidated salary for a particular month from the Chief Executive of the Management.

This finding has been given taking into consideration the deposition of M.W.1 wherein he has stated that the workman was appointed on 15.4.1998, thereafter engaged in the Hydro-Biological Monitoring Project thereafter w.e.f. the month of June, 2000 which came to an end w.e.f. 31.3.2004 with same terms and conditions he was also taken note to the fact that while shifting the workman in the Hydro-Biological Monitoring Project in June, 2000, no intimation was given to the workman. Moreover, he was

not given any document. The Tribunal came to the finding after taking into consideration that Exts. A, 2 and 2/a are the Xerox copies of the vouchers of the Management wherein the workman has endorsed his signature on revenue stamps mentioning therein that he had received his consolidated salary for the months of September, 2001 and June, 2003 respectively. The Tribunal has came to conclusion taking into consideration the admitted position that the salary of the workman was enhanced from time to time. But no order to that effect is available to ascertain other terms and conditions of engagement of the workman. Taking into consideration these documents, the contention of the Management regarding the nature of job has been held not tenable. The Tribunal after taking into consideration the period of service rendered by the workman, has come to the conclusion that such action adopted by the Management with a view to defeat provision of the Act, so that the workman may come under the exception under clauses as provided under section 2(oo)(bb) of the Act. The Tribunal has also examined the case of the workman as to whether the same is coming within section 2(oo)(bb) of the Act or not, considering the deposition and material available on record, it has been observed by the Tribunal that the plea have been taken consistently by the workman that in spite of his rendering continuous service under the management which is more than 240 days preceding his date of employment, Management has neither given any notice/nor paid any retrenchment compensation and as such the assertion of the workman regarding his engagement under the Management stands terminated. In the cross-examination of the Management witness no.1 he has stated that the workman has stated that the workman has rendered continuous service under the management from 16.4.1998 to 31.3.2004. The genuineness of the experience certificate marked as Ext.1, has also not been challenged, which also reveals that he was continuing with his assignment under the management from 16.4.1998. Taking into consideration these aspects of the matter, the Tribunal came to finding that all these actions of the Management attract the ingredients of section 25-F of the Act and the provision contained therein has not been followed by the Management and accordingly came to conclusion that the order of termination is illegal being in violation of section 25-F of the Act.

12. We have examined the order passed by this Court in W.P.(C) No. 8924 of 2009 and after close scrutiny of the judgment delivered therein we found that the terms of reference is same as in the instant case. We also found

that the adjudicatory authority has passed the award placing reliance upon the evidence which are exactly similar to that of the instant case.

We further gathered from the judgment passed therein that by taking into consideration the judgment relied upon by us, having been delivered by Hon'ble Apex Court in the case of **Hari Nandan Prasad** (supra) and in the case of **B.S.N.L. Vrs. Bhurumal**, reported in AIR 2014 Supreme Court 1188 and comparing the fact of these two cases with the case of the workmen of W.P.(C) No.8924 of 2009 came to finding that the Labour Court has not committed any error in passing the order of reinstatement in case of violation of provision of Section 25-F of the I.D. Act, 1947. This conclusion has been arrived at by us by taking into consideration the fact that the Management has come out with an advertisement for fulfilling the post of Scientific Assistant on contractual basis and as such applying the ratio laid down by the Hon'ble Apex Court in the of **State of Haryana Vrs. Piara Singh**, reported in (1992) 4 SCC 118 wherein at paragraph 46 their Lordships have been pleased to hold that "Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regular selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority."

We have also considered the fact that the judgment in the case of **State of Haryana Vrs. Piara Singh** (supra) has been taken note by the Constitution Bench of Hon'ble Apex Court while delivering judgment in the case of **State of Karnataka Vrs. Umadevi (3)**, reported in (2006) 4 SCC 1 wherein the ratio laid down in the case of **Piara Singh** with respect to regularization aspect has been over-ruled but the ratio laid down with respect to the replacement of one ad hoc or temporary employee by another set of ad hoc or temporary employee has not been said to be bad law.

We on examination of the facts and circumstances of this case have found that the workman was engaged initially as a daily wage worker, but subsequently he was engaged as Scientific Assistant, the post on which he continued and from which he has been terminated. We also gathered from the fact of W.P.(C) No.8924 of 2009 that the authorities have come out with the advertisement to fulfill the post of Scientific Assistant, purely on contract basis, the post hold by the workman during the time of termination in the instant case was Scientific Assistant, hence the order of reinstatement passed by the Labour Court in the case of violation of the provision of Section 25-F cannot be held to be improper.

In W.P.(C) No.8924 of 2009 we have dealt with the finding of Award and have found that the Tribunal has passed the order of reinstatement which according to us has been found to be correct for the reason that one advertisement was published by the Management inviting application for filling of vacant post of Scientific Assistant on contract basis, taking into consideration the stand of the Management that there were requirement of Scientific Assistant for that reason that the advertisement was published and also taking into consideration the settled principle that one stop gap arrangement cannot be substituted by another stop gap arrangement. In this regard reference of the judgment rendered by the Hon'ble apex Court in the case of **State of Haryana Vrs. Piara Singh** (supra) has been taken into consideration by this Court and, therefore, the order of reinstatement has been said to be correct.

The fact of this case is exactly similar to the said case since in the instant case, the workman was working as Scientific Assistant and from that post he was terminated and subsequently an advertisement was published. Hence in this case also the judgment rendered by this Court in W.P.(C) No.8924 of 2009 is squarely applicable, applying the principle of parity and also applying the said judgment in the instant case, we find that the order of reinstatement cannot be said to be an illegal order for the reason that the Management cannot be allowed to substitute one set of stop gap arrangement by another set of stop gap arrangement and as such the case of workman in this case has also been taken into consideration by taking into consideration the judgment rendered by the Hon'ble apex Court in the case of **Hari Nandan Prasad and BSNL** (supra). However, in these two cases, the facts are different to that of the instant case. But it is found t hat since the Management has come out with the appointment of a Scientific Assistant on contract basis which states that there is requirement of workman and as such the Management cannot be allowed to substitute one ad hoc workman by another ad hoc appointment. In this case also nothing found from record t hat the workman has discharged his duties on complaint and as such, the workman of this case is also entitled for reinstatement in service otherwise it will lead to unfair labour practice and workman will be subjected to exploitation which will hit the very purpose of the Constitution.

In view of the observations made hereinabove, we find that the learned Tribunal has not committed any error in passing the award.

13. So far as the back wages is concerned, we are conscious of the fact that the award has been challenged by the Management, but sitting under Article 226 of the Constitution of India this Court thought it proper also to scrutinize the finding given by the Labour Court with respect to the back wages.

We have examined that part of the Award in the light of the settled proposition of law as has been settled by Hon'ble Apex Court in the case of **Deepali Gundu Surwase Vrs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others**, reported in (2013) 10 SCC 324 which has been delivered by Hon'ble Apex Court after dealing with the previous judgments rendered in the case of **J.K. Synthetics Ltd. Vrs. K.P. Agarwal**, reported in (227) 2 SCC 433 and **Zilla Parishad, Gadchiroli Vrs. Prakash**, reported in (2009) 4 Mah. L.J. 628, **Hindustan Tin Works Pvt. Ltd., Vrs. Employees**, reported in (1979) 2 SCC 80, **Surendra Kumar Verma Vrs. Central Govt. Industrial Tribunal-cum-Labour Court**, reported in (1980) 4 SCC 443, **Mohan lal Vrs. Bharat Electronics Ltd.**, reported in (1981) 3 SCC 478 has given its verdict whereby and where under it has been held that the order directing the management to pay full back wages and to that effect the proposition laid down at paragraph 35 is being reproduced here under as:-

> *"35. In **Jagbir Singh v. Haryana State Agriculture Marketing Board**, reported in (2009) 15 SCC 327, this Court noted that as on the date of retrenchment, respondent No.1 had worked for less than 11 months and held: (SCC p.335, paras 14-15)*
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> *"14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-Falthough may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.*
>
> *15. Therefore, the view of the High Court that the Labour Court erred in granting reinstatement and back wages in the facts and circumstances of the present case cannot be said to suffer from any legal flaw. However, in our view, the High Court erred in not*

awarding compensation to the appellant while upsetting the award of reinstatement and back wages."

In another judgment rendered by Hon'ble Apex Court in **Tapas Kumar Paul Vrs. BSNL and another, 2014 4 SCR 875** wherein also the order of re-instatement with full back-wages has been directed to be paid and this order has been passed taking into consideration the fact that "True occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted" and after taking into consideration the pronouncement of the Hon'ble Apex Court in the case of Deepali Gundu (supra) in which reliance has been placed in the case of Surendra Kumar Verma (supra) and Hindustan Tin Workers Pvt. Ltd. (supra) the order of re-instatement with back wages has been passed.

In view of the settled position of law as on date as per the judgments rendered in the case of **Deepali Gundu's case (supra), Tapas Kumar Paul's case (supra),** etc, the direction of Tribunal to pay lump sum amount of Rs.10,000/- is too less and that part of award needs to be modified in view of the judgments pronounced by Hon'ble Apex Court in the cases of Deepali Gunda, Tapas Kumar Paul, etc. as referred herein above.

We accordingly modified the part of the award by directing the Management to reinstate the petitioner with all back wages. Accordingly, the writ petition is disposed of in terms of observations and directions made hereinabove.

Writ petition disposed of.

2017 (I) ILR - CUT- 654

DR. A.K. RATH, J.

C.M.P. NO. 125 OF 2017

AGANA PARIDA .....Petitioner

.Vrs.

SARASWATI PARIDA & ORS. .....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-18, R-16

Examination of witness immediately – When Court can exercise such power – The party making an application must satisfy the Court that the witness is about to leave the jurisdiction of the Court or assign other sufficient cause for taking his/her evidence immediately.

In this case, admittedly defendant No. 1 is an old woman of 80 years and she is suffering from paralysis – It is also evident that she is about to leave the jurisdiction of the Court for her better treatment at Visakhapatnam where her grandson is residing – Since the learned Trial Court has assigned reasons while allowing the application, the same cannot be said to be perfunctory, warranting interference by this Court. (Paras 7 to 11)

Case Laws Referred to :-

1. 2013(I)OLR-412 : Kamalakanta Parida and another vs. Sri Saroj Badan Parida & Ors.
2. 2014 (II) ILR-CUT-815 : Bishnupriya Devi vs. Ashoka Crokeries Ltd. & anr.

For Petitioner : Mr. S.K.Dwibedi
For Opp. Parties : Mr. D.P.Mohanty

Date of Hearing :28.02.2017
Date of Judgment:28.02.2017

JUDGMENT

DR. A.K. RATH, J.

This petition seeks to lacinate the order dated 22.12.2016 passed by the learned 2nd Addl. Civil Judge (Sr. Divn.), Balasore in C.S. No.881/2012 vide Annexure-1. By the said order, learned trial court allowed the application of the defendant no.1 under Order 18 Rule 16 C.P.C.

02. The petitioner as plaintiff instituted the suit for declaration, partition of the suit schedule property and permanent injunction impleading the opposite parties as defendants. Pursuant to issuance of summons, the

defendant no.1 (opposite party no.1 herein) entered appearance and filed written statement denying the assertions made in the plaint. While the matter stood thus, she filed an application under Order 18 Rule 16 C.P.C. seeking leave of the court to adduce evidence. It is stated that she is an old woman of 80 years. She is a paralysis patient and bed ridden. Her grandson is residing at Visakhapatnam. For her better treatment, she intends to leave the jurisdiction of the court and stay at Visakhapatnam. It is further stated that due to her old age, her memory fails. Another petition was filed under Order 26 Rule 1 C.P.C. to examine her by a commission. The plaintiff filed objections in both the petitions.

03. Learned trial court came to hold that the defendant no.1 is an old woman and about to leave the jurisdiction of the court for better treatment at Visakhapatnam. Held so, the learned trial court allowed both the petitions.

04. Mr. Dwibedi, learned counsel for the petitioner submits that the duty is cast upon the learned trial court to assign reasons while deciding the application under Order 18 Rule 16 C.P.C. Since no reason has been assigned, the impugned order is liable to be quashed. Further, the defendant no.1 has not produced any detail particulars of her illness. He further submits that the defendant no.1 in her written statement stated that she is undergoing treatment at SCB Medical College, Cuttack at some point of time. He cites decision of this Court in the case of *Kamalakanta Parida and another vs. Sri Saroj Badan Parida and others,* 2013(I)OLR-412 and *Bishnupriya Devi vs. Ashoka Crokeries Ltd. & another,* 2014 (II) ILR-CUT-815.

05. Per contra, Mr. Mohanty, learned counsel for the opposite party no.1 submits that the defendant no.1 is an old woman of 80 years. She is a paralysis patient. Her grandson is residing at Visakhapatnam. For better treatment, the defendant no.1 intends to go there. The applications were filed for her examination by a commission and seek to leave the jurisdiction of the court. He further submits that in the meantime commission has been appointed and examined the defendant no.1.

06. Order 18 Rule 16 C.P.C., which is the hub of the issue, reads as follows:

> "**16. Power to examine witness immediately.**—(1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit."

07. On a bare reading of the said provision, it is manifest that the party making an application must satisfy the court that the witness is about to leave the jurisdiction of the court or assign other sufficient cause for taking his evidence immediately.

08. In the instant case, there is no denial to the fact that the defendant no.1 is an old woman of 80 years and she is suffering from paralysis. As would be evident from the petitions, she is about to leave the jurisdiction of the court for her better treatment at Visakhapatnam where her grandson is residing. Learned trial court has assigned the reasons while allowing the application.

09. The decisions cited by Mr. Dwibedi, learned counsel for the petitioner, are of no avail. In *Kamalakanta Parida and another* (supra), the order of the learned trial court allowing the application filed under Order 18 Rule 16 C.P.C. has been quashed since the learned trial court has not assigned any reason. In *Bishnupriya Devi* (supra), learned trial court allowed the petition on the ground that there are certain manifest discrepancies regarding the age of defendant no.2, her signature and L.T.I. appearing in the sale deed. This Court held that the same are not germane for consideration in an application under Order 18 Rule 16 C.P.C.

10. On a cursory perusal of the decisions, it is evident that both the decisions are distinguishable on facts. In *State of Orissa vs. Sudhanu Sekhar Mishra and others,* AIR 1968 SC 647, the Constitution Bench held that a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it.

11. The reasons assigned by the learned trial court cannot be said to be perfunctory or flawed 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- 657

DR. A.K. RATH, J.

C.M.P. NO. 127 OF 2017

BASANTA MANJARI SAMAL ……..Petitioner

.Vrs.

RUPAKANTA SAHU & ORS. ……..Opp. Parties

CIVIL PROCEDURE CODE, 1908 – S. 10

Whether, the learned trial court can entertain an interim application and decide the same when further proceeding of the suit has been stayed by this Court ? Held, Yes.

In this Case the plaintiff instituted C.S. No. 40/11 in the Court of the learned Civil Judge (Sr. Divn.) Malkangiri for declaration of right, title and interest and other ancillary reliefs impleading the opposite parties as defendants – Since Written Statement filed by the defendant was not accepted, the said order was challenged in CMP No. 1049/16, wherein this Court stayed further proceeding of the suit – While the matter stood thus the plaintiff-petitioner filed an application for temporary injuction and the trial Court held that the Court ceases to entertain the application as original suit has been stayed – Hence the present C.M.P – Held, even if the suit has been stayed the trial court still retains its jurisdiction to consider interlocutory applications and pass orders to keep the lis alive and to protect the interest of the parties during subsistence of the order of stay – The impugned order is quashed – Direction issued to the learned trial Court to decide the application for injunction on merit. (Paras 4,5)

Case Laws Referred to :-

1. 64 (1987) CLT 540 : Sri Bijay Ku. Agarwalla & Anr. -V- Ramakanta Das

For Petitioner : Mr. G.N. Mishra
For Opp. Parties : Mr. P.K.Rath

Date of Hearing :28.02.2017
Date of Judgment:28.02.2017

JUDGMENT

DR. A.K. RATH, J.

The seminal question that inter alia hinges for consideration of this Court is as to whether the learned trial court can entertain an interim

application and decide the same when further proceeding of the suit has been stayed by this Court ?

02. The petitioner as plaintiff instituted C.S. No.40/11 in the court of the learned Civil Judge (Sr. Divn.), Malkangiri for declaration of right, title and interest and other ancillary reliefs impleading the opposite parties as defendants. Since the written statement filed by the defendants was not accepted, they filed C.M.P. No.1049 of 2016 before this Court. This Court as an interim measure directed to stay further proceeding of the suit. While the matter stood thus, the petitioner filed an application under Order 39 Rule 1 C.P.C. for temporary injunction. Learned trial court came to hold that the further proceeding of the suit has been stayed by this Court on 21.7.2016 in Misc. Case No.1062 of 2016 arising out of C.M.P. No.1049 of 2016. Since the original suit has been stayed, jurisdiction of this Court ceases to entertain the application.

03. Heard Mr. G.N. Mishra, learned counsel for the petitioner and Mr. P.K. Rath, learned counsel for the opposite parties.

04. The subject matter of dispute is no more res integra. An identical matter came before this Court in the case of *Sri Bijay Kumar Agarwalla and another vs. Ramakanta Das,* 64 (1987) C.L.T. 540. This Court held thus:-

> "4. The solution to the controversy regarding maintainability centres round the question what is the meaning and import of the order of stay further proceedings in the suit passed by the revisional Court. If the order is construed to mean stay of all further proceedings in the suit no matter whether it relates to hearing of the suit or any other collateral matter, then it has to be held that the learned Subordinate Judge took the correct view in the matter. If on the other hand, the order of stay means only stay of hearing of the suit and does not affect jurisdiction of the trial Court which is in seisin of the suit to pass orders in collateral matters, then the application under Order 38, Rule 5 filed by the petitioners before the Court below was maintainable. The point has been considered by different High Courts and there seems to be divergence of opinion amongst them. While the Madras High Court in the case of *Chidambaram v. Subramanian,* Madhya Pradesh High Court in the case of *Madanlal Agarwal v. Smt. Kamlesh Nigam,* Mysore High Court in the case of *Saburao Vithalrao Sulunke v. Madarappa Presappa Debbennavar,* and the Bombay High Court in the case of *Khemraj Ratanlal Sancheti and*

others v. Vasant Madhaose Vyavhare and another, have taken the view that the trial Court retains its jurisdiction to pass interlocutory orders for the purpose of keeping the proceedings alive or for preserving the subject-matter of the dispute or the for protecting the interest of the parties to the suit during pendency of the stay order passed by the appellate or revisional Court, the Patna High Court in the case of *Motiram Roshanlal Coal Co.(P) Ltd. v. District Committee, Dhanbad and others,* held that an order of stay passed by a superior Court becomes effective immediately after it is passed and it has the effect of suspending the power of the lower Court to continue the proceedings in the case. Any order passed by the lower Court in spite of the order of stay of further proceedings is without jurisdiction. It is necessary to point out here that in the case before the Patna High Court the order passed by the lower Court in contravention of the order of stay of further proceedings was one appointing a commissioner. As such, the order directly related to hearing of the suit and was not one relating to a collateral matter. On the other hand, the cases considered by the Madhya Pradesh and Mysore High Courts arose directly out of applications made under Order 38, Rule 5 of the Code as in the present case. In the case of *Chidambaram v. Subramanian,* the Division Bench of the Madras High Court considered the question whether it was open to the trial Court to make a reference to arbitration in the suit during pendency of the order of stay of further proceedings granted by the superior Court. Justice Venkatarama Aiyar speaking for the Court answered the question in the affirmative. I have carefully perused all the decisions referred to above. With respect, I would agree with the view taken by the learned Judges of the Madras, Mysore, Madhya Pradesh and Bombay High Courts holding that the lower Court retains its jurisdiction to consider and pass orders in matters which are collateral or which may be protective or which would be for the purpose of keeping the lis alive, even during subsistence of the order of the superior Court directing stay of further proceedings in the suit. But the Court should take care to ascertain that the subject matter in the petition does not touch the trial of the suit which has been stayed by the superior Court. To hold otherwise may in many cases work out injustice inasmuch as for every collateral matter the parties will be compelled to approach the appellate or revisional Court though such a matter may not be within the ambit and scope of appeal or revision

pending before the superior Court. To give an instance, when an appeal or revision is filed against an interlocutory order, the matte dealt with in that order is the subject matter in appeal or revision as the case may be. The application relating to the collateral matter may have no connection with the appeal or revision. In such cases also the party will be compelled to approach the appellate or revisional Court if it is held that in view of the stay order the trial Court is denuded of his jurisdiction to pass any order in the suit. On the aforesaid analysis, I would hold that the learned Subordinate Judge was not right in holding that in view of the order of this Court directing stay of further proceedings in the suit the petitioners' application under Order 38, Rule 5 of the Code filed before him was not maintainable."

