SUPREME COURT OF INDIA

ARUN MISHRA,J. & DR. D.Y.CHANDRACHUD, J.

CIVIL APPEAL NO. 3049 OF 2017

(ARISING OUT OF SLP(C) NO. 32285 OF 2015)

JAYAKANTHAM & ORS. .....Appellants

.Vrs.

ABAYKUMAR .....Respondent

SPECIFIC RELIEF ACT, 1963 – S. 20 (1),(2)

Decree of specific performance – When to be granted ? – Though it is the discretionary power of the Court, such discretion should not be arbitrary but the same must be sound and reasonable being guided by judicial principles, capable of correction by a Court of appeal – It is also not always necessary to grant specific performance merely because it is lawful to do so but the Court must consider, whether a party is trying to take undue advantage over the other and the hardship that may be caused to the defendant by directing specific performance.

In this case the father of the respondent-plaintiff carried on money lending business and the defendants had a transaction of loan with the father of the respondent and inorder to return the loan of Rs. 1,00, 000/- agreement to sell was executed – So the terms of contract and the conduct of the parties at the time of entering into the agreement gave the plaintiff an unfair advantage over the defendant which makes it inequitable to enforce specific performance and in the above back ground a decree for payment of compensation in lieu of specific performance would meet the ends of justice – Held, the decree for specific performance is set aside and shall stand substituted with a direction to the appellants to pay rupees fifteen lakhs to the respondent in lieu of specific performance – Such amount shall be paid within two months from the date of receipt of a copy this judgment, failing which the amount shall carry interest at the rate of 9 % per annum. (Paras 10 to13)

Case Laws Referred to :-

1 AIR 1987 SC 2328 : Parakunnan Veetill Joseph's Son Mathew v. Nedumbara kuruvila's Son and Ors[1]

2. (1994) 4 SCC 18 : Sardar Singh v. Smt. Krishna Devi and another[2] :

3. (1999) 5 SCC 77 : K. Narendra v. Riviera Apartments (P) Ltd[3]

4. (2001) 6 SCC 600 : A.C. Arulappan v. Smt. Ahalya Naik[4]

5. (2002) 8 SCC 146 : Nirmala Anand Vs. Advent Corporation (P) Ltd. & Ors.[5]

For Petitioner(s) : Mr. K. V. Mohan
For Respondent : Mr. A. Lakshminarayanan, AOR

Date of judgment : 21.02.2017

JUDGMENT

DR. D. Y. CHANDRACHUD, J.

Leave granted

2. This appeal arises from a judgment rendered by a learned Single Judge of the Madras High Court on 11 June 2015 in a second appeal under Section 100 of the Code of Civil Procedure, 1908. Dismissing the second appeal, the learned Single Judge confirmed the judgment of the Principal District Judge, Villupuram by which an appeal against the judgment of the sub-Judge, Kallakurichi was dismissed. The trial court decreed the suit for specific performance instituted by the respondent against the appellants.

3. The subject matter of the suit for specific performance is a property bearing survey No. 314/1A at Kallakurichi village admeasuring 735 square feet upon which a residential house is situated. An agreement to sell was entered into between the appellants and the father of the respondent on 2 June 1999. The consideration agreed upon was rupees one lakh sixty thousand of which an amount of rupees sixty thousand was received as advance. The balance was to be paid when the sale deed was executed. Time for completion of the sale transaction was reserved until 2 June 2002. A legal notice seeking performance of the agreement was issued on 7 May 2002. In response, the defence that was set up was *inter alia* that the agreement to sell was executed only as a security for a loan transaction.

4. In support of the plea for specific performance, the father of the respondent was examined as PW1. Evidence on behalf of the appellants was adduced by DW1 and DW2. The trial court by a judgment and order dated 5 January 2007 decreed the suit for specific performance and directed the appellants to execute a sale agreement in favour of the respondent against receipt of the balance consideration of rupees one lakh. The trial court noted that the agreement to sell had been registered and rejected the defence that it is merely a document executed by way of security for a loan transaction. In the view of the trial court, there was nothing in the agreement to indicate that it was executed merely by way of a security. A finding of fact was arrived at to the effect that the respondent was ready and willing to perform the agreement. The suit was decreed. The judgment of the trial court was

confirmed in appeal on 26 August 2008 by the Principal District Judge, Villupuram.

5. A second appeal was initially admitted on a substantial question of law but was eventually dismissed by a learned Single Judge of the Madras High Court on 11 June 2015.

6. When the Special Leave Petition came up on 29 January 2016, this Court observed that there was no error in the finding of facts recorded by three courts concurrently and hence those findings could not be reversed on merits. However, the alternative submission which was urged on behalf of the appellants was that the suit property is the only property held by them and has an extremely high value. The appellants stated that they are ready to pay a sum f rupees ten lakhs or even more to retain it. Notice was issued to the respondent limited to the above contention.

7. On behalf of the appellants, it has been submitted that this is a fit and proper case where specific performance ought not to be ordered and a decree for compensation in lieu thereof would meet the ends of justice. It was urged that specific performance of an agreement need not necessarily be ordered merely because it is lawful to do so and the matter lies in the judicious exercise of discretion of the court. In support of this plea, reliance was placed on several circumstances; primary among them being the fact that it is not in dispute that the father of the respondent who entered into the transaction and deposed as PW1(the respondent being about sixteen years of age at the time of execution of the agreement) carried on money lending business. Opposing this submission, it was urged on behalf of the respondent that while it is true that his father is a money lender, this by itself would not disable the respondent from seeking specific performance. Moreover, it was urged that the mere fact that there has been an escalation of land prices would not be a justification to refuse specific performance.

8. While evaluating whether specific performance ought to have been decreed in the present case, it would be necessary to bear in mind the fundamental principles of law. The court is not bound to grant the relief of specific performance merely because it is lawful to do so. Section 20(1) of the Specific Relief Act, 1963 indicates that the jurisdiction to decree specific performance is discretionary. Yet, the discretion of the court is not arbitrary but is "sound and reasonable", to be "guided by judicial principles". The exercise of discretion is capable of being corrected by a court of appeal in the hierarchy of appellate courts. Sub-section 2 of Section 20 contains a stipulation of those cases where the court may exercise its discretion not to

grant specific performance. Sub-Section 2 of Section 20 is in the following terms :

> "Section 20 (2). The following are cases in which the court may properly exercise discretion not to decree specific performance-
>
> (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;
>
> (c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance."

However, explanation 1 stipulates that the mere inadequacy of sideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, will not constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Moreover, explanation 2 requires that the issue as to whether the performance of a contract involves hardship on the defendant has to be determined with reference to the circumstances existing at the time of the contract, except where the hardship has been caused from an act of the plaintiff subsequent to the contract.

9 . The precedent on the subject is elucidated below :

(i) In **Parakunnan Veetill Joseph's Son Mathew** v. **Nedumbara kuruvila's Son and Ors**[1] ,this Court held that :

> "…14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff…"

(ii) A similar view was adopted by this Court in **Sardar Singh** v. **Smt. Krishna Devi and another**[2] :

[1] AIR 1987 SC 2328 , [2] (1994) 4 SCC 18

"…14. Section 20(1) of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the contract."

(iii) Reiterating the position in **K. Narendra** v. **Riviera Apartments (P) Ltd**[3], this Court held thus :

"…29. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature , shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant.The principle underlying Section 20 has been summed up by this Court in Lourdu Mari David v. Louis Chinnaya Arogiaswamy by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court."

(iv) These principles were followed by this Court in **A.C. Arulappan v. Smt. Ahalya Naik**[4], with the following observations :

"…..7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract

[3] (1999) 5 SCC 77 , [4] (2001) 6 SCC 600

the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff." ……..

"…..15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court….."

(v) A Bench of three Judges of this Court considered the position in **Nirmala Anand Vs. Advent Corporation (P) Ltd. and Ors**.[5], and held thus

"…..6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

[5] (2002) 8 SCC 146

10. In the present case, the material on the record contains several aspects which will have to weigh in the balance. There is no dispute about the fact that the father of the respondent who entered into an agreement on his behalf (and deposed in evidence) carried on money lending business. The consistent case of the appellants in reply to the legal notice, in the written statement as well as in the course of evidence was that there was a transaction of a loan with the father of the respondent. The evidence of DW2 was to the following effect :

> "The defendant was having a relationship with plaintiff's father, Babu Dhanaraj in respect of loan transaction. Already the Defendant No. 2 has taken loan from Babu Dhanapathy Raj and bought a lorry and was driving it. In this case, in order to return the loan of Rs. 1,00,000/- as per the instruction of Babu Dhanapathy Raj only on the basis of trust, the Exhibit P1 agreement to sell was executed. In the said document, I have put my signature as a witness."

During the course of the evidence, the appellants produced material (Exhibit D3) indicating that the value of the property was six lakhs thirty thousand on 20 November 2006. The agreed consideration between the parties was rupees one lakh sixty thousand of which an amount of rupees sixty thousand was paid at the time of the execution of the agreement. The sale transaction was to be completed within three years against the payment of the balance of rupees one lakh. The appellants also relied upon Exhibit D2 which indicated that the value of the property as on 1 April 1999. These aspects were adverted to in the judgment of the trial court and the first appellate court while setting out the evidence, but have evidently not been borne in mind in determining as to whether a decree for specific performance could judiciously have been passed.

11. In our view the material which has been placed on record indicates that the terms of the contract, the conduct of parties at the time of entering into the agreement and circumstances under which the contract was entered into gave the plaintiff an unfair advantage over the defendants. These circumstances make it inequitable to enforce specific performance.

12. For the above reasons a decree for the payment of compensation in lieu of specific performance would meet the ends of justice. As we have noted earlier the father of the respondent paid an amount of rupees sixty thousand to the appellants in June 1999 of the total agreed consideration of Rs. 1.60 lakhs. The appellants have voluntarily offered to pay an amount of rupees ten lakhs, as just compensation in lieu of specific performance. In our

view, the ends of justice would be met by directing the appellants to pay to the respondent an amount of rupees fifteen lakhs in lieu of specific performance.

13. The decree for specific performance shall accordingly stand set aside and shall stand substituted with a direction to the appellants to pay a sum of rupees fifteen lakhs to the respondent in lieu of specific performance. The amount shall be paid within two months from the date of receipt of a copy of this judgment. Upon the expiry of the period of two months, the amount shall carry interest at the rate of 9 per cent per annum, till payment or realization.

14. The appeal shall stand allowed in these terms. There shall be no order as to costs.

Appeal allowed.

2017 (I) ILR - CUT-370 (S.C.)

SUPREME COURT OF INDIA

DIPAK MISRA, J. & VIKRAMAJIT SEN, J.

CIVIL APPEAL NO. 6897-6900 OF 2008

STATE OF ORISSA ORS. ……..Appellants

.Vrs.

SASWATI SWAIN & ANR. **..**……..Respondents

CONSTITUTION OF INDIA, 1950 – Art. 226

Writ petition disposed of with directions to the authorities – No action taken by the authorities within the time stipulated by the High Court – Aggrieved party filed a miscellaneous case in the disposed of writ petition wherein the High Court issued certain directions – Hence this appeal – Held, after disposal of the writ petition, either a contempt petition or a separate writ petition lies but not a miscellaneous petition.

Appellant : Mr. Sibo Sankar Mishra
Respondents : Mr. Ashok Kumar Gupta

Date of Judgment : 24.09.2014

JUDGMENT

DIPAK MISRA, J.

Heard Mr. Mishra learned counsel for the appellants and Mr. Bharat Sangal learned counsel for the respondents.

Assailing the impugned order dated 29.02.08 passed by the High Court of Orissa at Cuttack, Mr. Mishra learned counsel for the appellants has contended that such an order could not have been passed in a Miscellaneous Case No. 836 in W.P. (C) No. 8637 of 2004. Learned counsel has drawn out attention to the initial order passed in the writ petition. The relevant pat of the order reads as follows:

> "The grievance being simple, I depose of the writ application directing the petitioner to file a representation before the Inspector of Schools, opposite party No. 3 highlighting all her grievances. If such a representation is filed, opposite party No. 3 is directed to scrutinize the same. On scrutiny, if it is found that any of the amount is payable to the petitioner, pass necessary orders for disbursement of the same in consonance with law. It is further directed that if the petitioner is, in fact, discharging her duties regularly and she is otherwise legally entitled to receive, the authorities shall also take steps for disbursement of the current salary. The entire exercise shall be completed within a period of three months from the date of filing of the representation."

We have been apprised at the bar that after the aforesaid order came to be passed, the concerned authority of the State Government enter into intra-departmental communications but no order was passed with the time stipulated by the High Court. The said inaction on the part of the competent authority could have made the concerned officer liable for contempt, if any, but definitely the affected parties could not have filed the Miscellaneous Case and the High Court, in our view, should not have adverted to number of facets and pass an order. We have no iota of doubt in our mind that adoption of such a discursive method to issue directions in a Miscellaneous Case in a disposed of writ petition is not permissible.

Presently we think the best course is to set aside the order passed in the Miscellaneous Case No.836/2008 and direct the Registry of the High Court to register the same as a separate writ petition and request the High Court to deal with the same in accordance with law. Liberty is granted to the parties to incorporate additional pleadings by way of amendment to the petition, file counter affidavit and the affidavit in rejoinder. Needless to emphasise, all the issues pertaining to facts and law are kept open.

At this juncture, we are obliged to state that when the matter was listed on 23.07.2014, the following order was passed:

> "Heard Mr. Kaartiar, learned senior counsel, Mr. Mishra, learned counsel for the appellant and Mr. Bharat Sangal, learned counsel for the respondents in part.
>
> Having heard the appellants at some length, as advised at present, we are inclined to direct the State of Orissa to pay the salary to the respondent-teachers in praesenti, commencing 07.07.2014.
>
> Needless to say that the aforesaid payment shall be without any prejudice to the contentions raised in these appeals.
>
> Let the matters be listed for further hearing on 23.09.2014."

Mr. Mishra submitted that pursuant to the aforesaid order, the teachers are being paid the current salary. Mr. Sangal States that he does not have proper instructions in the matter. As we are finally disposing of the matter, we only direct that the State shall pay the current salary without prejudice to the contentions to be raised before the High Court and, of course, it should be subject to the outcome of the writ petition. The civil appeals are allowed to the extent indicated above without any order as to costs.

Appeals allowed.

2017 (I) ILR - CUT- 372

SUPREME COURT OF INDIA

DIPAK MISRA, J. & R. BANUMATHI, J.

CIVIL APPEAL NO. 3860 OF 2007

T.A. KATHIRU KUNJU …….Appellant

.Vrs.

JACOB MATHAI & ANR. ……..Respondents

ADVOCATES ACT, 1961 – S.35

Misconduct of an advocate – Disciplinary Authority of Bar Council of India punished the appellant-advocate for gross negligence in duty – Hence this appeal – Respondent engaged the appellant to file a complaint under the N.I. Act for dishonor of a cheque for a sum of Rs. 75, 000/- – Appellant filed complaint U/s 420 I.P.C. where in Magistrate

directed investigation U/s 156 (3) Cr.P.C. and he had given the cheque to the police – No finding that the cheque was kept back by the appellant and his only fault is that he could not get the acknowledgment – Held, in view of the evidence on record, the appellant cannot be treated to be in the realm of "gross negligence" but only "negligence" – Impugned order is setaside.

(Paras 15,16,17,18)

Case Laws Referred to :-

1. AIR 1963 SC 1313 : Mr. 'P' an Advocate, Re v.[1]
2. (1984) 2 SCC 556 : P.D. Khandekar vs. Bar Council of Maharashtra, Bombay & Ors.[2]
3. (1995) 3 SCC 619 : Sanjiv Datta Dy. Secy. Ministry of Information & Broadcasting, In re.[3]
4. (2012) 1 SCC 741 : Dhanraj Singh Choudhary v. National Vishwakarma[4]

For Petitioner : Ms. Anitha Shenoy
For Respondents : Mrs. K. Sarada Devi

Date of judgment : 21.02.2017

JUDGMENT

DIPAK MISRA, J.

The present appeal preferred under Section 38 of the Advocates Act, 1961 (for brevity, 'the Act') assails the correctness of the order dated 15.10.2006 passed by the Disciplinary Committee of the Bar Council of India in BCI TR Case No.138 of 2005 whereby the said authority has found the appellant guilty of gross negligence in discharge of his professional service to the client and accordingly imposed the punishment of reprimand with a further stipulation that he shall pay a sum of Rs.5,000/- to the Bar Council of India and an equivalent amount to the complainant within two weeks' time from the date of receipt of the order failing which he would stand suspended from practising for a period of six months.

2. As the factual score would unroll, the respondent-complainant engaged the appellant as advocate in respect of a matrimonial dispute and during the pendency of the matrimonial case, the wife of the respondent breathed her last due to kidney failure in the year 2002. The appellant advised the complainant-respondent that as the wife had expired, there was no justification to prosecute any further the case for divorce and it was advisable to withdraw the said litigation. In the meantime, the respondent engaged him to file a complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act') as a cheque issued by one Ramachandran in favour

of the respondent for a sum of Rs.75,000/- (Rupees seventy five thousand only) had been dishonoured. It is not in dispute that the appellant thought it appropriate not to file a complaint under the N.I. Act but he felt it apposite to file a complaint case before the competent Magistrate under Section 420 of the Indian Penal Code and accordingly he did so. As is demonstrable, the learned Magistrate directed investigation to be conducted under Section 156(3) of the Code of Criminal Procedure. The eventual result of the said investigation has not been brought on record.

3. At this stage, the respondent filed a complaint before the Bar Council of Kerala, principally alleging that the cheque that was handed over to the appellant to initiate criminal action against Ramachandran under Section 138 of the NI Act was not returned to him. On the basis of complaint received, a disciplinary proceeding was initiated against him and eventually the Disciplinary Committee issued a memo of charges on the appellant. It is seemly to reproduce the same :-

"**MEMO OF CHARGES**

> "That Sri Jacob Mathai, Kachirackal House, Marampally, Always entrusted with you to file a case under the provisions of Negotiable Instruments Act against Sri. Ramachandran, Nedumpally House, Marampally for bouncing of cheque dated 04.09.2002; and that you have not filed the case under N I Act; and that the handiyittaparambu police station directed the complainant to produce the said cheque to the said police, but you didn't return it so far; and you did it so on the offer of the said Ramachandran to pay you Rs.10,000/- and thereby you had committed professional and other misconduct punishable u/s 35 of the Advocats Act, 1961."

4. The said memo of charges is dated 22.8.2004. As the Disciplinary Committee of the Bar Council of Kerala could not complete the proceeding within a span of one year, the matter stood transferred to Bar Council of India where it was registered as BCI TR Case No.138 of 2005. Before the Disciplinary Committee, the complainant examined himself and asserted that the appellant was under legal obligation to file the complaint under Section 138 of the NI Act and further, he was obligated to return the cheque. The appellant, in the cross examination before the Disciplinary Committee, stated that he was entrusted with the original cheque along with the photostat copies and the original cheque was handed over to the investigating agency when the investigation commenced in pursuance of the direction issued under

Section 156(3) Cr.P.C. by the learned Magistrate. The Disciplinary Committee adverted to the facts and held as follows :-

> "But, however, the Advocate in his professional capacity while discharging the duties is to be doubly careful in dealing such matters. According to his own evidence, he has stated that he has returned some cheque to the complainant and he is unable to prove which cheque he has returned. Though he stated the cheque which he has returned was not the subject matter of the complaint, but he failed to et *(sic)* an acknowledgment from the respondent for having returned the cheque. It is a well settled law that a person who is throwing allegation against another person, the burden of proof is on the part of the complainant who is throwing the allegation. Here in this case, the complainant had not proved his case beyond reasonable doubt and hence we are not inclined to give severe punishment to the respondent herein."

5. While expressing the aforesaid opinion, the Disciplinary Committee observed that as the appellant was an advocate, he should have been more careful and, therefore, he was guilty of gross negligence and accordingly imposed the punishment as has been indicated hereinbefore.

6. On a perusal of the analysis of the findings returned by the Disciplinary Committee of the Bar Council of India, it is evident that it has taken exception to one aspect, namely, the appellant had not obtained the acknowledgment of the cheque from the respondent. Be it noted, the Disciplinary Committee did not think it appropriate to advert to the fact whether the cheque was handed over to the police for the purpose of investigation. That apart, the Committee has also not adverted to any other aspect, and correctly so, as nothing else was brought in evidence.

7. It is submitted by Mr. Sanjay Parikh, learned counsel for the appellant, that when the Disciplinary Committee of the Bar Council of India has unequivocally arrived at the conclusion that it is a case of mere negligence which is also evincible, a punishment as envisaged under Section 35 could not have been imposed. He would further submit that disciplinary authority has erroneous stamped it as gross negligence which makes the order absolutely indefensible. He has commended us to a Constitution Bench decision in the matter of ***Mr. 'P' an Advocate, Re v.***[1]]. That apart, he has also placed reliance on a three Judge Bench decision in ***P.D. Khandekar* vs. *Bar Council of Maharashtra, Bombay & Ors.***[2].

[1] AIR 1963 SC 1313 , [2] (1984) 2 SCC 556

8. Ms. K. Sarda Devi, learned counsel for the respondent supported the order passed by the Disciplinary Committee of the Bar Council of India.

9. Section 35 of the Act reads as under :-

> "35. Punishment of advocates for misconduct (1) Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal of its disciplinary committee.
>
> (1A) The State Bar Council may, either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct the inquiry to be made by any other disciplinary committee of that State Bar Council.
>
> (2) The disciplinary committee of a State Bar Council shall fix a date for the hearing of the case a notice thereof to be given to the advocate concerned and to the Advocate General of the State.
>
> (3) The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate –General an opportunity of being heard, may make any of the following orders, namelya. Dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed.
>
> b. Reprimand the advocate
>
> c. Suspend the advocate from practice for such periods as it may deem fit.
>
> d. Remove the name of the advocate from the State roll of advocates
>
> (4) Where an advocate is suspended from practice under clause (c) of sub section
>
> (3) he shall, during the period of suspension, be debarred from practicing in any court or before any authority or person in India.
>
> (5) Where any notice is issued to the Advocate-General under sub-section (2) the Advocate –General may appear before the disciplinary committee of the State Bar Council either in person or through any advocate appearing on his behalf.
>
> Explanation - In this section, section 37 and section 38 the expression "Advocate-General" and "Advocate-General of the State" shall, in relation to the Union territory of Delhi, mean the Additional Solicitor General of India."

10. On a plain reading of the aforesaid provision, it is clear as crystal what punishment is to be imposed in case of misconduct. In the case at hand, as we find, that a conclusion has been arrived at by the Disciplinary Authority that it is a case of gross negligence at the hands of the appellant. As urged by Mr. Parikh, it is only required to be seen whether it is a mere negligence or gross negligence.

11. The Constitution Bench, in the matter of ***Mr. 'P' an Advocate***, (supra) has ruled that mere negligence or error of judgment on the part of an advocate would not amount to professional misconduct. It has been further held therein that error of judgment cannot be completely eliminated in all human affairs and mere negligence may not necessarily show that the advocate who is guilty of it can be charged with misconduct. The Constitution Bench, as is demonstrable, has drawn a distinction between 'negligence' and the 'gross negligence'. We think it appropriate to reproduce the said passage. It is as follows:-

> "But different considerations arise where the negligence of the Advocate is gross. It may be that before condemning an Advocate for misconduct, courts are inclined to examine the question as to whether such gross negligence involves moral turpitude or delinquency. In dealing with this aspect of the matter, however, it is of utmost importance to remember that the expression "moral turpitude or delinquency" is not to receive a narrow construction. Wherever conduct proved against an Advocate is contrary to honesty, or opposed to good morals, or is unethical, it may be safely held that it involves moral turpitude. A willful and callous disregard for the interests of the client may, in a proper case, be characterized as conduct unbefitting an Advocate. In dealing with matters of professional propriety, we cannot ignore the fact that the profession of law is an honourable profession and it occupies a place of pride in the liberal professions of the country. Any conduct which makes a person unworthy to belong to the noble fraternity of lawyers or makes an Advocate unfit to be entrusted with the responsible task of looking after the interests of the litigant, must be regarded as conduct involving moral turpitude. The Advocates-on-record like the other members of the Bar Advocates are Officers of the Court and the purity of the administration of justice depends as much on the integrity of the Judges as on the honesty of the Bar. That is why in dealing with the question as to whether an Advocate has rendered

himself unfit to belong to the brotherhood at the Bar, the expression "moral turpitude or delinquency" is not to be construed in an unduly narrow and restricted sense." [Emphasis Supplied]

12. On a careful reading of the aforesaid passage, it is quite clear that concept of "gross negligence" cannot be construed in a narrow or a restricted sense. It is because honesty of an Advocate is extremely significant. The conduct of an Advocate has to be worthy so that he can be called as a member of the noble fraternity of lawyers. It is his obligation to look after the interest of the litigant when is entrusted with the responsible task in trust. An Advocate has to bear in mind that the profession of law is a noble one. In this regard, we may fruitfully refer to what has been stated in ***Sanjiv Datta Dy. Secy. Ministry of Information & Broadcasting, In re.***[3]:-

"The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behaviour. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure due to the tireless role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practised it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible."

13. Slightly recently in ***Dhanraj Singh Choudhary v. National Vishwakarma***[4], it has been observed:-

"The legal profession is a noble profession. It is not a business or a trade. A person practising law has to practise in the spirit of honesty

[3] (1995) 3 SCC 619 , [4] (2012) 1 SCC 741

> and not in\ the spirit of mischief-making or money-getting. An advocate's attitude towards and dealings with his client have to be scrupulously honest and fair."

14. There can be no doubt that nobility, sanctity and ethicality of the profession has to be kept uppermost in the m nd of an Advocate. Keeping that primary principle inview, his conduct has to be weighed. There the approach of appreciating the evidence rought on record and the yardstick to be applied, become quite relevant. A three-Judge Bench in ***P.D Khandekar*** (supra) while dealing with the scope of an appeal preferred under Section 38 of the Act, ruled that in an appeal under Section 38, this Court in a general rule, cannot interfere with the concurrent finding of fact by the Disciplinary Committee of the Bar Council of India and the State Bar Council unless the finding is based on no evidence or it proceeds on mere conjectures and surmises. The Court has further laid down that finding in such disciplinary proceedings must be sustained by a higher degree of proof than that required in civil suits, yet falling short of the proof required to sustain a conviction in a criminal prosecution; and there should be convincing preponderance of evidence. We must immediately note with profit that the said principle is absolutely significant. The Court has stressed upon the rule to be applied for acceptance or treating the finding defensible by the Disciplinary Committee of Bar Council. In this regard it is fruitful to reproduce the following passage from the said authority:-

> "There is a world of difference between the giving of improper legal advice and the giving of wrong legal advice. Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct. In re A Vakil, Coutts Trotter, C.J. followed the decision in re G. Mayor Cooke and said that:
>
> "Negligence by itself is not professional misconduct; into that offence there must enter the element of moral delinquency. Of that there is no suggestion here, and we are therefore able to say that there is no case to investigate, and that no reflection adverse to his professional honour rests upon Mr. M.', The decision was followed by the Calcutta High Court in re An Advocate, and by the Allahabad High Court in the matter of An Advocate of Agra and by this court in the matter of *P. An Advocate*. The decision was followed by the Calcutta High Court *In re An Advocate* [AIR 1955 CAL 484], and by the Allahabad High Court *In the matter of An Advocate of Agra* [AIR 1940 All 289]

and by this Court *In the matter of P. An Advocate* [AIR 1934 Rang 33]"

15. It is urged by Mr. Parikh that when no finding is returned that the cheque was kept back by the appellant, there is no gross negligence. On the contrary, as he would submit, it was handed over to the investigating agency which was directed by learned Magistrate to carry out the investigation under Section 156(3) CrPC. His only fault is that he could not get the acknowledgment.

16. Ms. K. Sarda Devi, learned counsel for the respondent, per contra, would urge that the case of the respondent is squarely covered by the dictum of the Constitution Bench inasmuch as the Disciplinary Committee of the Bar Council of India has held that there was gross-negligence on the part of the appellant.

17. On a studied scrutiny of the evidence in this context, the factual score, the act of the present appellant cannot be treated to be in the realm of gross negligence. It would be only one of negligence. The tenor of the impugned order, as we notice, puts the blame on the appellant on the foundation that he had not received the acknowledgment. He has offered an explanation that he had given the cheque to the police. There has been no delineation in that regard. That apart, there is no clear cut analysis on deliberation on gross negligence by the advocate. The Disciplinary Committee found the appellant guilty of gross-negligence as he had failed to get the acknowledgment from the complainant-respondent. The examples given by the Constitution Bench are of different nature. In the obtaining factual matrix, therefore, we are unable to accept the conclusion arrived at by the Disciplinary Authority of the Bar Council of India that the negligence is gross. Hence we are impelled not to accept the submission advanced by learned counsel for the respondent.

18. Thus analysed, we are disposed to allow the appeal and accordingly, we so direct and the order passed by the Disciplinary Committee of the Bar Council of India is set aside. Though we have set aside the order, on a suggestion being made, Mr. Sanjay Parikh, learned counsel for the appellant, agreed that the amount paid to the complainant need not be refunded. The amount that has been deposited to the Bar Council of India shall be refunded by the Bar Council of India. There shall be no order as to costs.

Appeal allowed.

2017 (I) ILR - CUT- 381

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

W.P.(C). NO. 8247 OF 2016

PRAFULLA KUMAR PRADHAN .....Petitioner

.Vrs.

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

TENDER – Incentive for early completion of work – Petitioner completed the work six months prior to the stipulated date – Clause-6.21 of the tender call notice is relevant – Authorities denied such incentive on a technical ground that the same was to be paid only for new work as per Clause 3.5.5. of the OPWD code appears to be an after thought as the opposite parties kept the matter pending without taking any decision till the petitioner approached the Court – Held, petitioner is entitled to the incentive for early completion of work – Held, impugned order Dt 30.05 2016 is quashed – Direction issued to O.P. No.2 to pass a fresh order in accordance with law.

(Paras 9 to 12)

Case Law Referred to :-

1. (2014) 4 SCC 186 : S.V.A. Steel Re-Rolling Mills Limited v. State of Kerala

For petitioner : M/s. P.C. Nayak & S.K. Rout
For opp. Parties : Mr. P.K. Muduli (Addl. Govt. Adv.)

Decided on : 20.12.2016

JUDGMENT

VINEET SARAN, C.J.

In response to a tender call notice dated 26.08.2014 issued by opposite party no.4-Superintending Engineer, Public Health Circle, Bhubaneswar, the petitioner was awarded the contract on 28.11.2014. As per the agreement, the petitioner was to complete the work within one year of 28.11.2014, i.e., by 27.11.2015. As per the clause of the tender notice, incentive was to be granted for early completion of work. The relevant clause-6.21 relating to incentive for early completion of work is reproduced below:-

"6.21. ***Incentive for Early Completion****:*

Incentive @1% will be paid in case of completion of the work ahead of One month (Part of month shall be excluded) from the stipulated date for completion and the maximum amount shall be 2% if the work is completed 2 months ahead of the schedule time. For payment of

incentive, the codal provision as laid by Works Department in their letter No.10070 Dt.08.06.2007 and OPWD Code Volume-I, Para 3.5.5. and subsequent amendment thereof shall be followed."

2. The petitioner completed the work on 27.05.2015, which was six months prior to the stipulated date of completion. He was also paid the final bill on 05.06.2015. Then, on 07.08.2015, the Executive Engineer-opposite party no.5 gave its report to the effect that the petitioner would be entitled to an incentive of 10% under the said clause-6.21, which amounts to Rs.19,98,222/-. A reminder was s ent to the said effect by opposite party no.5-Executive Engineer to the opposite parties no.4 and 2 on 06.02.2016. When no order was passed on the communications made by opposite party no.5 to the higher authorities for grant of incentive to the petitioner, the petitioner approached this Court by filing this writ petition praying for direction to the opposite parties to pay the incentive amount along with interest.

3. During pendency of the writ petition, opposite party no.2-Engineer-in-Chief, Public Health, Odisha, has passed the order rejecting the claim of the petitioner for being paid the incentive amount on the ground that the Executive Engineer did not intimate about the completion of work within seven days as required and also on the ground that the work allotted to the petitioner was not a new work, but only "replacement of existing water supply rising main (PSC pipe) with M.S./D.I Pipe". By way of amendment, the petitioner has brought the said order dated 30.05.2016 on record and also challenged the same.

4. We have heard Sri P.C. Nayak, learned counsel for the petitioner, as well as Sri P.K. Muduli, learned Addl. Govt. Advocate for the State-opposite parties, and perused the records. Pleadings between the parties have been exchanged and with the consent of learned counsel for the parties, this writ petition is being disposed of at the admission stage.

5. The clause 6.1 of the tender notice, as mentioned supra, deals with "*incentive for early completion"*. Before delving into this clause, we have to examine the meaning of word "*incentive"*. In common parlance of English, meaning of the word "*incentive" as* provided in different dictionaries, reads as follows:

As per ***Oxford Dictionary***, "*incentive"* means:

"*1.A thing that motivates or encourages someone to do something.*

2. A payment or concession to stimulate greater output or investment."

According to ***The Concise Oxford Dictionary,*** the meaning of "*incentive*" is:

> "*1.a Tending to incite, 2.n. Incitement (to action, to do, to doing), provocation, motive, payment or concession to stimulate greater output by workers."*

As per ***Chambers Dictionary,*** the meaning of "*incentive"* is:

> *"In-sent'iv, adj inciting, encouraging; igniting(Milton). –n that which incites to action, a stimulus, esp to work more efficiently, productively, etc.*

As per ***Collins Dictionary,*** "*incentive"* means :

> *"an additional payment made to employees as a means of increasing production, an incentive scheme.*
> *Wage incentive:- additional wage payments intended to stimulate improved work performance"*

According to ***Dictionary.com*** "*incentive*" means:

> *"1. something that incites or tends to incite to action or greater effort, as a reward offered for increased productivity.*
> *2. inciting, as to action; stimulating; provocative."*

As per ***Cambridge Advanced Learner's Dictionary & Thesaurus,*** "incentive" means:

> *"something that encourages a person to do something."*

According to ***Merriam-Webster Dictionary"****incentive*" means:

> *"Something that incites or has a tendency to incite to determination or action.*
> ***Incentive synonyms***
> *Boost, encouragement, goad, impetus, impulse, incitation, incitement, instigation, momentum, motivation, provocation, spur, stimulant, stimulus, yeast."*

In **P. Ramanatha Aiyar's Advanced Law Lexicon, 4th Edition,** "*incentive"* has been defined to mean:

> *"something that aroused feeling or incites to action. Positive motive (something artificially generated) for performing some task. It is not appropriate to limit the word 'incentive' to the provision of incentives for employees only. An incentive scheme is a scheme which has the purpose of giving rewards in order to encourage performance of some description."*

One of such example is ***Export incentive***-

"Government incentives to promote exports. They include direct-tax incentives, subsidies, favourable terms for insurance and the provision of cheap credit."

6. Applying the meaning of '*incentive"* discussed above, to clause 6.21, the incentive is provided by the authority for early completion of work so that the authorities may be benefited by the efficient and proper action of the contractor.

7. The apex Court in the case of ***S.V.A. Steel Re-Rolling Mills Limited v. State of Kerala,*** (2014) 4 SCC 186, in paragraph-30 of the judgment held as under:-

"Before laying down any policy which would give benefits to its subjects, the State must think about pros and cons of the policy and its capacity to give the benefits. Without proper appreciation of all the relevant factors, the State should not give any assurance, not only because that would be in violation of the principles of promissory estoppel but it would be unfair and immoral on the part of the State not to act as per its promise."

8. In the present case, there is no denial of fact that there was an incentive clause in the tender as well as agreement. Even the opposite party no.5-Executive Engineer has certified that the work was completed six months prior to the stipulated date of completion. Further, more than three months prior to the date of completion, the Executive Engineer has on 07.08.2015 recommended for payment of incentive to the petitioner under the terms of the agreement. Even in the impugned order it is admitted that the work was completed on 27.05.2015, but the same was intimated by the Executive Engineer after three months, i.e., 07.08.2015. It is evident that parties had knowledge that the work was completed on 27.05.2015, inasmuch as even the payment of final bill was made to the petitioner on 05.06.2015. Merely for the fault, if any, of the Executive Engineer in not intimating of the completion of work prior to 07.08.2015 would not deny the petitioner the benefit of incentive clause in the agreement, as well as tender call notice, as the fault cannot be attributed to the petitioner.

9. Clause-6.21, as has been reproduced hereinabove, clearly stipulates payment of incentive for early completion of work which clause is not denied by the opposite parties. A technical ground for denial of incentive has been taken that the same was to be paid only for new work, as per clause-3.5.5. of

OPWD Code. The same appears to be an after thought as the opposite parties kept the matter for grant of incentive pending and did not take any decision till the petitioner approached this Court, and it was only during pendency of the writ petition that on such technical ground, the claim of the petitioner has been rejected. The Executive Engineer, who is the executing authority, had never raised such objection. He had, in fact, recommended for payment of incentive on 07.08.2015, and then again sent reminder on 06.02.2016.

10. The clause for grant of incentive is specified in the tender call notice itself. Resorting to a technical objection that the same is not provided for under the OPWD Code cannot sustain in the eye of law, as the work to be executed was specified in the tender call notice and the incentive clause was also in the said notice, meaning thereby for the work to be executed, incentive for early completion of work was to be given for such work, which was also provided for in the tender call notice.

11. In the order passed on 30.05.2016, opposite party no.2 has resorted to a clause in the OPWD Code which provided that it is the obligation of the Executive Engineer to report about the completion of work within seven days thereof and since the Executive Engineer failed to do so, the petitioner would not be entitled to grant of incentive. It is surprising that for no fault of the petitioner, he has to suffer even though he has completed the work much prior to the stipulated date of completion and has already been paid the final bill, within ten days of completion of the work. The petitioner cannot be made to suffer for no fault on his part, especially when all the authorities have themselves accepted that the work was completed much prior to the date of completion.

12. In our view, in the facts of this case, the petitioner would be entitled to the incentive for early completion of work as provided for under clause-6.21 of the tender call notice. The order dated 30.05.2016 is thus quashed. Opposite party no.2-Engineer-in-Chief, Public Health, Odisha is directed to pass a fresh order in accordance with law giving the petitioner benefit of clause-6.21 of the tender call notice within two months from the date of filing of the certified copy of this order.

13. The writ petition stands allowed to the extent indicated above. No order as to costs.

Writ petition allowed.

2017 (I) ILR - CUT-386

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

W.P.(C) No. 2711 of 2017 &
Misc. Case No.2356 of 2017
&
W.P.(C) No.2712 of 2017 &
Misc. Case No.2307 of 2017

THE HIGH COURT BAR ASSOCIATION, ODISHA & ANR. ……..Petitioners

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – Art 19 (i)(a)

Freedom of press – It is no doubt very precious and sacrosanct but it should not be absolute, unlimited, unfettered and it must be subject to reasonable restrictions – Due to wrong reporting of a news public gets a biased opinion of the incident – So it is the duty of a responsible journalist to verify the correctness of the news before publication and inform the people with accurate and impartial news alongwith his views – Held, Courts intervention is required when there is inappropriate reporting by the press and Electronic Media.

In this case O.P. No 3-informant, who is the Inspector of Police CID Crime Branch, alleged that on 07.02.2017 she had come to the Court for official work and while coming down in Lift No 5, certain advocates misbehaved her by leaning against her body and she lodged information to S.P. Police – Though FIR was registered on 09. 02. 2017 there was a press report in the Oriya daily on 08.02.2017 involving lawyers of the Court – In the other hand nothing incriminating found from the CCTV footage of the Lift – Due to such irresponsible reporting in different papers the image of the lawyers as a whole and the judiciary in particular has been tarnished – Hence the writ petitions – The above facts warrant immediate interference of this Court by issuing interim directions that the O.P. Nos 4 to 16, their agents, assigns or any of them acting on their behalf and any other person (s) involved in print or Electronic Media or Internet are restrained from further publishing or highlighting the allegations against the lawyer's as a whole, or the advocates against whom allegations have been made in the complaint, or the informant, or the High Court as an institution, in any form without disclosing in the headlines of the article that they are mere allegations against such party in their write up or telecast –The said O.P.s further restrained from publishing and telecasting the names and photographs of the accused persons or the

informant – The above directions shall remain in force till the next date of hearing. (Paras 31,32,33)

Case Laws Referred to :-

1. AIR 1982 SC 149 : S.P. Gupta v. President of India.
2. AIR 1997 SC 73 : Re: Harijai Singh and another and In Re: Vijay Kumar.
3. AIR 2005 SC 790 : M.P. Lohia, v. State of West Bengal.
4. AIR 2010 SC 2352 : Sidhartha Vashisht @ Manu Sharma v. State (N.C.T. of Delhi).
5. AIR 2012 SC 3829 : Sahara India Real Estate Corpn. Ltd. v. Securities and Exchange Board of India,
6. AIR 1967 SC 1 : Naresh Shridhar Mirajkar v. State of Maharashtra.

For petitioners : Mr. Ashok Mohanty, Sr. Advocate,
Mr. Ashok Parija, Sr. Advocate,
Mr. Karunakar Das, Mr. A.A. Das,
Mr. K.P. Mishra & Mr. S.P. Sarangi,
Mr. Shivsankar Mohanty (In person)

For opp. parties : Mr. R.K. Mohapatra, Govt. Adv.
Mr. R.K. Mohapatra, Govt. Adv.

Decided on : 17.2.2017

JUDGMENT

VINEET SARAN, C.J.

These two writ petitions have been filed with regard to an incident which is alleged to be occurred in the premises of the High Court on 07.02.2017.

2. The first writ petition is filed by the High Court Bar Association, Odisha, on behalf of the lawyers of Orissa High Court praying that a Judicial Commission be constituted to enquire into the alleged incident which had occurred on 07.02.2017 and also for issue of a direction to the Press as well as Electronic Media not to publish or telecast colourable, exaggerated, unverified and unnecessary news on the issue involved in the matter, as it will not only worsen the situation, but completely tarnish and damage the reputation of the institution.

3. The second writ petition has been filed by a practicing advocate of Orissa High Court with similar prayers. For the present, the prayer which is pressed by the petitioners is for an interim direction to the Print and Electronic Media not to publish any news with regard to the alleged incident,

as the same is tarnishing the image of the High Court as an institution, and lawyers in general.

4. We shall treat the writ petition No. 2711 of 2017 as the leading petition. In the said writ petition, the State of Odisha; Director General and Inspector General of Police; and the informant of the incident; are arrayed as opposite parties 1, 2 and 3 respectively. Various Print and Electronic Media Publishers/Channels have also been arrayed as opposite parties no. 4 to 16. The Registrar General of Orissa High Court has been arrayed as proforma opposite party no.17.

5. We have heard Sri Ashok Mohanty and Sri Ashok Parija, learned Senior Counsel along with Sri Asim Amitav Das, Sri K.P.Mishra and Sri Karunakar Das, learned counsel appearing on behalf of the petitioner in the first writ petition; as well as Sri Shivshankar Mohanty- petitioner, a practicing advocate, in the second writ petition. We have also heard Sri R.K.Mohapatra, learned Government Advocate appearing on behalf of the State-opposite parties. Sri S.P.Mishra, learned Advocate General, was also requested to address the Court on the issues involved in these writ petitions.

6. The case of the petitioner in the first writ petition is that the petitioner is a Registered Society consisting of practicing lawyers of the High Court of Orissa, which has filed this writ petition on behalf of the lawyers' community as a whole. The facts, as borne out from the record, are that on 7.2.2017, opposite party no.3 (hereinafter referred to as 'informant') who is an Inspector of Police, working in CID, Crime Branch, had visited the High Court for some official work and that while she was coming down from the Lift No.5 in the premises of the High Court, it is alleged by the informant that certain advocates had misbehaved with her by leaning against her body. It is stated that the said incident was reported by the informant to the Superintendent of Police, CID, Crime Branch, who in turn vide letter dated 08.02.2017 intimated the Deputy Commissioner of Police, Cuttack to take necessary legal action on the grievance petition of opposite party no.3, on the basis of which First Information Report was registered on 9.2.2017, a copy of which has been filed as Annexure-1 to the writ petition. In the petition, it is stated that even before the First Information Report could be registered, there was a press report in the daily Oriya newspaper "Sambad" on 8.2.2017 with the headline (as translated in English) as "*Even the Lady Police Inspector was not spared"*. In the body of the said article, it was mentioned that certain persons in the Lift No.5 of the High Court premises had misbehaved with the informant.

7. Learned Senior Counsel Sri Ashok Mohanty has submitted that not only the above report had been published in the newspaper on 08.02.2017 even prior to any case being registered, on 9.2.2017 in the same newspaper, there was another article with the heading (as translated in English) as "*Alleged misbehavior to Lady Inspector-Direction for investigation"*. Learned Senior Counsel has pointed out that then on 10.2.2017, the English daily "Times of India" carried an article with the heading "*Lady Inspector harassed*" in which it was reported that two Government lawyers had allegedly misbehaved and harassed the Lady Inspector in the premises of the Orissa High Court. It has been pointed that another Odiya newspaper "Pramaya" also carried an article with the heading (as translated in English) as "*Misbehaviour to the Lady Police Employee- FIR against three Government advocates"*. On the same day, the English daily newspaper "Indian Express" carried an article with the heading "*Case against the lawyers for outraging the modesty of lady cop*".

8. It is contended by the learned Senior Counsel for the petitioner that in the said articles, the version of the police and the informant has been given, without verifying the authenticity or correctness of such version, which could have been done so by viewing the CCTV footage of the entire incident, a copy of which had already been handed over by the High Court Registry to the Police Department, which is a matter of record. It is further contended that the Electronic Media also carried similar news, because of which the reputation of the lawyers community as a whole, as well as the Judiciary in particular, has been tarnished as the entire incident is said to be have been projected as if the lawyer community is in the habit of misbehaving and scandalizing with the female visitors in the campus of the High Court. The contention is that without verifying the correctness and truthfulness of the incident published in the daily newspapers in an irresponsible manner amounts to defamation. By publishing such libelous statement, which has been circulated widely, it affects the reputation of the temple of justice, i.e., High Court, as well as lawyers as a class. Such publication imputing an association or collection of person jointly may amount to defamation.

9. Sri Ashok Mohanty and Sri Ashok Parija, learned Senior Counsel appearing on behalf of the High Court Bar Association, have submitted that by such reporting of the incident in the Print as well as Electronic Media, the reputation of the lawyers community as a whole, and the High Court as an Institution, has been brought down and tarnished because it is projected by the Media as if lawyers cannot be controlled and they harass the female visitors. It is contended that by giving such unauthenticated news

items/reporting, the entire incident has been scandalized to the detriment of the reputation of the lawyers community and in case such reporting is not stopped by an interim direction of this Court, the reporting by the Print and Electronic Media would bring down the reputation of the institution as a whole and the public at large will lose faith in the High Court, which is the highest body of the State Judiciary and regarded as temple of justice. Learned counsel have also contended that Right to Privacy and Right to Fair Trial is a fundamental right, flowing from Article 21 of the Constitution of India and such reckless and the irresponsible reporting by the Media would prejudice the mind of the public, as well as the authorities concerned, against the lawyers, and would thus, also amount to interference with the administration of justice and the right of the concerned lawyers for fair trial. Thus, it is urged that this Court may restrain the Print and Electronic Media from reporting the involvement of the lawyers of this Court in the said incident, till the truth finally comes out after investigation and trial.

10. Sri R.K.Mohapatra, learned Government Advocate appearing for the State-opposite parties, on having received instructions from the State-authorities for which time was granted on 14.02.2017 and 15.02.2017, has submitted that the Government does not propose to impose any restriction on the reporting the incident by the Press, but leaves it to the Court to pass suitable orders, after considering the facts of the case. He has however stated that with regard to appointment of any Judicial Commission, the State-opposite parties would require time to file counter affidavit. He has produced the case diary for perusal of the Court.