05. In view of the authoritative pronouncement of this Court in the case of *Sri Bijay Kumar Agarwalla and another* (supra), the order dated 11.11.2016 passed by the learned Civil Judge (Sr. Divn.), Malkangiri in I.A. No.1 of 2017 arising out of C.S. No.40/11 is quashed. Learned trial court shall decide the application for injunction on merit. The petition is allowed. No costs.

Petition allowed.

2017 (I) ILR - CUT- 660

DR. A.K. RATH, J.

C.M.P. NO. 1481 OF 2014

SRIKANTA TRIPATHY ……..Petitioner

.Vrs.

DASARATHI TRIPATHY & ORS. ……..Opp. Parties

CIVIL PROCEDURE CODE, 1908 – S. 96

Appeal against the judgment and decree of the trial court – Who can file appeal – A party to the suit, who is adversely affected by the decree may file appeal – However, a person, who is not a party to the suit but adversely affected by the decree may prefer an appeal with the leave of the Court and such leave would not be refused where the judgment would be binding on him under explanation 6 to Section 11 of the Code of Civil Procedure.

Admittedly the petitioner was not a party to the suit and he claims to be the adopted son of Nishamani Tripathy – While deciding an application for grant of leave, the Court has to be prima facie satisfied that the person making application has been adversely affected by the decree – But in this case, the learned appellate court refused to grant leave on the ground that the deed of acknowledgement of adoption on the basis of which the petitioner claims to be the adopted son of Nishamani Tripathy, though a registered one, does not satisfy the requirement of section 16 of the Hindu Adoption and Maintenance Act – Held, the impugned order is quashed – Leave is granted – Direction issued to the learned appellate Court to hear the appeal on merit. (Paras 6, 7)

Case Laws Referred to :-

1. AIR 1971 SC 385 : Adi.Pherozshah Gandhi -V- H.M.Seervai, Advocate General of Maharashtra, Bombay.

For Petitioner : Mr. D.P.Mohanty
For Opp. Parties : Ms. Debasmita Debadarsini Acharya

Date of Hearing : 28.02.2017
Date of Judgment: 15.03.2017

JUDGMENT

DR.A.K.RATH, J.

This petition challenges the order dated 20.10.2014 passed by the learned District Judge, Puri in R.F.A.No.45 of 2008. By the said order, the learned appellate court rejected the application of the petitioner for grant of leave to file appeal.

2. Damodar Tripathy, the predecessor in interest of opposite party nos. 1 and 2 instituted C.S.No.60/394 of 2006/2004 in the court of the learned Additional Civil Judge (Sr.Division), Puri for specific performance of contract impleading opposite party no.3 as defendant. The suit was decreed on 12.5.2006. The petitioner was not a party in the suit. Aggrieved by and dissatisfied with the judgment passed by the learned trial court, he filed R.F.A. No.45 of 2008 before the learned District Judge, Puri. Since there was delay, an application for condonation of delay was filed. According to the petitioner, he is the adopted son of Nishamani Tripathy. Respondent no.2 filed objection. Though the learned appellate court came to hold that the person, who is not a party to the decree or order, may file appeal with the leave of the Court, but then it came to a conclusion that the deed of

acknowledgement of adoption on the basis of which the petitioner claims to be adopted son of Nishamani though a registered one, does not satisfy the requirement of Section 16 of the Hindu Adoption and Maintenance Act. Held so, the learned lower appellate court refused to grant leave.

2. Heard Mr. D.P.Mohanty, learned Advocate for the petitioner and Ms.Debasmita Debdarsini Acharya, learned Advocate for opposite parties.

3. Mr.Mohanty, learned Advocate for the petitioner submits that the petitioner is the adopted son of Nishamani Tripathy. Nishamani executed a registered deed of adoption in favour of the petitioner. He was not a party to the suit. Aggrieved by the judgment and decree, he filed appeal along with an application for condonation of delay. Without considering the matter in its proper perspective, the learned appellate court rejected the petition.

4. Per contra, Ms. Debasmita Debadarsini Acharya, learned Advocate for the opposite parties submitted that the alleged deed of acknowledgment of adoption does not satisfy the requirement of Section 16 of Hindu Adoption and Maintenance Act. The learned appellate court is justified in refusing leave to file appeal.

5. Two conditions must be satisfied for filing of appeal against the judgment and decree of the learned trial court viz., (1) the subject matter of appeal must be a decree (2) a person is adversely affected by the decree. Thus, the sine qua non for maintaining an appeal is that only a party to the suit who is adversely affected by the decree may file appeal. However, a person who is not a party to the suit but then adversely affected by the decree may prefer appeal with the leave of the Court.

6. The Apex Court in Adi. Pherozshah Gandhi vrs. H.M.Seervai, Advocate General of Maharashtra, Bombay, A.I.R. 1971 SC 385 held thus:-

> "Generally speaking, a person can be said be aggrieved by an order which is to his detriment, pecuniary or otherwise or causes him some prejudice in some form or other. A person who is not a party to a litigation has no right to appeal merely because the judgment or order contains some adverse remarks against him. But it has been held in a number of cases that a person who is not a party to suit may prefer an appeal with the leave of the appellate court and such leave would not be refused where the judgment would be binding on him under Explanation 6 to section 11 of the Code of Civil Code of procedure."

7. Admittedly, the petitioner was not a party to the suit. He claims to be the adopted son of Nishamani Tripathy. According to the petitioner, he is aggrieved by the judgment and decree of the learned trial court. While deciding an application for grant of leave, the Court has to be prima facie satisfied that as to whether the person making application has been adversely affected by the decree. But in the instant case, the learned appellate court went further and rendered finding with regard to the registered deed of acknowledgment of adoption. The same cannot be. Since the petitioner has been adversely affected by the judgment and decree, the order dated 20.10.2014 passed by the learned District Judge, Puri in R.F.A.No.45 of 2008 is quashed. Leave is granted. The learned appellate court shall hear the appeal on merit. The petition is allowed. No costs.

Petition allowed.

2017 (I) ILR - CUT- 663

DR. A.K. RATH, J.

C.M.P. NO. 614 OF 2015

PRAMILA DASH & ORS. ……..Petitioners

.Vrs.

BASANTI DASH ……Opp. Party

HINDU LAW (MULLA) – ARTICLE 333

Suit for partition – Parties to the suit – Plaintiff is bound to implead as defendant:-

(i) the heads of all branches;

(ii) females who are entitled to a share on partition;

(iii) the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener;

(iv) if the plaintiff himself is a purchaser from a coparcener, his alienor.

The above are necessary parties and if any of them is not joined, the suit is liable to be dismissed – The entire joint family must be represented either expressly or implicitly.

Moreover it is also desirable that the following persons should be made parties, though not necessary parties but proper parties to the suit.

(i) a mortgagee with possession of the family property or of the undivided interest of a coparcener;

(ii) simple mortgagees of specific items of the family property;

(iii) purchaser of the undivided interest of a coparcener;

(iv) persons entitled to provision for their maintenance and marriage, i.e., widows, daughters, sisters and such like and distinguished heirs;

(v) any person entitled to maintenance from the family.

The plaintiff may also implead any other coparcener or any person interested in the family property such as a mortgagee or a lessee – Such a person may himself apply and be made a party.

(Para 8)

Case Laws Referred to :-

1. AIR 1963 SC 786 : Udit Narain Singh Malpaharia v. Additional Member . Board of Revenue, Bihar and anr.
2. AIR 1958 SC 886 : Razia Begum v. Sahebzadi Anwar Begum and others.
3. 57 (1984) CLT 31 : Indrajit Dandasena & Ors. v. Mangal Charan Dandasena & Ors. 57 (1984) CLT 31

For Petitioners : Mrs. Supriya Patra
For Opp. Party : Mr. Satya Shiva Dash

Date of Hearing : 04.01.2017
Date of Judgment: 11.01.2017

JUDGMENT

DR. A.K. RATH, J.

This petition challenges the order dated 16.4.2015 passed by the learned 1st Additional Civil Judge (Sr. Divn.), Bhubaneswar in C.S. No.631 of 2013 vide Annexure-6. By the said order, learned trial court rejected the application of the defendants under Order 1 Rule 10 C.P.C. to implead the purchasers as well as the daughter and son of defendant no.3 as defendants.

02. The opposite party as plaintiff instituted the suit for partition, declaration that the 'B' schedule property is the joint family property and permanent injunction impleading the petitioners as defendants. Pursuant to

issuance of summons, two written statements had been filed, one by defendant nos.1 and 2 and another by defendant nos.3 & 4 refuting the allegations made in the plaint. The defendants have challenged the maintainability of the suit on the ground of non-joinder of necessary parties. While the matter stood thus, the defendants filed an application under Order 1 Rule 10 C.P.C. praying, inter alia, to implead the transferees and daughter and son of defendant no.3 as defendants. No objection was filed by the plaintiff. Learned trial court came to hold that the application filed by the defendants under Order 7 Rule 11 C.P.C. for rejection of plaint has been rejected. Further the plaintiff is the master of the suit and he cannot be compelled to implead the intervenors as defendants. Held so, learned trial court rejected the application on 16.4.2015.

03. Heard Mrs. Supriya Patra, learned counsel for the petitioners and Mr.Satya Shiva Dash, learned counsel, appearing on behalf of Mr. A.P. Bose, learned counsel for the opposite party.

04. Really two points arise for consideration of this Court;

(1) Whether the court can implead a party as defendant against the wish of the plaintiff ?

(2) Whether the intervenors are necessary or proper parties to the suit ?

Point No.1

05. An identical question came up for consideration before this Court in *Indrajit Dandasena and others v. Mangal Charan Dandasena and others*, 57 (1984) CLT 31. Learned Single Judge, before whom the revision came up for hearing, has observed that there are cleavage of decisions of this Court on the point. The matter was referred to a larger Bench. This Court went in-depth into the matter and held that the maxim "dominus litis" means the plaintiff is the master of suit. It was further observed that the rule of dominus litis is subject to the powers of the Court under Order 1, Rule 10(2) of the Code inasmuch as the said rule authorises the Court to direct addition of further parties to the suit even suo motu where it appears that such impletion is just and the party who has not been joined in the litigation by the plaintiff is either a necessary or a proper party. The exercise of discretion by the Court in cases where it satisfies the requirements of the rule would be made nugatory if the controlling authority would be the plaintiff by application of the rule of dominus litis. As a matter of fact, while considering as to whether impletion

of a party is necessary to pass an effective and executable decree, or to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit the Court is required to go into the question as to whether the discretion is to be exercised by it in the facts and circumstances of the case.

Point No.2

06. The distinction between a necessary party and a proper party is well known. In *Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another*, AIR 1963 SC 786, the apex Court held that a necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

07. In *Razia Begum v. Sahebzadi Anwar Begum and others,* AIR 1958 SC 886, the apex Court held that it is firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit, he should have a direct interest in the subject matter of the litigation whether it raises questions relating to moveable or immoveable property.

08. In a suit for partition, the plaintiff is bound to implead as defendant :

(i) the heads of all branches;

(ii) females who are entitled to a share on partition;

(iii) the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener;

(iv) if the plaintiff himself is a purchaser from a coparcener, his alienor.

The above are necessary parties and if any of them is not joined, the suit is liable to be dismissed. The entire joint family must be represented either expressly or implicitly. (Article 332 of Mulla Hindu Law). Article 332 further provides that it is desirable that the following persons should be made parties; though not necessary parties, they are proper parties to the suit:

(i) a mortgagee with possession of the family property or of the undivided interest of a coparcener;

(ii) simple mortgagees of specific items of the family property;

(iii) purchaser of the undivided interest of a coparcener;

(iv) persons entitled to provision for their maintenance and marriage, i.e., widows, daughters, sisters and such like and distinguished heirs;

(v) any person entitled to maintenance from the family.

The plaintiff may also implead any other coparcener or any person interested in the family property such as a mortgagee or a lessee. Such a person may himself apply and be made a party.

09. Reverting to the facts of the case and keeping in view the aforesaid principles, this Court finds that Somnath Dash was the common ancestor of the parties. He had two sons, namely, Prana Krushan and Bipin Bihari. The plaintiff and defendants are the descendants of the common ancestor. In paragraph 4 of the plaint, the plaintiff asserts that the suit property has been recorded jointly in the name of Prana Krushna and Bipin Bihari. The same has not been partitioned by metes and bounds. Defendant nos.1 and 2 in paragraph 14 of the written statement have stated that during life time of Prana Krushna Dash, he had sold some property for legal necessity. The said property cannot be the subject matter of partition without impleadment of the vendees.

10. The policy of law is to avoid multiplicity of proceedings. In an application for impleadment, the court has to see whether the intervenor is necessary or proper party to the suit. Learned trial court has not rendered any finding to that effect. The purchasers of the undivided interest of a coparcener are proper parties in the suit for partition, but not the son and daughter of the defendant no.3.

11. In the wake of aforesaid, the order dated 16.4.2015 passed by the learned 1st Additional Civil Judge (Sr. Divn.), Bhubaneswar in C.S. No.631 of 2013 is quashed. The learned trial court shall implead the purchasers of the undivided interest of the coparcener as defendants. The petition is allowed. No costs.

Petition allowed.

2017 (I) ILR - CUT- 668

DR. B.R. SARANGI, J.

W.P.(C) NO. 8888 OF 2005

SARAT CHANDRA DASH ……Petitioner

.Vrs.

ORISSA STATE COOPERATIVE AGRICULTURAL & RURAL DEVELOPMENT BANK LTD, & ANR. ……Opp. Parties

SERVICE LAW – Reversion – Originally the Petitioner was appointed as Jr.Asst and subsequently he was reverted to the post of Jr. Typist with a further direction for recovery of officiating allowance from him – Action challenged – Reversion made without following due procedure of law – Non compliance of the principles of natural justice – Moreover recovering of amount is bad as the petitioner discharged the duty in the higher post – Held, the impugned orders i.e. reverting the petitioner from the cadre of Jr. Asst. to Jr. Typist as well as for recovery of officiating allowance are quashed – Since the petitioner has already retired from service, he is entitled to the consequential financial benefits which should be granted to him within four months.

(Paras 22,23,24)

Case Laws Referred to :-

1. (1978) 1 SCC 248 : Maneka Gandhi v. Union of India
2. AIR 1965 SC 1767 : Bhagwan v. Ramchand
3. AIR 1975 SC 1331 : Sukdev Singh v. Bhagatram
4. AIR 1995 SC 1130 : State of U.P. v. Vijay Kumar Tripathi.
5. AIR 1981 SC 818 : Swadeshi Cotton Mills v. Union of India.
6. (2008) 16 SCC 276 : Nagarjuna Construction Company v. Government of Andhra Pradesh

For Petitioner : M/s. Sanjib Swain ,S.C.Panda & B.R.Rath
For Opp. Parties : M/s A.K.Mishra,S.Mishra, A.K.Sharma, M.K.Dash, P.K.Dash.
M/s.B.P.Pradhan (Addl.Govt.Adv.)

Date of argument: 24.03.2017
Date of Judgment: 24.03.2017

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner was appointed in Orissa State Cooperative Agricultural and Rural Development Bank Ltd., Bhubaneswar (OSCARD Bank) as

contingent Junior Assistant on 11.06.1982 along with others. While continuing as such, the committee of the OSCARD Bank made a resolution on 10.09.1986 approving the earlier resolution dated 23.01.1986 to regularize the services of the contingent employees in their respective posts. But, the Chief Administrator of the committee offered his dissenting views, and consequentially the matter was referred to the Registrar, Cooperative Societies, Orissa for final decision. The Registrar, Cooperative Societies, Orissa in Revision Case No.30 of 1986 vide order dated 18.06.1988 directed the OSCARD Bank authorities to regularize the services of contingent employees, as stood on 23.01.1986, and to implement the resolution of the committee dated 23.01.1986. Subsequently, in another meeting of the Board held on 25.05.1987, same view was reiterated to regularize the services of the contingent employees within a period of two months from 20.06.1987. Pursuant to such resolution and finding of the Registrar, Cooperative Societies, Orissa, the OSCARD Bank regularized the services of 14 contingent employees out of 22. The remaining eight contingent employees, including the petitioner, filed Misc. Case before the Registrar, Cooperative Societies, Orissa, who directed the OSCARD Bank to regularize the services of the eight contingent employees considering their length of service on compassionate ground, by observing that it would not be fair to throw them out of their service. As per the finding of the Registrar, the petitioner was required to be regularized against the post of Junior Assistant, but the OSCARD Bank instead of regularizing the services of the petitioner as Junior Assistant, appointed him in the post of Junior Typist.

2. Aggrieved by such action of the OSCARD Bank, the petitioner approached the learned Civil Judge (Jr. Division), Bhubaneswar in Title Suit No.13 of 1996, and after due adjudication, by order dated 10.03.1999, the court below directed opposite party no.1 to consider the case of the petitioner in the matter of regularization of service as against the post of Junior Assistant in compliance of the order dated 18.06.1988 of opposite party no.2 in Revision Case No.30 of 1986, giving retrospective effect, in letter and spirit. Consequentially, the petitioner's services were regularized retrospectively w.e.f. 18.06.1988. The order dated 10.03.1999 passed by the learned Civil Judge (Jr. Division), Bhubaneswar in Title Suit No.13 of 1996, having not been challenged before the higher forum, reached its finality.

3. As the petitioner was regularized as Junior Assistant w.e.f. 18.06.1988, his inter se seniority was fixed in the post of Junior Assistant below Smt. Sukanti Mishra, Jr. Asst. and above Sri Suresh Mohanty, Jr. Asst.

The Board of Directors in its resolution dated 14.10.1999 notified the action taken by the President of the OSCARD Bank on the basis of the order of the learned Civil Judge (Jr. Division), Bhubaneswar, and subsequently vide order dated 23.04.2003, the petitioner was allowed to officiate the promotional post of Senior Assistant by fixing his inter se seniority between Smt. Sukanti Mishra, Sr. Asst. and Sri Suresh Chandra Mohanty, Sr. Asst.

4. Thereafter, one Madhusudan Pattnaik working as Jr. Asst. in the OSCARD Bank approached this Court by filing W.P.(C) No. 5017 of 2003 challenging the action of opposite party no.1 for not considering his case for promotion. In the said writ petition, the petitioner was impleaded as opposite party no.3. This Court, after due adjudication of the writ petition, vide judgment dated 19.11.2004 quashed the portion of the order passed by the OSCARD Bank, by which the petitioner was regularized in the post of Jr. Asst. with retrospective effect, as well as his consequential officiating promotion as Sr. Asst., and further directed to re-fix his seniority at his own place from the date the order of regularization was passed, i.e., 16.09.1999. Consequentially, vide order no.401 dated 12.04.2005 the officiating promotion given to the employees of the OSCARD Bank including the petitioner in different grades was withdrawn from the date of issue of the order, and order no.403 dated 12.04.2005 was passed fixing the inter se seniority of the petitioner in the grade of Jr. Asst. below Sri Madhusudan Pattnaik, Jr. Asst. and Sri P.K. Sahani, Jr. Asst. with prospective effect from 16.09.1999.

5. Subsequently, the opposite party no.1 vide office order dated 10.06.2005, by misinterpreting the judgment of this Court, directed that in modification of the office order no.403 dated 12.04.2005, the office order no.4490 dated 16.09.1999 absorbing the petitioner as Jr. Asst. was quashed and the petitioner was reverted back to his former post as Jr. Typist w.e.f. 16.09.1999 and his inter se seniority was fixed in the rank of Jr. Typist below Chittaranjan Panda, Jr. Typist, and that the inter se seniority of Sri Madhusudan Panda, Jr. Asst. was fixed below Sri Rabindranath Mohanty, Jr. Asst and above Sri Prafulla Kumar Sahani, Jr. Asst. Further, vide office order dated 11.06.2005 direction was given for recovery from the petitioner the officiating allowance already received by him for the period from 1.5.2003 to 12.04.2005, during which he was officiating in the post of Sr. Asst., in twenty equal instalments starting from June, 2005 and onwards. Aggrieved by the said order, this application has been filed.