11. Sri R.K. Mohapatra then proceeded to submit as an officer of the Court and not as a counsel for the Government. In this capacity, he has contended that though freedom of press is very dear and precious to him, but the same cannot be considered as an absolute right of the press, which is always subject to reasonable restrictions. Sri Mohapatra states that, as an officer of the Court, he would support truthful reporting by the Print and Electronic Media but not colourable reporting to create sensation. He has however contended that in the present case, reporting of the incident in question, as has been made by the Print and Electronic Media, tarnishes the image of the lawyers community as a whole, and such reporting has been done without verifying the correctness of the facts and merely on the basis of the version given by the police authorities or the informant. He has submitted that he is deeply concerned with the reputation of the lawyers in general and the institution in particular and if such kind of reporting is permitted, then (as

the incident had occurred in the premises of the High Court) the reputation of the institution would also be brought down and damaged. His submission is that if the Press exceeds its jurisdiction and puts the Institutional reputation in jeopardy, then it is the duty of the Court to intervene and issue necessary directions to restrain such kind of reporting. As regards maintainability of these writ petitions, Sri Mohapatra has submitted that these writ petitions, filed by the High Court Bar Association and by a practicing advocate of this Court, would be maintainable because the incident is said to have taken place within the premises of the Court, and the Bar Association being a registered body of the lawyers, would have every right to raise such an issue before this Court when the reputation of the lawyers, and the High Court as an institution, is at stake.

12. Sri S.P. Mishra, learned Advocate General submitted that the Court has the power to restrain the Press in certain matters where the Press is not reporting the matter correctly because of which the reputation of the lawyers and Judiciary is brought down, and is also likely to interfere in the administration of justice, as the matter is still pending investigation, as well as consideration by the trial court. He has contended that by such reporting of the Press and Electronic Media (as has been done in the present case), the public at large gets a biased opinion of the incident as in the present times, the Print and Electronic Media plays a very vital role in building an opinion regarding any case or incident, which can influence the investigation, as well as the trial.

13. Sri Shivsankar Mohanty-petitioner, who is also a practicing advocate of this Court, has adopted the submission of Sri Ashok Mohanty and Sri Ashok Parija, learned Senior Counsel appearing for the petitioner in the connected writ petition. He has further submitted that the reporting by the Print and Electronic Media, as has been done with regard to the incident relating the present case, has been irresponsible, which tarnishes the image of the lawyers in general, as also the High Court as an institution. He contends that being associated with the lawyers body and the institution, he is deeply concerned with the reputation of all lawyers, which is brought down because of incorrect reporting in the Press, which affects each and every advocate of this High Court.

14. Learned counsel for the parties have relied on certain decisions of the apex Court as well as High Court, which shall be dealt with while considering their submission.

From the record, what we find is that the informant has alleged that an incident had taken place on 7.2.2017 between 11.00 and 11.30 A.M. in Lift No.5 in the High Court premises. It is alleged that certain lawyers had misbehaved with her. It is a matter of record that the CCTV footage of the entire incident is with the High Court and copy of such recording has also been handed over to the police after the lodging of the FIR dated 09.02.2017. It has also been brought on record that the CCTV footage was viewed by the learned Advocate General, President of the Bar Association, Senior Police Officials and Investigating Officer. Although there are averments made in the petition that a Senior Police Official had, after viewing the CCTV footage, opined that there was nothing incriminating found in the said CCTV footage, but we would not like to comment on the same, as the same was contradicted by the Police Officers Association immediately thereafter, and also because the matter is under investigation and subjudice before the appropriate Court. Commenting on a matter which is subjudice at this stage would be neither justified for us nor for the Press, as the same would amount to pre-judging the issue.

16. It cannot be denied that lawyers are as much part of the Judiciary as an institution, as the Judges are. If the reputation of lawyers is affected, then, the reputation of the Judiciary also gets affected. It cannot be said that the reputation of the judiciary would be tarnished only when some adverse opinion or charges are leveled against the Judges alone. As such, if the allegations, without being verified, are made against the lawyers, it would definitely bringing down the reputation of the Institution as a whole and also of the lawyers, as a community. We say so as lawyers are officers of the Court and the Court cannot function without the assistance of the lawyers. Thus, we are of the firm opinion that if the reputation of the lawyers community is at stake, it would definitely amount to the reputation of the Judiciary as a whole being at stake.

17. ***Lord Denning, M.R.*** in his book 'Road to Justice' states:-

> *"The Press plays a vital role in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and above board. But the watchdog may sometimes break loose and have to be punished for misbehaviour".*

Press occupies a vital place in modern society. Any institution when misused is bound to do more harm than good. Judiciary is the bed rock and handmaid of democracy. If people would lose faith in justice imparted by a Court of law, the entire democratic set up would crumble down.

18. The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned. The press does not have the right, which is its professional function, to criticise and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not least the administration of justice. But the public function, which belongs to the press, makes it an obligation of honour to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility, a free press may readily become a powerful instrument of injustice. It should not, and may not, attempt to influence judges before they have made up their minds on pending controversies.

19. Freedom of Press is certainly very precious and sacrosanct, but such freedom does not mean absolute freedom and it certainly comes with restraints. Article 19(1)(a) of the Constitution of India provides for freedom of speech and expression, which would cover the freedom of Press also. But the same is with certain restrictions as provided under Article 19(2) of the Constitution of India, which have been dealt with in various decisions of the Apex Court.

20. As back as in the year 1982, the Apex Court, in ***S.P. Gupta v. President of India,*** AIR 1982 SC 149, while dealing with the case relating to appointment and transfer of Judges, where there had been inappropriate reporting by the Press regarding that case, held that "*such behaviour of a section of the Press has been most distressing and has unnecessarily affected the image of Judiciary and the high constitutional functionaries involved*." The Courts have always been of the opinion that reporting by the Press relating to any pending case should not be in such manner so as to affect the reputation of any institution or cause interference in the Administration of Justice.

21. In ***Re: Harijai Singh and another and In Re: Vijay Kumar,*** AIR 1997 SC 73, the apex Court while dealing with freedom of press, held as follows:

> *"A free and healthy press is indispensable to the functioning of the true democracy. In a democratic set-up, there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept*

informed about current political, social, economic and cultural life as well as the burning topics and important issues of the day, in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries. The primary function of the press is to provide comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It has an educative and mobilising role to play. It plays an important role in moulding public opinion and can be an instrument of social change. The press should have the right to present anything which it thinks fit for publication. <u>But freedom of press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of the speech and expression would amount to an uncontrolled licence. If it were wholly free even from reasonable restraints, it would lead to disorder and anarchy. The freedom is not to be mis-understood as to be a press free to disregard its duty to be responsible.</u> In an organized society, the rights of the press free to disregard its duty to be responsible. In an organized society, the rights of the press have to be recognized with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterance has a far greater circulation and impact than utterance of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views.
(Emphasis supplied)

22. In ***M.P. Lohia, v. State of West Bengal,*** AIR 2005 SC 790, the same view was reiterated by the apex Court. In the said case, even though trial in the criminal case was going on, which related to the death of a lady, the Press had reported in favour of the deceased and projected as if she was a victim of dowry in article titled "*Doomed by Dowry*", which was done so based on an interview of the family of the deceased and giving the version extensively quoting the father of the deceased as to his version of the case. In paragraph-10 of the said judgment, the Apex Court held as under:

"*The facts narrated therein are all materials that may be used in the forthcoming trial in this case and we have no hesitation that this type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who were responsible for the said article against in such trial by media when the issue is subjudiced*."

23. Similar view was again taken by the Supreme Court in the case of ***Sidhartha Vashisht @ Manu Sharma v. State (N.C.T. of Delhi),*** AIR 2010 SC 2352. In paragraphs-148 and 152 of the said judgment, the Apex Court observed as under:

"***148***. *Despite the significance of the print and electronic media in the present day, it is not only desirable but least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial.*

152. *In the present case, various articles in the print media had appeared even during the pendency of the matter before the High Court which again gave rise to unnecessary controversies and apparently, had an effect of interfering with the administration of criminal justice. We would certainly caution all modes of media to extend their co-operation to ensure fair investigation, trial, defence of accused and non-interference in the administration of justice in matters subjudice*."

24. In ***Sahara India Real Estate Corpn. Ltd. v. Securities and Exchange Board of India,*** AIR 2012 SC 3829, a Constitution Bench of the Apex Court was dealing with the question whether appropriate orders could be passed by the Court with regard to reporting of matters, which are subjudice and as to whether guidelines for media could be laid down or not.

25. While dealing with the Indian approach to prior restraints of the press, after placing reliance on Nine Judges decision of the Apex Court in the case of **Naresh Shridhar Mirajkar v. State of Maharashtra**, AIR 1967 SC 1, the Supreme Court in paragraph-32 of the said judgment has held as under:

"*32. Thus, the principle of open justice is not absolute. There can be exceptions in the interest of administration of justice. In Mirajkar, the High Court ordered that the deposition of the defence witness should*

not be reported in the newspapers. This order of the High Court was challenged in this Court under Article 32. This Court held that apart from Section 151 of the Code of Civil Procedure, the High Court had the inherent power to restrain the press from reporting where administration of justice so demanded. This Court held vide para 30 that evidence of the witness need not receive excessive publicity as fear of such publicity may prevent the witness from speaking the truth. That, such orders prohibiting publication for a temporary period during the course of trial are permissible under the inherent powers of the court whenever the court is satisfied that interest of justice so requires. As to whether such a temporary prohibition of publication of court proceedings in the media under the inherent powers of the court can be said to offend Article 19(1)(a) rights [which includes freedom of the press to make such publication], this Court held that an order of a court passed to protect the interest of justice and the administration of justice could not be treated as violative of Article 19(1)(a) [see para 12]. The judgment of this Court in Mirajkar is delivered by a Bench of 9-Judges and is binding on this Court."

26. In paragraph-33 of the said judgment, the Supreme Court has further held as under:

"……..However, in Mirajkar, this Court held that all Courts which have inherent powers, i.e., the Supreme Court, the High Courts and Civil Courts can issue prior restraint orders or proceedings, prohibitory orders in exceptional circumstances temporarily prohibiting publications of Court proceedings to be made in the media and that such powers do not violate Article 19(1)(a)."

27. The Apex Court has always been, and more particularly in the aforesaid Sahara's case (supra), concerned with the trial by media and in the said Sahara's case it has been observed that-

"*Trial by newspaper comes in the category of acts which interferes with the course of justice or due administration of justice*".

It further goes on to hold that-

"*the courts have evolved mechanisms such as postponement of publicity to balance presumption of innocence, which is now recognized as a human right in Ranjitsing Brahajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294".*

The Apex Court thus held that the order of postponement of publication can be passed, if so warranted. In paragraph-40 of the said judgment it observed as under:

> "*In our view, orders of postponement of publications/publicity in appropriate cases, as indicated above, keeping in mind the timing (the stage at which it should be ordered), its duration and the right of appeal to challenge such orders is just a neutralizing devidce, when no other alternative such as change of venue or postponement of trial is available, evolved by courts as a preventive measure to protect the press from getting prosecuted for contempt and also to prevent administration of justice from getting perverted or prejudiced."*

28. Then in the conclusion, while considering the right to approach the High Court/Supreme Court in this regard, in paragraph-43, it has been held as under:

> "*43. In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework."*

29. In view of the aforesaid discussion, we are of the firm view that in a case where, by exaggerated or incorrect reporting of an incident by the Print or Electronic Media, either the administration justice is affected or the reputation of an institution or any class of person(s) is affected, this Court is not only be obliged, but is duty bound to interfere and issue necessary directions so as to save the reputation of any such institution, or class of persons, which is affected.

30. A similar case came up before the Delhi High Court wherein by irresponsible reporting by the Press, reputation of a retired Judge of the Supreme Court was affected. The Delhi High Court in the said case of ***Swatanter Kumar v. The Indian Express*****,** (2014)1 High Court Cases (Del) 572, relying on the judgment in the Sahara's case (supra) and other earlier judgments of the Apex Court, issued directions to the defendants therein [which included the Print and Electronic Media and any other person(s)] restraining them from publication of matters relating to the incident involved in that case.

31. In the present case, on the facts as have been stated herein above, and on the basis of the nature of the reports in the Print and Electronic Media and the averments made in the writ petition with regard to reporting by the Media, we are of the opinion that the facts warrant immediate interference by this Court by issuing necessary interim directions to the opposite parties and other persons from reporting the incident which is alleged to have taken place in the premises of this High Court on 07.02.2017.

32. Accordingly, the opposite parties 4 to 16, their agents, assigns or any of them acting on their behalf/any other person(s) involved in Print or Electronic Media or Internet are restrained from further publishing or highlighting the allegations against the lawyers as a whole, or the Advocates against whom allegations have been made in the complaint, or the informant, or the High Court as an institution, in any form without disclosing in the headlines of the article that they are mere allegations against such party in their write up or telecast. The said opp. parties are further restrained from publishing and telecasting the names and photographs of the accused persons or the informant, which may suggest the actions of the advocates relating to the said allegations made by the informant.

33. The interim directions, as mentioned above, are for postponement of publication which shall remain in force till the next date of hearing and are temporary in nature as per the Sahara's case (supra) and shall be subject to further monitoring by this Court from time to time.

34. The observations made in this order are prima facie in nature, and will not preclude the opposite parties to report the Court cases and happenings of facts which are covered within the ambit of fair reporting on the basis of true, correct and verified information.

35. In W.P.(C) No.2711 of 2017, the opposite parties 1, 2 and 17 are already represented through the learned Government Advocate. Steps to serve opposite parties 3 to 16 be taken by Speed Post with A.D. by

22.02.2017. Office shall send notice to the said opposite parties fixing 15.03.2017.

36. In W.P.(C) No.2712 of 2017, the learned Government Advocate has accepted notice on behalf of opposite parties 1 to 5. Steps to serve opposite party no.6 (earlier opposite party no.7) by speed post with A.D. be taken by 22.02.2017. Office shall send notice to the said opposite party fixing 15.03.2017.

37. List on 15.03.2017. By which date, all the opposite parties in both the writ petitions may file their respective counter affidavits. A free copy of this order be given to the learned Government Advocate.

2017 (I) ILR - CUT-399

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

W.P.(C) NO. 5058 OF 2016

M/S. CHENNAI RADHA ENGINEERING WORKS (P) LTD. ……...Petitioner

.Vrs.

PARADIP PORT TRUST & ORS. ……Opp. Parties

TENDER – Petitioner being the lowest bidder PPT granted license in its favour for installation of Mobile Harbour Crane for five years – During such period, there was a fire accident in the crane engine and PPT was requested to consider the accident as "force majeure" – Claim rejected by the Executive Engineer of PPT and penalty of Rs. 44.00 lakhs was imposed – Representation made to the Chairman, PPT but the same was rejected vide order Dt. 16.03.2016 without assigning any reason – Hence the writ petition.

When a decision is to be taken by an authority it is obvious that he has applied his mind and there must be reasons for arriving at such decision – "Reason is the mistress and queen of all things" – It is the life of the law – Law is nothing but experience developed by reasons –

What is inconsistent with and contrary to reason is not permitted in law and reason alone can make the laws obligatory and lasting – Held, the impugned order is quashed – Matter is remitted to the Chairman, PPT to take a fresh decision by passing a speaking order in accordance with law. (Para 15)

Case Laws Referred to :-

1. (1968) 1 All E.R. 694 : Padfield v. Minister of Agriculture, Fisheries and Food.
2. (1961) 3 SCR 1020 : AIR 1961 SC 1285 : Dhanrajamal Gobindram v. Shamji Kalidas and Co.
3. (1976) 2 SCC 877 : M/s. Northern India Iron & Steel Co. v. State of Haryana.
4. (1987) 2 SCC 160 : State of Karnataka v. Shree Rameshwara Rice Mills, Thirthahalli.
5. 2011 (6) Mh.L.J. 750 : Esjay International Pvt. Ltd., Mumbai v. Union of India.

For Petitioner : Mr. Asok Mohanty, Sr. Counsel & B.K.Nayak.
For Opp. Parties : M/s. P.K.Nayak, A.K.Mohapatra & S.Mishra.

Date of judgment : 01.03.2017

JUDGMENT

VINEET SARAN, C.J.

In response to a tender call notice dated 23.03.2011 issued by the opposite party - Paradip Port Trust (PPT) inviting tender for grant of license for installation, operation and maintenance of Mobile Harbour Crane (MHC) inside PPT for a period of five years, the petitioner, being the lowest bidder, was declared successful, and pursuant thereto a license was granted for execution of contract for a period of five years, i.e., till 23.03.2017.

2. While the work of the petitioner was being carried on, unfortunately, on 20.11.2015, there was a fire accident in the crane engine, which was immediately informed to the PPT on 23.11.2015 with the request to consider the fire accident as '*force majeure'*. Such intimation was given in terms of Clause-5 of the General Conditions of the contract, which provided for any such information to be given within seven days. After prolonged correspondence between the petitioner and PPT, the claim of the petitioner for treating the fire accident as '*force majeure'* was rejected by the Executive Engineer of PPT on 20.02.2016 and by the said order, a total penalty amount of Rs.44.00 lakhs was imposed for the MHC being unoperational for 44 days beyond the permissible 10 days period.

3. The petitioner, thereafter, on 23.02.2016 represented to the Executive Engineer of PPT, with copy to the Chairman, PPT, for favourably considering the case of the petitioner and treating the fire accident as a '*force majeure'*. Such application of the petitioner was treated as a case of 'resolution of dispute' provided for under Clause-4 of the General Conditions of the Contract. Then by communication dated 16.03.2016 made by the Executive Engineer of PPT, the petitioner was informed that the Chairman, PPT had decided that the contention to treat fire accident as '*force majeure*' was not accepted. Challenging the aforesaid communication of the Chairman, PPT, this writ petition has been filed.

4. We have Mr. Asok Mohanty, learned Senior counsel along with Mr. B.K. Nayak, learned counsel for the petitioner, and Mr. P.K. Nayak, learned counsel for the opposite parties, and perused the record. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties, this petition is disposed of at the admission stage.

5. Besides several other contentions, which have been raised by learned counsel for the petitioner, it has been specifically submitted that the order dated 16.03.2016, which has been communicated to the petitioner, is without assigning any reason as to why the representation of the petitioner for resolution of dispute submitted on 23.02.2016 has been rejected. Specific averment in this regard has been made in paragraph 27 of the writ petition, wherein it has been contended that the Chairman, PPT has not given any reason for rejecting the claim of the petitioner, which has been done so only by mentioning that the claim is not accepted.

6. In Clause-4 of the General Conditions of the Contract it is provided that for resolution of a dispute which may be raised, the Chairman, PPT shall take a decision, which shall be final and binding on both the parties. When a decision is to be taken by an authority, it would necessarily mean that the person taking the decision has applied his mind, and the least that would be expected, is that while taking any decision, the reasons for arriving at such conclusion or decision should be given in the order. Such specific ground that no reason has been given by the Chairman, PPT, while taking a decision rejecting the claim of the petitioner has been taken in the writ petition, which has not been denied in the counter affidavit filed by the opposite parties, nor has it been stated that the Chairman, PPT has passed any other separate reasoned order.

7. **Cicero** said:

"Reason is the mistress and queen of all things."

The legal maxim –

"***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.

8. Besides the aforesaid, in support of his contention that the case of the petitioner would be covered as '*force majeure'* learned counsel for the petitioner has placed reliance on the decisions of the apex Court in ***Dhanrajamal Gobindram v. Shamji Kalidas and Co.,*** (1961) 3 SCR 1020 : AIR 1961 SC 1285; ***M/s. Northern India Iron & Steel Co. v. State of Haryana,*** (1976) 2 SCC 877; and ***State of Karnataka v. Shree Rameshwara Rice Mills, Thirthahalli,*** (1987) 2 SCC 160, as well as of Bombay High Court in ***Esjay International Pvt. Ltd., Mumbai v. Union of India,*** 2011 (6) Mh.L.J. 750. Such aspect has also not been considered by the Chairman, PPT, while considering the case of the petitioner.

9. In view of the aforesaid facts and circumstances, and especially taking into consideration the fact that the order of the Chairman, PPT, as communicated to the petitioner on 16.03.2016, does not contain any reason, nor has it been stated in the counter affidavit that any separate reasoned order has been passed by the Chairman, PPT, we are of the opinion that the order/communication dated 16.03.2016 deserves to be quashed only on the ground that the same does not contain any reason.

10. Accordingly, this writ petition stands allowed. The order dated 16.03.2016 is quashed. The matter is remitted to the Chairman, PPT to take a fresh decision on the application of the petitioner dated 23.02.2016 in

accordance with law and, if necessary, after giving personal hearing to the petitioner or its representative. The petitioner is further given liberty to file an additional application bringing on record the decisions of the various Courts that it relies upon in support of its contention. The same may be filed along with the certified copy of this order within two weeks from today. The Chairman, PPT shall take a decision in the matter by passing a reasoned and speaking order, in accordance with law, as expeditiously as possible.

Writ petition allowed.

2017 (I) ILR - CUT- 403

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

W.P.(C) NO. 21355 & 19976 OF 2016

CHANDRA SEKHAR SWAIN (IN BOTH) .....Petitioner

.Vrs.

STATE OF ODISHA & ORS. (IN BOTH) .....Opp. Parties

TENDER – Petitioner participated in the tender process and found to be L-1 –Subsequently it was detected that there was non compliance of the provisions contained in the detailed tender call notice – Tender cancelled and fresh tender was issued – Action challenged – Held, since the authorities realized their mistake and rectified the same, it is well within their jurisdiction to cancel that tender and go for a fresh one.

In this case the petitioner participated in the tender process and the technical committee on erroneous consideration of his tender documents found him L-1 basing on which recommendation was made by the Chief Engineer, World Bank Project, Odisha to the Government for approval – No approval by the approving authority as the tender document was defective and not in consonance with the DTCN – Moreover when the bid of the petitioner was not accepted by the Government, no right accrued in his favour to get the work – Merely because the petitioner was found L-1 on consideration of an erroneous document, that itself can not create a right in his favour, unless the parties have entered into an agreement and a concluded contract exists between them to that extent – Held, this court is not inclined to interfere with the impugned decision. (Paras 19 to 25)

Case Laws Referred to :-

1. 2016(II) OLR 237 : M/s. Shree Ganesh Construction v. State of Orissa & Ors.
2. 2016(II) ILR-CUT-515: M/s. D.K. Engineering v. State.
3. 2016(ILR-CUT-760 : Bhupendra Kumar Dash v. State of Odisha & Ors.
4. AIR 2016 Orissa 178 : Homogenomics Private Ltd. V. State of Odisha.
5. (2013) 10 SCC 95 : Rashmi Metaliks Limited & another v. Kolkata Metropolitan Development Authority & Ors.
6. AIR 2016 SC 2570 : Om Prakash Sharma v. Ramesh Chand.
7. (2016) 1 SCC 724 : State of Punjab v. Bandeep Singh & Ors.
8. AIR 2001 SC 3887 : Union of India v. Dinesh Engineering Corporation,
9. AIR 1993 SC 1601 : Food Corporation of India v. M/s. Kamdhenu Cattle Fee Industries
10. (1990) 3 SCC 280 : M/s. Star Enterprises and others v. City and Industrial Development Corporatin of Maharashtra Ltd. & Ors.
11. (2016) 4 SCC 716 : State of Uttar Pradesh v. Al Faheem Meetex Private Ltd.
12. AIR 2016 SC 3366 : State of Jharkhand v. M/s. CWE-SOMA Construction.
13. (2015) 13 SCC 233 : Rishi Kiran Logistics v. Board of Trustees.
14. 2016(II) OLR 819 : Pramod Kumar Sahu v. State of Odisha & Ors.
15. AIR 2005 SC 3110 : State of Andhra Pradesh v. T. Suryachandra Rao.

For petitioner : Mr. R.K. Rath, Sr. Advocate
M/s.U.C. Mohanty, T. Sahoo, B.K.Swain, P.B. Mohapatra & S.K. Pattanaik.