6. Mr. Sanjib Swain, learned counsel for the petitioner has submitted that the petitioner, having been appointed initially as Jr. Asst. and his services having been regularized pursuant to the order passed by the Registrar, Cooperative Societies in Revision Case No. 30 of 1986 dated 18.06.1988 and subsequent order passed on 10.03.1998 by the learned Civil Judge (Jr. Division), Bhubaneswar in T.S. No. 13 of 1996 giving retrospective effect from 18.06.1988, the subsequent action taken by the authority reverting the petitioner from Jr. Asst. to Jr. Typist w.e.f. 16.09.1999 without complying the principles of natural justice is bad in law. He has further submitted that the consequential direction given for recovery of the officiating allowance already paid to the petitioner for the period from 01.05.2003 to 12.05.2005, pursuant to order dated 11.06.2005, cannot also sustain in the eye of law. As such, there is wrong interpretation of the judgment dated 19.11.2004 passed by this Court in W.P.(C) No. 5017 of 2004, by which this Court only quashed the portion of the order, i.e., regularization of the petitioner in the post of Jr. Asst. with retrospective effect and consequential promotion as reflected in the order of officiating promotion. It is contended that the petitioner accepted the judgment dated 19.11.2004 passed in W.P.(C) No.5017 of 2003 and did not claim any retrospective regularization w.e.f. 18.06.1988, but absorption in service w.e.f. 16.09.1999 as Jr. Asst. in the grade. So far as officiating promotion is concerned, it is contended that since the petitioner has accepted the benefit of regularization as Jr. Asst with prospective effect, i.e., from 16.09.1999, and that he was discharging duty in the officiating promotion post, the allowance, which was received by the petitioner for discharging higher responsibility, should not have been recovered from him.

7. Mr. A.K. Mishra, learned counsel for opposite party no.1 strenuously justified the impugned orders passed by the authority concerned and contended that the petitioner was not entitled to get the benefit of promotional post of Sr. Asst. Therefore, any amount paid during officiating period has to be recovered from him. So far as reversion from the post of Jr. Asst. to Jr. Typist is concerned, it is contended that the same has been made in compliance of the judgment dated 19.11.2004 passed by this Court in W.P.(C) No. 5017 of 2003. Therefore, this Court should not interfere with the same at this stage.

8. Mr. B.P. Pradhan, learned Addl. Govt. Advocate has stated that the order dated 18.06.1988 passed by the Registrar, Cooperative Societies in Revision Case No.30 of 1986 is well within his competence and, as such, the same has to be implemented with letter and spirit.

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

10. The undisputed fact being that the petitioner got his appointment by the OSCARD Bank on 11.06.1982 as contingent Jr. Asst. along with others pursuant to resolution passed by the committee of the OSCARD Bank dated 10.09.1986 approving the resolution dated 23.01.1986 with regard to regularization of services of contingent employees. The Chief Administrator of the committee having given dissenting views, the matter was placed before the Registrar, Cooperative Societies and, as such, the Registrar in Revision Case No.30 of 1986 vide order dated 18.06.1988 directed the OSCARD Bank to regularize the services of contingent employees as stood on 23.01.1986. The relevant portion of the order of the Registrar Cooperative Societies dated 18.06.1988 is extracted below:

> *"However, I would like to observe that in view of the length of service these 8 contingent employees have put in the service of the Bank. I think the management may consider their cases on the ground of compassion. But at the same time the compassion should not and cannot be mis-placed. The services of a contingent employee who does not posses the regular eligibility for being appointed for the post against which he has been appointed in the first instance should not be regularized against that post. In consideration the length of service of these contingent employees have put in, it would be fair if the management considers favourable their cases to regularize their services against such posts for which these contingent employees passes the eligibility at the time of their first appointment. Really, it is unfortunate that the Bank has appointed a number of persons on contingent basis ignoring even the minimum qualification of services of such contingent employees is not permissible but because of the length of service they have put in on the ground of compassion, it would not be fair to throw these employees out of service. The above order shall not be cited as a precedent in future."*

11. Pursuant to such order, the OSCARD Bank regularized the services of 14 contingent employees out of 22. But, eight employees, including the petitioner, filed a Misc. Case before the Registrar and thereafter the Registrar directed the OSCARD Bank to regularize the services of those contingent

employees considering their length of service on compassionate ground. As per the finding of the Registrar, the services of the petitioner were required to be regularized as against the post of Jr. Asst., but he was given appointment in the post of Jr. Typist, which the petitioner challenged by filing T.S. No. 13 of 1996 before the learned Civil Judge (Jr. Division), Bhubaneswar. After due adjudication, learned Civil Judge passed order on 10.03.1999 directing opposite party no.1 to consider the case of the petitioner for regularization as against the post of Jr. Asst. The relevant portion of the order passed by the learned Civil Judge (Jr. Division), Bhubaneswar is extracted below:-

> *"That the suit is decreed in part on contest against the defendant, but in the circumstances without costs. The defendant is directed to reconsider the case of the plaintiff in the matter of regularization of his services as against the post of Junior Assistant in compliance with the order dated 18.06.1988 of the Registrar of Cooperative Societies in Revision Case No.30 of 1986 in letter and spirit within two months hence as per the observation made in the judgment."*

In compliance of the judgment and decree passed by the learned Civil Judge (Jr. Division), Bhubaneswar on 10.03.1999, opposite party no.1 vide order dated 16.09.1999 absorbed the petitioner in the post of Jr. Asst. w.e.f. 18.06.1988 in the identical scale of pay of Rs.950-20-1150-EB-25-1500/-. Subsequently, the petitioner was allowed to officiate in the next higher post as per the inter se seniority and allowed to discharge his duty as Sr. Asst. vide office order dated 23.04.2003, wherein the name of the petitioner found place at serial no.23. Such officiating discharge of duty in a higher post by the petitioner was challenged by one Madhusudan Pattnaik, Jr. Asst. before this Court in W.P.(C) No. 5017 of 2003. In the said writ petition, the petitioner was made opposite party no.3, and after due adjudication, this Court vide judgment dated 19.11.2004, passed the following order:-

> *"In that view of the matter, we quash that portion of the order of opposite party no.1 and 2 by which opposite party no.3 was regularized in the post of Junior Assistant with retrospective effect and his consequential promotion as in Annexures-13 and 14. Opposite party no.1 and 2 are therefore, directed to re-fix the seniority of opposite party no.3 vis-à-vis the petitioner and others and place him at his own place considering the seniority from the date the order of regularization was passed, i.e., 16.09.1999."*

12. In compliance of the said order of this Court, the retrospective regularization of services of the petitioner w.e.f. 18.06.1988 was modified and he was placed in the grade of Jr. Asst. below Sri Madhusudan Pattnaik, Jr. Asst. and Sri P.K. Sahani, Jr. Asst. with prospective effect from 16.09.1999. Thereafter, all on a sudden, vide order dated 10.06.2005, by misinterpreting the judgment of this Court dated 19.11.2004 in W.P.(C) No. 5017 of 2003, the petitioner, who was discharging the duty of Jr. Asst., was reverted back to his former post of Jr. Typist w.e.f. 16.09.1999 and his inter se seniority was also fixed in the rank of Jr. Typist below Sri Chittaranjan Panda, Jr. Typist, and also the inter se seniority of Sri Madhusudan Pattanaik, Jr. Asst., the petitioner in W.P.(C) No.5017 of 2003 was fixed below Rabindranath Mohanty, Jr. Asst. and above Sri P.K. Sahani, Jr. Asst. Further, vide order dated 11.06.2005, direction was given for recovery of officiating allowance paid to the petitioner for holding the higher post for the period from 01.05.2003 to 12.04.2005.

13. In course of hearing, pursuant to a query made by this Court with regard to the claim of regularization with retrospective effect from 18.06.1988, learned counsel for the petitioner candidly stated that the petitioner does not claim the retrospective promotion as Jr. Asst. from 18.06.1988, rather he has accepted his absorption as Jr. Asst. prospectively w.e.f. 16.09.1999. It is admitted that after regularization of services prospectively w.e.f. 16.09.1999, the entitlement of the petitioner was extended.

14. On perusal of the order impugned dated 10.06.2005 (Annexure-13) and consequential order dated 11.06.2005 (Annexure-14) for recovery the officiating allowance, it is apparent that the same were passed without complying the principles of natural justice, meaning thereby no opportunity of hearing was given to the petitioner for such reversion from the post of Jr. Asst. to Jr. Typist. The post of Jr. Asst. is a different cadre than that of Jr. Typist. If an employee is to be reverted back from one cadre to another, he has to be given opportunity of hearing and as such, the authority cannot revert the employee at its own will without complying the principles of natural justice and without following due procedure of law. On perusal of the order passed by the Registrar and the learned Civil Judge, as well as the judgment passed by this Court, nowhere it has been directed that the petitioner should be reverted back to the cadre of Jr. Typist from Jr. Asst., but on the other hand, the fact is very clear that the petitioner was initially appointed as contingent Jr. Asst. If the petitioner was appointed as Jr. Asst.

originally, subsequently the same cannot be changed in any manner without following due procedure of law and, more particularly, without complying the principles of natural justice.

15. Natural justice, another name of which is common sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that fundamental quality of fairness which being adopted, justice may not only be done but also appears to be done.

16. In ***Maneka Gandhi v. Union of India***, (1978) 1 SCC 248, the apex Court countered natural justice with 'fair play in action'. The soul of natural justice is 'fair play in action'.

17. In ***Bhagwan v. Ramchand***, AIR 1965 SC 1767, the apex Court held that the rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice.

18. In ***Sukdev Singh v. Bhagatram***, AIR 1975 SC 1331, the apex Court held that whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice.

19. In ***State of U.P. v. Vijay Kumar Tripathi***, AIR 1995 SC 1130, the apex Court held that it is important to note in this context the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principles of natural justice, but in that event, the validity of that rule may fall for consideration.

20. In ***Nagarjuna Construction Company v. Government of Andhra Pradesh***, (2008) 16 SCC 276, the apex Court held that what is meant by the term 'principles of natural justice' is not easy to determine. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

21. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the apex Court held that principles of natural justice are principles ingrained into

the conscience of men. Justice being based substantially on natural ideals and human values, the administration of justice here is freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. Principles/rules of natural justice are not embodied principles/rules. Being means to an end and not an end in them, it is not possible to make an exhaustive catalogue of such rules (principles). The principles of natural justice operate as checks on the freedom of administrative action. The observance thereof is the pragmatic requirement of fair play in action.

22. Applying the principles laid down by the apex Court, as discussed above, to the present context, nothing has been elucidated that, while reverting the petitioner from the cadre of Jr. Asst. to Jr. Typist by the order impugned dated 10.06.2005, minimum requirement of law of principles of natural justice was followed. The entire administrative action suffers from fair play in action. Subsequently, recovery of amount as directed vide order dated 11.06.2005 cannot sustain, in view of the fact that the petitioner, having discharged the duty in the responsible higher post, is entitled to officiating allowance. While entertaining this application, this Court vide order dated 27.09.2005 granted stay of recovery of the amount in question.

23. In view of such position, the order dated 10.06.2005 reverting the petitioner from the cadre of Jr. Asst. to Jr. Typist, as well as the order dated 11.06.2005 for recovery of the officiating allowance for the period from 01.05.2003 to 12.04.2005 suffers from vice of non-compliance of principles of natural justice. Therefore, the same, being not sustainable in the eye of law, deserve to be quashed and are hereby quashed.

24. Learned counsel for the petitioner states that during pendency of the writ petition, the petitioner has already retired from service on attaining the age of superannuation. Considering the same, this Court having quashed the orders dated 10.06.2005 and 11.06.2005 under Annexures-13 and 14 respectively, consequential benefits, as due and admissible to the petitioner, should be granted to him including the financial benefits, as expeditiously as possible, preferably within a period of four months from the date of passing of this order.

25. The writ petition is accordingly allowed. No order to cost.

Writ petition allowed.

2017 (I) ILR - CUT- 677

DR. B.R. SARANGI, J.

W.P.(C) NO. 9059 OF 2006

PRAFULLA KU. BHUYAN ……...Petitioner

.Vrs.

DIRECTOR OF ESTATES, G.A. DEPTT. STATE SECRETARIATE & ANR. ……Opp. Parties

ODISHA PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) RULES, 1988 – RULE-10

Whether the appellate authority has been empowered/conferred with any specific power to dispose of/dismiss an appeal preferred before it U/s. 9 of the OPP, Act 1972 in a summary manner without causing service of notice and without hearing the petitioner on merit ? – Held, No.

In this case the appellate authority dismissed the appeal preferred by the petitioner while rejecting his prayer for adjournment – Hence the writ petition – By use of the word "shall" in Rule 10(2) of the OPP, Rules 1988, the procedure is of mandatory character – Held, the impugned order passed by the appellate authority is quashed – The matter is remanded back to the appellate authority for fresh disposal in accordance with law. (Paras 11, 12)

Case Laws Referred to :-

1. Vol.67 (1989) CLT 85 : Prafulla Chandra Das v. Revenue Divisional Commissioner (Central Division), Cuttack,
2. Vol.76 (1993) CLT 475 : Bidyadhar Raul v. State of Orissa,

For Petitioner : M/s. S.Udgata, P.K.Nayak & T.K.Kamila
For Opp. Parties : Mr. P.K.Muduli, Addl. Govt. Adv.

Date of judgment : 28.02.2017

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, during his posting at Bhubaneswar, was allotted with a quarter and was allowed to retain the same, even after he was transferred to Puri, on the ground that his wife was suffering from heart ailment and his children were prosecuting their study.

2. The Estate Officer, General Administration Department-opposite party no.2 initiated proceedings under Section 4(1) of the Orissa Public Premises (Eviction of Unauthorized Occupants) Act, 1972 (for short "OPP Act, 1972") and posted the case to 25.03.2006 for filing of show cause. Even though show cause was filed on 25.03.2006, opposite party no.2, without giving reasonable opportunity of hearing, passed order dated 25.03.2006 in Case No.38 of 2006 (Q) directing to vacate Qrs. No.17/ER situated at Chandra-sekharpur, Bhubaneswar. Aggrieved by that order, petitioner preferred an appeal being Appeal Case No.35 of 2006 (Qr.) before the Director of Estates-opposite party no.1, which was dismissed vide order dated 21.06.2006, while rejecting the prayer for adjournment sought for by the petitioner, by confirming the order passed by the Estate Officer, without causing service of notice on opposite party no.2. Hence, this application.

3. Mr. Sanjeev Udgata, learned counsel for the petitioner states that the appeal preferred before the Director of Estates, against the order passed by the Estate Officer, being in the nature of First Appeal, the procedure envisaged under Rule 10 of the Orissa Public Premises (Eviction of Unauithorized Occupants) Rules, 1988 (for short "OPP Rules, 1988"), before admitting the appeal, has to be followed in its letter and spirit. Disposal/dismissal of the appeal preferred before the Director of Estates in a summery manner, without compliance of the provision of Rue 10 of the OPP Rules, 1988, cannot be held to be sustainable in the eye of law and, therefore, the order impugned cannot be allowed to stand. To substantiate his contention he placed reliance on the decision of a Division Bench of this Court in ***Prafulla Chandra Das v. Revenue Divisional Commissioner (Central Division), Cuttack***, Vol.67 (1989) CLT 85.

4. Mr. P.K. Muduli, learned Addl. Government Advocate contended that the petitioner, being in occupation of the government quarter even after his transfer to Puri, was to vacate the same. As he did not do so, steps for eviction of the quarter were taken in accordance with the provisions contained in OPP Act, 1972 and the Rules framed thereunder, since similarly situated persons were waiting to get allotment of the quarter in their favour. Therefore, the authority has not committed any illegality or irregularity in passing the order impugned in this writ application.

5. Heard Mr. Sanjeev Udgata, learned counsel for the petitioner, as well as P.K. Muduli, learned Addl. Government Advocate for the State-opposite parties, and perused the records. It appears that though the writ application

was filed in the year 2006, but no counter affidavit has been filed by the opposite parties as yet. Since the petitioner seeks for writ of certiorari, the writ application is being decided on the basis of the materials available on record itself.

6. The facts, as enumerated above, are undisputed. Therefore, only question which is to be examined is whether the order passed by the Director of Estates is in consonance with the provision contained in the OPP Act, 1972 read with OPP Rules, 1988. Section 2(g) defines "unauthorized occupation", which is extracted below:

> "*2(g) "**unauthorized occupation**" in relation to any public premises means the occupation by the person of the public premises without authority for such occupation and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever."*

7. The provisions of the OPP Act, 1972 and Rules framed thereunder further reveal that if the Estate Officer is of the opinion that any person is in unauthorized occupation of any public premises and he should be evicted, the Estate Officer shall issue notice in writing calling upon the person concerned to show cause as to why an order of eviction shall not be made. After considering the cause shown by such person, in pursuance of the notice issued under Section 4 of the Act, and any evidence he may produce in support of the same, and after giving him a reasonable opportunity of being heard, if the Estate Officer is satisfied that the public premises is in unauthorized occupation, he may make an order of eviction, for reasons to be recorded therein, and take steps in view of the provisions contained in Section 5 of the Act itself. Against such order of eviction passed under Section 5 of the Act, the appeal shall lie, in respect of any public premises situated within Cuttack and Bhubaneswar Municipal area and owned by the General Administration Department of Government, to the Director of Estates, Orissa under Section 9 of the Act. Every order made by the Estate Officer or appellate authority under the Act shall be final and shall not be called in question in any original suit, application or execution proceedings. Consequentially, the order passed by the Director of Estates is to be reached its finality.

8. Similarly, Section 14 clearly states that no suit or other proceeding in respect of matters or disputes for determining or deciding which provision is

made in this Act shall be instituted in any Court of Law, except under and in conformity with the provisions of this Act. It means, once an order under the Act attains finality under Section 10, Section 14 ousts the jurisdiction of Civil Court. In other words, if an authority having jurisdiction passes an order after giving adequate opportunity of hearing and the said order attains finality, in that case, suit is not maintainable. Similar question had come up for consideration before this Court in ***Bidyadhar Raul v. State of Orissa***, Vol.76 (1993) CLT 475, wherein the above view has been settled.

9. Section 17 of the Act states about the power to make rules, by which the State Government may, by notification, make rules for carrying out the purpose of this Act. In exercise of such power conferred by Section 17 of the Act, the State Government has framed the OPP Rules, 1988. Rule 10 thereof, which provides for procedure to appeal, is extracted below:

> *"10.* **Procedure in appeal**-*(1) the memorandum of appeal filed under Section 9 of the Act shall precisely state the grounds of objection to the order appealed against and shall be accompanied by a copy of such order.*
>
> *(2) On receipt of the appeal the appellate authority shall call for the records of the proceedings before the Estate Officer and such other particulars as may be required and shall appoint a date and time for the hearing of the appeal by sending notice thereof to the Estate Officer against whose orders the appeal is preferred and to the appellant as well as the authority concerned under whose administrative control the premises situates.*
>
> *(3) The appellant shall along with the memorandum of appeal, supply copies thereof to be served on the respondents."*

The aforesaid provisions, as provided in the statute, are mandatory in nature and are to be followed strictly. Therefore, the appellate authority has not been empowered to dispose of/dismiss an appeal preferred before it in a summary manner.

10. Sub-Rule-2 of Rule 10 specifically prescribes a particular mode of disposal of an appeal under Section-9 of the Act. According to it, on receipt of an appeal, the appellate authority shall have to follow the following procedure:

> "*(a) The records of the proceedings before the Estate Officer shall be called for along with such other particulars as may be required;*

(b) A date and time for hearing the appeal shall be appointed by sending notice thereof to the Estate Officer against whose order the appeal is preferred;

(c) Notice of the date and time of hearing shall be sent to the appellant;

(d) Such notice shall also be sent to the authority concerned under whose administrative control and premises situates; and

(e) As contemplated in sub-rule (3) copies of the memorandum of appeal shall be supplied so as to be served on the respondents."