For opp. parties : Mr. P.K. Muduli, (A G. A.)

Date of hearing : 21.02.2017
Date of Judgment : 03.03.2017

JUDGMENT

DR. B.R. SARANGI, J.

Chief Engineer, World Bank Project, Odisha, Bhubaneswar invited bids vide Bid Identification No. CE-WBP (O)-02/2016-17 (Final No.P-IM-Misc.-10/2008 (Pt) No.18972 dated 30.04.2016) in respect of the work "*Improvement to Rajnagar-Dangamala-Talachuan road from 0.0 to 8.290 Km in the District of Kendrapara under NABARD Assistance*" for a contract

value of Rs.10,36,50,709.00 with the period of completion within ten calendar months.

2. The petitioner participated along with another bidder in the said tender process and, being qualified in the technical as well as price bids evaluated on 22.07.2016 and 27.08.2016 respectively, was declared as L-I. The work value being more than rupees ten crores, the recommendation of the tender committee was placed before the Engineer-in-Chief-cum-Secretary to the Government, Works Department, Odisha vide letter no.40514 dated 14.09.2016 for approval. As the matter was kept pending for a quiet long time, the petitioner approached this Court by filing WP(C) No.19976 of 2016. By order dated 16.11.2016, when the matter was placed for the first time, this Court called upon learned Addl. Government Advocate to obtain instructions or file counter affidavit within a period of ten days. On 30.11.2016, when the matter was listed again, the learned Addl. Government Advocate prayed for and was granted further time till 07.12.2016 to obtain instructions or file counter affidavit.

3. During pendency of WP(C) No.19976 of 2016, petitioner preferred WP(C) No.21355 of 2016 alleging therein that on the very same day, i.e., 30.11.2016, when the State Counsel took further time till 07.12.2016 to obtain instructions or file counter affidavit, the opposite parties cancelled the previous tender and issued a fresh tender vide Annexure-8 thereto. The said writ petition (WP(C) No.21355 of 2016) was listed on 06.12.2016, on which date learned Addl. Government Advocate was directed to obtain instructions and produce the records pertaining to the case on the next date, which was fixed to 19.12.2016. When WP(C) No.19976 of 2016 was listed on 07.12.2016, it was directed to be listed on 19.12.2016 under the heading "Fresh Admission". However, in WP(C) No.21335 of 2016, by order dated 22.12.2016 this Court permitted the petitioner to file his tender in response to the fresh tender call notice dated 30.11.2016. On 11.01.2017, this Court passed an interim order in Misc. Case No.21058 of 2016 that, till 19.01.2017, any contract awarded in pursuance of the fresh tender call notice dated 30.11.2016 would be subject to further order to be passed in the writ petition. By order dated 19.12.2016 passed in WP(C) No.19976 of 2016 this Court directed that the said matter would be listed along with WP(C) No.21355 of 2016. Hence, both the writ petitions have been heard analogously and are disposed of by this common judgment.

4. The factual matrix of the case, as is borne out from the records of both the writ petitions, is that the petitioner is a super class contractor having registration no.477/2016 issued by the Chairman of the Committee of Chief

Engineers and Engineer-in-Chief (Civil), Bhubaneswar dated 31.05.2016, which is valid up to 31.03.2019. Opposite Party No.2 vide tender call notice dated 30.04.2016 (Annexure-1 to WP(C) No.219976 of 2016) invited bids only on "online" up to 07.06.2016 with the stipulation for opening of the bids on 16.06.2016 at 11.30 hours in the office of the Engineer-in-Chief (Civil), Nirmana Saudha, Unit-V, Bhubaneswar in presence of the bidders. As per clause-5 of the Detailed Tender Call Notice (DTCN), the bid was to be submitted in two covers. Cover-I was to contain scanned EMD, Cost and Vat of bid document, DTCN, scanned copy of contractor registration certificate for execution of civil works, PAN card, valid VAT clearance certificate required under Section 99 of Odisha VAT Act, besides other documents. Cover-II was to contain the price bid duly filled in and signed by the bidder. Clause-7 of the DTCN provided the documents to be produced by the successful lowest bidder, whereas clause-8 provided the work to be completed in all respect within the time period as specified in the Contract Data. Clause-10 of the DTCN stipulated the various conditions to be complied with, while submitting bids, by the contractors.

5. Pursuant to the above tender call notice, the petitioner, in compliance of the conditions stipulated in the DTCN, furnished the affidavit of authentication and agreement for hiring machineries with one Subala Behera, which was valid for a period of twelve months commencing from 04.07.2016. Petitioner also extended the aforesaid agreement dated 04.07.2016 up to 02.11.2018 vide agreement dated 29.10.2016 covering the period from 03.06.2017 to 02.11.2018.

6. As per schedule, the technical bids were opened on 22.07.2017. The technical evaluation committee, which evaluated the technical bids, in which only the petitioner and one Sanjay Kumar Samntaray had participated, found them qualified and accordingly on 27.08.2016 recommended for consideration of their price bids. On the basis of such recommendation of the technical evaluation committee, the price bids were opened on 31.08.2016 at 4.30 p.m. and the finding thereof was floated on the website (e-Procurement System Government of Odisha) wherein the petitioner was found to be lowest successful bidder having quoted the lowest price of Rs.10,06,10,633.76 against the estimated rate of Rs.10,36,50,709.0602.The Chief Engineer, World Bank Project, Odisha recommended the offer of the petitioner, being the lowest one and submitted the additional performance security amounting to Rs.30,42,000.00 against the requirement of Rs.30,40,075.00, and sought for administrative approval as per the codal provision, since the amount was

more than rupees ten crores. Even though the recommendation was made by the Chief Engineer, World Bank Project, Odisha, as no action was taken, the petitioner approached this Court by filing WP(C) No.19976 of 2016.

7. When the above noted writ petition was pending before this Court and learned counsel appearing for State was asking for time to obtain instructions or file counter affidavit, on 17.11.2016, the Government of Odisha in Works Department communicated the Chief Engineer, World Bank Project, Odisha, to re-evaluate the bids and to take follow-up action under intimation to the Department. Pursuant to such letter, the Chief Engineer, World Bank Project, Odisha without issuing any intimation to the petitioner issued the 3rd corrigendum to Bid Identification No.CE-WBP(O)-02/2016-17 on 30.11.2016, whereby the previous tender for the work in question was cancelled without assigning any reason, and invited fresh tenders on the very same day, vide Annexures-7 and 8 respectively which are the subject-matter of challenge in W.P.(C) No.21355 of 2016.

8. Mr. R.K. Rath, learned Senior Counsel appearing along with Mr. U.C. Mohanty, learned counsel for the petitioner stated that pursuant to the tender call notice issued on 30.04.2016 (Annexure-1), the petitioner participated in the tender process and was found to be L-1. His case was recommended by the Chief Engineer, World Bank Project, Odisha for approval by the Government, as the tender amount was exceeding rupees ten crores. There was no valid and justifiable reason to cancel the said tender and invite a fresh tender on 30.11.2016, when the inaction on the part of the authority in approving the L-1 bidder was pending consideration before this Court in W.P.(C) No.19976/2016. Therefore, such cancellation of tender dated 30.04.2016 and issuance of fresh tender dated 30.11.2016 is not justified and hit by the principle of *lis pendence*. It is further contended that, when in one hand State counsel was asking for time to get instructions or file counter affidavit on 30.11.2016, on the very same day the cancellation of earlier tender dated 30.04.2016 in respect of the work in question and issuance of fresh tender should not have been done without affording opportunity of hearing to the petitioner, when admittedly he was L-1 assessed by the tender committee and recommendation was pending before the Government for approval. It is also contended that the action of the authority is arbitrary, unreasonable and contrary to the provisions of law. Therefore, the petitioner seeks interference of this Court. To substantiate his contention, he has placed reliance on ***M/s. Shree Ganesh Construction v. State of Orissa and others***, 2016(II) OLR 237; ***M/s. D.K. Engineering v. State***, 2016(II) ILR-CUT-515;

Bhupendra Kumar Dash v. State of Odisha and others, 2016(ILR-CUT-760; ***Homogenomics Private Ltd. V. State of Odisha***, AIR 2016 Orissa 178; ***Rashmi Metaliks Limited and another v. Kolkata Metropolitan Development Authority and others***, (2013) 10 SCC 95; ***Om Prakash Sharma v. Ramesh Chand***, AIR 2016 SC 2570; ***State of Punjab v. Bandeep Singh and others***, (2016) 1 SCC 724; ***Union of India v. Dinesh Engineering Corporation***, AIR 2001 SC 3887; ***Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries***, AIR 1993 SC 1601; ***M/s. Star Enterprises and others v. City and Industrial Development Corporatin of Maharashtra Ltd. and others***, (1990) 3 SCC 280; ***Bakshi Security and Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd.*** and an unreported judgment passed in W.P.(C) NO.2529 of 2016 (***Manash Kumar Sahu v. State of Odisha and others***) disposed of on 19.07.2016.

9. Mr. P.K. Muduli, learned Additional Government Advocate for the State raised a preliminary objection with regard to participation of the petitioner in the tender dated 30.04.2016 (Annexure-1), as the petitioner incurred disqualification in view of non-availability of an agreement on the date of submission of tender for the period from 04.07.2016 to 02.11.2018. Thereby, it is contended that fraud vitiates the entire process of consideration in technical bid by the authority concerned and, consequentially, no illegality or irregularity has been committed in cancelling the contract. It is also contended that even if the petitioner's name was recommended by the Chief Engineer, World Bank Project to the Government for approval, since no approval was incurred no right accrued in favour of the petitioner to claim that the contract should be awarded in his favour. As such the authority has got power to reject the bid without assigning any reason as per the terms of the Detailed Tender Call Notice (DTCN). It is contended that even if the petitioner was not eligible to be considered and under mistake of fact he was considered and subsequently the same was brought to the notice of the authority, the authority has got power to rectify its own mistake. Above all, it is further contended that for cancellation of the tender process, opportunity of hearing is not required. To substantiate his contention, he has relied upon ***State of Uttar Pradesh v. Al Faheem Meetex Private Ltd***., (2016) 4 SCC 716; ***State of Jharkhand v. M/s. CWE-SOMA Construction***, AIR 2016 SC 3366; ***Rishi Kiran Logistics v. Board of Trustees***, (2015) 13 SCC 233; ***Pramod Kumar Sahu v. State of Odisha and others***, 2016(II) OLR 819 and ***State of Andhra Pradesh v. T. Suryachandra Rao***, AIR 2005 SC 3110.

10. For just and proper adjudication of the case, the relevant portions of the Bid Identification, as contained in the Notice Inviting Tender, are extracted hereunder:

> *"**Clause-4.** The Bid documents will be available in the website: htpp://tendersodisha.gov.in from 10.00 AM of 0905.2016 to 5.00 PM of 07.06.2016 for online bidding. Any addendum/corrigendum/cancellation of tender can also be seen in the said website.*
>
> *xx xx xx*
>
> ***GENERAL INFORMATIONS***
>
> *xx xx xx*
>
> *B.* ***BID INFORMATION***
>
> *xx xx xx*

10.	*Last date and time of submission of Bid (Clause No.2 of DTCN)*	***Time: 5.00 PM*** **Date: 07.06.2016**
	Opening of Technical Bid (Cover-I document (Clause No.3 of DTCN)	***Time: 11.30 AM*** **Date: 16.06.2016**
14.	*Intended completion period/ Time period assigned for Completion as per clause 8 of DTCN.*	*10(ten) Calendar Months*
15.	*Bid validity period (Clause No.9 of DTCN).*	*90 days*
16.	*Minimum period of contract / agreement/ lease deed of equipment and machineries as per Clause No.10(v) of DTCN.*	*13 (thirteen) Calendar Months*

> ***Detailed Tender Call notice for Road and Bridge Works***
>
> *xx xx xx*
>
> ***Clause 10**. (i) The Contractors are required to furnish evidence of ownership of principal machineries/ equipments in **Schedule-C** as per **Annexure-1 for which contractor shall have to secure minimum 80% of marks failing which the tender shall be liable for rejection**.*

(ii) In case the contractor executing several works he is required to furnish a time schedule for movement of equipment/machinery from one site to work site of the tendered work in ***Annexure-IV of Schedule-C****.*

(iii) The contractor shall furnish ownership documents for those machineries which he is planning to deploy for the tendered work if these are not engaged and produce certificate from the Executive Engineer as per ***Annexure-III of Schedule-C*** *under whom these are deployed at the time of tendering as to the period by which these machines are likely to be released from the present contract. Certificate from the Executive Engineer of Government of Odisha or Engineer-in-Charge of the project (in case of non-Government projects) under whose jurisdiction the work is going on, shall not be more than 90 days old on the last date of receipt of tender.*

(iv) In case the contractor proposes to engage machineries and equipments as asked for in the tender document, owned or hired but deployed outside the State, he/she is required to furnish additional 1% EMD/Bid Security. The entire bid security including the additional bid security shall stand forfeited in case the contractor fails to mobilize the machineries within a period as to be able to execute an item of work as per original programme which will be part of the agreement.

(v) The contractor intending to hire/lease equipments/ machineries are required to furnish proof of ownership from the company/person providing equipments/ machineries on hire/lease along with contracts/ agreements/lease deed and duration of such contract. The contracts/agreements /lease deed should be on long term basis for a minimum period of ***as mentioned in contract data*** *from the last date of receipt of Bid documents.*

xx xx xx

<u>Clause 121.4</u>** : **Equipment capabilities: Fulfilling requirement of Clause 10 above

xx xx xx

***<u>Clause 122</u>- The bidder must fulfill the eligibility criteria & qualifying criteria in order to qualify for the bid**:*

A. ***ELIGIBILITY CRITERIA**: To be eligible for evaluation of qualifying criteria, applicants shall furnish the followings.*

a. *Required **E.M.D (Bid Security)** as per the **clause No.06**.*

b. *Scanned Copy of valid Registration Certificate, Valid VAT clearance certificate, PAN card along with the tender documents as per **Clause No.07**.*

c. ***Information regarding (i) Evidence of ownership of principal machineries/equipments in Schedule-C as per Annexure-I of Schedule-C (ii) Annexure-III of Schedule-C & (iii) Annexure-IV** of Schedule-C if required as per **Clause No.10 scanned copy of all documents are to be furnished with the bid**.*

d. *Information in scanned copy regarding current litigation, debarring/expelling of the applicant or abandonment of work by the applicant in **schedule "E"** and **affidavit to that effect including authentication of tender documents in schedule "F"** as per **clause 11**.*

e. *Information regarding experience in similar nature of works in Schedule D-1 and progress of Civil Engineering works in Schedule-D 2 as per **Clause No.13 with scanned copy of experience certificate**.*

f. *Submission of original bid security and tender paper cost as prescribed in the relevant clause of DTCN after last date and time of submission of bid but before the stipulated date and time for opening of the bid. **Non-submission of original bid security and cost of bid document within the designated period shall debar the bidder from participating in the on-line bidding system and his portal registration shall be cancelled. His name shall also be informed to the registering authority for cancellation of his registration**.*

*B)QUALIFYING CRITERIA: **As per Clause-121 of DTCN**."*

11. In compliance of the tender conditions, as discussed above, the petitioner submitted relevant documents. The technical evaluation committee in its meeting held on 27.08.2016 at 4.30 P.M. under the Chairmanship of Engineer-in-Chief (Civil), Odisha, Bhubaneswar scrutinized the technical bids under Agenda No.2 and found as follows:

> "***Sri Chandra Sekhar swain, super Class Contractor**: The bidder have furnished the Demand Draft of State Bank of India, Patamundai Branch, Kendrapara bearing No.474937 dated 08.07.2016 amounting to Rs.10,500.00 towards required paper cost and required EMD in shape of Term Deposit Advice A/C NO.35844402780 dated 17.06.2016 of State Bank of India, Rajnagar Branch, Kendrapara*

amounting to Rs.10,37,000.00 duly pledged in favour of executive Engineer, Kendrapara (R & B) Division, Kendrapara. The bidder has furnished copy of Registration Certificate valid up to 31.03.2019, VAT clearance certificate valid up to 31.03.2017 & PAN Card. He has secured 100% marks in respect of required machineries against minimum requirement of 80% as per DTCN Clause No.10. The bidder has Bid capacity of Rs.40.01 Crore against requirement of Rs.9.76 Crore and hence has satisfied the qualifying criteria for bid capacity as per Clause No.121.7 of DTCN. The bidder has satisfied the experience criteria as per Clause No.121 of DTCN. All other requirement of eligibility criteria and qualifying criteria as per DTCN Clause No.122 have been fulfilled."

And consequentially recommendation was made to the following effect:

Recommendation

"*After detailed discussion and deliberation the committee unanimously recommended to qualify the Technical Bid (Cover-I) of* ***both the bidders (i) Sri Sanjay Kumar Samantray, Super Class Contractor & (ii) Sri Chandra Sekhar Swain, Super Class Contractor*** *for fulfilling all the eligibility criteria and qualifying criteria as per requirement of Clause No.122 of DTCN."*

12. Thereafter, the price bids were opened and, accordingly, the Chief Engineer, World Bank Project, Odisha vide letter dated 14.09.2016 made following recommendations in respect of the petitioner:

"*After opening of Price Bid (Cover-II) it is observed that, the 1st lowest bidder Sri Chandra Sekhar Swain, Super Class Contractor has quoted 2.933% less than the estimated cost of Rs.10,36,50,709.00 put to tender at S/R-2014, with corresponding bid amount of Rs.10,06,10,634.00 as appeared in the computer generated comparative statement (copy enclosed). The 1st lowest bidder has submitted the Additional Performance Security Deposit amounting to Rs.30,42,000.00 against the requirement of Rs.30,40,075.00 according to their bid amount.*

Administrative Approval for Rs.10,81,86,000.00 has been accorded for this work by Government in Works Department vide letter No.9833 dated 05.08.2016."

13. On 07.11.2016, the tender committee meeting was held at 4.30 p.m. in the conference hall of the Works Department and under item No.11 the

work in question was again considered and the decision to the following effect was taken:

> *"11.* ***Improvement to Rajnagar- Dangamala-Talachuan road from 0.0 to 8.200 Km in the District of Kendrapara under NABARD Assistance RIDF-XXII***
>
> *The Chief Engineer, World Bank Projects, Odisha has recommended the lowest tender of Sri Chandra Sekhar Swain, Super Class contractor amounting to Rs.10,06,10,634.00 (Rupees Ten Crore Six Lakh Ten Thousand Six Hundred Thirty-Four) only which is 2.933% less than the corresponding estimated cost of Rs.10,36,50,709.00 put to tender at S.R-2014 for approval of Government.*
>
> *Administrative Approval for Rs.10,81,86,000.00 has been accorded vide Works Department Letter No.9833 dated 05.08.2016.*
>
> *Revisided Technical sanction for an amount of Rs.10,36,50,709.00 vide Sl. No.06/2016-17 of Technical Sanction Register of C.E. World Bank Projects, Odisha.*
>
> *The total completion period of the work is 10(Ten) calendar months.*
>
> *The amount put to tender for the work is Rs. 10,36,50,709.00 at S/R-2014.*
>
> *There is a Budget provision of Rs.0.02 lakh for this project during the Outcome Budget 2016-17.*
>
> *The tender for the above work being invited through Bid Identification No. C.E.-WBP (O)-02/2016-17 issued dated 30.04.2016.*
>
> *The NIT was published in the English National Daily "The Times of India" on 07.05.2016 and in the Odia daily "The Dharitri" on 08.05.2016. The NIT was also posted to the State Govt. Website. The sale and receipt of the Bid document was allowed for 70 days. In response to the NIT, two numbers of bids were received from the following contractors within stipulated date and time.*
>
> *1. Sri Sanjay Kumar Samantaray, super class Contractor*
>
> *2. Sri Chandra Sekhar Swain, Super Class Contractor*
>
> *The technical bids of all the bidders were opened on 22.07.2016 and scrutinized by the Evaluation Committee chaired by the EIC (Civil),*

Odisha on 27.08.2016. The Technical Committee found both the bidders to be qualified for opening of their cover-II Price Bid.

The cover-II (Price Bid) of both the qualified bidders were opened and worked out to be as follows:

Sl. No.	*Name of the Bidder*	*Quoted Rate*	*Calculated Amount*
1.	*Sri Chandra Sekhar Swain, Super Class Contractor*	*2.933%*	*Rs.10,06,10,134.00*
2.	*Sri Sanjay Kumar Samantaray, Super Class Contractor*	*At par*	*Rs.10,36,50,709.00*

As reported by the Chief Engineer, World Bank Projects, Odisha the lowest bidder has satisfied the qualifying criteria for bid capacity.

The tender was placed before the Tender Committee of Works Deptt. In their meeting held on 07.11.2016 at 4.30 P.M. in the Conference Hall of Works Department for detailed discussion. During discussion, the allegation received against the lowest bidder was raised. The CE apprised the Committee that the Technical Evaluation Committee has inadvertently qualified the bidder when the validity8 of lease deed of machineries/equipment of the L1 bidder is up to 03.07.2016 against the requirement up to 17.08.2016. So, after detailed discussion the Committee unanimously decided to recommend that the tender be evaluated again by the Technical Evaluation Committee strictly as per conditions of DTCN."

14. On 17.11.2016, a communication was made to the Chief Engineer, World Bank Projects, Odisha stating that the tender committee in its meeting held on 07.11.2016 has recommended for evaluation of bid again by the technical evaluation committee strictly as per conditions of DTCN. Accordingly, follow-up action should be taken by the Chief Engineer, Work Bank Projects. The Technical Evaluation Committee in its meeting held on 28.11.2016 scrutinized the technical bid and observed as follows:

Observation by the Committee:-

"As per direction of Government in Works Department vide letter No.14700 dt.17.11.2016, the committee examined thoroughly again for the Technical Bid (Cover-I) documents of the bidder Sri Chandra Sekhar Swain, Super Class Contractor and following observations made:-

Clause No.10(v) of the DTCN states "The contractor intending to hire/lease equipments/machineries are required to furnish proof of ownership from the company/per providing equipments/machineries on hire/lease along with contracts/agreements/lease deed and duration of such contract. The contracts/agreements/lease deed should be on long term basis for a minimum period of ***as mentioned in contract data from the last date of receipt of Bid documents****".*
As mentioned in the contract data at Sl. 16 the minimum period of contract/agreement/lease deed of equipments and machineries is 13(thirteen) calendar months.

In this case Sri Chandra Sekhar Swain, super Class contractor has made lease deed Agreement with two machine owners on dt. 04.07.2016 for 12 (twelve) months as such lease deed is valid upto 03.07.2017. Requirement of validity of lease deed should be upto 13 months from last date of receipt of bid i.e. 13 months from 18.07.2016 which is upto 17.08.2017. As such there is a gap of 1 month 14 days against requirement as per DTCN. The eligibility criteria as 121 of DTCN states "The bidder must fulfill the eligibility and qualifying criteria in order to qualify the bid" Committee observed that the bidder Sri Chandra Sekhar Swain, Super class Contractor has not fulfilled the eligibility criteria at 122 © of DTCN as requirement of clause 10(v) of DTCN is not fulfilled. So there is a shortfall with a gap of one month and 14 days against requirement as per Clause No.10(v) of DTCN as submitted by the bidder Sri Chandra Sekhar Swain, Super Class contractor.

Recommendation

After detailed discussion and deliberation the committee unanimously recommended to cancel the above tender and to invite fresh tender for better competition.

The meeting ended with vote of thanks to the Chair."