The procedure which has been discussed above clearly indicates that it is complete by itself and does not admit of any departure to be made by the appellate authority. As such, it does not give any discretion to it to dismiss an appeal summarily without sending for the records and causing service of notice to the Estate Officer, as well as the authority concerned under whose administrative control the premises situates. There is also no other provision in the OPP Rules, 1988 authorising the appellate authority for summary dismissal of an appeal.

Similar question had come up for consideration before this Court in ***Prafulla Chandra Das v. Revenue Divisional Commissioner (Central Division), Cuttack and others***, 67 (1989) CLT 85, which has been relied upon by learned counsel for the petitioner, in which the above view has been settled.

11. In view of the aforementioned provisions contained in the OPP Act, 1972 and Rules framed thereunder and perusing the order impugned under Annexure-2 dated 21.06.2016 passed in Appeal Case No.35 of 2006 (Qr.), this Court is of the considered view that the appellate authority has not been conferred with any specific power to dispose of/dismiss an appeal preferred before it in a summary manner. The appellate authority has to comply with Rule 10 of the OPP Rules, 1988, as it clearly envisages, by use of the word "shall" in Sub-rule (2) of Rule 10, that the procedure is of mandatory character. Consequentially, the order impugned cannot be sustained and the appeal has to be remanded for fresh disposal in accordance with law in the light of discussions made in this judgment.

12. In the result, therefore, the writ petition is allowed, the order dated 21.06.2006 passed by the Director of Estates-opposite party no.1 in Appeal Case No.35/2006(Qr) is quashed and the matter is remanded back to the appellate authority for fresh disposal in accordance with law. No order as to cost. Writ petition is allowed.

2017 (I) ILR - CUT- 682

D. DASH, J.

W.P.(C) NO. 5148 OF 2012

BISWANATH DALEI ……..Petitioner

.Vrs.

PRINCIPAL CHIEF CONSERVATOR OF FOREST & ORS. ……..Opp. Parties

SERVICE LAW – Petitioner applied for the post of Forest Guard on contractual basis being a member of S.C. – He was wrongly treated as S.T. category candidate and passed in the Physical Standard Measurement Test by getting relaxation in height by 10 cm which is not available neither for the S.C. nor general category candidates – When the petitioner appeared in the viva voce Test and produced the documents for verification, the mistake was detected and his Candidature was rejected – Hence the writ petition – Admittedly the petitioner's name appeared in the written test result under ST category though he applied for the post as S.C. category – So if a mistake is committed in passing an administrative order the same may be rectified by the authority – No application of the principle of estoppel against the opposite parties – Held, action of the Opp. Party cannot be said to be arbitrary or discriminatory. (Paras 6)

Case Laws Referred to :-

1. (1997)6 SCC 266 : ICAR and Anr. vrs. T.K.Suryanarayan and Ors
2. (2006)8 SCC192) : (Union of India vrs. Bikash Kuanar

For Petitioner : Mr. D.Mishra, K.P.Mishra,S.Mohapatra, T.P.Tripathy & L.P.Dwivedy

For Opp. Parties : Mr. Bikram Senapati, (AGA)

Date of hearing : 22.02.2017
Date of judgment: 01.03.2017

JUDGMENT

D. DASH, J.

The petitioner by filing this writ application seeks a direction for consideration of his candidature in Schedule Caste (SC) category so as to be declared as qualified in the Viva Voce Test in the process of recruitment of contractual Forest Guards under Dhenkanal Forest Division held in the year 2006 and accordingly to give him the appointment against one such vacant post of contractual Forest Guard.

2. Facts necessary for the purpose are as under:-

Pursuant to the advertisement dated 31.07.2006 published in Odia daily "Sambad", the petitioner had applied for the post of Forest Guard on contractual basis under Dhenkanal Forest Division along with required documents. The petitioner is a member of Schedule Caste (SC) being Kaibarta (Dewar) by caste. He was qualified in the written examination held on 01.09.2006 and was next directed to attend the Physical Standard Measurement Test. Finally, he was asked to appear in Viva Voce Test by letter dated 03.10.2006 and to produce all the testimonials in original for verification. At that time for appearing in the Viva Voce Test when he produced the documents for verification, it was detected that in the provisional result of written test instead of mentioning the name of the petitioner under SC category, his name had been so mentioned under the category of Schedule Tribe (ST). However, he had the qualifying marks for being called to the next test even then as candidate of SC category. So despite the wrong mention of the category, the call for the next test was not faulty in as much as even being taken as SC category, he was to receive the said call. But in the Physical Standard Measurement Test, he was being treated as ST category candidate and sent up whereas there he would not have passed, had he been treated as SC category candidate as the relaxation in so far as the height is concerned was only available in respect of the candidates of ST category and none else and this petitioner had the shortfall in that. So, finally candidature of the petitioner having been rejected at that stage and he having not been allowed, the present writ application has been filed.

3. The opposite parties in the counter have pleaded that in the written test, for the candidates belonging to SC and ST categories, the qualifying marks has been fixed at 40%. The petitioner having scored 20.4 marks out of 50 marks had been qualified as SC candidate. It is next stated that inadvertently the petitioner had been shown as ST candidate in the provisional result of the written test and that having been further taken into account; he has been found to have passed in the Physical Standard Measurement Test. Thus, according to the opposite parties this would not have happened, had he been treated as a candidate of SC category since he got the advantage of the relaxation in height by 10 cm which was not available for General and SC candidate. This being said to have been inadvertently made, the same has later on been rectified and therefore his candidature was not considered. It is stated that the petitioner having known

this has also not pointed it out. He being well aware of the fact, took the advantage as ST category candidate to which he did not belong. Therefore, it cannot be claimed a matter of right that he has to be held to have passed the Physical Standard Measurement Test meant for the candidates of SC category though he is not passing it and the follow up action cannot be taken up accordingly.

4. Heard Miss S. Mohapatra, learned counsel for the petitioner and Mr. Bikram Senapati, learned Addl. Government Advocate.

5. Admittedly the petitioner is a member of SC category and he has so applied for his participation in the selection process for recruitment to the post of contractual Forest Guard held in the year 2006 under Dhenkanal Forest Division. He qualified in the written test having scored more than 40% as meant for both SC & ST candidates. However, the fact remains that in the next Physical Standard Measurement Test, the petitioner has been treated as a candidate of ST category and thus having got the relaxation in the minimum height prescribed had been asked to appear in the Viva Voce Test. This leads to two inferences i.e. either inadvertently being shown under ST category in the provisional result of written test or by perpetration of mischief so as to be given undue advantage. The petitioner had known about this that he instead of having the minimum height as required for SC candidates has got less than that but more than the requirement of height for the ST candidates and thus has been called for the Viva Voce Test. At this stage, on verification of the certificate, the petitioner having been found to have been treated as a ST category candidate during Physical Standard Measurement Test, in view of his name appearing in the provisional result of the written test as a candidate of ST category, he has not been further allowed to participate. As per the said test, he was found to have not passed through the Physical Standard Measurement Test as prescribed for SC Category candidate and accordingly has been held disqualified therefrom.

It is the trite law that if a mistake is committed in passing an administrative order, the same may be rectified and when the mistake is apparent on the face of the record, a rectification is permissible without even giving any hearing to the aggrieved party (***Union of India vrs. Bikash Kuanar;*** (2006)8 SCC192).

It has been held in case of ***ICAR and another vrs. T.K.Suryanarayan and others;*** (1997)6 SCC 266 that even a promotion granted by a mistake in ignorance of the service rule is capable of being rectified.

6. In the above factual and legal settings, here the action of the opposite parties can neither be said to be arbitrary nor discriminatory. Also their approach in the matter at the time of detection of the wrong be it committed inadvertently or mischievously, cannot be said to be unfair and deliberate so as to deny the petitioner of his legal right. The petitioner in any case is not permitted to take advantage of this wrong for whatever reason may it be, but certainly detrimental to the right of another causing deprivation to him. Rather had it not been so done even after detection or even saying it to have been an inadvertent action remaining unnoticed and without that going undetected, the final outcome in so far as the ST category candidates are concerned would have remained amenable to serious challenge with scathing attack that it was so made to accommodate the petitioner illegally in the pretext of inadvertent mistake or deliberate omission by taking him within ST category instead of SC category. Even assuming that without any mischievous intention, had it reached the finality as such, the petitioner's final engagement even if would have been so made, on being questioned would not have sustained as he would have been clearly found to have been illegally accommodated in ST category being of SC category. Thereby a candidate of ST category would have been deprived on being selected in place of the petitioner.

Moreover, in the present case, in view of the fact that the petitioner has made the application as SC category candidate, he having been held to have passed in the Physical Standard Measurement Test as a candidate of ST category in view of his name appearing in the written test result under that category, there cannot be application of the principle of estoppel against the opposite parties that they cannot remedy the wrong that too before culmination of the whole process.

Therefore, this Court finds that the submission of learned counsel for the petitioner that the action of the opposite parties is in the direction of victimizing the petitioner and as such arbitrary and discriminatory is not acceptable. The petitioner's claim in the matter is devoid of merit.

7. In the result, the writ application stands dismissed. In the peculiar facts and circumstance, there shall however be no order as to cost.

Writ application dismissed.

2017 (I) ILR - CUT- 686

S.PUJAHARI, J.

JCRLA . NO. 1 OF 2005

NARASINGHA SARABU @ LAHARA @ BINDHANI & ORS. .....Appellants

.Vrs.

STATE OF ORISSA .....Respondent

(A) PENAL CODE, 1860 – S. 300 (Exception-4) & 304

Absence of premeditation alone is not sufficient to attract exception 4 to section 300 I.P.C. – It must also be considered that the offender committed the culpable homicide without having taken undue advantage or without having acted in a cruel or unusual manner.

In this case there was no scuffle but the unarmed deceased was assaulted by the appellant-Damu with axe on the vital parts like head and chest and proved to be fatal – So it cannot be said that the said appellant acted without taking undue advantage of the situation and it can not be denied that he acted in a cruel and unusual manner – Held, there is no scope to bring the case of the appellant within the ambit of exception-4 to section 300 I.P.C. to attract section 304- I.P.C..

(Paras 16,17)

(B) CRIMINAL PROCEDURE CODE, 1973 – S. 154

F.I.R. – Murder Case – Whether delay of one day in lodging the F.I.R. is fatal to the prosecution case? – Held, No

It is only inordinate and unexplained delay which adds suspicion to the veracity of the prosecution case, may prove fatal to the case – Moreover, when evidence adduced by the prosecution is worthy of credence, without any suspicion, the delay factor becomes insignificant – Held, delay of one day in lodging F.I.R will not affect the probative value of the prosecution case. (Para 14)

(C) CRIMINAL TRIAL – Evidentiary value of enimical witness – Should not be brushed aside mechanically.

In this case P.W. 1, 9 and 11 are unequivocal that the appellant-Damu was armed with an axe and gave blows to the deceased – Admittedly P.W.1 was not pulling on well with the appellant-Damu, so credibility of his evidence challenged – Evidence of P.W.1 not only corroborated with the evidence of P.W.s 9 and 11 but also the medical evidence and other circumstantial evidence on record – Held, since this Court has not noticed any inherent improbability or infirmity in the

evidence of P.W1, the said animosity cannot be taken as a ground to affect the credibility of his evidence. (Para 13)

Case Laws Referred to :-

1. (2015) 60 OCR (SC) 1031 : Sanjeev vrs. State of Haryana.

For appellants : M/s. R.K. Prusty , B.C.Majhee, D.Das & S.R. Chhatoi.

For respondent : Mr. A.N. Das. (A.G.A)

Date of hearing : 05.01.2017
Date of judgment : 18.01.2017

JUDGMENT

S.PUJAHARI, J.

Challenge under this appeal is made to the judgment dated 07.10.2004 passed by the learned Addl. Sessions Judge, Nabarangpur in Sessions Case No.11 of 2002 convicting the appellants under Section 302/34 of the Indian Penal Code (for short "I.P.C.") and sentencing them to life imprisonment.

2. The case of the prosecution as unfolded during trial may be stated as follows :-

The appellants, namely, Narasingha Sarabu @ Lohara @ Bindhani and his wife – Sukumani @ Tunu Sarabu @ Lohara @ Bindhani of village- Duruaguda had visited the house of the appellant – Damu @ Dambarudhar Bhatra @ Gonda situated at village- Dengaguda on 22.06.2001. The deceased, namely, Padamsingh Dhakad had also visited the house of Damu on the same date, and at about 6 p.m. there ensued a quarrel between the appellants on one side and the deceased on the other, and in course of that quarrel, all the appellants assaulted the deceased and gave him a chase, and near a Mahula tree, all the appellants unitedly assaulted the deceased by means of axe and lathi resulting in his death. The appellants then threw the dead body of the deceased in the land of one Laxman Gonda of village- Pujariguda. On the next day, at 6 p.m., Nilam Bhatra, the brother of the appellant – Damu, lodged F.I.R. with police setting the law into motion. In course of investigation, the Investigating Officer conducted inquest over the dead body of the deceased, subjected the same to autopsy, examined material witnesses, effected seizure of incriminating objects and on completion of investigation laid charge-sheet against the appellants under Section 302/34 of I.P.C. before the learned Judicial Magistrate First Class, Umerkote. The case on being committed to the Court of Sessions, ultimately stood transferred to

the Court of the Addl. Sessions Judge, Nabarangpur for disposal according to law.

3. As the accused-appellants pleaded innocence and false implication, trial was held, in course of which the prosecution examined thirteen witnesses in toto and produced documentary evidence vide Exts.1 to 17. The seized incriminating objects were also produced during the trial vide M.Os.I to X. From the side of the defence, appellant- Sukumani @ Tunu Lohara was examined as the sole witness. The learned trial court on evaluating the materials on record found all the appellants guilty under Section 302/34 of I.P.C. and returned the verdict of conviction and sentence which is under challenge in this appeal.

4. It is the submission of the learned counsel for the appellants that the prosecution witnesses, especially the P.Ws.1, 3, 8, 9 and 11 who are projected to be the eyewitnesses to the incident, being at wide variance on material particulars, and the informant (P.W.1) being admittedly inimical to the appellants, the learned trial court ought not to have reposed confidence in their testimonies. He further pointed out that the delay in lodging the F.I.R. has not been explained much less satisfactorily and the said aspect has not been properly dealt with by the learned court below. His ultimate contention is that the prosecution having not been able to prove its case beyond reasonable doubt by legal evidence, either direct or circumstantial, the impugned judgment is vulnerable and liable to be set-aside.

5. The learned Addl. Government advocate appearing for the State, however, supported the verdict of the trial court on the ground that the same is based upon appreciation of evidence in right perspective. He sought to repel the contention of his adversary by advancing argument that discrepancies and contradictions being natural to occur in human testimony, and unless the same strike at the root of the prosecution case, the Court instead of being influenced by them or discarding the same in entirety should separate the grain from chaff while appreciating the total evidence on record. According to him, the learned trial court has dealt with each and every aspect of the contentions raised by the defence and arrived at a just finding and conclusion, and hence, there is no scope for interference by this Court.

6. Having regard to the rival contentions, we have gone through the evidence on record. At the outset, the evidence of the P.W.10 who conducted autopsy over the dead body of the deceased, is gone through. He has deposed that on 24.06.2001 on conducting the autopsy he found the following external injuries :-

"i) Incised wound over the head on backside of size 5 c.m. x ½ cm bone deep.
ii) One incised injury over the right arm just above the elbow on the backside.
iii) One incised injury over left side of chest and root of the neck of size 4 cm x 1 cm x muscle deep fracturing the left clavica and left side muscle.
iv) One abrasion on the right great to of size 2 cm x 1 cm x skin deep.
v) One bruise four in number on the back of size 6cm x 1 ½ cm x skin deep.
vi) One bruise over right arm of size 4 cm x 1 cm x skin deep.
vii) A bruise over left arm of 4 cm x 1 cm x skin deep."

Ext.11 is the report of the P.W.10. His opinion is that the cause of death was due to cardio respiratory failure due to the injuries on head and chest corresponding to injury nos.(i) and (iii) above which were possible by axe. As it appears, during course of investigation, the Investigating Officer produced the seized weapons of offence, namely, two number of axes besides lathis and wooden planks, and on examining those objects, the P.W.10 affirmed the injury nos.(i), (ii) and (iii) being possible by the seized axes and the rest of the injuries by wooden planks and lathi. His written opinion in this regard has been marked as Ext.12. The P.W.10 has been subjected to cross-examination by defence and there appears nothing to deny or dispute that the death of the deceased was homicidal in nature being caused by the injuries inflicted by axe blows.

7. The informant – P.W.1 is no other than the brother of the appellant – Damu. His evidence is that on the relevant date at about 6 p.m. while he was returning home from labour work he found appellants – Tunu and Narasingha assaulting the deceased by means of a piece of wood and axe respectively and all the appellants chasing the deceased. He further stated in specific that his brother – Damu was armed with axe by means of which he gave a blow to the deceased and the deceased on receiving the assault fell down in a cultivable land. In paragraph-4 during his cross-examination the defence elicited that he had seen his brother – Damu giving blow to the deceased, and the deceased running away, and that he did not see anything else. It has further been elicited from him during cross-examination that he is not pulling on well with his brother – Damu owing to some land disputes and also for the reason that Damu having left his wife has kept a girl of a different community, i.e., the community of the appellant – Narasingha Lohara.

8. The evidence of P.W.3 is that one day at about 4 p.m. while he was returning from work he found the appellants giving blows to the deceased and the deceased ran towards a Mahua tree. The defence during cross-examination elicited from him that there was disturbance in the house of the appellant – Damu, and that while being inside his own house he could not see the disturbance that occurred inside the house of the appellant – Damu. A scrutiny of the evidence of P.W.3 does not rank him as an eyewitness to the case incident.

9. The P.W.8 in his evidence-in-chief deposed that while the appellants – Damu and Narasingha were giving blows to the deceased by means of axe, the other appellant – Tunu was found empty handed. During cross-examination, however, he admitted that he has not seen any blows being given to the deceased, inasmuch as he was inside his house and the incident was not visible from inside his house.

10. P.W.9 has claimed his direct knowledge that he saw the appellant – Damu giving blows to the deceased by means of an axe and that when the deceased ran towards a Mahua tree, the appellants chased him. During cross-examination he reiterated his claim that he saw Damu giving blows and that he did not see anything further after the deceased ran towards Mahua tree.

11. The evidence of P.W.11, another co-villager of the appellants, is that one day in the evening while he was inside his house, on hearing hullah he came out and saw the appellant – Damu being armed with an axe, Narasingha with a bamboo stick and Tunu with a piece of wood chasing the deceased while giving blows. He further deposed that the deceased ran towards a Mahua tree and that Damu gave blows to the deceased by the axe, and the deceased died there on receiving the blows. He further added that on the next day morning the villagers found the dead body lying at the spot. During cross-examination it was elicited from him by the defence that the place of assault was about half furlong away from his house and that he had seen the deceased being chased upto a Mahua tree. It is also there in his evidence that the assailants returned to village from that Mahua tree whereas the dead body of the deceased was traced at a spot about two kilometers away from his house. The defence despite cross-examination has not been able to shake the claim of the P.W.11 that the appellant – Damu dealt axe blows to the deceased resulting in his death. Of course, the P.W.11 has expressed his ignorance as to how the dead body of the deceased was found at a different place at a distance. In this context, a reference may be made to the evidence

of the Investigating Officer (P.W.12) who in paragraph-4 of his cross-examination has specified that the Mahua tree where the assault took place is about 200 feets away from the house of the appellant - Damu and the spot where the dead body was found lying is about 3/4th kilometer from the Mahua tree.

12. A scrutiny of the evidence of the aforesaid witnesses would show that there is a lack of coherence and consistency as to what nature of weapon was held or used by the appellants – Narasingha and Tunu, and to reiterate, according to P.W.11, Tunu was empty handed. The learned trial court failed to take note of the above features while appreciating the evidence. As already stated, the medical evidence is that the death of the deceased was due to the injuries inflicted by axe, and with the available evidence on record, it cannot be held beyond reasonable doubt that the appellants – Tunu and Narasingha inflicted any fatal injury much less with the requisite intention or knowledge to cause death of the deceased or that they shared common intention with the other appellants to cause death of the deceased. The appellants – Tunu and Narasingha, in our opinion, are entitled to benefit of doubt.

13. P.Ws.1, 9 and 11 are unequivocal that appellant – Damu was armed with axe by means of which he gave blows to the deceased. Admittedly, P.W.1 was not pulling on well with the appellant – Damu, but his evidence being corroborated by direct evidence of P.Ws.9 and 11 as well as the medical evidence and other circumstantial evidence on record and no inherent improbability or infirmity in his evidence having come to our notice, the said animosity cannot be taken as a ground to affect the credibility of his evidence.

14. Admittedly, there is delay of one day in lodging the F.I.R., but delay by itself is not always fatal to the prosecution. It is only inordinate and unexplained delay which adds suspicion to the veracity of the prosecution version and may prove fatal to the case. But, when the evidence produced by the prosecution regarding the incident is worthy of credence admitting of no suspicion, and the facts sought to be proved are proved to the hilt, the delay factor becomes insignificant. Be that as it may, in the case at hand, it would be noticed from the evidence of the P.W.1 and other materials on record that the deceased had been driven out of the village due to his some past nefarious activities and was moving here and there like an insane person. There is also nothing on record to show that there was any person near or dear to him to be sensitive of his plight and death. In the circumstances, the delay of one day in

lodging the F.I.R. with police is no way affects the probative value of the prosecution case.

15. It is further argued by the learned counsel for the appellants that there being no evidence on record to show as to how the dead body of the deceased was found lying at a spot different from the spot of assault, there arises suspicion about the cause of the death of the deceased. To reiterate, it has been elicited by the defence from the P.W.13 that the spot where the dead body was found was only 3/4th kilometer from the Mahua tree where the assault took place to the notice of the independent witnesses. The direct evidence on record is that the appellant – Damu dealt axe blows to the deceased causing his death, and the medical evidence also lends assurance to the prosecution case that the death was caused due to the incised wounds on head and chest which were possible by axe. In that view of the unimpeachable evidence on record, the point raised on behalf of the appellants does not merit any consideration.

16. The contention next advanced by the learned counsel for the appellants is that there being nothing to suggest any premeditation, and the alleged incident having stemmed from a sudden quarrel, that too, out of provocation actuated by the deceased, the offence cannot be brought within the definition of 'murder'. To put in other words, according to the learned counsel, the case is covered by the exception 4 to Section 300 of I.P.C., and at best Section 304 of I.P.C. may be attracted. In the context, he has made a reference to the evidence of the defence witness and the elicitation made from the P.W.13 during cross-examination. In support of his contention, he has also placed reliance on a decision of the Apex Court in the case of ***Sanjeev vrs. State of Haryana,*** (2015) 60 OCR (SC) 1031.

17. In the case of ***Sanjeev (supra),*** both the appellant and the deceased being drunk engaged in an altercation leading to a scuffle and the appellant in that course caused injuries to the deceased. Further, in the same incident, the appellant had also received one incised wound on his person. In the facts and circumstances, the case at hand is distinguishable. Here, the deceased was not armed with any weapon nor there is any material on record to suggest that either there was any scuffle or the deceased caused any injury to the assailant (Damu) who evidently was armed with axe and by that weapon he inflicted injuries to the deceased on giving him chase. It is also pertinent to mention here that absence of premeditation alone is not sufficient to attract the exception 4 to Section 300 of I.P.C. It must also be shown that the offender committed the culpable homicide without having taken undue advantage or

without having acted in a cruel or unusual manner. The fact scenario as depicted from the evidence on record shows that because the deceased sat on a Charpoi (cot) where the appellant – Tunu was lying, the quarrel ensued and the unarmed deceased was assaulted with axe on the vital parts like head and chest which proved fatal. In that view of the manner and nature of the indulgence, it cannot be said that the appellant – Damu acted without having taken undue advantage of the situation. Equally, it cannot be denied that he acted in a cruel and unusual manner. We find no scope to bring the case within the ambit of any exception.

18. The ultimate conclusion is that the conviction of the appellants, namely, Narasingha Sarabu @ Lohara @ Bindhani and Sukumani @ Tunu Sarabu @ Lohara @ Bindhani being not sustainable in law is hereby set-aside, and the impugned judgment in so far as it relates to the conviction of the appellant – Damu @ Damburudhar Bhatra @ Gonda under Section 302 of I.P.C. and the sentence awarded to him stands confirmed. The common appeal filed by all the three appellants is disposed of accordingly. The appellants, namely, Narasingha Sarabu @ Lohara @ Bindhani and Sukumani @ Tunu Sarabu @ Lohara @ Bindhani be set at liberty forthwith if their further detention in custody is not required for any other case. L.C.R. received be sent back forthwith along with a copy of this Judgment.

Appeal disposed of.

2017 (I) ILR - CUT-693

BISWANATH RATH, J.

C.M.P. NO. 438 OF 2016

STATE OF ORISSA ……..Petitioner

.Vrs.

BIRANCHI NARAYAN DAS & ORS. ……..Opp. Parties

(A) Doctrine of Merger – High Court passed order allowing the writ petition – Order challenged before the Apex Court – Apex Court confirmed the order with certain directions – Order of the High Court merged with the order of the Apex Court, being the superior authority.

(Para 7)

(B) CIVIL PROCEDURE CODE, 1908 – O-45, R-15

High Court order merged with the order of the Apex Court – Execution of the order – Since the execution proceeding involved execution of the order of the Apex Court it is to be filed before the High Court, from which order appeal preferred to the Apex Court, following the provisions contained in Order 45, Rule 15 C.P.C.

In this case order of the Apex Court put to execution before the Registrar (Judicial) of the High Court under chapter XXVIII of the Rules of the High Court of Orissa, 1948 and the Registrar disposed of the same vide Order Dt. 10.02.2016 which is under challenge in this Civil Miscellaneous Petition – Held, the Registrar being incompetent to deal with the above execution case, all the impugned orders passed by him are set aside – Direction issued to the Registry to place the execution proceeding before the assigned Bench of this Court for disposal. (Para 17)

(C) CONSTITUTION OF INDIA, 1950 – ART-227

Order of the Apex Court put to execution before the Registrar (Judicial) of this Court under chapter XXVIII of the Rules of the High Court of Orissa, 1948 – Registrar disposed of the Execution Case vide Order Dt. 10.02.2016 – Such order challenged before this Court in C.M.P. No. 438 of 2016 – Maintainability of the CMP questioned –Since the CMP is directed against the order of the Registrar High Court and the action of the Registrar being an action of a Court subordinate to the High Court, the High Court can exercise its power of superintendence under Article 227 of the Constitution of India against that order – Held, the Civil Miscellaneous Petition is maintainable. (Para 16)

Editorial Note

The Judgment Dt. 21.12.2016 passed by this Court in C.M.P. No. 438 of 2016 was challenged before the Supreme Court of India in petition for Special Leave to Appeal (C) No. 4464/2017, wherein the Apex Court vide order Dt. 28.02.2017, while not inclined to interfere with the order passed by this Court, directed that the execution application filed for execution of the order passed by the Apex Court be dealt with by the High Court on the judicial side and decide the same expeditiously in accordance with law, preferably within three months.

Case Laws Referred to :-

1. 2006 SCC 359 : Kunhya Mamed & Ors. vrs. State of Kerala & Anr.
2. 2006 (1) SCC 212 : Satru Charl, Vijay Rama Raju vrs. Nimmaka, Jaya, Raju & Ors.

3. (2014) 14 SCC 102 : Sri Ram Builders vrs. State of Madhya Pradesh & Ors.
4. (2015) 9 SCC page-1 : Jogendra Singhji, Vijay Singhji vrs. State of Gujarat & Ors.
5. 2015 (7) SCC 373 : Himalayan Cooperative Group Housing Society vrs. Balbin Singh & Ors.
6. (2015) 5 SCC 432 : Radheshyam & Ors. vrs. V. Chabinath & Ors.
7. 2016 (4) SCC 696 : Bussa Overseas and properties (pvt.) Ltd. vrs. Union of India.
8. AIR 1975 Bombay 182 : Jhaman Karan Singh Dadalani vrs. Ramallal Maniklal Kantabala.
9. Vol.66 (1988) CLT 302 : Benet Coalman & Co. Ltd. & Ors. vrs. J.B.Patnaik & anr.
10. AIR 1958 SC 868 : CIT v. Amritlal Bhogilal and Co.
11. (2015) 5 S.C.C.-423 : Radhey Shyam & another vrs. Chhabi Nath & Ors.

For Petitioner :Mr. B.N.Bhuyan, Addl. Govt. Adv.

For Opp. Parties :M/s. R.K.Mohanty, Sr. Adv., S.K.Biswal, A.K.Baral & J.Khilar

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Date of hearing : 14.12.2016
Date of Judgment : 21.12.2016

JUDGMENT

BISWANATH RATH, J.

This is a Civil Miscellaneous Petition filed under Article 227 of the Constitution of India assailing the impugned order dated 10.2.2016 passed by the Registrar (Judicial) of this Court exercising his power under Chapter XXVII of the Rules of the High Court of Orissa, 1948 in the Execution Proceeding No.2/2015, vide under Annexure-8.

2. The Civil Miscellaneous Petition being entertained, notice was issued to the opposite parties keeping the question of maintainability of the Civil Revision open to be taken up in the final disposal of the Civil Miscellaneous Petition. On their appearance, the opposite parties at the threshold of the matter pressed for deciding the question of maintainability of the Civil Miscellaneous Petition ahead of the decision on other issues involved.

3. Sri B.N.Bhuyan, learned Additional Government Advocate appearing for the petitioner-State, referring to the orders involving the present dispute, i.e., one passed by the High Court of Orissa dated 21.5.2009 in disposal of

O.J.C.No.11342/2000 and the subsequent order being passed by the Hon'ble apex Court dated 9.1.2013 in disposal of S.L.P.(C) No.32998 of 2009, submitted that there involves two different orders and looking to the prayer made in the Execution Proceeding submitted that there remains no doubt that the Execution Proceeding confined to the direction of the Hon'ble apex Court dated 9.1.2013 in the S.L.P.(C) No.32998 of 2009 and in this view of the matter, strenuously urged that no Execution Proceeding was lying to the Registrar of the High Court following the Chapter XXVIII of High Court of Orissa Rules, 1948 instead an Execution Proceeding following Order 45 Rule 15 was lying and accordingly submitted that the Execution Proceeding so initiated cannot be deemed to be a proceeding under Chapter XXVIII of Rules of the High Court of Orissa. Under the circumstance and as the Registrar here being subordinate to the High Court exercised power not vested in him, his orders can be assailed by way of Civil Miscellaneous Petition under Article 227 of Constitution of India for scrutiny of the High Court in its Civil Miscellaneous Petition jurisdiction side.

Assailing the impugned order, Sri B.N.Bhuyan, learned Additional Government appearing for the petitioner, going away from the grounds of challenge in the Revision made legal submission challenging the initiation of the execution proceeding itself and contended that looking to the prayer made in the Execution Petition No.2/2015, it appears, the execution proceeding was initiated under the provision of Chapter XXVIII Rule-1 of the Rules, 1948 read with Order XXI Rule-11(2) of the Code of Civil Procedure, 1908 for execution of the order of the Hon'ble apex Court dated 9.1.2013 passed in S.L.P.(C) No.32998 of 2009. For the provision contained in Chapter XXVIII Rule-1 of the Rules, 1948 and the provision contained in Order 45 Rule 15 of Civil Procedure Code. Sri Bhuyan, learned Additional Government for the petitioner contended that since the Execution Proceeding involved the execution of the order of the Hon'ble apex Court dated 9.1.2013 in S.L.P.(C) No.32998 of 2009, it should have been initiated following the provision contained in Order 45 Rule 15 of C.P.C. to the court from which the appeal to the apex Court was preferred and following the provision under Order 45 Rule 15(2), such court receiving the execution proceeding was required to transmit the decree or order of the Hon'ble apex Court to the court, which passed the first decree, appeal from all such decree or order would direct for execution of the same. Finally, Sri B.N.Bhuyan, learned Additional Government Advocate, urged that the Registrar of the High Court was taking up the Execution Proceeding without competency, here was functioning as a

court subordinate to the High Court and under the circumstance, the present Revision is maintainable and hence requested this Court for interfering with the impugned order and set aside the same.

To substantiate his argument, Sri Bhuyan, learned Additional Government Advocate for the petitioner, relied on decisions in the case of ***Kunhya Mamed & others vrs. State of Kerala & another*** reported in 2006 SCC 359, ***Satru Charl, Vijay Rama Raju vrs. Nimmaka, Jaya, Raju and others*** reported in 2006 (1) SCC 212, ***Sri Ram Builders vrs. State of Madhya Pradesh and others*** reported in (2014) 14 SCC 102, ***Jogendra Singhji, Vijay Singhji vrs. State of Gujarat and others*** reported in (2015) 9 SCC page-1, ***Himalayan Cooperative Group Housing Society vrs. Balbin Singh and others*** reported in 2015 (7) SCC 373, ***Radheshyam and others vrs. V. Chabinath and others*** reported in (2015) 5 SCC 432, ***Bussa Overseas and properties (pvt.) Ltd. vrs. Union of India*** reported in 2016 (4) SCC 696.

4. Sri R.K.Mohanty, learned senior counsel appearing for the opposite parties, though did not dispute that the Execution Proceeding is directed involving the direction of the Hon'ble apex Court and that the prayer involved therein is also in terms of direction of the Hon'ble apex Court but contended that there is ultimate merger of the direction of the Hon'ble apex Court in the order passed by the High Court of Orissa in O.J.C. No.11342/2000 and it cannot be construed that the Execution Proceeding involved the independent direction of the Hon'ble apex Court. Sri Mohanty, learned senior counsel for the opposite parties, further submitted that even assuming that the order of the Hon'ble apex Court is put to execution following the provisions contained in Order 45 Rule 15, the Execution Proceeding was required to be filed in this Court and therefore, the Execution Proceeding has been rightly entertained by this Court. Sri Mohanty further contended that nomenclation of the Execution Proceeding is immaterial and claimed that ultimately, the intention of the party through his pleadings should be the paramount consideration. In the event, the petitioner is aggrieved by any order in the Execution, for the provision contained in Sub-Rule 7(iii) of the Chapter XXVIII of the Rules of the High Court of Orissa, 1948, an appeal as against this order shall lie to the Division Bench of this Court and thus, the Civil Miscellaneous proceeding under Article 227 of Constitution of India is not maintainable.

Sri Mohanty, learned senior counsel for the petitioner, substantiating his argument on the question of maintainability of the Civil Miscellaneous

Petition under Article 227 of the Constitution of India relied on decision in the case of ***S. Sesagiri Rao (petitioner)*** reported in AIR 1966 Andhra Pradesh 167, ***Jhaman Karan Singh Dadalani vrs. Ramallal Maniklal Kantabala*** reported in AIR 1975 Bombay 182, ***Benet Coalman & Co. Ltd. & others vrs. J.B.Patnaik and another*** reported in Vol.66 (1988) CLT 302.

5. Now coming back to the case at hand, it appears that the present opposite parties filed a writ petition bearing O.J.C. No.11342/2000 in the High Court of Orissa seeking a command against the opposite parties therein and the present petitioner to re-transfer and convey the lands belonging to the petitioners and /or allot land of equivalent area in exchange of land taken from the petitioners and utilizes for town planning scheme-II, Nayapalli (North) which stands abandoned/dropped. This writ petition was heard finally and disposed of with the following direction :-

> "In view of the facts and circumstances of the case, we allow this writ petition and direct the opposite party no.1 to allot to the petitioner equivalent extent of land (Ac.1.837 dec.) in exchange having the similar potential value which they have counted within a period of three months from the date of production of a copy of this order and the other opposite parties are directed to execute the order to be passed by opposite party no.1 in compliance of this order."

6. The State Government, the present petitioner being aggrieved by the direction of the High Court, as indicated herein above, filed S.L.P.(C) No.32998/2009, which matter upon hearing both the sides though was dismissed for having no valid and legal ground for interference by order dated 9.1.2013 but with the direction as follows :-

> "Heard learned senior counsel for the petitioner State, respondents and perused the relevant material.
>
> We do not find any valid and legal ground for interference. The special leave petition is dismissed.
>
> However, the petitioner is granted three months' time to comply with the order of the High Court.
>
> In case if the State finds no suitable land, as suggested by the High Court, they are permitted to pay the market value prevailing as on date to the parties concerned."

7. Consequent upon dismissal of the S.L.P. and as the order of the Hon'ble apex Court contained a positive direction in addition to the direction contained in the disposal of the writ petition by the High court of Orissa, the present opposite parties filed CONTEMPT. PET.(C) No.202/2013 in the Hon'ble apex Court. Leaving apart the developments taken therein remaining unnecessary for the purpose of the present case, it is worth mentioning here that Hon'ble apex Court while dropping the Contempt Petition by order dated 28.1.2015 passed the following direction :-

> "Having heard learned counsel for the rival parties for a considerable length of time, on different dates of hearing, we are of the view, that it is not possible to hold the respondent guilty of deliberate and willful disobedience of any Court order. We accordingly, drop contempt proceedings initiated against the respondent, and discharge the notice issued to the respondent on 2.7.2013.
>
> Despite the observations recorded herein above, it shall be open to the respondents (in the main petition), to execute the order passed in their favour, in accordance with law.
>
> The contempt petition is disposed of in the above terms."

Answering the submission made by Sri Mohanty, learned Senior Counsel that for the observations made by the Hon'ble Apex Court, the order of the Hon'ble Apex Court merged in the order of the High Court, this Court observes that it is rather the merger of the High Court order in the order of Hon'ble Apex Court and not the vice versa. In the case of ***CIT v. Amritlal Bhogilal and Co***, *AIR 1958 SC 868*, the Hon'ble Apex Court held that as a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement. Similarly, in the case of ***State of Madras v. Madurai Mills Co. Ltd***., the Hon'ble apex Court again held that the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order. This submission of Sri Mohanty found to be contrary to the settled position of law.

8. It appears, following the decision of the Hon'ble apex Court, the opposite parties, i.e., the decree holders preferred the Execution Petition No.2/2015 appears to be a petition under Chapter XXVIII of High Court of Orissa Rules, 1948 in the High Court of Orissa seeking the following relief :-

> "In the above facts and circumstances, this Hon'ble Court may be pleased to issue process on the judgment debtor fixing the time for the payment of Rs.32,49,75,000/- (rupees thirty two crores forty nine lacs seventy five thousand only) with future interest @ 12% to the decree holders.
>
> Failing the compliance of the same by the judgment debtor within time fixed, Hon'ble Court may be further pleased to realize the amount in accordance with the provision of Order XXI Rule-11(2) of the Code of Civil Procedure read with Chapter-XXVII Rule-1 of the High Court of Orissa, 1948, i.e., at the 1st instance by realizing the above said amount by attachment and sale of the immovable properties and attachment of Bank A/c as stated above.
>
> And may be pleased to pass any other order/orders as may be deem fit and proper.
>
> And for this act of kindness the decree holder as in duty bound shall ever pray."