15. From the aforesaid, what can be followed is that the technical evaluation committee inadvertently qualified the bidder, inasmuch as the

validity of the contract/agreement/ lease deed of the equipments/machineries was not in accordance with the requirement stipulated in the Contract Data. As mentioned in the Contract Data at Sl. No.16, the minimum period of contract/agreement/lease deed of the equipment/machineries should have been for a period of 13 calendar months from the last date of receipt of the bid documents, i.e., from 18.07.2016 up to 17.08.2017. But, as a matter of fact, the lease deed/ agreement, which was furnished by the petitioner with two machine owners, was dated 04.07.2016 for a period of 12 months. That means, the lease deed is valid up to 03.07.2017, whereas, as per the requirement, it should have been for 13 months from the last date of receipt of the bid. Therefore, there was a gap of one month and 14 days against requirement as per the DTCN. Furthermore, lease agreement, which was furnished by the petitioner, is stated to have been executed on 04.07.2016 and further extension of the lease deed was admittedly executed and registered on 29.10.2016. So, it can be safely construed that by the time the tender document was submitted for consideration of technical bid, the petitioner did not comply with the conditions stipulated under Clause-121 of the DTCN. Therefore, the petitioner's technical bid was inadvertently qualified by the technical evaluation committee at its first instance and on that basis recommendation was made by the Chief Engineer, World Bank Projects, Odisha for approval by the Government. But, on scrutiny of the documents, the Government decided to reconsider the same and to make re-evaluation by the technical committee and on reconsideration of the same the technical evaluation committee recommended to cancel the tender. In such view of the matter, it cannot be construed that any illegality or irregularity has been committed by the authority in cancelling the tender on 30.11.2016 on the basis of the recommendation made by the tender evaluation committee dated 28.11.2016.

16. In the above context, the law is fairly settled that if an inadvertent mistake/error is found to be committed by the technical evaluation committee, while evaluating the technical bids, and subsequently it is required to be corrected, the authority has got every power to do the same. The ratio decided by this Court in ***Pramod Kumar Sahu*** (supra) is applicable to the present context. To be more specific, merely because recommendation was made by the Chief Engineer, World Bank Projects, Odisha, on consideration of the erroneous evaluation made by the technical evaluation committee, to the State Government for approval, that by itself does not create any right in favour of the petitioner to award the work in his favour.

When the bid of the petitioner was not accepted by the State/competent authority, no right could accrued in favour of the petitioner to award the work.

17. In ***State of Uttar Pradesh and another*** (supra), the apex Court in paragraphs-14 and 15 held as follows:

> ***"14.*** *We find force in the aforesaid argument of the learned counsel for the appellants. In the first instance, it is to be noted that BEC is only a recommendatory authority. It is the competent authority which is to ultimately decide as to whether the recommendation of BEC is to be accepted or not. We are not entering into the discussion as to whether this competent authority is the State Government or the Municipal Corporation. The fact remains that there is no approval by either of them. Matter has not even reached the competent authority and no final decision was taken to accept the bid of Respondent 1 herein. Much before that, when BEC was informed that there were only two valid bids before it when it made its recommendation on 8-9-2010 and as per the Financial Rules there must be three or more bids to ensure that bidding process becomes competitive, BEC realised its mistake and recalled its recommendation dated 8-9-2010. It cannot be said that such a decision was unfair, mala fide or based on irrelevant considerations. This, coupled with the fact that the authority has right to accept or reject any bid and even to annul the whole bidding process, the High Court was not justified in interfering with such a decision of BEC.*
>
> ***15.*** *The High Court has also gone wrong in finding fault with the decision of BEC by holding that such a subsequent decision could not have been taken by BEC without notice to or in the absence of the appellant. When the decision-making process had not reached any finality and was still in embryo and there was no acceptance of the bid of Respondent 1 by the competent authority, no right (much less enforceable right) accrued to Respondent 1. In such a situation, there was no question of giving any notice or hearing to Respondent 1."*

18. In ***State of Jharkhand*** (supra), the apex Court in paragraphs 12 and 14 held as follows:

"12. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well-settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour (vide Laxmikant and Ors. v. Satyawan and Ors. (1996) 4 SCC 208: (AIR 1996 SC 2052); Rajasthan Housing Board and Anr. v. G.S. Investments and Anr. (2007) 1 SCC 477 : (2006 AIR SCW 5968) and Uttar Pradesh Avas Evam Vikash Parishad and Ors. v. Om Prakash Sharma (2013) 5 SCC 182 : AIR 2013 SC (Supp) 495))."

"14. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India…."

19. As there is no concluded contract exists between the parties, the claim made by the petitioner to award the contract in his favour on the basis of recommendation made by the Chief Engineer, World Bank Projects, Odisha to the Government for approval by virtue of the erroneous consideration made by the technical evaluation committee, cannot be acceded to. Direction given for re-evaluation of the assessment made by the tender committee on the basis of the materials available cannot be also said to be *mala fide* exercise of power by the authority concerned. If the DTCN specifies the mode of submission of tender document and that mode is found to have been not followed, the submission of tender document itself is defective one. The tender document has to be in consonance with the DTCN and it must be unconditional one and in proper form. Merely because the petitioner was found, on consideration of an erroneous document, to have quoted lowest price, that by itself cannot create a right in favour of the petitioner, unless the parties have entered into agreement and there is concluded contract to that extent. Reference made to ***Rishi Kiran Logistics mentioned*** (supra), in our view, is squarely applicable to the present context.

20. On the basis of the pleadings available on record and also materials produced before this Court, the cancellation of bid made by the authority has got ample justification, as there was erroneous consideration by the technical

evaluation committee and non-compliance of the provisions contained in Clause-10 read with Clause-121 of the DTCN. The contention raised by learned Addl. Government Advocate, that fraud vitiates everything, has no bearing in the instant case. Ordinarily, fraud is proved, when it is shown false representation has been made knowingly. But, as has been stated earlier, in the instant case evidently the technical evaluation committee had erroneously considered the documents submitted by the petitioner which has been subsequently rectified on the basis of the direction given by the Government/appropriate authority.

21. Annexure-7 dated 30.11.2016 is the order impugned, whereby the bid in respect of the work in question has been cancelled. The contention raised by learned Senior Counsel for the petitioner is that no reason has been assigned in support of such cancellation. To buttress his contention, he has placed reliance on ***M/s. Shree Ganesh Construction*** (supra). On perusal of the materials available on record, it appears that on 28.11.2016 the technical evaluation committee scrutinized the technical bids afresh on the basis of communication made on 17.11.2016. The proceedings of the technical evaluation committee held on 28.11.2016, which indicate the reasons for cancellation of the tender in question, were evidently made available on the website. On the basis of such reasons, as a consequential follow up action, the cancellation order was passed on 30.11.2016 in Annexure-7. In view of that, it cannot be said that the order of cancellation is a cryptic one, particularly when the same has been explained subsequently in the counter affidavit. If the reasons were available to the parties on the website on the date of cancellation, i.e., on 28.11.2016 itself, the communication vide Annexure-7, which was made on 30.11.2016, cannot be held to be unsustainable in the eye of law for not containing the reasons for cancellation of the bid in question. As such, the ratio decided in ***M/s. Shree Ganesh Construction*** (supra) is absolutely not applicable to the present case.

22. The facts and circumstances of the case in ***M/s. D.K. Engineering*** (supra), on which reliance has been placed by learned Senior Counsel for the petitioner, are different from the case in hand and as such is not applicable. Similarly, in ***Bhupendra Kumar Dash*** (supra) consideration was made that the District Tender Committee, after having given the report and having approved the tender of the petitioner therein for grant of contract, had become "functus officio", meaning thereby it had no longer power or jurisdiction. Therefore, this Court held that the District Tender Committee could not have recommended the matter one month after having given the

report on 23.04.2015 and having approved the tender of the petitioner for grant of contract. The said judgment has been rendered on the basis of the facts of the said case, but the present case is totally different to the extent that the tender committee, having erroneously considered the documents, the case of the petitioner was recommended for approval by the competent authority, but the competent authority instead of approving the same directed for reconsideration, which is well within its jurisdiction. Consequentially, the ratio decided in ***Bhupendra Kumar Dash*** (supra) has also no application to the present case.

23. A further argument was advanced before this Court by learned Senior Counsel for the petitioner that, when the petitioner had approached this Court by filing W.P.(C) No.19976 of 2016 for delay in approving the recommendation made by the Chief Engineer, World Bank Projects, Odisha on the basis of the consideration made by the tender committee, and when such matter was pending, the cancellation thereof and consequential issuance of fresh tender on 30.11.2016 cannot sustain. The plea advanced was that the action of the authority is hit by the principle of *lis pendence* and, as such, is liable to be quashed. To substantiate his claim, reliance has been placed on ***Homogenomics Private Ltd.*** (supra). In the instant case, since there is no approval of the recommendation made by the Chief Engineer, World Bank Projects, Odisha, on the basis of assessment of the tender committee, no right has been accrued in favour of the petitioner. Even if the matter was pending before this Court for consideration, the tender committee could reconsider the matter on the basis of the direction given by the competent authority, namely, the approving authority. Thereby, the ratio decided in ***Homogenomics Private Ltd.*** (supra) is also not applicable to the present case.

24. Insofar as other judgments are concerned, on which reliance has been placed but not specifically dealt in, in view of the factual matrix of the case in hand and discussion made in the foregoing paragraphs, we are of the considered view that the same are not applicable to the present context and they have been decided on their respective facts.

25. In view of the aforesaid facts and circumstances, we are of the considered view that, since no right had been accrued in favour of the petitioner and the authorities, having realized their mistakes, have rectified the same, which is well within their jurisdiction, we are not inclined to interfere with the decision so taken. However, since by virtue of the order passed by this Court on 22.12.2016 the petitioner has been permitted to file tender in response to the fresh tender call notice dated 30.11.2016, the same

may be considered by the authority on its own merit, on which we do not express any opinion.

26. Thus, we do not find any merits in both the writ petitions, which are hereby dismissed. No order as to cost.

Writ petitions dismissed.

2017 (I) ILR - CUT- 421

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

W.P.(C) NO. 17388 OF 2016

M/S. EXECUTIVE SECURITY SERVICES PVT. LTD. .....Petitioner

.Vrs.

SUPERINTENDENT, SVP POST GRADUATE INSTITUTE OF PEDIATRICS, CUTTACK & ANR. .....Opp. Parties

TENDER – Submission of tender documents not in conformity with general instructions is liable to be rejected.

In this case, admittedly a criminal case is pending against one of the Managing Directors of the petitioner-company which is not in conformity with the provisions contained in clause 10(k) and there is also overwriting in the financial bid form submitted by O.P.No.2 which is also not in conformity with clause-12 of the General Instructions of tender documents – Held, since both petitioner and O.P.No.2 are found to be ineligible to participate in the tender process, the impugned order Dt. 19.09.2016 passed by O.P.No.1 requesting the petitioner to withdraw the security service manpower with effect from 16.10.2016 and allowing O.P.No.2 to provide security service manpower w.e.f. 16.10.2016 by executing agreement before 15.10.2016 is quashed – However such order will not preclude O.P.No.1 from proceeding with fresh tender in accordance with law. (Para 15)

Case Laws Referred to :-

1. 1980-II L.L.J.: Digvijay Woollen Mills Ltd. V. Mahendra Pratap Buch
2. 1984-II L.L.J : Jeewanlal (1929) Ltd. etc. etc. v. Appellate Authority, Payment of Gratuity Act and others etc. etc.,

For Petitioner : M/s. Aditya Mishra, S.Pradhan & A.Mishra

For Opp. Parties : Mr. B.P.Pradhan, A.G.A.
M/s.Sumit Lal, R.K.Satpathy, S.K.Kanungo, A.K.Jethy & N.K.Sahoo

---

Date of hearing : 22.02.2017
Date of Judgment: 03.03.2017

JUDGMENT

DR. B.R. SARANGI, J.

The Superintendent, Sardar Vallavbhai Patel Post Graduate Institute of Pediatrics (SVPPGIP), Health and Family Welfare Department, Cuttack-opposite party no.1 published tender notice no.2654 (Annexure-1) inviting sealed tenders under two bid system from reputed and experienced service providers for supply of manpower for cleaning and sanitation of the hospital, as well as for security services for round the clock services for a period of one year. Each tender was to contain both technical and financial bids separately. The technical bids were to be opened first and financial bids were to be opened of those bidders, who qualified in technical bids. The details of information for outsourcing the service of cleaning, sanitation work and security services was given in the tender documents separately, which was to be downloaded from the website or purchased from the office on paying cash of Rs.1000/- non-refundable for each tender papers on all working days from 11 AM to 4 PM within the stipulated period.

2. The petitioner M/s Executive Security Services Pvt. Ltd. is a company registered under the Companies Act. It has been providing security services to different government, as well as private organizations across the State, and possessed proper registration and licenses for doing such work. As such, it was the successful bidder for the previous year in respect of opposite party no.1. The petitioner and opposite party no.2 submitted their bids to provide services of security guards before the last date and time for submission of tender, i.e., 09.08.2016 up to 4.30 PM. As per the tender document, the technical bids were to be opened on 10.08.2016 at 3.30 PM in the office chamber of opposite party no.1, and the bidders who would be successful in the technical bid, were to be allowed to participate in the financial bid to be opened on 11.08.2016 at 3.30 PM. Both petitioner and opposite party no.2, having become successful in technical bid, their financial bids were opened on the date fixed by the competent authority and opposite party no.2, being the lowest bidder, was declared successful.

3. An objection was raised by the petitioner that performance of opposite party no.2, in providing cleaning and sanitation services to Capital Hospital, Bhubaneswar, was not satisfactory, and it had earned a bad reputation. In addition to the same, the bid submitted by opposite party no.2 violated the circular issued by the Government of India on service tax component, labour component and other ancillary things, and without verifying the same in proper perspective as because the opposite party no.2 had quoted lowest price, the declaration of it for the work in question cannot sustain. Hence, the petitioner has approached this Court by filing the present writ petition to quash the office order dated 19.09.2016, by which the petitioner has been requested to withdraw the security services manpower with effect from 16.10.2016 forenoon and allow opposite party no.2 to provide security services manpower to the institution from that date for smooth management of the hospital, and opposite party no.2 has been directed to submit the agreement before 15.10.2016.

4. Sri Aditya Mishra, learned counsel for the petitioner strenuously contended that consideration of the tender submitted by opposite party no.2 was in gross violation of the provisions contained in the tender document, inasmuch it violated the circular issued by Government of India on service tax component, labour component and, more particularly, the statutory deposits, which were to be paid in shape of E.S.I. and E.P.F. of the security persons. As such, the price quoted was violative of minimum wages notifications of the government issued from time to time. Above all, the performance of opposite party no.2 was not satisfactory as it was carrying on the cleaning and sanitation service of the Capital Hospital, Bhubaneswar. He further contended that opposite party no.2 was otherwise also ineligible due to overwriting in financial bid, which is violative of clause-12 of the General Instructions of the tender documents. Therefore, the office order dated 19.09.2016 is liable to be quashed.

5. Mr. B.P. Pradhan, learned Addl. Govt. Advocate, by referring to the counter affidavit filed on behalf of opposite party no.1, tried to justify the action taken in selecting opposite party no.2. He contended that the petitioner had been providing security services to SVPPGIP Institute from 2011, pursuant to DMET order dated 25.04.2011 and office order dated 17.06.2011 for a period of three years. After expiry of the contract period of three years, the petitioner was allowed to continue by way of an interim arrangement vide order dated 05.09.2014 till finalization of the tender process. As such, there was no agreement executed between the parties after 2014. As the selection

of opposite party no.2 has been done in consonance with the terms and conditions of the tender call notice and also as per law and guidelines applicable from time to time, the contention raised that there was violation of such law and guidelines is not tenable. It is further contended that pursuant to tender call notice, six bidders had submitted their respective bids for security services. The technical bids of six bidders including the petitioner were opened on 10.08.2016 at 3.00 PM by the Tender Committee consisting of six members in presence of bidders/authorized agents of the concerned firms. In the technical bid process, four bidders were technically qualified for opening of the financial bids. On 11.08.2016, the financial bids were opened in presence of bidders/authorized agents and after opening of financial bids for security services, the tender committee examined the financial bids of four technically qualified bidders. As it was found that M/s Reliable Services and Intelligence Pvt. Ltd. had not filled up the I.T. column, which was mandatory for every outsourcing agencies as per Section 194-C of the Income Tax Act, 1961, its financial bid was cancelled by the Tender Committee. According to the Finance Department of the Government of Odisha, the service charges quoted in the range of one paisa to rupees seven are considered to be unreasonably low to carry out any service providing work. Therefore, the Tender Committee, on verification of the remaining financial bids, found that the bid of the petitioner was not acceptable, rather the bid of opposite party no.2, which fulfilled the criteria and was also lowest one, was acceptable and, accordingly, recommended the name of opposite party no.2 to award the contract for providing security services to the institution for a period of one year. It is further submitted that the contention raised, that opposite party no.2 had not quoted the correct service tax component in its price bid, was not correct. Further, as per Rules 22 and 23 of the Odisha Minimum Wages Rules, 1954 read with Form-IXA thereof, the maximum days a person can be engaged to work is 26 days in a month with minimum daily wages and other benefits like EPF, ESI etc. and, as such, there shall be one day off in a week. If there are four Sundays in a month, then an employee can work for a maximum period of 26 days only. Therefore, the calculation of all price/tax components by taking into consideration 26 working days is fully justified and is in accordance with the provisions of Rules 22 and 23 of Odisha Minimum Wages Rules, 1954, as well as Form-IXA thereof. To substantiate his contention, he has relied upon the judgments of the apex Court in the cases of ***Digvijay Woollen Mills Ltd. V. Mahendra Pratap Buch,*** 1980-II L.L.J. and ***Jeewanlal (1929) Ltd. etc. etc. v. Appellate Authority, Payment of Gratuity Act and others etc. etc.,*** 1984-II L.L.J.

6. Mr. S. Lal, learned counsel appearing for opposite party no.2 submitted that the petitioner was ineligble to participate in the tender process, as a criminal case is pending against it. So far as the compliance of the statutory provisions, as mentioned in tender call notice, is concerned, it is stated that there was no violation and, as such, he has adopted the arguments advanced by learned Addl. Govt. Advocate.

7. We have heard learned counsel for the parties and perused the records. Since pleadings have been exchanged between the parties, the matter is disposed of finally at the stage of admission.

8. Some of the clauses of the tender document for outsourcing of security service provider for SVPPG Institution of Pediatrics, Cuttack, which are relevant for effective adjudication of the case, are extracted below:

*"**General Instructions for bidders.***

Scope of the work

xx xx xx

2. The security personnel shall be deployed round the clock in 3 shifts at different places of the premises as will be required.

xx xx xx

General instructions

xx xx xx

10(k) An affidavit to the effect that no criminal case is pending with the police against the Proprietor/Firm/Partner or the Company (Service Provider) and the Service Provider has not been blacklisted anywhere.

xx xx xx

12. All entries in the tender form should be legible and filled clearly. If the space for furnishing information is insufficient, a separate sheet duly signed by the authorized signatory may be attached. Amounts quoted in figure should be repeated in words and in case of any discrepancy the amounts stated in words shall prevail. ***No overwriting or cutting is permitted in the Financial Bid Form. In such cases, the tender shall be summarily rejected.*** *However, the cuttings, if any, in the Technical Bid Application must be initiated by the person authorized to sign the tender bids."*

xx xx xx

15. The quoted rates shall not be less than the minimum wages as fixed/notified by the Government of Odisha from time to time and shall include all statutory obligations. The service provider shall be liable for all kinds of dues payable in respect of the personnel provided under the contract and the Authority shall not be liable for any dues for availing the services of the personnel. The Performance Security Deposit will not be released until the service provider produces proof of up to date payment of Service Tax, EPF & ESI contribution of the personnel so engaged.

xx xx xx

Application - Financial Bid

xx xx xx

2. Rate per person per month inclusive of all statutory liabilities, tax, levies, cess etc.

xx xx xx

Notes:-1 *The Remuneration of manpower not to be less than the minimum wages fixed by the Govt. of Odisha, Labour & Employees State Insurance Department.*

2. The total rates quoted by the tendering Service Provider should be inclusive of all statutory/taxation liabilities in force at the time of entering into the contract. The Authority will have no liability in relation to any statutory or other dues.

3. The payment shall be made on conclusion of the calendar month only on the basis of no. of working days for which duty has been performed by each person as certified by the Authority.

Terms & Conditions General

xx xx xx

10. ***It will be the responsibility of the Service Provider to pay to the person deployed a sum not less than the minimum rate prescribed the Government to their respective account, and adduce such evidence to the Superintendent, SVPPGIP., Cuttack, every month prior to payment towards remuneration of the personnel. Payment of remuneration of any kind other than the above procedure is not acceptable at any cost.***

xx xx xx

19. The Service Provider shall provides reasonably good uniform with name badges to its personnel deployed at check gate at its own

cost and ensure that they are used by the personnel deployed and are maintained in good condition. The uniform, accessories such as, belt shoes, socks, caps torch with cell, cane stick etc. shall be borne/supplied by the Service Provider at its cost. The clothes worn by the security guards while on active duty shall be such that it would not hamper in his efficient performance. In particular, it will neither be too tight nor too loose so as to obstruct movement or bending of limbs. Every private security guard will carry a notebook and a writing instrument with him. Every private security guard, while on active security duty, will wear and display the ***Photo identity card issued on the outer most garment above waist level in a conspicuous manner to be signed by the Authority and the Service Provider.***

xx xx xx

Legal

xx xx xx

27. The Service Provider shall also be liable depositing all taxes, levies, Cess etc. on account of service rendered by it to the Department of office concerned to the concerned tax collection authorities, from time to time, as per the rules and regulations in the matter. Attested Xerox copies of such documents shall be furnished to the Department or office concerned.

xx xx xx

Financial

xx xx xx

40. The agency shall be solely responsible for compliance to the provisions of various labour and industrial laws, such as, wages allowances, compensations, EPF, Bonus, Gratuity ESI etc. relating to personnel deployed by it or for any accident caused to them and the Superintendent, SVPPGIP, Cuttack shall not be ***liable to bear any expense in this*** *regard. The Agency shall make payment of wages of a month to security personnel engaged by it by first working day of the succeeding month irrespective of any delay in settlement of its bill by the Superintendent, SVPPGIP, Cuttack for whatever reason. The Agency shall also be responsible for the insurance of its personnel. The security agency shall specifically ensure compliance of various Laws/Acts, including but not limited to the following and their re-enactments/amendments modifications:-*

I) The payment of Wages Act 1936
II) The Employees Provident Fund Act, 1952.
III) The Contract Labour (Regulation) Act, 1970
IV) The Payment of Bonus Act, 1965
V) The Payment of Gratuity Act, 1972
VI) The Employees State Insurance Act, 1948
VII) The Employment of Children Act, 1938
VIII) Minimum Wages Act, 1948
IX) Private Security Agencies (Regulation) Act, 2005
xx xx xx"

9. Clause-15 of the General Instructions for Bidders, which has been quoted above, stipulates that the quoted rates shall not be less than the minimum wages as fixed/notified by the Government of Odisha from time to time and shall include all statutory obligations. So far as minimum wages per month is concerned, the same has to be calculated by multiplying the minimum wages by 26 days and not by 30 days, as the rate of wages includes one day of weekly off. No person shall be engaged for more than 6 days in a week and for every extra day of work, he/she shall be entitled for double his/her wages. Therefore, arrangement should be made in such a manner that every guard gets a weekly off, another reliever, who does not have an off day on that, is engaged in his place. So in actual, for those four days in the month considered to be weekly off, one person is entitled for a paid off, while another person is discharging duty instead of him. Thus, in actual there is double payment for those four days and after adjustment of four wages against off, there are remaining four wages, which ultimately takes the count to 30 days, and the wages quoted below 30 days cannot be accepted as valid. In the event of the establishment of the opposite party no.1 remaining closed on Sundays, the proper calculation would have been 26 days as suggested, but not otherwise.

10. Clause-2 of the General Instructions for Bidders, under the heading "Scope of the work", clearly stipulates that security personnel shall be deployed round the clock in three shifts at different places of the premises as will be required. Under the heading "Application-Financial Bid", in clause-2 it has been specifically stated rate per person per month inclusive of all statutory liabilities, taxes, levies, cess etc. are to be paid. Thereby, the total rates quoted by the tendering service provider should be inclusive of all statutory/taxation liabilities in force at the time of entering into the contract

as the authority will have no liability in relation to any statutory or other dues.