9. The Execution Petition was registered as E.P. No.2/2015 and the Registrar of this Court while exercising his power under Chapter XXVIII of High Court of Orissa Rules, 1948 and vide his order dated 10.2.2016 passed the following :-

> "This order arises out of an application under Chapter XXVIII of the Rules of the High Court of Orissa, 1948 in terms Order XXI Rule 11 of the Code of Civil Procedure, 1908 and several affidavits exchanged between the parties. Those affidavits have hardly any significance before the Executing Court, which does not possess any jurisdiction except for the purpose of execution, discharge and satisfaction of the order sought to be executed. Along with the application for execution, the Decree Holders have filed several documents, for execution of the Order dated 21.5.2009 passed in OJC No.11342 of 2000, which stood modified by the Order dated 9.1.2013 passed in SLP (Civil) No.32998 of 2013. In fact the Hon'ble apex

Court while dismissing the Special Leave Petition at the instance of the Judgment Debtors, way back in 2013 was pleased to observe that if State finds no suitable land as suggested by the High Court, they are permitted to pay the market value prevailing as on date to the parties concerned and granted three months time for compliance of the Order of High Court. More than three months time for compliance of the Order of High Court. More than three years have passed in the meantime. It is found that in OJC No.11342 of 2000, the Hon'ble Court directed the opposite party No.1 (Jdr), to allot equivalent extent of land (Ac.1.837 situated in Mouza Jayadev Vihar and Mouza Sahid Nagar at Bhubaneswar), in exchange, having similar potential value. As regards money value, the Decree holders have stated that the Bench mark value of those plots is Rs.12 Crore per acre. Regard being had to the question of determination of similar potential value, by order dated 11.3.2014, the Apex Court appointed an Arbitrator to determine the 'market value prevailing as on date', on the basis of which the Report was submitted indicating the market value. Finally, when the Dhrs approached in Contempt Petition No.202 of 2013, by order dated 28.1.2015, it was observed by the Apex Court that the respondents in the main petition may execute the order in their favour. There is no point in harbouring in between 'potential value' and 'market value' since the amount is to be paid in exchange of the land value as on date. Dhrs have urged that they are entitled to Rs.25,71,80,000/-, calculated @ Rs.14 Crore per acre besides interest @ 12% per annum. Perused the Bench mark valuation in respect of different plots in Mouza : Jaydev Vihar and Shampur (the proposed alternative site) submitted by Dhrs along with memo dated 2.12.2015, which obviously was prepared for collection of stamp duty. Market Value may be little more or less than the Bench mark Value. It is submitted that the Report of the Arbitrator submitted before the Apex Court, having not been set aside holds good for recovery of the amount at such rate. But then, the Jdrs. disputed that there is no material to indicate that such report was accepted. A moot question arises now that such report partakers the character of an Award inasmuch as the Apex Court appointed the Arbitrator for such purpose. Value has been determined accordingly, Jdrs have failed to point out that the Award is not enforceable. Parties have exchanged affidavits at random and it has been contended by the Jdrs, in their affidavit dated 9.2.2016 that this Court should direct the

Dhrs to accept the alternative site at Shampur. This Court has no jurisdiction for passing that kind of direction as indicated in the said affidavit. On the other hand, the Jdrs are directed to deposit that amount claimed by the Dhrs, by 24.2.2016, failing which Dhrs may take steps for attachment. Put up on 24.2.2016 for further orders."

10. Before proceeding to decide the question involved herein, it would be proper to take note of the provisions of the Rules of the High Court of Orissa, 1948 as well as the Civil Procedure Code relevant and as referred to by both the sides, which are reflected as herein below :-

"CHAPTER XXVIII Rules for Execution of Decrees.

Rules for the execution of decrees and executable orders passed by the High Court in exercise of the original jurisdiction including cases decided under Articles 226 and 227 of the Constitution of India, under the provisions of the Indian Income-tax Act, the Orissa Sales Tax Act and other taxing statutes and the contempt cases.

1. All applications for execution shall be presented before the Registrar. Such applications shall be in writing, signed and verified by the applicant and shall include, as far as practicable, the particulars mentioned in Rule 11(2) of Order XXI of the Code of Civil Procedure.

xxx xxx xxx

7. (i) If such payment is not made within the time fixed, the Registrar shall proceed to realize the amount in accordance with the provisions of Order XXI of the Code of Civil Procedure and the said provisions shall apply mutatis mutandis to the applications filed under this chapter :

Provided that, whenever possible, the Registrar shall in the first instance, proceed to realize the amount by arrest and detention in the Civil prison, of the judgment debtor as provided in Rules 37, 38, 39 and 40 of Order XXI of the Code.

(ii) For the purpose of such execution, the Registrar shall be deemed to be the Court which passed the decree or order, as the case may be.

(iii) An appeal shall lie to a Division Bench of the Court against an order of the Registrar passed unde r sub-Rule(3) of rule 40 of Order

XXI of the Code of Civil Procedure or any other order which under the law is appealable."

Order 45 Rule 15 of the Code of Civil Procedure

15. Procedure to enforce orders of the Supreme Court.- (1) Whoever desires to obtain execution of any decree or order] of the Supreme Court shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the court from which the appeal to the Supreme Court was preferred.

(2) Such court shall transmit the decree or order of the Supreme Court to the Court which passed the first decree appealed from, or to such other court as the Supreme Court by such decree or order may direct and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said decree or order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(Sub-Rule (3) omitted)

(4) Unless the Supreme Court otherwise directs, no decree or order of that court shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party of deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the court whose decree was complained of or at any proceedings subsequent to the decree of that court, but such order shall have the same force and effect as if it had been made before the death took place."

Order 45 Rule 16 of the Code of Civil Procedure

16. Appeal from order relating to execution – The orders made by the Court which executes the (decree or order) of (the Supreme Court) relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution to its own decrees.

11. Reading of the provisions contained in Chapter XXVIII of the Rules of the High Court of Orissa, 1948 makes way for execution of decrees in

shape of judgment or orders passed by the High Court in exercise of the original jurisdiction including the cases decided under Articles 226 & 227 of the Constitution of India or under some other provisions, as mentioned therein and in the case of execution of orders in exercise of power under Articles 226 & 227 of the Constitution of India, the applications for execution shall have to be presented before the Registrar in terms of Rule 11(2) of Order 21 of C.P.C. and following the provision contained in Rule 7 of Chapter XXVIII unless the payment involved is made within the time fixed, the Registrar is required to proceed to realize the amount in accordance with the provision of the Order 21 of C.P.C. and following Sub-Rule (2) of Rule 7 for the purpose of execution, the Registrar taking up the execution shall be deemed to be the Court, which passed the decree or order as the case may be and any order of the Registrar is appealable to a Division Bench of the same Court.

12. Now following the provisions contained in Order 45 Rule 15, this is a mechanism for enforcing the orders of the Hon'ble apex Court by way of execution. Following this procedure, an application for execution of the Hon'ble apex Court's orders is required to be made to the Court, from which the appeal to the Hon'ble apex Court was preferred and following Sub-Clause (2) therein upon the direction of the Court and transmission of the record to the Court, which passed the first decree appealed or to such other Court as the Hon'ble apex Court may direct and the Court, to which the said decree or order is so transmitted shall execute it accordingly.

13. Now coming back to the facts involved in the case and the directions therein, more particularly, looking to the prayer made in the Execution Petition, it appears, the opposite parties sought for execution of the direction contained in the order dated 9.1.2013 passed in S.L.P.(C) No.32998/2009. Hon'ble Supreme Court though dismissed the S.L.P. but by order dated 9.1.2013 passed the following :-

> "Heard learned senior counsel for the petitioner State, respondents and perused the relevant material.
>
> We do not find any valid and legal ground for interference. The special leave petition is dismissed.
>
> However, the petitioner is granted three months' time to comply with the order of the High Court.

> In case if the State finds no suitable land, as suggested by the High Court, they are permitted to pay the market value prevailing as on date to the parties concerned."

Reading of this order, it appears, Hon'ble apex Court going ahead of the final direction of the High Court specifically, directed the State Government in the event it is unable to find out any suitable land, it is permitted to pay market value as on date of the order to the parties concerned. This direction is a positive direction and available for execution and there is no dispute, thus, that order of the Hon'ble apex Court is put to execution. Since the order of the Hon'ble apex Court was sought to be executed, this Court finds, there was no question of application of the provision of the Chapter XXVIII of the Rules of the Orissa High Court, 1948 in the present case. It is, on the other hand, the provision contained in Order 45 Rule 15 of C.P.C. has a direct application. Assuming that nomenclature in the body of the Execution Petition is immaterial for the settled position of law and since the Execution Petition is filed in the High Court from which the appeal was preferred to Hon'ble apex Court can be treated as an application under Order 45 Rule 15 of the Code of Civil Procedure. It is now to be seen, if the Registrar is competent to deal with such Execution Petition ? Under the admitted circumstance specifically for the admission of the opposite parties that the Execution Petition is directed involving the direction of Hon'ble apex Court dated 9.1.2013 being permitted by order of the Hon'ble apex Court in the contempt proceeding in its order dated 28.1.2015, the execution, if any, was only maintainable under Order 45 Rule 15 of C.P.C. Reading of the provision at Order 45 Rule 15 of C.P.C., it makes clear that the Execution Petition is not only to be made to High Court, from which the appeal to the Hon'ble Supreme Court was preferred and such Court which for all purpose in the case at hand here will be this High Court. In such event, this Court was required to transmit the decree or order of the Hon'ble Supreme Court to the Court which passed the decree appealed from and the Court to which the record is transmitted should have executed it accordingly in the manner and according to the provision applicable to the execution of its original decrees/orders. In the given circumstance, the execution application since maintainable applying provision at Order 45 Rule 15 is required to be dealt by the High Court not by the Registrar and the Registrar has absolutely no power to sit over it. This Court finds, the Registrar exercising power involving the present execution proceeding was without jurisdiction.

14. Considering the challenge of the opposite parties with regard to maintainability of the Civil Miscellaneous Petition and also framed by this Court at the admission of the Civil Miscellaneous Petition, this Court finds, under the facts scenario of the case, the Registrar taking up the Execution Proceeding, since involved execution of the direction of the Hon'ble apex Court, was incompetent to exercise its power under Order 45 Rule 15 of C.P.C. and therefore, its action being an action of a Court subordinate to the High Court is coming well within the scope of Article 227 of the Constitution of India, as such this Court finds, the Civil Miscellaneous Petition under Article 227 of the Constitution of India where the High Court exercises its power of superintendence over the subordinate courts, is very much maintainable.

15. Deciding the scope of High Court in exercise of power under Article 227 of Constitution of India the Hon'ble Apex Court in the case of **Radhey Shyam & another vrs. Chhabi Nath & others** reported in (2015) 5 S.C.C.-423, has held in paragraph-25 as follows:-

> "25. It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all other courts having limited jurisdiction subject to supervision of King's Court. Courts are set up under the Constitution or the laws. All courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of Tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to judicial courts, as rightly observed in the referring order in paras 26 and 27 quoted above.

16. Looking to the dispute herein as decision of the Hon'ble Apex court is under execution, this Court finds the decision (Supra) has a direct bearing in the present case and the Civil Miscellaneous petition, since directed against the order of the Registrar of the High Court being subordinate to this Court the Civil Miscellaneous petition is maintainable.

17. Under the circumstance and for the reason assigned in paragraph-14 herein, this Court finds the execution petition No.2/2015 in the present form is maintainable under Order 45 Rule 15 of C.P.C. forgetting the nomenclation be treated as a proceeding under Order 45 Rule 15 of the Code of Civil Procedure but the Registrar exercising his power under Chapter XXVIII of the Rules of the High Court of Orissa is incompetent and as such, all orders passed by the Registrar of High Court of Orissa become void and inoperative. Thus, while holding that the present Civil Miscellaneous Petition under Article 227 of the Constitution of India maintainable, this Court finds, all the orders passed by the Registrar are without competency and as such, this Court sets aside all the orders passed by the Registrar of High Court of Orissa involving E.P.No.2/2015 and directs the Registry to place the Execution Proceeding before the assigned Bench taking the permission of the Bench for its proceeding in accordance with law. Dealing with the deposit made by the State on the orders in the execution side, this Court directs the deposit made here will be treated as a deposit involving the Execution Case and release of the same shall be dependent on the orders to be passed in the Execution Proceeding by the Court of competency. The Civil Miscellaneous Petition stands allowed. No cost.

Petitiion allowed.

2017 (I) ILR - CUT-708

S. K. SAHOO, J.

CRLREV NO. 111 OF 2000

RANJAN KUMAR SAHU ……..Petitioner

.Vrs.

STATE OF ORISSA ……...Opp. Party

(A) PENAL CODE, 1860 – Ss. 306, 498-A
r/w Section 113-A, Evidence Act. 1872

Abetment of suicide – How to determine – There must be evidence that suicide was committed by the deceased due to direct and alarming encouragement or incitement by the accused leaving no option to commit suicide.

Merely because a married woman was subjected to torture would not mean that there was abetment to commit suicide – However, when it is established that the deceased committed suicide within seven years from the date of her marriage and she was subjected to cruelty by her husband or any relative of her husband, presumption U/s. 113-A of the Evidence Act may be drawn by the Court having regard to all other circumstances of the case – So unless the initial onus that the accused subjected the deceased to cruelty as defined U/s. 498-A I.P.C. is discharged by the prosecution, question of drawing presumption U/s. 113-A Evidence Act does not arise – Hence there must be existence of proximate link between the cruelties imparted as well as the death.

In this case while the learned trial court discarded all other evidence, accepted the sole testimony of P.W.6 which is full of material contradictions so it can not be said that the prosecution has proved its case beyond all reasonable doubt, that it is the petitioner who abetted the commission of suicide of the deceased – Held, the impugned judgment and order of conviction is set aside and the petitioner is acquitted of the charges under section 498-A & 306 I.P.C.
(Paras 10, 11)

(B) Criminal Trial – Offence U/ss. 498-A/306/34 I.P.C. – Conviction based on the testimony of a solitary witness – Evidence of such witness must be clear, cogent, convincing, fully truthful, unblemished and completely above board.

In this case the petitioner was convicted U/ss. 498-A/306 I.P.C. basing on the solitary evidence of P.W.6, which is full of material

Contradictions, even the evidence of P.W.14 (father of the deceased) is totally silent about the evidence narrated by P.W.6 on the previous day of occurrence – Held, it cannot be said that P.W.6 is a truthful witness on whom implicit reliance can be placed – Impugned judgment and order of conviction is set aside.

(Paras 9,10,11)

For Petitioner : Mr. Biswa Ku. Mishra
For Opp. Party : Mr. Jyoti Prakash Patra, A.S.C.

Date of Hearing : 01.09.2016
Date of Judgment: 01.09.2016

JUDGMENT

S. K. SAHOO, J.

The petitioner Ranjan Kumar Sahu faced the trial in the Court of learned Asst. Sessions Judge, Chatrapur along with his mother Chandrama Sahu and sister Subasini Sahu for offences punishable under sections 498-A/306/34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act in Sessions Case No. 17 of 1992/Sessions Case No. 54 of 1992.

Learned Trial Court vide impugned judgment and order dated 20.12.1994 acquitted the co-accused persons Chandrama Sahu and Subasini Sahu of all the charges and also acquitted the petitioner of the charge under section 4 of the Dowry Prohibition Act but found him guilty under sections 498-A and 306 of the Indian Penal Code and sentenced him to undergo R.I. for three years for the offence under section 306 of the Indian Penal Code and one year for the offence under section 498-A of the Indian Penal Code and to pay a fine of Rs. 500/- on each count and in default, to undergo further period of imprisonment for one month on each count and the sentences were directed to run concurrently.

The petitioner preferred an appeal in the Court of Session which was heard by learned 2nd Addl. Sessions Judge, Berhampur in Criminal Appeal No. 175 of 1997/Criminal Appeal No.9 of 1995-GDC and the learned Appellate Court vide impugned judgment and order dated 09.02.2000 has been pleased to dismiss the criminal appeal and upheld the impugned judgment of the learned Trial Court, hence the revision.

2. The prosecution case as per the First Information Report presented by one Dandapani Sahu (P.W.14), father of Kabita Sahu (hereafter 'the deceased') is that the marriage between the petitioner and the deceased was solemnized on 08.03.1988 and P.W.6 Somanath Sahu was the mediator in

the said marriage and one Mangulu Sahu also helped him in the marriage. It is further stated in the F.I.R. that as per the demand of the petitioner, cash of Rs.16,000/-, gold ornaments and other household articles were given by the informant. The informant came to the house of the petitioner for inviting the petitioner to his house and on that day, he heard from the deceased as well as from the neighbourhood that the accused persons were torturing the deceased as they were not satisfied with the quality of the articles those were given at the time of marriage. The informant tried to settle the matter amicably and left the house of the petitioner. It is further stated in the F.I.R. that in the year 1989 in the month of Shravan, the deceased was taken to her father's place for the delivery where she gave birth to a female child and after the child became seven months old, on 27.05.1990 the informant brought the deceased back to her in-laws house along with the grand daughter and left them in the house of the petitioner in spite of the unwillingness of the deceased to go there. On that day, the accused persons created disturbance and complained about the quality of different articles which were given at the time of marriage. When the informant challenged them, he was abused by the accused persons and also threatened. On 25.06.1990 the informant sent his wife as well as daughter Babita to the in-laws' house of the deceased and both of them visited the deceased and on return, they informed the informant that nobody talked with them and the deceased also was not interested to stay there in her in-laws' house. Since the informant was busy with his business, immediately he could not go to the house of the petitioner and on 02.07.1990 at about 6 O' clock in the evening, he came to know from the Inspector in charge, Balugaon Police station that the deceased had expired. The informant immediately rushed to the hospital and found the dead body of the deceased there and he heard from his brother-in-law (wife's sister's husband) Somanath Sahu (P.W.6) that on the previous day at about 10.00 a.m. when he had been to the house of the petitioner on being invited, the deceased was tortured and he was also abused and accordingly, it is stated in the F.I.R. that due to physical and mental torture given to the deceased in connection with demand of dowry by the accused persons, the deceased died.

3. On the basis of such First Information Report, Chatrapur P.S. Case No. 122 of 1990 was registered on 02.07.1990 under sections 498-A/304-B of the Indian Penal Code against the petitioner, his mother Chandrama Sahu as well as sister Subasini Sahu.

P.W. 20 Alok Kumar Das, who was the officer in charge of Chatrapur Police Station took up investigation of the case, seized the records of

Chatrapur P.S.U.D. case No. 80 of 1990. He examined the witnesses, sent requisition to the Scientific Officer, D.F.S.L., Chatrapur and on 03.07.1990, the Scientific team visited the spot and submitted their report vide Ext.6. The I.O. also seized the rope along with the old saree which was used for hanging the deceased under seizure list Ext.12. He held inquest over the dead body in presence of the Executive Magistrate-cum-Tahasildar, Chatrapur at S.D. Hospital, Chatrapur on 03.07.1990 and prepared inquest report (Ext.3) and sent the dead body for post mortem examination. He also seized gold ornaments of the deceased under seizure list Ext.2 and left the same in zima of the informant under zimanama Ext.13.

P.W. 15 Dr. Suresh Chandra Mohapatra who was the Professor in F.M.T. Department, M.K.C.G. Medical College, Berhampur conducted post mortem examination and found a ligature mark around the neck. He opined that the cause of death was due to asphyxia as a result of constriction of neck by hanging. He examined the ligature materials i.e. torn saree as well as rope which were produced before him by the investigating officer and after examination, he opined that the ligature mark found on the neck of the deceased appeared to have been caused by the cloth portion of the ligature. He also submitted the post mortem report (Ext.10) to the investigating officer. On 07.07.1990 the investigating officer seized the dowry articles given by the informant to the deceased as per the seizure list Ext.4 which were left in the zima of the informant under zimanama Ext.8 and thereafter, as per the order of S.P., Manmohan Mohapatra (P.W.19), D.S.P., Chatrapur took over charge of the investigation on 07.07.1990. He also visited the spot, examined the witnesses and arrested the accused persons and forwarded them to the Court. He sent the viscera for chemical analysis on 12.07.1990. On 27.02.1991 he made over the charge of investigation to Sri Laxminarayan Mishra, Inspector, H.A.D.D. as per order of S.P., who on completion of investigation submitted the charge sheet on 06.06.1991 under sections 498-A/306/34 of the Indian Penal Code and sections 4 and 6 of the Dowry Prohibition Act against the petitioner, his mother Chandrama Sahu as well as sister Subasini Sahu.

4. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned Trial Court framed the charges on 12.03.1992 for offences punishable under sections 498-A/306/34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act and since the accused persons refuted the charge, pleaded not

guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

5. In order to establish its case, the prosecution examined twenty witnesses.

P.W.1 Brundaban Behera was the constable who is a witness to the seizure of wearing apparels and ornaments of the deceased as per the seizure list Ext.1.

P.W.2 Purna Chandra Sahu was the cousin brother of the deceased and is a witness to the seizure of the ornaments of the deceased under seizure list Ext.2.

P.W.3 Sadananda Pattnaik was the Tahasildar, Chatrapur who was present at the time of inquest and proved the inquest report Ext.3.

P.W.4 Promod Kumar Das is an auto rickshaw driver and his evidence is not very material for the purpose of this case.

P.W.5 Janaki Subudhi stated about the dissatisfaction of accused Subasini before her regarding the payment of dowry by the parents of the deceased.