11. Reliance has been placed by learned Addl. Government Advocate on the judgment rendered in **Digvijay Woollen Mills Ltd.** (supra), wherein the apex Court, while considering the provisions contained under Section 4(2) of the Payment of Gratuity Act, 1972, in paragraph-5 thereof observed as follows:

> *"The view expressed in the extract quoted above appears to be legitimate and reasonable. Ordinarily, of course, a month is understood to mean 30 days, but the manner of calculating gratuity payable under the Act to the employees the work for 26 days a month followed by the Gujarat High Court cannot be called perverse. It is not necessary to consider whether another view is possible. The High Court summarily dismissed the petition of the appellant in both the appeals before us and upheld the decision of the authorities under the Act."*

In paragraph-6 of the said judgment, it has been clarified that, the decisions based on some provisions of the Minimum Wages Act and other statutes, which were relied on by either side, are not relevant on the question of computation of fifteen days' wages under Section 4(2) of the Payment of Gratuity Act. Similar view has also been taken by the apex Court in **Jeewanlal (1929) Ltd.** (supra), more particularly the ratio decided in ***Shri Digvijay Woollen Mills Ltd.*** (supra) has been referred to in paragraph 11 of the said judgment.

12. This Court is not disputing the position, as discussed above by the apex Court, so far as applicability of Payment of Gratuity Act is concerned. But, the question raised in the present case is with regard to the minimum wages to be paid by the service provider to its employees, which is completely different from that of the judgment referred to above. In any case, if the minimum wages provided by the service provider to its employees is less than the amount fixed by the competent authority, then certainly the bids submitted by the parties could not have been taken into consideration by the authority concerned. But, instead of delving into such issue, objection has been raised by opposite party no.2 that the petitioner is not eligible for participating in the bid, in view of the provisions contained in Clause-10(k) of the General Instructions of the tender documents, which specifically states that an affidavit to the effect that, no criminal case is pending with the police against the proprietor/firm/partner, or the Company (Service Provider) and

the Service Provider has not been blacklisted anywhere. The opposite party no.2, in its counter affidavit, in paragraph 17, has categorically stated that the petitioner, which had been discharging the duties and job in different establishments and sectors of Odisha, has misappropriated, cheated and manipulated the EPF and ESI amounts of the poor labouers at ITPS, Banaharpali of the District of Jharsuguda, for which a criminal proceeding bearing GR Case No. 1678/2009 arising out of Banaharpali P.S. Case No. 84 of 2009 has been initiated against the Managing Director of the petitioner company.

13. Apart from the same, the EPF organization has also declared the petitioner company as defaulter of making payment of EPF amount to its employees, while issuing the defaulting establishment list in the month of March 2015, and it has been clearly indicated at Sl. 81 of the said list that the petitioner agency was a defaulter in making payment of the EPF dues. In view of the provisions contained in Clause 10(k), the petitioner has filed an affidavit stating that no criminal case is pending against the proprietor/firm/partner of the company, but in reality, a criminal case is pending, which amounts to filing of false affidavit. Consequentially, the petitioner is ineligible to participate in the bid. Though a rejoinder affidavit has been filed by the petitioner to the counter affidavit filed by opposite parties no. 1 and 2 on 09.11.2016, no specific reply has been given to the contention raised with regard to pendency of the criminal case against one of the Managing Directors of the petitioner-company, as stated in paragraphs 17 and 18 of the counter affidavit filed by opposite party no.2. In view of such, it is admitted that a criminal case is pending against one of the Managing Directors of the petitioner-company itself and on query, being made by this Court, Mr. A. Mishra, learned counsel for the petitioner also candidly stated that against one of the Managing Directors of the petitioner-company a criminal case is pending for adjudication, but he has not been convicted.

14. Mr. A. Mishra, learned counsel for the petitioner stated that opposite party no.2 incurs disqualification, in view of Clause-12 of General Instructions of the tender documents, which specifically states that no overwriting or cutting is permitted in the financial bid form, and in such cases the tender shall be summarily rejected. It is stated that financial bid form of opposite party no.2 was not made available to the petitioner at the time of filing of the writ petition. But, in the counter affidavit filed by opposite party no.2, said application of financial bid submitted by opposite party no.2 has been filed vide Annexure-B/2 dated 04.08.2016. On perusal of the same, it is

clear that there is overwriting and cutting in the said application form so far as figures are concerned. Consequentially, the financial bid submitted by opposite party no.2 should have been rejected in view of Clause-12 of the General Instructions of tender documents. In the rejoinder affidavit filed by the petitioner in paragraph 7(v), in reply to the counter affidavit filed opposite party no.2, it has been clearly stated that it is evident from Annexure-B/2 that the figures have been overwritten and there is cutting, which is not permitted in the financial bid as per Clause-12 of General Instructions of the tender documents in Annexure-2 and the said tender was to be summarily rejected.

15. In the facts and circumstances, as discussed above, the petitioner's tender could not have been considered in view of the provisions contained in Clause-10(k) of the General Instructions of the tender document in Annexure-2. Similarly, the tender of opposite party no.2 also could not have been considered as there was overwriting and cutting in financial bid application form. Consequentially, since both petitioner and opposite party no.2 are found to be ineligible to participate in the tender process itself, this Court is of the considered view that the office order dated 19.09.2016 passed by opposite party no.1 in Annexure-7, requesting the petitioner to withdraw the Security Service manpower with effect from 16.10.2016 and allowing opposite party no.2 to provide Security Service manpower with effect from 16.10.2016 by executing the agreement before 15.10.2016, cannot sustain in the eye of law, and accordingly, the same is hereby quashed. However, quashing of order dated 19.09.2016 in Annexure-7 will not preclude opposite party no.1 from proceeding with fresh tender, in accordance with law, as expeditiously as possible.

16. The writ petition is disposed of with the aforesaid observation and direction. No order as to cost.

Writ petition disposed of.

2017 (I) ILR - CUT- 432

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

STREV NO.174 OF 2004

M/S. LAXMI LIME CENTRE .....Petitioner

.Vrs.

STATE OF ORISSA .....Opp. Party

ODISHA SALES TAX ACT, 1947 – S. 12 (5)

Petitioner was an unregistered dealer dealing with first point tax paid goods, i.e. cement and other associated products – He was not liable to be assessed as his sale turnover did not exceed the exemption limit of Rs. 2,00,000/- – However the Sales Tax Officer basing on the report of the Inspector and resorting to "best judgment assessment" assessed the petitioner and raised demand and penalty – In first appeal, the first appellate authority found the sale turnover for the relevant period comes to Rs.1,81,952.76 which is below the exemption limit and held the appellant is not liable to pay tax during that period – State challenged the same in second appeal which was allowed – Hence this revision – Contention of the petitioner that he had purchased cement and other goods from local registered dealers and had paid tax thereon has never been disputed by the department – In the other hand the Inspector of Sales Tax having not indicated any discrepancy or suppression, resorting to best judgment assessment is wholly erroneous and without jurisdiction – Held, the impugned order passed by the second appellate authority is quashed and the order passed by the first appellate authority is affirmed.

(Paras 8,9,10,11)

For Petitioner : M/s. M.L. Agarwalla & S.P.Dalai

For Opp. Party : Mr. R.P. Kar (S C, Sales Tax Department)

Date of Judgment: 01.03.2017

JUDGMENT

I. MAHANTY, J.

The present sales tax revision has come to be filed by the petitioner-M/s. Laxmi Lime Centre, Sambalpur under Section 24 of the Orissa Sales Tax Act, 1947 seeking to challenge the order dated 02.06.2004 passed in S.A. No.2788 of 1995-96 by which order, the Sales Tax Tribunal, Cuttack has reversed the first appellate order and came to direct recalculation of the tax demand and imposed penalty @ 25% on the petitioner.

2. Mr. M.L. Agarwalla, learned counsel for the petitioner has submitted that the petitioner was an unregistered dealer, essentially dealing with resale of cement and associated products. The sale turnover of the petitioner was below the exemption limit of Rs.2,00,000/- (during the year 1993-94) and, therefore, was not liable to be assessed. It is further submitted on behalf of the petitioner that the petitioner had started a retail business in the district of Sambalpur on and from 03.09.1991. The petitioner purchased goods locally within the State of Orissa, on payment of tax and such tax paid goods was sold by the petitioner for small margins of profit. It is declared that no purchases were effected by the petitioner from outside the State of Orissa. The petitioner essentially dealt "with first point tax paid goods" i.e. cement and few other goods i.e. lime stone, colour, water proof powder etc. purchased from local registered dealers, who in turn had collected tax and such liability consequently devolved on the selling dealers. The petitioner was not required to get himself registered under the Act, since his turn over had not exceeded the threshold limit of Rs.2,00,000/- as provided under the Act.

Mr. Agarwalla, learned counsel for the petitioner further submitted that on 10.09.1993, the Circle Inspector of Sales Tax paid a visit to the business premises of the petitioner, verified the stock, purchase memos, purchase register maintained by the petitioner including the cement sale bills which were issued to the customers on demand. It appears that a statement was recorded by the Inspector of Sales Tax but, it is most important to note herein that no discrepancy was found nor is there any allegation of suppression. In spite of such fact, it appears that the Inspector forwarded a report to the Sales Tax Officer and the Sales Tax Officer proceeded to assess the petitioner based on "Best Judgment Assessment" and estimated the average daily sale of the petitioner at Rs.400/- in the year 1991 up to Rs.800/- in the year 1993 and, accordingly, assessed the petitioner for the year 1993-94 and raised demand and levied penalty thereon.

3. The petitioner filed a first appeal and the said appeal was allowed quashing the demand of penalty to the following effect:

> "Heard the learned Advocate. Gone through the orders of assessment and grounds of appeal. Prima-facie the learned Assessing Officer has relied on the I.S.T's report, who visited the business premises on 10.09.93. The appellant has started his business from 3.9.91 i.e. the first purchase and has maintained purchase register with supporting purchase vouchers. Neither the I.S.T. nor the learned Assessing

Officer has any ground or evidence to declare the same as incorrect nor any deficiency was noticed in the purchase register. Further, it is noticed that as per the said purchase register the appellant has effected the following purchases and sale of cement as per sale bills noted against each.

Period	Purchase	Sale
1991-92	81,428.00	57,705.00
1992-93	85,110.00	1,04,627.00
1993-94	1,19,650.00	1,50,570.00

For the year 93-94 total purchases were Rs.1,33,254.80. Out of the same purchase of cement was for Rs.1,19,650.00. So the balance amount of other purchases comes to Rs.13,604.80. The appellant has disclosed sale of cement for Rs.1,50,570.00 which is enhanced by 10% to determine the sales turnover of the same for Rs.1,65,627.00. Regarding other items the purchases are enhanced by 20% to determine the sale turnover of Rs.16,325.76. Thus the sales turnover during 93-94 comes to Rs.1,81,952.76 which is below the exemption limit of Rs.2,00,000/-. Therefore the appellant is not liable to pay any tax during the year 93-94. As such the assessment against the appellant are hereby deleted".

4. It appears that the State being aggrieved by the first appellate order, moved the Sales Tax Tribunal in second appeal and the second appeal has come to be allowed by order dated 02.06.2004 with the further direction that the taxable turnover (TTO) be reduced from 16% to 12% and penalty should be levied @ 25% of the demanded amount.

5. The essential issue that arises for consideration in the present case is, as to whether on the facts and circumstances of the case fixation of accrual of liability with effect from 01.04.1993 is legally correct, justified and proper or not.

6. Mr. Agarwalla, learned counsel for the petitioner in support of the revision petition vehemently submitted that since the report of the Inspector of Sales Tax, who inspected the petitioner premises on 10.09.1993 did not indicate neither any discrepancy in the accounts produced nor any alleged suppression, the Sales Tax Officer and the Tribunal ought not to have proceeded on the basis of an alleged average per day sale as has been committed by the said authorities. It is submitted that as would be evident

from the first appellate order, the first appellate authority took into account the quantum of purchase and sale during the aforesaid three years in question as mentioned therein and came to a finding that the sales turnover during 1993-94 comes to Rs.1,81,952.76 paise which was below the exemption limit of Rs.2,00,000/- and, consequently, held the petitioner not to be liable to pay any tax during the year 1993-94.

7. Mr. R.P. Kar, learned Standing Counsel for the Sales Tax Department, on the other hand, supported the orders passed by the Tribunal and submitted that the petitioner did not maintain any sale register or sale account but, issued sale memos on demand by customers and in the absence of any sale register or sale account, the Assessing Officer was left with no choice but to resort to best judgment assessment to assess the average daily sale and consequently arrived at the taxable turnover and levy of tax thereon.

8. Having heard learned counsel for the respective parties and on perusing the orders annexed to the present revision petition, what is abundantly clear in the present case is that the averment made by the petitioner that he had purchased cement and other goods from local registered dealers and had paid tax thereon has never been in dispute by the Department. In other words, it is clear that the petitioner is a small trader who purchased "first point tax paid goods" on payment of tax and resold the same to purchasers in the local areas where he established his business.

9. Even though it may be a fact that the petitioner did not maintain any sale register or sale account but, the Tribunal found that the petitioner had kept accounts of his purchases in a register and has kept the purchase memos. The Tribunal further noted that the I.S.T. "glanced through his sale memo book" and found his daily average sale as per the same memos issued varied from Rs.485 to Rs.1526/-. It is this, which forms the basis of the assessment by the Assessing Officer that to his best judgment. It is estimated by him that the average sale by the petitioner was Rs.400/- in 1991 and Rs.800/- in 1993 and as a consequence of that, held the petitioner to be liable to pay tax with effect from 01.04.1993 i.e. for the assessment year 1993-94.

10. In the light of the circumstances that arise for our consideration in the present case, we are constrained to note how a small trader can be put to great difficulties. Such a trader has admittedly kept register of all the purchase memos through which he had made purchases of stock. The said purchase memos and computation thereof ought to have formed the basis of any calculation of turnover, if at all necessary. A mere assumption based on

a visit on a particular date of inspection of the possible daily average sale cannot and ought not to form the foundation for resorting to best judgment assessment. We are of the considered view that in the present case, since the Inspector of Sales Tax did not give report indicating any discrepancy or suppression, consequently, in the absence of any findings by the Inspector regarding either discrepancy or suppression, resorting to best judgment assessment is wholly erroneous and without jurisdiction.

11. We have also perused the first appellate order and we find that the first appellate authority appears to have approached the issue with great amount of clarity and necessary application of mind. Consequently, the present revision is allowed and we affirm the first appellate order dated 12.09.1995 passed in Sales Tax Appeal No.AA.238,239(S.A.I) 94-95 under Annexure-2 and quash the Second Appellate order dated 02.06.2004 passed in S.A. No.2788 of 1995-96 under Annexure-3.

Revision allowed.

2017 (I) ILR - CUT- 436

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

W.P.(C) No 20352 OF 2016

KENDRIYA VIDYALAYA SANGATHAN & ORS. .....Petitioners

.Vrs.

SHRI ANANTA CHANDRA DAS & ORS. .....Opp. Parties

SERVICE LAW – O.P.No 1- teacher had shown immoral behavior towards a girl student of Class-VII – Asst. Commissioner, Kendriya Vidyalaya Sangathan, after preliminary enquiry dismissed him from service under Article 81 (b) of the Kendriya Vidyalaya Sangathan Education Code – Action challenged before the Tribunal – Tribunal quashed the order of dismissal on the ground that there was no regular enquiry as contemplated in CCS (CCA) Rules 1965 and in compliance to Article 311 (2) of the Constitution of India – Hence the writ petition – Asst. Commissioner KVS recorded reasons that it was not expedient to hold regular enquiry on account of embarrassment to a girl student or her guardian and such other practical difficulties – Moreover, O.P.No 1 in his memorandum of appeal has stated that the occurrence might have committed by him once or twice but it is only

by chance and not intentional which shows that he has admitted his guilt – Moreover KVS Education Code is Parimeteria to the CCS (CCA) Rules 1965 – Held, in view of the nature of allegations the competent disciplinary authority has not committed error in exercising power conferred upon him under Article 81 (b) of the KVSE Code – Impugned order passed by the Tribunal is setaside.

Case Laws Referred to :-

1. AIR 1985 SC 1416 : Union of India v. Tulsiram Patel.
2. (1991) 1 SCC 362 : Jaswant Singh v. State of Punjab.
3. (1997) 2 SCC 534 : Avinash Nagra Vrs.Navodaya Vidyalaya Samiti& Ors.
4. (2004) 13 SCC 568: Director, Navodaya Vidyalaya Samiti & Ors. Vrs. Babban Prasad Yadav & Anr.
5. (S.L.P.(C) No.4627 of 2008 : Commissioner, Kendriya Vidyalaya Sangathan & Ors Vrs. Rathin Pal.
6. (2006) I SCC (L&S) 840 : Narinder Mohan Arya Vrs. United India Insurance Company Ltd.
7. (2008) I SCC (L&S) 819 : Moni Shankar Vrs. Union of India & Anr.
8. 1990 SC 1984 : S. N. Mukherjee Vrs. Union of India.
9. (2008) 1 SCC (L&S) 788 : Officer, Kothagudem & Ors Vrs. Madhusudan Rao.

Counsel for Petitioner : Mr. Hrusikesh Tripathy.
Counsel for Respondents: M/s. Satyajit Behera, A.Mishra, S.Soren, C.K.Sahoo, A.K.Mohanty & Mr.A.K.Bose.

Date of hearing : 08. 02.2017
Date of judgment : 17.02. 2017

JUDGMENT

S. N. PRASAD, J.

The Kendriya Vidyalaya Sangathana and its functionaries, being aggrieved with the order dtd.19th September, 2016 passed in Original Application No.1019 of 2012 by the Central Administrative Tribunal, Cuttack Bench, Cuttack are before this court by way of this writ petition whereby and where under the order dtd.09.03.2012 and 04.10.2012, the orders of dismissal of the opposite party no.1, has been quashed and set aside and the matter has been remitted back to the disciplinary authority to reconsider the matter *de novo*, after giving the applicant an opportunity of being heard.

2. The brief fact of the case is that the opposite party no.1 was working as work-experienced teacher in Kendriya Vidyalaya Sangathana, after putting 18 years of service as a teacher at various places, was lastly posted at

Kendriya Vidyalaya, Charbatia, while posted there, was removed from service on the allegation that he misbehaved a minor girl-student of about 11 to 12 years of age.

3. The case of the opposite party no.1 is that the order of dismissal has been passed without following the provisions as contemplated under Article 311(2) of the Constitution of India as also without initiating a regular departmental proceeding as per the Discipline and Appeal Rules governing the field, hence the order of dismissal is an arbitrary exercise of the authorities concern, hence according to him the order of dismissal is not fit to be sustainable in the eye of law.

4. While, on the other hand, the case of the Kendriya Vidyalaya Sangathana and its functionaries is that on the basis of allegation that the opposite party no.1 misbehaved a minor girl student aged about 11 to 12 years, on complaint having been received, a preliminary enquiry was directed to be conducted by the Asst. Commissioner of the Kendriya Vidyalaya Sangathana, who constituted a fact finding committee and the committee after recording the evidence of various girl students including the lady teachers working in the school, has found the allegation to be true and as such the matter has been referred before the Commissioner, being the competent disciplinary authority, who has taken recourse of the provision of Section 81(b) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (herein after referred to as the Rules, 1965) since according to him it is not expedient to hold regular inquiry on account of embarrassment to student or their guardians or for other practical difficulties, after recording reasons in writing, the Commissioner, in exercise of power conferred under Article 80 and 81(b) of the Kendriya Vidyalaya Sangathana Education Code, has passed the order of dismissal and as such in such circumstances it cannot be said that the order of dismissal is illegal and arbitrary exercise of power.

It has been submitted that the Commissioner has got power under the provision of Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code to dismiss an employee if in his opinion it is not expedient to hold regular departmental proceeding and to that effect he can pass an order of dismissal after getting *prima facie* report on the basis of preliminary inquiry by the Asst. Commissioner, Kendriya Vidyalaya Sangathana and invoking the said jurisdiction he has rightly passed the order of dismissal taking into consideration the nature of allegation upon a working teacher.

On this factual aspects, the learned Tribunal, before whom the order of dismissal has been put to judicial review, has passed order and while

disposing of the original application the order of dismissal passed by the appellate authority as well as the original authority has been quashed and set aside by remitting the matter back before the authority to initiate *de novo* enquiry, the order is under challenge before this court under Article 226 and 227 of the Constitution of India having been assailed by the Kendriya Vidyalaya Sangathana on the ground that the Tribunal has not taken into consideration the nature of allegation, the preliminary enquiry report of the committee constituted under the direction of Asst. Commissioner of Kendriya Vidyalaya Sangathana who has found the allegation true on the basis of the statements recorded by him of the victim girl and other girls who were studying in the school including the lady teacher and thereafter the allegations of guilt having been proved in the preliminary enquiry, has been sent before the Commissioner who is the competent authority to impose punishment upon the employee working under the Kendriya Vidyalaya Sangathana under the prevalent rule and the Commissioner after being satisfied with the report and after recording reasons of not holding regular enquiry as contemplated under the prevalent rule, as also making deviation of Article 311(2) of the Constitution of India by recording specific reason for doing this, has passed the order of dismissal in exercise of power conferred under Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code and as such the order cannot be said to be without jurisdiction and suffers from non-application of mind, but the Tribunal has not taken into consideration this aspect of the matter and set aside the order of dismissal passed by the disciplinary authority against the opposite party no.1.

The other ground has been taken that the Court of Law is to judicially review the order of punishment if there is non-consideration of reply, but the fact finding given by the disciplinary authority cannot be reversed assuming the power of appellate court by a Court sitting under Article 226 of the Constitution of India.

Further it has been argued that the provisions of following the principle of natural justice is required to be followed, it is not in dispute, but there is exception carved out even under Article 311(2)(b) of the Constitution of India read with Article 81(b) of Kendriya Vidyalaya Sangathan Code and it is open to the disciplinary authority to deviate from the settled proposition to initiate regular departmental proceeding in case of exceptional circumstances but the requirement is to record the reason for deviating from the settled proposition to initiate a departmental enquiry by providing opportunity to defend the delinquent employee, here in the instant case the

allegation leveled against the opposite party no.1 is to sexually harass the girl student of 11 to 12 years age and the girl student herself has disclosed before the preliminary enquiry committee regarding the veracity of the allegation which has been supported by the other girl students studying in the school including the lady teacher and as such in the preliminary enquiry the allegation has been found to be true and accordingly the Commissioner, on examination of the preliminary enquiry report, has exercised the power conferred under Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code by recording reasons to deviate from the regular departmental proceeding since it will cause embarrassment to the victim girl student and the guardians if they will be asked to go for examination and cross-examination in course of enquiry and as such the competent authority, in exercise of power vested upon him, has passed the order of dismissal and hence the Tribunal ought not to have interfered with the decision taken by the disciplinary authority by setting aside the same.

5. We have heard the learned counsels for the parties at length and perused the written notes of submission filed on behalf of opposite party.

We, after going through the factual aspects, have found that the questions arose for consideration are:-

(i) whether the dismissal of opposite party no.1 is vitiated by error of law and whether he is entitled to full-fledged enquiry and opportunity to cross-examine the girl students who have given the statement against him; and

(ii) whether the Central Administrative Tribunal was right in allowing the original application under the impugned order dtd.19th September, 2016.

6. Indisputably, the provision of Rules, 1965 of the Government of India is applicable to the employees of the Kendriya Vidyalaya Sangathana. The Kendriya Vidyalaya Sangathana has also constituted its own Education Code. The provision under Article 80 and 81(b) of the Kendriya Vidyalaya Sangathana Education Code is as under:-

> *"Article 80 – Extension of the application of Central Civil Services (Classification, Control and Appeal) Rules, 1965:*
>
> *(a) All employees of Kendriya Vidyalayas, Regional Offices and the Headquarters of the Sangathan shall be subject to the disciplinary control of the Sangathan and the Central Civil Services (Classification, Control and Appeal) Rules, 1965, as amended from time to time, will apply mutatis mutandis to all Members of the staff of*

the Sangathan except when otherwise decided. (In the above Rules, for the words "Government Servant", whether they occur, the words "Employee of Kendriya Vidyalaya Kendriya Vidyalaya Sangathan" shall be substituted.