P.W.6 Somanath Sahu is one of the relatives of the deceased who stated that on the previous day of the occurrence, he had been to be house of the petitioner where the petitioner abused the deceased as well as the informant in filthy language and complained about the quality of the dowry articles and he also threw away the dunlop bed received on dowry saying it to be of low quality. He is also a witness to the seizure of the articles from the room where the deceased committed suicide under seizure list Ext.4.

P.W.7 V. Jaga Rao stated about the seizure of gold and silver ornaments under seizure list Ext.4.

P.W.8 Dinabandhu Pradhan was the constable attached to Chatrapur Police Station and carried the dead body from Chatrapur Hospital to M.K.C.G. Medical College and Hospital, Berhampur for post mortem examination.

P.W.9 Naresh Naik was the A.S.I., photographer attached to the office of D.F.S.L. at Chatrapur who accompanied the Scientific Officer to the spot and took some snaps of the spot. He also signed the report prepared by the Scientific Officer under Ext.6.

P.W.10 Gouranga Barik stated about giving of cash and gold ornaments by the informant to the deceased at the time of marriage. He further stated that about a month after the marriage, the deceased returned to her father's place and she told him that she was being assaulted as the cot, mattress and bed sheet were not upto the standard.

P.W.11 Nabakishore Tarai also stated about the disclosure made by the deceased regarding demand of more money for a scooter by the in-laws.

P.W.12 Babita Sahu is the sister of the deceased and she stated that a month after the marriage, the deceased complained regarding harassment to her in connection with demand of dowry by the petitioner. She further stated that the petitioner had also come to their house and asked the deceased to bring more gold ornaments and cash for purchasing a scooter. She further stated about the physical and mental torture to the deceased by the in-laws' family members.

P.W.13 Sashirekha Sahu is the mother of the deceased and she also stated about the demand of dowry and physical and mental torture to the deceased by the accused persons.

P.W.14 Dandapani Sahu is the father of the deceased and he also stated about the demand of dowry and physical and mental torture to the deceased in connection with the demand of dowry.

P.W.15 Dr. Suresh Chandra Mahapatra was the Asst. Professor in F.M.T. Department of M.K.C.G. Medical College, Berhampur who conducted the post mortem examination and submitted his report Ext.10.

P.W.16 Dr. Surath Bisoi was attached to R.F.S.L., Berhampur as Scientific Officer and he examined the exhibits sent from the Court of learned S.D.J.M., Chatrapur and gave his opinion under Ext.11.

P.W.17 Jagannath Senapati stated that the informant purchased some clothes from his shop.

P.W.18 Sukadev Maharana was having a carpenter shop at Balugaon and he stated that the informant purchased some wooden furnitures from his shop on the eve of the marriage of the deceased.

P.W.19 Manamohan Mohapatra was the D.S.P. at Chatrapur, who is one of the investigating officers.

P.W.20 Alok Kumar Das was attached to Chatrapur Police Station who in the absence of the officer in charge registered the F.I.R. and investigated the case.

The prosecution exhibited fourteen documents. Exts.1, 2, 4 and 12 are the seizure lists, Ext.3 is the inquest report, Ext.5 is the dead body challan, Ext.6 is the report of Scientific Officer, Ext.7 is the written report, Exts.8, 13 and 14 are the Zimanama, Ext.9 is the report of Dr. S.C. Sahu, Ext.10 is the post mortem report and Ext.11 is the opinion report of Scientific Officer of R.F.S.L., Berhampur.

The prosecution also proved three material objects. M.O.I is the saree, M.O.II is the saya and M.O.III is the blouse.

6. The defence plea is one of denial and it was pleaded that the deceased was suffering from some stomach problem for which she was under medication but she could not bear the pain for which she committed suicide and after her death, her family members have foisted the case.

The defence did not examine any witness but proved the report of Dr. Suresh Chandra Mahapatra as Ext.A and invitation Card as Ext. B.

7. The learned Trial Court held in the impugned judgment that the post mortem report is not denied or challenged by the defence and it is also crystal clear that the deceased committed suicidal hanging and unnatural death took place within a period of seven years from the date of her marriage. The learned Trial Court discarded all the evidence including the parents of the deceased but relying upon the evidence of P.W.6, found the petitioner guilty of the offences under sections 498-A/306 of the Indian Penal Code. The learned Trial Court considered the evidence of P.W.6 and held that in his evidence, P.W.6 has not stated to have any knowledge of torture and further demand of dowry rather it reveals from his evidence that the petitioner was not satisfied with the quality of the cot and its material and on the previous day of death of the deceased, when P.W.6 was called to the house of the petitioner, in presence of the deceased, the petitioner scolded the informant and threw away the pillows and bed sheets complaining that those articles were of low qualities. The learned Trial Court further held that though the defence has taken a plea that the deceased committed suicide due to suffering from some ailment in her stomach and she could not tolerate the pain but the illness of the deceased has not been proved by any documentary medical evidence and therefore, such a plea was held to be an afterthought one and

without any basis. The learned Trial Court further held that since the petitioner was not satisfied with the cot and its materials, there was dissension between him and the deceased and he burst his anger not only at the deceased but also before P.W.6 which according to the learned Trial Court amounts to mental torture which ultimately compelled the deceased to put an end to her life and accordingly, she hanged herself when the petitioner was absent from his house and had gone to the office.

The learned Appellate Court also analyzing the provision under section 113-A of the Evidence Act and the facts and circumstances of the case held that the learned Trial Court was justified in convicting the petitioner under sections 498-A and 306 of the Indian Penal Code.

8. Mr. Biswa Kumar Mishra, learned counsel for the petitioner vehemently contended that when the evidence of all the material witnesses including the parents of the deceased have been disbelieved and the evidence of P.W.6 suffers from material contradictions and when there is no proximate link between the act of the petitioner with the commission of suicide by the deceased, the learned Trial Court erred in convicting the petitioner under section 306 of the Indian Penal Code. He further contended that the learned Trial Court should not have invoked the provision under section 113-A of the Evidence Act since the prosecution has failed to establish any kind of cruelty or torture on the deceased.

Mr. Jyoti Prakash Patra, learned Additional Standing Counsel appearing on behalf of the State submitted that even though the co-accused persons who are the mother and sister of the petitioner have been acquitted by the learned Trial Court but the case of the petitioner who is the husband of the deceased stands in the different footing and materials on record indicates that he was squarely responsible for the untimely death of the deceased as the deceased could not tolerate the abusive words hurled to her father in presence of P.W.6 on the previous day of occurrence which prompted her to take extreme step to end her life and therefore, it is the petitioner who abated the commission of suicide and therefore, there is no infirmity or illegality in the impugned judgments and order of conviction passed by the Courts below.

9. There is no dispute that the conviction of the petitioner is based on the sole testimony of P.W.6. It is the settled principle of law that in order to base an order of conviction on the testimony of a solitary witness, the evidence of such witnesses must be clear, cogent, convincing, fully truthful, unblemished and completely above board.

Analysing at the evidence of P.W.6, it is found that not only he is closely related to the deceased but he has stated due to illness, he could not attend the marriage of the deceased and four days after the marriage, he went to the house of the petitioner and found the deceased was cooking in the kitchen and on his enquiry, the father-in-law of the deceased expressed his pleasure and satisfaction over the conduct and behaviour and cooking of the deceased. Though he has stated that two years after the marriage, he was called by the petitioner to his house and when he arrived there in the house of the petitioner, the petitioner abused in filthy language towards the deceased as well as to the informant (P.W.14) complaining about the quality of the dowry articles brought by the deceased and the petitioner also threw away the dunlop bed received on dowry saying it to be of low quality and that on the next day, the deceased died, but it has been confronted to P.W.6 and proved through the Investigating Officer (P.W.20) that P.W.6 has not stated before him that in his presence, the petitioner abused the informant in filthy language on the ground that he had given low quality articles and so saying, he threw away the dunlop pillow. Thus the evidence which P.W.6 has given in Court relating to the conduct of the petitioner on the previous day of the occurrence has not stated by him before the Investigating Officer but stated for the first time in Court after two years of the occurrence and therefore, it cannot be said that P.W.6 is a truthful witness on whom implicit reliance can be placed.

10. Section 306 of the Indian Penal Code deals with abetment of suicide. Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. More active role which can be described as instigating or aiding the doing of a thing is required before a person can be said to be abetting the commission of offence under section 306 of the I.P.C. Merely because a married woman committed suicide within seven years of her marriage does not, ipso facto result into the presumption of abetment of suicide by the husband or his relatives under section 306 of the Indian Penal Code. There must be evidence that suicide was committed by the deceased due to direct and alarming encouragement or incitement by the accused leaving no option but to commit suicide. The clear mens rea to commit the offence must exist. Simply because the victim was subjected to torture would not mean that there was abatement to commit suicide. Only when it is established that the deceased committed suicide within a period of seven years from the date of her marriage and she was subjected to 'cruelty' by her husband or any relative of her husband, presumption under section

113-A of the Evidence Act may be drawn by the Court having regard to all the other circumstances of the case. The circumstances or the happenings on which a Court may presume that the suicide committed by a woman was abetted by her husband or any relative of her husband would depend on the facts and circumstances of each case. Unless the initial onus that the accused subjected the deceased to cruelty as defined in section 498-A of the Indian Penal Code is discharged by the prosecution, the question of drawing presumption under section 113-A of the Evidence Act does not arise. There must be existence of proximate link between the cruelties imparted as well as the death. If the alleged incident of cruelty is remote in time which is not likely to disturb the mental equilibrium, it will be no consequence. Under section 4 of the Evidence Act, it is provided that the Court *may presume* a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. The expression 'may presume' confers discretion on the Court to presume a fact or not to presume it. The discretion must not be whimsical, arbitrary, vague or fanciful but it must be exercised in accordance with law. Thus from the meaning of the term *may presume* as appears in section 113-A of the Evidence Act, it is clear that it is not incumbent upon a Court to presume that whenever a woman dies within seven years of the marriage and she was subjected to cruelty, she was abetted to commit suicide by her husband or the relatives of her husband.

11. Coming to the facts of the case, when all other evidence have been discarded by the learned Trial Court and co-accused persons have been acquitted and reliance has been placed only on the evidence of P.W.6 which is full of material contradictions, therefore, it cannot be said that the version of P.W.6 is clear, cogent, convincing, fully truthful, unblemished and completely above board so as to hold that the prosecution has proved beyond all reasonable doubt that it is the petitioner who abetted the commission of suicide of the deceased.

The father of the deceased P.W.14 is totally silent in his evidence regarding the incident which P.W.6 narrated to have happened on the previous day of occurrence. In ordinary course of nature, P.W.6 would have informed the same to P.W.14. Mere mention of such aspect in the first information report is not sufficient to take it as substantive piece of evidence. Therefore, the evidence of P.W.6 that such an incident happened on the previous day of the occurrence is not acceptable.

In the light of the above discussion, I am of the considered opinion that the impugned judgment and order of conviction passed by the learned

Trial Court which was confirmed by the learned Appellate Court are not sustainable eye of law and accordingly, the same are hereby set aside and the petitioner is acquitted of the charges under sections 498-A and 306 of the Indian Penal Code.

The petitioner has been released on bail by this Court during pending of the revision petition. He is discharged from the liability of his bail bonds. His personal bonds and surety bonds stand cancelled. Accordingly, the CRLREV is allowed.

Revision allowed.

2017 (I) ILR - CUT-718

S. K. SAHOO, J.

CRLREV NO. 190 OF 2015

M/S. FAIRDEAL SUPPLIES PVT. LTD. & ORS. .....Petitioners

.Vrs.

M/S. M.M.T.C. LTD. .....Opp. Party

NEGOTIABLE INSTRUMENTS ACT, 1881 – Ss. 138, 142(2)(a)

Dishonour of cheque – Complaint filed – Territorial jurisdiction of the Court to entertain the complaint – The place where a cheque is delivered for collection i.e. the branch of the bank of the payee or holder in due course, where the drawee maintains an account, would be determinative of the place of territorial jurisdiction.

In this case the complainant-Opp.party was having an account in the State Bank of India, commercial Branch, Bhubaneswar and the cheque in question which was issued by the petitioners was presented in the said branch for collection, where it was dishonoured – Since learned JMFC Bhubaneswar has jurisdiction to try the offence, he has rightly rejected the petition filed by the petitioners to transfer the case – Held, this court is not inclined to interfere with the impugned order.

Case Laws Referred to :-

1. (2014) 59 OCR (SC) 289 : Dashrath Rupsingh Rathod -Vrs.- State of Maharashtra and Anr.
2. (2016) 63 OCR (SC) 178 : M/s. Bridgestone India Private Limited -Vrs.- Inderpal Singh.

For Petitioners : M/s. H.M.Dhal, P.K.Dash, J.R.Kar
For Opp. Party : M/s. Bijoy Dasmohapatra & B.N.Bhol

Date of Argument : 13.01.2017
Date of Order : 13.01.2017

JUDGMENT

S. K. SAHOO, J.

Heard Mr. H.M. Dhal, learned counsel for the petitioners and Mr. Bijoy Dasmohapatra, learned counsel for the opposite party.

The petitioners have filed this revision petition challenging the impugned order dated 20.02.2015 passed by Sri B. K. Sahoo, learned J.M.F.C., Bhubaneswar in I.C.C. Case No. 3295 of 2010 in rejecting the petition dated 18.11.2014 filed by the petitioners to transfer the case to the proper Court on the ground of jurisdiction and further holding that his Court has jurisdiction to try the complaint case under section 138 of the Negotiable Instruments Act, 1881.

It was contended by the petitioners before the learned Magistrate that the cheques in question were drawn on Jammu & Kashmir Bank Limited, Stephen House, Kolkata and therefore, the Court of J.M.F.C., Bhubaneswar lacks jurisdiction to try the case. Reliance was placed by the petitioners in the case of **Dashrath Rupsingh Rathod -Vrs.- State of Maharashtra and Anr. reported in (2014) 59 Orissa Criminal Reports (SC) 289** wherein it was held that place of judicial inquiry and trial of offence must logically be restricted to where drawee bank is located. Place where complainant may present cheque for encashment would not confer or create territorial jurisdiction. Unilateral acts of the complainant in presenting a cheque at a place of his choice or issuing a notice for payment of dishonoured amount cannot arm the complainant with power to choose place of trial.

The learned Magistrate rejected the petition filed by the petitioners on the ground that the evidence of P.W.1 has already been recorded and the case is posted for recording of the evidence of other witnesses from the side of prosecution and therefore, his Court has got jurisdiction to try the case. The learned Magistrate taken note of the observation of the Hon'ble Supreme Court in the case of Dashrath Rupsingh Rathod (supra) wherein it was held as follows:-

> "53(20)……..Consequent on considerable consideration, we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged accused, the recording of evidence has commenced as envisaged in section 145 (2) of the Negotiable Instruments Act, 1881, will proceeding continue at that place. To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the Complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of Complaint cases where proceedings have gone to the stage of section 145 (2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending."

It is not disputed that even though the cheques in question were drawn on Jammu & Kashmir Bank Limited, Stephen House, Kolkata but those were presented by the opposite party-complainant in the State Bank of India, Commercial Branch, Bhubaneswar for collection and it was dishonoured.

Considering the amendment of section 142 as well as insertion of sub-section 142(2) and new section 142-A of the Negotiable Instruments Act, in the case of **M/s. Bridgestone India Private Limited -Vrs.- Inderpal Singh reported in (2016) 63 Orissa Criminal Reports (SC) 178**, it was held as follows:-

> "10…….. A perusal of the amended section 142(2), extracted above, leaves no room for any doubt, specially in view of the explanation thereunder, that with reference to an offence under section 138 of the Negotiable Instruments Act, 1881, the place where a cheque is delivered for collection i.e., the branch of the bank of the payee or holder in due course, where the drawee maintains an account, would be determinative of the place of territorial jurisdiction."
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> xx xx xx
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> 12. We are in complete agreement with the contention advanced at the hands of the learned counsel for the appellant. We are satisfied, that section 142(2)(a), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015, vests jurisdiction for

initiating proceedings for the offence under section 138 of the Negotiable Instruments Act, inter alia, in the territorial jurisdiction of the Court, where the cheque is delivered for collection (through an account of the branch of the bank where the payee or holder in due course maintains an account). We are also satisfied, based on section 142A(1) to the effect, that the judgment rendered by this Court in Dashrath Rupsingh Rathod case, would not stand in the way of the appellant, in so far as the territorial jurisdiction for initiating proceedings emerging from the dishonor of the cheque in the present case arises.

13. Since cheque No. 1950, in the sum of Rs. 26,958/-, drawn on the Union Bank of India, Chandigarh, dated 02.05.2006, was presented for encashment at the IDBI Bank, Indore, which intimated its dishonor to the appellant on 04.08.2006, we are of the view that the Judicial Magistrate, First Class, Indore, would have the territorial jurisdiction to take cognizance of the proceedings initiated by the appellant under section 138 of the Negotiable Instruments Act, 1881, after the promulgation of the Negotiable Instruments (Amendment) Second Ordinance, 2015. The words "...as if that sub-section had been in force at all material times..." used with reference to section 142(2), in section 142A(1) gives retrospectivity to the provision."

In view of the undisputed fact that the complainant-opposite party was having an account in the State Bank of India, Commercial Branch, Bhubaneswar and the cheque in question which was issued by the petitioners was also presented for collection in the said branch for collection and it was dishonoured, I am of the view that the learned J.M.F.C., Bhubaneswar has jurisdiction to try the offence, and therefore, the learned Magistrate rightly rejected the petition filed by the petitioners to transfer the case, Accordingly, I am not inclined to interfere with the impugned order dated 20.02.2015 passed by the learned J.M.F.C., Bhubaneswar in I.C.C. Case No.3295 of 2010.

Since the case is of the year 2010, the learned J.M.F.C., Bhubaneswar shall do well to expedite the trial of the case and if possible, to conclude the same within a period of three months from the date of receipt of the order. With the aforesaid observation, the CRLREV application is disposed of.

Revision disposed of.

2017 (I) ILR - CUT- 722

S. K. SAHOO, J.

CRLREV NO. 608 OF 2016

GIRIDHARI NATH ……..Petitioner

.Vrs.

MAMITARANI SUTAR ……Opp. Party

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE Act, 2005 – S.12

Application U/s 12 of the Act – When maintainable? – If two persons lived together in a shared household as defined U/s 2 (s) of the Act at any point of time and during the subsistence of such relationship, the woman is subjected to any act of "domestic violence" as defined U/s 3 of the Act, she can be said to be an aggrieved person U/s 2(a) of the Act and can maintain an application before the Magistrate U/s 12 of the Act – It is also not necessary that the woman concerned must be living with the respondent under one roof or in a shared household at the time of filing such application.

In this case since the divorce proceeding between the parties is subjudiced and it is the case of the Opp.party that the petitioner was regularly coming to her rented house and subjecting her to physical and mental torture, merely because they are living at separate places since 2012, it cannot be said that the legal relationship between them as husband and wife was snapped – Moreover there is nothing in the P.W.D.V. Act that application U/s. 12 has to be filed within one year from the date of alleged cessation of domestic relationship between the aggrieved person and the respondent – Held, the application U/s. 12 is maintainable and the learned Magistrate has rightly rejected the application filed by the petitioner challenging maintainability of the proceeding U/s 12 of the Act. (Paras 8,9)

Case Laws Referred to :-

1. (2011) 50 OCR (SC) 430 : Inderjit Singh Grewal -Vrs.- State of Punjab
2. 2013 (4) Crimes 15 : Hima Chugh -Vrs.- Pritam Ashok Sadaphule
3. 2016 (2) Crimes 783 : Amit Agarwal -Vrs.- Sanjay Aggarwal
4. Sunil Kumar -Vrs.- Sumitra Panda 2014 (1) OLR
5. 2014 (3) Crimes 44 : Smt. Sabana @ Chand Bai -Vrs.- Mohd. Talib Ali.
6. AIR 2012 SC 965 : V.D. Bhanot -Vrs.- Savita Bhanot.
7. (2010) 14 SCC 38 : Ramjas Foundation -Vrs.- Union of India.
8. (2016) 63 OCR (SC) 1 : Krishna Bhatacharjee -Vrs.- Sarathi Choudhury.