Article 81(B) – Termination of services of an employee found guilty of immoral behavior towards students:

Whether the 'Commissioner' is satisfied after such a summary enquiry as 'he' deems proper and practicable in the circumstances of the case that any member of the Kendriya Vidyalaya is prima facie guilty of moral turpitude involving sexual offence or exhibition of immoral sexual behavior towards any student, he can terminate the services of that employee by giving him one month's or three months pay and allowances accordingly as the guilty employee is temporary or permanent in the service of the Sangathan. In such cases, procedure prescribed for holding enquiry for imposing major penalty in accordance with CCS (CCA) Rules, 1965 as applicable to the employees of the Kendriya Vidyalaya Sangathan, shall be dispensed with, provided that the 'Commissioner' is of the opinion that it is not expedient to hold regular enquiry on account of embarrassment to student or his guardians or such other practical difficulties. The 'Commissioner' shall record in writing the reasons under which it is not reasonably practicable to hold such enquiry and he shall keep the Chairman of the Sangathan informed of the circumstances leading to such termination of services."

The petitioner before this court is running nation wide co-educational, specialized and prestigious school in which almost half of the students are girls, with a view to ensure safety and security to the girl student, to protect their modesty and prevent their unnecessary exposure at an enquiry in relation to the conduct of a teacher resulting in such harassment of the girl student, etc. involving misconduct of moral turpitude, the provision has been made under the Kendriya Vidyalaya Sangathana Education Code under Article 81(b) providing therein the power upon the Commissioner to terminate the services of an employee found guilty of immoral behaviour towards students if the delinquent is found to be *prima facie* guilty of moral turpitude involving sexual offence for exhibition of immoral sexual behavior towards any student, he can terminate the services of that employee by giving him one months' or three months pay and allowances accordingly as the guilty employee is temporary or permanent in the Sangathan. In such cases,

procedure prescribed for holding enquiry for imposing major penalty in accordance with the Rules, 1965 as applicable to the employees of the Kendriya Vidyalaya Sangathana, shall be dispensed with, provided that the Commissioner is of the opinion that it is not expedient to hold regular enquiry on account of embarrassment to student or his guardians or such other practical difficulties. The commissioner shall record in writing the reasons under which it is not reasonably practicable to hold such enquiry and he shall keep the Chairman of the Sangathan informed of the circumstances leading to such termination of service. Before doing this, an enquiry is to be conducted by the committee and it will submit report before the Commissioner and if the Commissioner found to be satisfied for deviating from initiating regular departmental enquiry, he can do so in exercise of power conferred under Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code.

It is not in dispute that the provisions of Rules, 1965 is mutatis mutandis applied to the disciplinary proceeding initiated against employees of the Kendriya Vidyalaya Sangathan and the provisions made in the Kendriya Vidyalaya Sangathana Education Code is parameteria to the Rules, 1965. Under the provisions of Rules, 1965 it has been provided to impose major punishment by holding regular enquiry, i.e. by providing adequate and sufficient opportunity to the delinquent employee with an exception as contemplated under the provisions of Rule 19 which is parameteria to the provision of Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code. The provision to hold regular enquiry is contemplated under Rule 14 of the Rules, 1965 which is in compliance to the provision as contained in Article 311 of the Constitution of India, i.e. by way of complying the principle of natural justice.

Sub-clause (2) of Article 311 contains exception, i.e.:

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct, which has led to his conviction on a criminal charge; or

(b) Whether the authority is empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) Whether the President or the Governor, as the case may be, is satisfied that in the interest of security of the State, it is not expedient to hold such enquiry.

It is evident from the Constitutional provision as contained under Article 311 that the order of dismissal or removal can only be passed after providing adequate and sufficient opportunity of being heard to the delinquent employee subject to some exception, one of such exception is that the order of dismissal or removal can be passed without holding any enquiry, but by reflecting reasons to be recorded in writing to show that the enquiry is not reasonably practicable.

The provision to Article 311(2)(b) is attracted when the authority is satisfied from the materials placed before him that it is not reasonably practicable to hold a departmental inquiry. The authority empowered to dismiss etc. must record his reason in writing for denying the opportunity under Clause 2 before making the order of dismissal etc. and the reasons recorded must *ex facie* show that it was not reasonably practicable to hold a disciplinary enquiry. To emphasize, the provision of Rule 14 of Rules, 1965 is parameteria to Article 311 of the Constitution of India while the provision of Article 80 and 81(b) of the Kendriya Vidyalaya Sangathana Education Code the parameteria to Art.311(2)(b) of the Constitution of India.

On the subject, we thought it proper to have a discussion regarding the propositions laid down by the Hon'ble Apex Court and the relevant is the judgment pronounced by Hon'ble Apex Court in the case of **Union of India v. Tulsiram Patel,** AIR 1985 SC 1416, wherein at paragraphs 130 and 133, their Lordships have been pleased to hold as follows :

> *"130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform: capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute*

impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry. x x x"

"133. The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a Constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional."

The judgment rendered in the case of **Jaswant Singh v. State of Punjab**, (1991) 1 SCC 362 wherein their Lordships at paragraph 5 have been pleased to hold as follows:-

"The decision to dispense with the departmental enquiry cannot be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a court of law. it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer."

In the case of **Avinash Nagra Vrs. Navodaya Vidyalaya Samiti and Others**, reported in (1997) 2 SCC 534 in the similar nature of allegation, the Hon'ble Apex Court while dealing with the subject, has been pleased to hold that the decision taken by the Director not to conduct any enquiry exposing the student and modesty of the girls and to terminate the services of the appellant by giving one month's salary and allowance in lieu of notice as he is a temporary employee under probation, their Lordships have taken view that the conduct of the appellant is unbecoming of a teacher much less a *loco parentis,* and therefore, dispensing with regular enquiry under the rules and denial of cross-examination are legal and not vitiated by violation of principle of natural justice.

Hon'ble Apex court in the case of **Director, Navodaya Vidyalaya Samiti and Others Vrs. Babban Prasad Yadav and Another**, reported in (2004) 13 SCC 568, after putting reliance upon the judgment rendered in the case of Avinash Nagra's case (supra) has been pleased to observe that in

deviating from holding regular enquiry in a case of sexual harassment against the girl student, no illegality can be said to be committed.

In the case of **Commissioner, Kendriya Vidyalaya Sangathan and Others Vrs. Rathin Pal** (S.L.P.(C) No.4627 of 2008, decided on 16th August, 2010) their Lordships of the Hon'ble Apex Court after taking into consideration the judgment rendered in the case of Avinash Nagra (supra) has been pleased to approve the decision taken by the competent authority by invoking the provision of Article 81(b) of the Kendriya Vidyalaya Sangathan Education Code dispensing with holding regular departmental enquiry before passing order of punishment in a case of sexual harassment towards the girl student.

7. We, in the light of these judgments of Hon'ble Apex Court, have examined the factual aspects and on its perusal it is evident that a written complaint has been submitted by the father of the victim girl student of class-VII regarding sexual harassment by opposite party no.1, explanation was called for by the authority, i.e. Principal, Kendriya Vidyalaya, Charbatia, opposite party no.1 has given its explanation, the Principal has constituted a school-level preliminary enquiry committee, statement of victim girl student with others before preliminary committee have been recorded and the preliminary enquiry report has been submitted holding that the complaint made by the father of the victim girl is genuine.

We have gone through the preliminary enquiry report, perused the statements of the girl students including the victim girl and the lady teachers and found that the girl of such a minor age cannot tell lie regarding the fact which has been stated in her statement recorded by the preliminary inquiry committee.

We have also gone through the memorandum of appeal filed by the opposite party no.1 and from its perusal it is evident that the fault has been admitted by opposite party no.1 where he has said that the occurrence might have committed by him once or twice, but it is only by chance and not intentional, but thing is that a teacher who is imparting study in a co-educational institution cannot be expected to deal with the girl student in such a manner and as such we are also of the view that even the delinquent employee, the opposite party no.1 has admitted his guilt.

The statutory provision provides that the Commissioner is to act upon on the basis of the preliminary enquiry report, if he has to invoke the jurisdiction conferred to him under Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code, we have found from the record that the

preliminary enquiry report has been submitted before it, the statement of various girl students have been recorded including the lady teachers and it is not to be disbelieved that the girl student will tell lie for false implication of the teacher who is imparting teaching to the students without any rhyme and reason, that too, a girl aged about 11 to 12 years.

The Commissioner, after going through the report submitted by the Committee constituted under the order of Asst. Commissioner of the Kendriya Vidyalaya Sangathana, has exercised the power conferred to him under Article 81(b) of the Kendriya Vidyalaya Sangathan Education Code by recording its reason that it is not practicable to hold regular enquiry in order not to embarrass the student who is a girl having the age of 11 to 12 years and the guardians subjecting them to examination and cross-examination and thereby deviated from holding regular departmental proceeding and accordingly imposed the punishment after issuing show cause notice to him to explain the reason as to why he will not be dismissed from service.

We have also found from the record that the delinquent employee has submitted his detail reply in terms of the show cause given by the Commissioner and the Commissioner, after taking into consideration the reply having not found to be satisfactory and accepting the statement of the girl students including the lady teachers, has dismissed him from service.

The opposite party no.1 has preferred an appeal before the competent appellate authority wherein he has stated that the occurrence might have committed by him once or twice but the explanation given to that effect that it is by chance but not intentional but according to us even if it is not intentional the question is why a teacher will commit such type of behaviour with the girl students studying in class-VII and further more whether it was intentional or non-intentional, it cannot be assessed by going through the mind of the teacher and further it is expected from every one that they must remain under their parameter and behave rationally and with morale.

The appellate authority after taking into consideration the various grounds taken by o.p.1 in the memorandum of appeal has declined to interfere with the final order of dismissal by rejecting it. The opposite party no.1, being aggrieved with the order of dismissal and the appellate order, has preferred original application before the Central Administrative Tribunal and the Central Administrative Tribunal, Cuttack Bench, Cuttack, after taking into consideration the submission of the opposite party no.1 that even in the preliminary enquiry he has not been provided with an opportunity to participate in the same and the enquiry has been conducted behind his back,

the order of dismissal has been quashed and set aside which is under challenge in this writ petition.

The provisions of the Kendriya Vidyalaya Sangathana Education Coder as contained in Article 81(b) which provides that where the commissioner is satisfied after such a summary enquiry as he deems proper and practicable in the circumstances of the case that any member of the Kendriya Vidyalaya is *prima facie* guilt of moral turpitude involving sexual offence or exhibition of immoral sexual behaviour towards any student, he can terminate the service of employee by giving him one months' or three months pay and allowances, accordingly as the guilty employee is temporary or permanent in the service of the Sangathan.

In such cases procedure prescribed for holding enquiry for imposing major penalty in accordance with Rules, 1965 as applicable to the employees of the Kendriya Vidyalaya Sangathan, shall be dispensed with, provided that the commissioner is of the opinion that it is not expedient to hold regular enquiry on account of embarrassment to the student or his guardian or such other practical difficulties. The commissioner shall record in writing the reason under which it is not reasonable practicable to hold such enquiry and he shall keep the Chairman of the Sangathan informed of the circumstances leading to such termination of service. Under the note it has been provided that wherever and as far as possible summary enquiry in the complaint of immoral behaviour by a teacher towards a student of Kendriya Vidyalays may be got investigated by the complaints redressal committee constituted in the regional offices.

We have found from the record that on complaint being received from the father of the victim girl student a complaint redressal committee was constituted by the Asst. Commissioner, Kendriya Vidyalaya Sangathana, who have called upon the girl students including the lady teachers, who have deposed regarding the truthness of the allegation leveled against opposite party no.1 and accordingly the Commissioner has proceeded with the matter, by deviating from the initiation of regular departmental proceeding by recording specific reasons thereof, hence according to us, the reasons stipulated in the order of dismissal cannot be said to be erroneous in the facts and circumstances of the instant case.

So far as the ground that opposite party no.1 has not been provided with an opportunity to participate in the enquiry conducted by the committee, we have not found anything on record or under the statute that in case enquiry to be conducted, the opportunity of being heard is to be provided to

the teacher against whom the allegation of sexual harassment has been leveled, rather the provision of Article 81(b) of the Kendriya Vidyalaya Sangathan Education Code stipulates that whether the Commissioner is satisfied after such a summary enquiry as he deems proper and practicable in the circumstances of the case that any member of the Kendriya Vidyalaya is prima facie guilty of moral turpitude involving sexual offence or exhibition of immoral sexual behavior towards any student, he can terminate the services of that employee by giving him one month's or three months pay and allowances. In such cases, procedure prescribed for holding enquiry for imposing major penalty in accordance with CCS (CCA) Rules, 1965 as applicable to the employees of the Kendriya Vidyalaya Sangathan, shall be dispensed with, provided that the 'Commissioner' is of the opinion that it is not expedient to hold regular enquiry on account of embarrassment to student or his guardians or such other practical difficulties. The 'Commissioner' shall record in writing the reasons under which it is not reasonably practicable to hold such enquiry.

According to our conscious view, the Commissioner has not exceeded his jurisdiction, rather he has passed order in consonance with the power conferred upon him under Article 81(b) of the Kendriya Vidyalaya Sangathan Education Code and in terms thereof he has given specific reasons for deviating with the established procedure for imposing major penalties.

Moreover, the Commissioner before imposing the punishment of dismissal, has issued a show cause notice upon opposite party no.1 which has been replied in detail and after going through the response the order of dismissal has been passed and as such it is not a case that the petitioner has not been heard, the only question is that the initiation of regular departmental proceeding and as to whether this case is coming under the exception as to cover under the provision of Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code which we have already discussed in detail in preceding paragraphs and answered it, hence the argument advanced on behalf of opposite party no.1 basis upon which the order of dismissal has been found to be incorrect by the Tribunal is not seems to be sustainable.

We have also seen in the order passed by the Tribunal, in which it has been observed that;

"The girls cannot be exposed during enquiry, but certainly that principle cannot be applied in so far as collecting evidence in presence of the parents of the members of teaching and nonteaching staff of the school".

But we are not in agreement with this observation, reason being that either before the parents or the members of teaching and non-teaching staff of the school, the girl student having such a tender age will be put to embarrassment in course of collecting evidence, which is admittedly through examination and cross-examination of the victim girl student, allowing this it will certainly create embarrassment to victim girl students who have been subjected to harassment, that too by her own teacher.

8. The opposite party no.1 has submitted a written note of submission wherein, apart from the factual aspects, reliance has been placed upon various judgments of Hon'ble Apex Court. In the cases of **Narinder Mohan Arya Vrs. United India Insurance Company Ltd**, reported in (2006) I SCC (L&S) 840 and **Moni Shankar Vrs. Union of India & Another**, reported in (2008) I SCC (L&S) 819, proposition has been laid down regarding the power of judicial review for the purpose of re-appreciating the evidence in order to take contrary view from the view of the disciplinary authority.

There is no dispute about the settled proposition of law as reflected in the Judgments referred in preceding paragraphs, but it is also settled that no judgment is of its universal application, rather the same is to be seen on the facts and circumstances of each and every case, the power of judicial review is vested upon the Court of Law for the purpose of judicially scrutinize the finding given by the disciplinary authority, but here in the instant case completely different situation is there since the question fell before this court regarding power of judicial review of an order of dismissal which has been passed against a teacher of an allegation of moral turpitude towards a girl student of about 11 to 12 years of age, the girl student, while deposing before the committee constituted for summary enquiry, has deposed regarding truthiness of the allegations and in that situation it would not be advisable for this Court to scrutinize the evidence given by the teen aged girl for the purpose of exercising the power of judicial review by assuming the power of disciplinary authority or enquiry committee.

Furthermore, it is not a trial of criminal case where the evidence, without any reasonable doubt is to be taken into consideration, rather it is a case of disciplinary enquiry where the preponderance of probability is required to be seen and from the facts and circumstances of the case, we have stated herein above that why a girl student aged about 11 to 12 years of age will depose against her teacher without any rhyme and reason, moreover, the opposite party no.1 himself has admitted in the memorandum of appeal that the occurrence might have been committed by him once or twice but it is not

intentional, in that view of the matter there is no question of re-appreciating the evidence for the purpose of judicial review of the order of dismissal, hence these judgments are not applicable in the facts and circumstances of the instant case.

So far as the judgments rendered by Hon'ble Apex Court in the cases of **S. N. Mukherjee Vrs. Union of India**, reported in 1990 SC 1984 and **Divisional Forest Officer, Kothagudem and Others Vrs. Madhusudan Rao**, reported in (2008) 1 SCC (L&S) 788, the ratio decided in these cases are regarding reasons to be assigned by the disciplinary authority, these judgments are also not applicable, reason being that in the order passed by the Commissioner or the appellate authority, reasons have been assigned by the authorities concerned basing upon the finding given by the summary enquiry committee as also the reply submitted by the opposite party no.1.

9. We, after having appreciated the factual aspect and dealing it with the proposition laid down by the Hon'ble Apex Court in the cases of **Union of India Vrs. Tulsiram Patel** (supra), **Jaswant Singh Vrs. State of Punjab** (supra), **Avinash Nagra Vrs. Navodaya Vidyalaya Samiti and Others** (supra), **Director, Navodaya Vidyalaya Samiti and Others Vrs. Babban Prasad Yadav and Another** (supra) and **Commissioner, Kendriya Vidyalaya Sangathan and Others Vrs. Rathin Pal** (supra), are of the considered view that the competent disciplinary authority has not committed error in exercising power conferred upon him under Article 81(b) of the Kendriya Vidyalaya Sangathana Education Code taking into consideration the nature of allegation and the teen age of the girl student who is studying in class-VII. Accordingly, in our considered view the order passed by the Tribunal is not sustainable in the eye of law, hence the same is set aside, in the result the order of dismissal is restored. The writ petition stands allowed.

Writ petition allowed.

2017 (I) ILR - CUT- 451

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

W.P.(C) NO. 8034 OF 2016

ANGUL SUKINDA RAILWAY LTD. .....Petitioner

.Vrs.

PRIYABRATA PANDA & ANR. .....Opp. Parties

LAND ACQUISITION ACT, 1894 – S. 18

Reference – Whether order 1, Rule 10 C.P.C applies to the proceeding U/s 18 of the L.A. Act, 1894 ? – Held, No

A beneficiary (local authority or company for whose benefit the land is being acquired and who is ultimately liable to bear the burden of paying the compensation) can not apply for impleadment, nor can it be impleaded as a party respondent under Order 1, Rule 10 C.P.C. read with section 53 of the L.A. Act and its right is only the one recognized by Section 50 (2) of the Act – It can appear in such a reference, adduce evidence in support of its case, and cross-examine the witnesses produced by such claimants – It can not either ask for a reference U/s 18 nor can file an appeal against the judgment and award of the Civil Court as a matter of right U/s 54 of the Act – However, it can file such an appeal with the leave of the Court – Held, the impugned order passed by the learned Court bellow rejecting the application of the petitioner-company for impleadment warrants no interference by this Court. (Parass 15,16)

For Petitioner : M/s. Susanta Ku. Dash, A.K. Otta, A. Dhalsamanta, B.P. Dhal, S. Das.

For Opp. Parties :M/s. Sambit Pattnaik, Biswanath Swarnakar.

Date of hearing : 5.10.2016

Date of judgment : 5.10.2016

JUDGMENT

S. *N. PRASAD, J.*

The order dated 10.03.2016 passed in L.A. No.209 of 2013 is under challenge whereby and where under the prayer made by the Company, the petitioner herein under Order 1, Rule 10 of C.P.C. to implead him as necessary party in the present case has been rejected.

2. Case of the petitioner in short is that the Government of Odisha has issued notification under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') seeking acquisition of land for setting up the Angul-Duburi-Sukinda Rail Project expressing the necessity of land to be acquired in the district of Dhenkanal and adjacent district.

The petitioner being a "person interested" within the meaning of the Act, though entitled to notice under Section 20 of the Act and to participate in the reference in terms of Sub-Section (2) of Section 50 for determination of the market value under Section 18 of the Act, was not provided with such opportunity.

3. According to the petitioner, reference has been made under Section 18 of the Land Acquisition Act, 1894 and the land in question was acquired for the purpose of rail-line and the work has been entrusted to the petitioner-company with the liability to pay the compensation amount in respect of the said project, in terms of agreement with the Ministry of Railways, as such the petitioner –company being a necessary party has made application under Order I Rule10 of the Code of Civil Procedure, 1908 (in short 'CPC') for being impleaded as party. But the same has been rejected vide order passed in L.A. No.209 of 2013 dated 10.03.2016, being aggrieved this present writ petition has been filed.

4. Opposite party no.1 has been represented by M/s. Sambit Pattnaik and Biswanath Swarnakar, learned counsel who has shown no objection, if the petitioner – company will be provided an opportunity of being heard in the proceeding pending before the court below.

5. After hearing the parties and perusing the documents available on record and also the provision of the Land Acquisition Act, 1894, following question arises for our consideration i.e.,

(i) Whether the company or the authority for whose benefit the land is being acquired (hereinafter referred to as the beneficiary) and who has to bear the entire burden of compensation is a "person interested" within the meaning of the said expression as defined in clause (b) of Section 3 of the Land Acquisition Act ?

(ii) Whether the Order 1 Rule 10 of C.P.C. applies to the proceedings under Section 18 of the Land Acquisition Act.

(iii) Whether the Civil Court has jurisdiction to implead any person in a reference under Section 18 of the L.A. Act and whether such person is

"person interested" within the meaning of Section 3 (b) of the L.A. Act or not ?

6. Relevant provision which has got bearing for the issue involved in this case i.e., Section 3(b) which defines the expression "person interested" includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act and a person shall be deemed to be interested in land if he is interested in an easement affecting the land.

Section 18 entitled a person who has not accepted the award to apply to the Collector to refer the matter to the Court both with respect to the quantum of compensation as well as apportionment thereof.

Section 19 specifies the information which the Collector should send along with the reference. One of the matters, which he must specify is mentioned in clause (d) of sub-section (1) thereof, namely: "(d) if the objection be to the amount of the compensation, the grounds on which the amount of compensation was determined."

Section 20 says that the Court shall send notices to (a) the applicant, (b) all persons interested in the objection and (c) the Collector and thereupon proceed to dispose of the matter.

Section 50, which occurs in "Part VIII Miscellaneous" contains a provision, which is very relevant for our purpose, sub-section (2). Section 50 says that the acquisition of land at cost of a local authority or Company- (1) Where the provisions of this Act are put in force for the purpose of acquiring land at the cost of any fund controlled or managed by a local authority or of any Company, the charges of and incidental to such acquisition shall be defrayed from or by such fund or Company.

(2) In any proceeding held before a Collector or Court in such cases the local authority or Company concerned may appear and adduce evidence for the purpose of determining the amount of compensation. Provided that no such local authority or Company shall be entitled to demand a reference under Section 18."

Section 53 says "save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court under this Act."

Section 54 says Appeals in proceedings before Court.- Subject to the provisions of the Code of Civil Procedure, 1908 (5 of 1908), applicable to appeals from original decrees, and notwithstanding anything to the contrary

in any enactment for the time being in force, an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court and from any decree of the High Court passed on such appeal as aforesaid an appeal shall lie to the Supreme Court subject to the provisions contained in Section 110 of the Code of Civil Procedure, 1908.

7. So far as the arguments advanced on behalf of the learned counsel for the petitioner as to whether the Order 1 Rule 10 applies to the proceedings under Section 18 before the Court. Section 53 of the Act does apply the provisions of the Code of Civil Procedure to all proceedings before the Court under this Act. (The expression 'Court' is defined in clause (d) of Section 3 to mean a principal Civil Court of original jurisdiction unless the appropriate Government has appointed (as it is hereby empowered to do) a special judicial officer within any specified local limits to perform the functions of the Court under this Act) The question is whether Order 1, Rule 10 of C.P.C. inconsistent with any of the provisions contained in the Act. This question has to be answered on a consideration of Sections 18, 30 and 50. Section 18 entitled a person to ask for a reference to the Civil Court if he is dissatisfied with the award. Section 30 provides for reference of a dispute relating to apportionment of compensation to the Court.