For Petitioners : Smt. Umarani Panda & Ramakanta Pradhan
For Opp. Party : M/s. Susanata Kumar Dash,
Ananga Kumar Otta,
Arunima Dhalsamanta,
Biswa Prakash Dhal & Swetlana Das.

Date of Hearing : 28.09.2016
Date of Judgment: 15.11.2016

JUDGMENT

S. K. SAHOO, J.

Being dissatisfied by the order dated 04.04.2016 passed by the learned S.D.J.M., Bhubaneswar in C.M.C. No. 54 of 2016 in rejecting the petition dated 19.03.2016 challenging maintainability of the proceeding under the Protection of Women from Domestic Violence Act, 2005 (hereafter "P.W.D.V. Act") instituted by the opposite party Mamitarani Sutar which was confirmed by the learned Sessions Judge, Khurda at Bhubaneswar in Criminal Appeal No. 60 of 2016 vide order dated 23.07.2016, the petitioner Giridhari Nath has preferred this revision petition.

2. The opposite party filed an application under section 12 of the P.W.D.V. Act against the petitioner in the Court of learned S.D.J.M., Bhubaneswar which was registered as C.M.C. No. 54 of 2016 praying for a direction to the petitioner to pay compensation of Rs.50,00,000/- (rupees fifty lakhs) to her for the act of domestic violence and further to pay monthly maintenance of Rs.25,000/- (rupees twenty five thousand).

It is the case of the opposite party that she is the married wife of the petitioner and their marriage was solemnized at Laxminarayan Temple, Bahanaga, Balasore on 02.12.2002 in accordance with Hindu rites and customs. After marriage, the petitioner tortured the opposite party and demanded Rs.5,00,000/- (rupees five lakhs) to be brought from her father. Subsequently, the opposite party came to know that she is the third wife of the petitioner which shocked her. The opposite party tolerated all the immoral activities of the petitioner for the sake of their girl child and to avoid social stigma. The petitioner threatened the opposite party to obtain a decree of divorce as he was a seasoned lawyer. The opposite party also got herself enrolled as an Advocate but could not actively pursue her legal profession due to unruly attitude of the petitioner. The opposite party lodged an F.I.R. against the petitioner but subsequently withdrew the F.I.R. in order to lead a life of dignity. The opposite party in order to prepare herself for judicial

service took a house on rent in the KIIT area, Bhubaneswar in 2013 to attend coaching institutions and concentrate on study. The petitioner did not allow the opposite party to enter into the matrimonial home and to see her daughter. When the petitioner persuaded the opposite party to part with all her jewellery worth of about Rs.3,00,000/- (rupees three lakhs), the opposite party bluntly refused to oblige the same. The petitioner instituted a divorce proceeding against the opposite party alleging that she had illicit relationship with several persons including one Law Officer of the Oriental Bank of Commerce. Even after coming to Bhubaneswar, the opposite party was subjected to physical and mental cruelty by the petitioner who was frequently visiting the rented house of the opposite party and on 16.07.2015 the petitioner came to the rented house of the opposite party and asked her to sign on some papers but when the opposite party did not agree, the petitioner assaulted her and threatened her with dire consequence. The opposite party lodged an F.I.R. before Mahila Police Station, Bhubaneswar on 15.08.2015 for which Bhubaneswar Mahila P.S. Case No. 231 of 2015 was instituted under sections 498-A, 323, 294, 417, 506 of the Indian Penal Code and section 4 of Dowry Prohibition Act. It is further stated that the petitioner is having 22 years of active practice at Bhadrak and other places and he earns around Rs.50,000/- (rupees fifty thousand) per month.

3. The petitioner entered his appearance in the P.W.D.V. Act proceeding and filed a petition on dated 19.03.2016 to dismiss the application filed by the opposite party under section 12 of the P.W.D.V. Act as not maintainable. It is the case of the petitioner that after solemnization of marriage in the year 2002, the petitioner and the opposite party resided at Bhadrak and on 04.03.2012 the opposite party left the house of the petitioner after taking away all her jewellery and other valuables worth of Rs.12,00,000/- (rupees twelve lakhs) and the opposite party was living in adultery with a Senior Bank Officer and others for which at the instance of the petitioner, one station diary entry was made at Bhadrak Town Police Station and one F.I.R. was also lodged against one Amiya Kumar Sahoo vide Bhadrak Town P.S. Case No. 233 of 2015 dated 10.07.2015 under sections 506, 497, 406, 379 read with section 34 of the Indian Penal Code. It is further stated that the petitioner filed M.A.T. Case No. 492 of 2015 under section 13 of the Hindu Marriage Act in the Court of learned Civil Judge (Senior Division), Bhadrak. It is the further case of the petitioner that their minor daughter is prosecuting her studies in Class-VII at Bhadrak and staying with the petitioner and that the opposite party has brought all sorts of false allegations in the application

under P.W.D.V. Act. It is further case of the petitioner that the opposite party left Bhadrak in the year 2012 and thereafter, there was no domestic relationship between the parties and since the application under P.W.D.V. Act was instituted in January 2016, therefore, it is not maintainable.

The opposite party filed her objection to the petition dated 19.03.2016 filed by the petitioner wherein it is stated that such a petition is thoroughly misconceived and apparently a calculated move to delay the disposal of the application under section 12 of the P.W.D.V. Act. It is further stated in the objection that the opposite party is an aggrieved person and residing within the local limits of the jurisdiction of S.D.J.M., Bhubaneswar and therefore, in view of section 27 of the P.W.D.V. Act, the said Court has jurisdiction to adjudicate the matter.

4. The learned S.D.J.M., Bhubaneswar vide impugned order dated 04.04.2016 has been pleased to held that on going through the application under section 12 of the P.W.D.V. Act filed by the opposite party, report of the Protection Officer, petition filed by the petitioner on dated 19.03.2016 and the objection filed by the opposite party on dated 21.03.2016 and keeping in view the provision under section 27(1) of the P.W.D.V. Act, it appears that domestic violence had been caused upon the opposite party also at Bhubaneswar which comes within the local limits of the Court and therefore, it was held that the Court of S.D.J.M., Bhubaneswar has got ample jurisdiction to adjudicate the matter and accordingly, rejected the petition dated 19.03.2016 filed by the petitioner being devoid of merits.

The petitioner challenged the aforesaid order dated 04.04.2016 of the learned S.D.J.M., Bhubaneswar passed in C.M.C. No. 54 of 2016 before the learned Sessions Judge, Khurda at Bhubaneswar in Criminal Appeal No. 60 of 2016. The learned Appellate Court has been pleased to observe that specific allegation has been made in the original application by the opposite party that the petitioner was frequently visiting her in the rented accommodation at Bhubaneswar and used to subject her to cruelty, both mentally and physically for which she was in a state of panic. The learned Appellate Court further held that institution of case relating to torture on the opposite party in Mahila Police Station, Bhubaneswar finds place in the original application. The learned Appellate Court considered the provision under section 27(1) of the P.W.D.V. Act and upheld the order passed by the learned S.D.J.M., Bhubaneswar.

5. Smt. Umarani Panda, learned counsel appearing for the petitioner contended that when the opposite party had left Bhadrak in the year 2012 and staying at Bhubaneswar and the domestic relationship between the petitioner and the opposite party had ceased since then, therefore, without existence and continuance of domestic relationship between the parties, taking recourse to the provisions of the P.W.D.V. Act by the opposite party against the petitioner is not maintainable in the eye of law. The learned counsel for the petitioner relied upon the decision of the Hon'ble Supreme Court in case of **Inderjit Singh Grewal -Vrs.- State of Punjab reported in (2011) 50 Orissa Criminal Reports (SC) 430**, wherein it was held that in view of the provisions under sections 28 and 32 of the P.W.D.V. Act and Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006 (hereafter "P.W.D.V. Rules") which make the provisions of Cr.P.C. applicable, the complaint has to be filed only within a period of one year from the date of the incident in view of the provisions under section 468 of Cr.P.C. The learned counsel further relied upon a decision of Delhi High Court in case of **Hima Chugh -Vrs.- Pritam Ashok Sadaphule reported in 2013 (4) Crimes 15**, wherein it is held that a protection order can be obtained only against a person who is in the domestic relationship with the aggrieved person and since the respondents no. 2 to 6 who are the father-in-law, brother-in-law and other near relations of the respondent no.1 (husband) were not in domestic relationship with the petitioner, no protection order can be passed against them. The application filed by the petitioner against her husband (respondent no.1) with whom she was in domestic relationship was held to be maintainable. The learned counsel further placed reliance in case of **Amit Agarwal -Vrs.- Sanjay Aggarwal reported in 2016 (2) Crimes 783**, wherein it is held that the definition "domestic relationship" as per section 2(f) of P.W.D.V. Act speaks about the existence of a relationship by marriage or a relationship in the nature of marriage at the time. The expression used is 'are related' by marriage. The expression by the legislature is not 'were related'. From the bare reading of the provisions, it is apparent that the intention of the legislature is to protect those women who are living in a domestic relationship. It is further held that if the domestic relationship continued and if the parties have lived together at any point of time in a shared household, the person can be a respondent but if the relationship does not continue and the relationship had been in the past and is not in the present, a person cannot be made respondent on the ground of a past relationship. The domestic relationship between the aggrieved person and the

respondent must be present and alive at the time when the complaint under Domestic Violence Act is filed.

6. Mr. Susanta Kumar Dash, learned counsel for the opposite party on the other hand while countering the arguments advanced by the learned counsel for the petitioner contended that in M.A.T. Case No. 492 of 2015 instituted by the petitioner in the Court of learned Civil Judge, Senior Division, Bhadrak which was transferred and subjudiced in the Court of Judge, Family Court, Bhubaneswar in C.P. No. 588 of 2015, the address of the opposite party has been indicated at Bhubaneswar. The institution of the F.I.R. by the opposite party against the petitioner on 15.08.2015 at Mahila Police Station, Bhubaneswar and the narration made therein clearly reveals that the cause of action arises within the jurisdiction of learned S.D.J.M., Bhubaneswar. The learned counsel further urged that both the Courts below have rightly turned down the prayer made by the petitioner challenging the maintainability of the application filed by the opposite party under the P.W.D.V. Act as in terms of section 27 of the P.W.D.V. Act, the opposite party has got temporary residence at Bhubaneswar. The learned counsel further submitted that in view of the decision of this Court in case of **Sunil Kumar -Vrs.- Sumitra Panda reported in 2014 (1) Orissa Law Reviews 532** which accepted the view taken by the Division Bench of the Rajasthan High Court in case of **Smt. Sabana @ Chand Bai -Vrs.- Mohd. Talib Ali reported in 2014 (3) Crimes 44** holding that it is not necessary that an applicant-woman should have a marriage or relationship in the nature of marriage existing and subsisting with the respondent as on the date of coming into force of the Act or at the time of filing of the application under section 12 of the Act before the Magistrate seeking for one or more reliefs as provided for under the Act. In other words, the aggrieved person who had been in domestic relationship with the respondent at any point of time even prior to coming into force of the Act and one subjected to domestic violence, is entitled to invoke the remedial measures provided for under the Act. The expression, "who live or have, at any point of time, lived together in a shared household" as per section 2(f) of P.W.D.V. Act shows that subsisting relationship between the parties i.e., the aggrieved person and a respondent is not a sine qua non for filing an application for seeking relief under section 12 of the Act. It is urged by the learned counsel that in the present case when the suit seeking for dissolution of marriage instituted by the petitioner is subjudiced, it cannot be said that the application is not maintainable even though the parties had lived together for the last time in the year 2012. The

learned counsel for the opposite party further placed reliance in the case of **V.D. Bhanot -Vrs.- Savita Bhanot reported in AIR 2012 SC 965**, wherein it was held that the conduct of the parties even prior to the coming into force of the P.W.D.V. Act, could be taken into consideration while passing an order under sections 18, 19 and 20 thereof. It was further held that even if a wife, who had shared a household in the past, but was no longer doing so when the P.W.D.V. Act came into force, would still be entitled to the protection under the P.W.D.V. Act. The learned counsel while concluding his arguments contended that when both the Courts below have given concurrent findings that the application filed by the opposite party under section 12 of the P.W.D.V. Act is maintainable and there is no illegality or infirmity in the findings, it would not be proper to interfere with the same invoking the revisional jurisdiction.

7. Before adverting the contentions raised by the learned counsels for the respective sides, certain facts are borne out of records which are as follows:-

(i) The opposite party is the wife of the petitioner and their marriage was solemnized in the year 2002.

Though in the written notes of arguments filed by the petitioner on 12.09.2016, it is mentioned in paragraph-1 that "admittedly the opposite party is not the legally married wife of the petitioner", "since the year 2002 she had been staying with the petitioner up to 03.03.2012 and in the year 2003, a girl child namely Smaranika was born" and in the list of dates and events submitted by the petitioner before this Court on 28.09.2016, it is mentioned that in 2002 "started living together in live in relationship" but such averments appear to be an afterthought one and inconsistent to the stand already taken by the petitioner.

In M.A.T Suit No. 492 of 2015 which was filed by the petitioner in the Court of Civil Judge, Senior Division, Bhadrak against the opposite party under section 13 of the Hindu Marriage Act seeking for a decree of divorce, the petitioner has made verification and sworn affidavit, it is mentioned in paragraph-5 as follows:-

> "5…… The marriage of the petitioner with the respondent was solemnized on 13.07.2002 at Laxmi Narayan temple complex at Bahanaga in the district of Balasore according to Hindu tradition and custom and after marriage, they led conjugal life in the rented house of the petitioner at Kuansh in Bhadrak Town within territorial

jurisdiction of this Court and out of this wedlock, one female child was born on 07.09.2003 namely Smaranika Priyadarshini."

In the non-maintainability petition filed by the petitioner before the learned S.D.J.M., Bhubaneswar, it is mentioned in different paragraphs as follows:-

"3. That the marriage was solemnized in 2002 in the district of Balasore and subsequently both resided at Bhadrak…."

"4. That all along the petitioner and respondent after marriage stayed together under one roof at Bhadrak….."

"5. That the petitioner married in 2002. She lived with her husband at Bhadrak…."

Even in this revision petition in ground 'B', it is mentioned by the petitioner on affidavit as follows:-

"**B.** For that it is humbly submitted that the marriage of the present petitioner (husband) with the opposite party (wife) took place on dated 02.12.2002 at Bahanaga, Balasore and out of their wedlock, a female child was born on 17.09.2003 at Bhadrak as because the couple were residing there after their marriage."

In view of the inconsistent stand taken by the petitioner, it is clear that the petitioner has not come to this Court with clean hands and deliberately making misrepresentation to get the relief. An act of suppression of certain facts or misrepresentation of facts or fraud on Court to get the reliefs is always viewed seriously. In case of **Ramjas Foundation –Vrs.- Union of India reported in (2010) 14 Supreme Court Cases 38**, it is held as follows:-

"14. The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in other courts and judicial forums. The object underlying the principle is that every Court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have bearing on adjudication of the issue(s) arising in the case."

Therefore, in view of the materials on record, it is apparent that the opposite party is the wife of the petitioner and their marriage was solemnized in the year 2002 and they were blessed with a daughter in the year 2003.

(ii) The opposite party was residing at Bhubaneswar at the time of initiation of the P.W.D.V. Act proceeding. The specific averment made in the application filed by the opposite party under Section 12 of the P.W.D.V. Act, the address of the opposite party given in the divorce petition filed by the petitioner and the contents of the First Information Report submitted by the opposite party before the Mahila Police Station, Bhubaneswar on 15.08.2015 clearly substantiate such aspect.

8. The pivotal contention advanced by the learned counsel for the petitioner is that since the 'domestic relationship' between the petitioner and the opposite party ceased since 2012, therefore, the application under section 12 of the P.W.D.V. Act presented by the opposite party against the petitioner in the year 2016 seeking remedial measures is not maintainable in the eye of law.

Under section 12 of the P.W.D.V. Act, an aggrieved person can file an application before the Magistrate seeking one or more reliefs under the Act. As per section 2(a) of the P.W.D.V. Act, an 'aggrieved person' means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. 'Domestic relationship' as per section 2(f) of the P.W.D.V. Act means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Therefore, if two persons lived together in a shared household as defined under section 2(s) of the P.W.D.V. Act at any point of time and during the subsistence of such relationship, the woman is subjected to any act of 'domestic violence' as defined under section 3 of the P.W.D.V.Act, she can maintain an application before the Magistrate under section 12 the Act.

In case of **Krishna Bhatacharjee -Vrs.- Sarathi Choudhury reported in (2016) 63 Orissa Criminal Reports (SC) 1**, Hon'ble Justice Dipak Mishra speaking for the Bench observed as follows:-

> "22. In view of the aforesaid pronouncement, it is quite clear that there is a distinction between a decree for divorce and decree of

> judicial separation; in the former, there is a severance of status and the parties do not remain as husband and wife, whereas in the latter, the relationship between husband and wife continues and the legal relationship continues as it has not been snapped. Thus understood, the finding recorded by the courts below which have been concurred by the High Court that the parties having been judicial separated, the Appellant wife has ceased to be an "aggrieved person" is wholly unsustainable."

When the divorce proceeding is subjudiced between the parties and there is no severance of status between them, merely because they are living at separate places since 2012, since it is the case of the opposite party that the petitioner was regularly coming to the rented house of the opposite party at Bhubaneswar and subjecting her to physical and mental torture, it can very well be said that the legal relationship between husband and wife continues and it has not been snapped and it is very much present and alive. For subjecting a woman to any act of domestic violence as defined under section 3 of the P.W.D.V. Act and maintaining an application under section 12 of the P.W.D.V. Act, it is not necessary that the woman concerned must be living with the respondent under one roof or in a shared household at the time of presenting the application to the Magistrate. The alleged overt acts committed by the petitioner on the opposite party as mentioned in the application prima facie makes out a case of domestic violence. The truthfulness or otherwise of such averments relating to domestic violence shall be gone into during hearing of the application or at the time of disposing of the application. Specific finding on this vital aspect has to be given. Therefore, I am of the view that the opposite party is an 'aggrieved person' as defined under section 2(a) of the P.W.D.V. Act. The reliefs sought for by the opposite party against the petitioner i.e. compensation order and maintenance order come under sections 22 and 20 of the P.W.D.V. Act respectively. I am further of the view that the S.D.J.M., Bhubaneswar under whose local limits the opposite party is residing has jurisdiction to grant such reliefs.

9. Section 31 of the P.W.D.V. Act prescribes penalty for breach of protection order by the respondent which shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both. There must be an issuance of protection order or an interim protection order by the competent Court and there must be a case of breach such order by the respondent which would amount to an offence under the P.W.D.V. Act. In

such cases, the complaint has to be filed only within a period of one year from the date of the incident as held in the case of **Inderjit Singh Grewal** (supra).

In the present case, no protection order or interim protection order has been passed nor has any complaint been filed to punish the petitioner in terms of section 31 of the P.W.D.V. Act. There is nothing in the P.W.D.V. Act that an application under section 12 has to be filed within one year from the date of alleged cessation of domestic relationship between the aggrieved person and the respondent. The application under section 12 of the P.W.D.V. Act is of different in nature than the complaint under section 31 of the P.W.D.V. Act. While in an application under section 12 of the P.W.D.V. Act, the Magistrate is competent to pass different orders as mentioned under sections 18, 19, 20, 21 and 22 of the said Act and can also pass interim and ex parte orders whereas in a complaint under section 31 of the Act, a Magistrate can pass order for punishment as provided under the said section on the respondent. Therefore, the contention raised by the learned counsel for the petitioner that the P.W.D.V. Act proceeding is not maintainable as it was presented more than a year after the parties lived separately, is not acceptable.

Therefore, I am of the view that no justifiable grounds have been put forward by the learned counsel for the petitioner to interfere with the concurrent findings recorded by the Courts below exercising revisional jurisdiction. The learned Magistrate rightly rejected the petition filed by the petitioner challenging maintainability of the proceeding under the P.W.D.V. Act.

In the result, the Criminal Revision petition being devoid of merit, stands dismissed. The learned S.D.J.M., Bhubaneswar on receipt of the judgment shall fix the date of hearing at an earliest and shall endeavour to dispose the application under section 12 of the P.W.D.V. Act within a period of sixty days from that date.

CRLREV dismissed.