8. Section 30 provides for reference of a dispute relating to apportionment of compensation to the Court. Section 30 entitles a person, who has not appeared before or participated in the proceeding before the Collector, to ask for a reference if he claims any part or whole of the compensation amount.

9. Section 50 confers a specific right on the beneficiary. It says that the local authority or the Company for whose benefit the land is being acquired is entitled to appear and adduce evidence for the purpose of determining a reference under Section 18.

10. Thus, both are conflicting to each other. What do the above provisions indicate? In our considered view, though the proceeding before the Court under Section 18 is not an appeal, as held by the Supreme Court in **Chimanlal Hargovinddas Vrs. S.L.O.** reported in *AIR 1988 SC 1652*, at the same time, it is not like a civil suit. The matter comes before the Court on a reference being made by the Collector either under Section 18 or under Section 30. The Civil Court cannot take cognizance of the dispute as an original court by itself. A person whose case is not referred by the Collector under Section 18 or 30 cannot appear before the court and claim either a

share in the compensation or for enhancement of the compensation. If such a thing is permitted, the very purpose of including a proviso relating to limitation in Section 18 would be defeated. The Act provides for a reference being made at the instance of a person who has appeared or participated in the award proceedings before the Collector under Section 18, but this must be done within the period prescribed. Under Section 30, no doubt, even a person who has not appeared before the Collector can ask for a reference, without any limitation of time, but this is confined only to a dispute of apportionment. But even this provision indicates how a party must approach the Court, he cannot go directly but through Collector.

11. So far as the beneficiary is concerned, sub-section (2) of Section 50 specifically provides for a limited right in his favour. It says that the local authority or the Company for whose benefit the land is acquired may appear and adduce evidence for the purpose of determining the amount of compensation. This right given to the is akin to the right given to a person by Order 1, Rule 10 of CPC, though somewhat lesser in its content though undoubtedly the right given by sub-section (2) of Section 50 extends not only to appear and lead evidence in support of its case but also to cross-examine the witnesses produced by the claimants.

12. Since its only interest is in ensuring that excessive compensation is not awarded, the right given to it by Section 50(2) is adequate to safeguard the said interest. The main difference appears to be that if the beneficiary is impleaded as party, it can file an appeal under Section 54 as a matter of right, but where it is not impleaded as such and exercise the right given by Section 50(2), it has to apply for leave to file an appeal.

13. Thus, Order 1, Rule 10 is inconsistent with the provisions contained in the Act. The right of the beneficiary to participate in a reference is only that as is recognized by Section 50(2) and no more. In this regard reference needs to be made the judgment rendered by the Hon'ble Supreme Court in the case of **City of Ahmedabad vrs. Chandulal Shamaldas Patel** reported in (1971) 3 SCC 821, wherein certain lands were notified for acquisition under Section 4. A writ petition was filed in the High Court of Gujrat, impugning the validity of the said notification as well as of the declaration made under Section 6. In the writ petition, Municipal Corporation of the City of Ahmedabad, for whose benefit the land was being acquired, was impleaded as the fourth respondent, but no relief as such was prayed for against it, nor was granted against it. The writ petition was allowed, holding

that the notifications issued by the Government was not valid by the law. Against the judgment of the High Court, Corporation has preferred an appeal to the Supreme Court and after hearing the parties it has been held as follows:-

> "The Municipal Corporation was impleaded as the fourth respondent before the High Court but no relief was claimed against the Municipal Corporation, The property, it is true, was notified for acquisition by the State Government for the use of the Municipal Corporation after it was acquired, but that, in our judgment, did not confer any interest in the Municipal Corporation so as to enable it to file an appeal against the order of the High Court allowing the petition. Substantially, the grounds on which the petition was filed were that the notifications were invalid on account of diverse reasons. Some of these reasons have been upheld and some have not been upheld but all those grounds related to the validity of the Notifications issued by the Government of Bombay and the Government of Gujarat. Not even an order of costs has been passed against the Municipal Corporation of the City of Ahmedabad. We fail to see what interest the Municipal Corporation has which would sustain an appeal by it against the order of the High Court allowing the writ petition filed by the first respondent."

In the judgment, it has held by the Hon'ble Supreme Court that the Municipal Corporation could not be said to be an aggrieved party and hence could not file an appeal.

14. So far as reference made of the judgment rendered in the case of Himalaya Tiles, AIR 1980 SC 1118, the Company moved the Government to acquire certain additional land for its purposes. The Government accordingly issued a notification under Section 4 followed by the declaration under Section 6. In pursuance thereof, an award was made and published. The acquisition was challenged by way of writ petition in the High Court of Bombay on the ground that an acquisition for the purposes of a company could not have been made as if for a public purpose under Section 4. The writ petition was allowed and the land acquisition proceeding was quashed. Thereupon, an appeal was filed which was dismissed merely on the ground that the Company has no locus standee to file an appeal since it was not a person interested within the meaning of Section 18(1). The order was questioned before the Supreme Court and at para-7, it has been held which is being quoted herein below:-

"It seems to us that the definition of 'a person interested' given in Section 18 is an inclusive definition and must be liberally construed so as to embrace all persons who may be directly or indirectly interested either in the title to the land or in the quantum of compensation. In the instant case, it is not disputed that the lands were actually acquired for the purpose of the company and once the land vested in the Government, after acquisition, it stood transferred to the company under the agreement entered into between the company and the Government, Thus, it cannot be said that the company had no claim or title to the land at all. Secondly, since under the agreement it had to pay the compensation, it was most certainly interested in seeing that a proper quantum of compensation was fixed so that the company may not have to pay very heavy amount of money. For this purpose, the company would undoubtedly appear and adduce evidence on the question of the quantum compensation."

In the case of **Santosh Kumar vrs. Central Warehousing Corporation**, *AIR 1968 SC 1164*, the Hon'ble Supreme Court has again considered this question and at para-4, it has been held which is being reproduced herein below:-

"In our view, there cannot be any possible doubt that the scheme of the Act is that, apart from fraud, corruption or collusion, the amount of compensation awarded by the Collector under Section 11 of the Act may not be questioned in any proceeding either by the Government or by the company or local authority at whose instance the acquisition is made. Section 50(2) and Section 25 lead to that inevitable conclusion. Surely what may not be done under the provisions of the Act may not be permitted to be done by invoking the jurisdiction of the High Court under Article 226. Article 226 is not meant to avoid or circumvent the processes of the law and the provisions of the statute. When Section 50(2) expressly bars the company or local authority at whose instance the acquisition is made from demanding a reference under Section 18 of the Act.

In the case of **U.P. Awas Evam Vikas Parishad vrs. Gyan Devi** reported in *AIR 1995 SC 724* rendered by the constitution Bench, wherein the judgment rendered in the case of **Municipal Corporation, Ahmedabad (supra)** has been said to be not a good law and the judgment rendered in the case of **Himalaya Tiles (supra)** has been said to be correct law and after

taking into consideration the entire aspect of the matter, the majority view has laid down at para-25 the following conclusions:-

1. *"Section 50(2) of the L.A. Act confers on a local authority for whom and is being acquired a right to appear in the acquisition proceedings before the Collector and the reference Court and adduce evidence for the purpose of determining the amount of compensation.*
2. *The said right carries with it the right to be given adequate notice by the Collector as well as the reference Court before whom acquisition proceedings are pending of the date on which the matter of determination of compensation will be taken up.*
3. *The proviso to Section 50(2) only precludes a local authority from seeking a reference but it does not deprive the local authority which feels aggrieved by the determination of the amount of compensation by the Collector or by the reference Court to invoke the remedy under Article 226 of the Constitution as well as the remedies available under the L.A. Act.*
4. *In the event of denial of the right conferred by Section 50(2) on account of failure of the Collector to serve notice of the acquisition proceedings the local authority can invoke the jurisdiction of the High Court under Article 226 of the Constitution.*
5. *Even when notice has been served on the local authority the remedy under Article 226 of the Constitution would be available to the local authority on grounds on which judicial review is permissible under Article 226.*
6. *The local authority is a proper party in the proceedings before the reference Court and is entitled to be impleaded as a party in those proceedings wherein it can defend the determination of the amount of compensation by the Collector and oppose enhancement of the said amount and also adduce evidence in that regard.*
7. *In the event of enhancement of the amount of compensation by the reference Court if the Government does not file an appeal the local authority can file an appeal against the award in the High Court after obtaining leave of the Court.*
8. *In an appeal by the person having an interest in land seeking enhancement of the amount of compensation awarded by the reference Court, the local authority should be impleaded as a party*

and is entitled to be served notice of the said appeal. This would apply to an appeal in the High Court as well as in this Court.

9. *Since a company for whom land is being acquired has the same right as a local authority under Section 50(2), whatever has been said with regard to a local authority would apply to a company too.*

10. *The matters which stand finally concluded will, however, not be reopened."*

15. In the light of these judgments, there is no dispute about the fact that the provision of Order 1, Rule 10 has no application to reference proceedings under Section 18 of the Land Acquisition Act. Its application is excluded by the context of the Act, that is, by necessary implication. A beneficiary (local authority or company for whose benefit the land is being acquired and who is ultimately liable to bear the burden of paying the compensation) cannot apply for impleading, nor can it be impleaded as a party-respondent under Order 1, Rule 10 of CPC read with Section 53 of the Land Acquisition Act and its right is only the one recognized by Section 50(2) of the Act. It can appear in such a reference and adduce evidence in support of its case and also to contradict the evidence produced by the claimants. It can also cross-examine the witnesses produced by the claimants. It cannot either ask for a reference under Section 18 nor can it file an appeal against the judgment and award of the Civil Court as a matter of right under Section 54 of the Act. It can file such an appeal with leave of the Court.

16. In the light of discussion made hereinabove, it is held that the Civil Judge (Senior Division), Kamakhyanagar was not wrong in rejecting the application for impleadment filed by the petitioner-company, Angul Sukinda Railway Limited, but he ought to have taken into consideration the provision as contained in Section 50(2) of the Land Acquisition Act, however the discussion has been made but due to lack of documents filed in support of the fact that the Company is the beneficiary, hence declined to allow the petitioner-Company to participate in the proceeding. But taking into consideration the specific averments made in the writ petition that the land has been acquired by the State of Odisha and to that effect under Section 4(1) of the Land Acquisition Act, 1894 for setting up Angul-Duburi –Sukinda Railway Project in the district of Dhenkanal and its adjacent district has been issued and the petitioner-company has entered into an agreement with the Ministry of Railways to execute the work with a specific liability to pay the compensation amount as would be evident from para-4 of the counter

affidavit and the same has not been disputed by opposite parties hence there is no question of disbelieve the statement.

Taking into consideration this aspect of the matter and without interfering with the order, liberty is granted to the petitioner to avail the right provided in sub-section (2) of Section 50 of the Land Acquisition Act.With the above discussion and observation, the writ petition is disposed of.

Wit petition disposed of.

2017 (I) ILR - CUT- 460

B.K. NAYAK, J.

CRLMC NO. 3351 OF 2016

GANESH MOHARANA & ORS. ……..Petitioners

.Vrs.

SABITRI MOHARANA ……..Opp. Party

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE Act, 2005 – S. 31 (1)

Language used in Section 31 (1) of the Act must be understood to have been limited to only the respondents in the proceeding, who commit the breach or violation of final or interim protection order

In this case, admittedly petitioner Nos 3 & 4 are not parties to the original proceeding filed by the Opp. Party and there was no protection order against them and they can not be said to have violated the protection order – Held, the impugned order taking congnizance and issuance of process against petitioner Nos 3 & 4 is quashed.

(Paras 9,10)

For Petitioner : M/s.Prafulla Ku.Jena
For Opp. Parties : M/s. R.N.Prusty

Date of Order : 04.01.2017

ORDER

B.K. NAYAK, J.

Heard learned counsel for the parties and perused the case record.

2. Petitioners have filed this application under Section 482 Cr.P.C challenging the order dated 16.02.2016 passed by the learned SDJM (Sadar)

Cuttack in 1.C.C. case No.119 of 2016 taking cognizance of offence under Section 31 (1) of the Protection of Women from Domestic Violence Act 2005 (in short 'PWDV Act') and directing issuance of summons to the petitioners.

3. Opposite Party has initiated a proceeding claiming several reliefs under the provisions of the PWDV Act in the court of learned SDJM (Sadar) Cuttack which has been registered as CRLMC No. 304 of 2015. She had also filed applications for some interim reliefs which were considered and disposed of by order dated 05.01.2016 whereby learned SDJM directed the husband (petitioner No.1) to pay a sum of Rs. 10,000-/ per month towards maintenance of Opposite Party and her minor son. The order further directed the respondents therein to provide separate accommodation to the Opposite Party and her minor son in the shared household. Similarly interim order was also passed directing the respondents therein not to commit aid or abet the commission of any sort of domestic violence to the aggrieved person.

4. It is admitted at the Bar that the order dated 05.01.2016 passed by the learned SDJM Cuttack was challenged by petitioner Nos. 1 and 2 in Criminal Appeal No.04 of 2016 before the learned 2nd Additional Sessions Judge Cuttack and that appeal having been dismissed the order of the learned SDJM has become final and conclusive.

5. Subsequently the Opposite Party filed a complaint alleging that as per the interim order passed on 05.01.2016 by the learned SDJM Sadar Cuttack directing the respondents to provide her accommodation in the shared household she went with the minor son but the petitioners and other family members opposed and refused to let her stay there. Even the efforts of IIC Mangalabag Police Station to get her accommodation in the shared household proved abortive which has been communicated by the IIC Mangalabag Police Station to the learned SDJM. The further allegation is that Opposite Party again went to the shared household on 08.01.2016 with her belongings and being prevented by the petitioners she kept all her articles in the garage of the shared household but the accused persons forcibly locked the garage and prevented her from taking back her belongings from garage. Again on 13.01.2016 Opposite Party accompanied by her brother went to the matrimonial home to stay as per the courts order but the accused persons drove her away and her brother without allowing them to take back her belongings from the garage and the petitioners even assaulted the brother of the Opposite Party.

6. By the impugned order dated 16.02.2016 the learned SDJM Sadar Cuttack took cognizance of the offence under Section 31(1) of PWDV Act

against all the petitioners. Subsequently the accused persons filed a petition before the learned SDJM for recall of the cognizance order which was also rejected.

7. In the aforesaid circumstances it is contended by the learned counsel for the petitioners that offence under Section 31(1) of Protection of Women from Domestic Violence Act 2005 Act is limited only to violation of final or interim protection order and not violation of order for residence or accommodation. Secondly it is submitted that petitioner Nos. 3 and 4 are not parties to the domestic violence proceeding and therefore they cannot be prosecuted for offence under Section 31(1) of the Protection of Women from Domestic Violence Act 2005.

Learned counsel for the Opposite Party on the other hand submits that the order dated 05.01.2016 was not only an interim order in respect of maintenance and accommodation but it was also directed interimly to the respondents not to commit or aid or abet the commission of any sort of domestic violence to the Opposite Party. He also submits that a protection order includes prohibition to commit Domestic Violence which includes refusal to access to the resources or facilities including access to the shared household and therefore refusal by the respondents to the opposite party to stay in the shared household in spite of order dated 05.01.2016 also amounts to violation of the interim protection order and therefore no exception can be taken to the impugned order of cognizance.

8. There is no quarrel over the proposition that the offence under Section 31(1) of the PWDV Act is limited to the breach of interim or final protection order by the respondent. It does not specifically include within its fold the breach of order of maintenance or accommodation. Protection order is envisaged under Section 18 of the Act whereby the learned Magistrate having jurisdiction can pass an order protecting the aggrieved person from commission of any act of domestic violence besides orders of several other categories of protections.

The expression "domestic violence" includes within its definition physical abuse sexual abuse and "economic abuse". Clause (iv) to Explanation-I of Section 3 defines economic abuse and sub-clause (c) thereof brings within the fold of economic abuse any prohibition or restriction to continue to access to resources or facilities including access to the shared household.

The allegations made in the complaint of the Opposite Party are to the effect that the respondents not only refused her accommodation in the shared household but also prevented her from retrieving her belongings back and

assaulted her brother which amount to economic abuse of the opposite party. Therefore substantially the action of the respondents as alleged in the complaint filed amounts to violation of interim protection order and therefore cognizance has rightly been taken against the respondents i.e. petitioner Nos. 1 and 2.

9. Language used in Section 31(1) of the PWDV Act must be understood to have been limited to only the respondents in the proceeding who commit the breach or violation of final or interim protection order. Admittedly petitioner nos. 3 and 4 are not parties to the original proceeding filed by the Opposite Party under the D. V. Act and there was no protection order against them. Therefore they cannot be said to have violated the protection order as respondents. Hence taking cognizance of offence under Section 31(1) and directing issuance of summons to them is illegal and unsustainable.

10. In the aforesaid analysis this petition is allowed in part and the order taking cognizance and issuance of process against petitioner nos. 3 and 4 is quashed.

Petition allowed in part.

2017 (I) ILR - CUT- 463

DR. A. K. RATH, J.

C.M.P. NO. 63 2016

INDUMATI SAHU ……..Petitioner

.Vrs.

THE SECRETARY, ROTARY CLUB, PURI & ANR. ……..Opposite parties

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

Whether a defendant can setup a counter claim against a co-defendant ? Held, - No

A counter claim has necessarily to be directed against the plaintiff, though incidentally or alongwith it, it may also claim relief against the co-defendants in the suit – However a counter claim directed solely against the co-defendants cannot be maintained – Learned trial Court is justified in rejecting the counter claim against the co-defendant. (Paras 8,9)

For Petitioner : Mr. Samir Kumar Mishra
For opposite parties : Mr. Ashok Mohanty (Sr. Adv)
Mr. H.N. Mohapatra

Date of hearing :08.02.2017
Date of judgment:15.02.2017

JUDGMENT

DR. A.K.RATH, J.

The seminal question that hinges for consideration of this Court is as to whether a defendant can set up a counter claim against a co-defendant ?

2. Opposite party no.2 as plaintiff instituted C.S No.71 of 2008 in the court of the learned Civil Judge (Junior Division), Puri for permanent injunction impleading the opposite party no.1 as defendant. The petitioner filed an application under Order 1 Rule 10 CPC for impleadment. The same having been rejected by the learned trial court, she approached this Court in WP(C) No.27298 of 2013. This Court allowed the petition, whereafter she has been impleaded as defendant no.2. She filed a written statement-cum-counter claim praying for the following reliefs;

> "6. That the defendant No.2, therefore prays-
>
> a) pass a decree that the alleged lease executed on dated 28.8.2000 (Twentyeighth August Two thousand) in favour of defendant no.1 (One) in respect of Schedule-'B' property of Counter Claim is illegal and void one.
>
> b) pass a decree of permanent injunction against the defendant no.1 (One) from causing any disturbance in the use of the Schedule-'A' property of Counter Claim, as Public Road.
>
> c) cost of the suit be decreed in favour of defendant no.2.
>
> d) pass any other relief, what the defendant No.2 is entitled."

3. Learned trial court came to hold that the counter claim of defendant no.2 is directed only against defendant no.1 and not against the plaintiff. Defendant no.2 has claimed for reliefs against defendant no.1. Therefore, the counter claim directed against the co-defendant is not maintainable. Relying upon the decision of the apex Court in the case of Rohit Singh and others v. State of Bihar (Now State of Jharkhand) and others, (2006) 12 SCC 734, learned trial court rejected the counter claim; but then accepted the written statement filed by defendant no.2.

4. Heard Mr.Mishra, learned counsel for the petitioner, Mr. Mohanty, learned Senior Advocate for the opposite party no.1 and Mr. Mohapatra, learned counsel for the opposite party no.2.

5. Mr.Mishra, learned counsel for the petitioner, submitted that the counter claim is not directed against the co-defendant but the same is directed against the plaintiff. Thus the learned trial court has committed manifest illegality in rejecting the counter claim.

6. Per contra, Mr. Mohanty, learned Senior Advocate and Mr.Mohapatra, learned counsel for the opposite parties supported the impugned order.

7. Sub-Rule (1) of Order 8 Rule 6A CPC postulates that a defendant in a suit may, in addition to his right of pleading a set off under Rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not.

8. In Rohit Singh, the apex Court held that normally, a counter claim, though based on a different cause of action than the one put in suit by the plaintiff could be made. A counter claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against the co-defendants in the suit. But a counter claim directed solely against the co-defendants cannot be maintained. By filing a counter claim the litigation cannot be converted into some sort of an inter pleader suit.

9. In view of the authoritative pronouncement of the apex Court in the case of Rohit Singh (supra), the learned trial court is justified in rejecting the counter claim. The order of the learned trial court cannot be said to be perfunctory or flawed warranting interference of this Court under Article 227 of the Constitution of India. Accordingly, the petition is dismissed. No costs.

Petition dismissed.

2017 (I) ILR - CUT- 466

DR. A. K. RATH, J.

C.M.P. NO. 1444 2016

ABANI KUMAR MEHER & ORS. ……..Petitioners

.Vrs.

DISTRICT COLLECTOR, BARGARH & ORS. ……Opp. parties

STAMP ACT, 1899 – Ss 33,35,38

Whether an unstamped document can be impounded and tendered into evidence ? – Held, yes

An unstamped instrument is not admissible in evidence even for collateral purpose, until the same is impounded – The Court being an authority under the provisions of the Act can impound an unstamped document and receive the same in evidence on payment of adequate stamp duty together with penalty, subject to proof and relevance – Held, the impugned order, rejecting the application of the petitioners to impound the deed of exchange, is quashed. (Paras 9,10,11)

For Petitioner : Mr. Ramakant Mohanty (Sr. Adv.)
For opposite parties : M/s.Samapika Mishra (ASC)

Date of Hearing : 08.02.2017
Date of Judgment: 15.02.2017

JUDGMENT

DR.A.K.RATH, J.

The seminal question that hinges for consideration of this Court is as to whether an unstamped document can be impounded and tendered into evidence ?

2. The petitioners as plaintiffs instituted C.S.No.7 of 2010 in the Court of the learned Civil Judge (Jr.Division), Barpali for permanent injunction impleading the opposite parties as defendants. Pursuant to issuance of notice, the defendants 1 and 2 entered contest and filed written statement denying the assertions made in the plaint. In course of hearing, the plaintiffs filed an application to impound the deed of exchange dated 14.6.1985 and permit them to deposit the deficit stamp with penalty. The defendants filed objection to the same. The learned trial court assigned the following reasons and rejected the petition.

> In order to accept a document in evidence it must have satisfied the requirement of the Stamp Act as well as the requirement of the Registration Act. Even if, one requirement is not satisfied then a

> "document cannot be taken into evidence. An unregistered document can be taken into evidence for collateral purpose provided it must have satisfied the requirement of the Stamp Act but where the document is itself is an unregistered document and hit by Section 49 of the Indian Registration Act then the same cannot be taken into evidence even if it satisfied the conditions of Section 35 of the Indian Stamp Act. It is pertinent to mention here that the provisions of the Stamp Act is very clear regarding impounding of a document wherein it is provided U/s.33 of the Stamp Act that a document which is insufficiently stamped shall be impounded. Even if we relied upon the provisions of Section 33 of the Stamp Act still the alleged deed of exchange is hit by Section 49 of the Indian Registration Act, which mandates that an unregistered document, which is compulsorily registrable under Section 17 of the Act, shall not be received in evidence. Regarding collateral use of the alleged deed of exchange, the position was made clear vide order dtd.07.08.2016 of this court. In such circumstances, I am of the opinion that the petition of the plaintiff is devoid of any merit and is rejected."

3. Heard Mr.Ramakanta Mohanty, learned Senior Advocate for the petitioners and Ms.Samapika Mishra, learned Additional Standing Counsel for the opposite parties 1 and 2.

4. Mr.Mohanty, learned Senior Advocate for the petitioners argued with vehemence that Section 35 of the Stamp Act makes instruments not duly stamped inadmissible in evidence. In the instant case, the plaintiffs have filed application to impound the deed of exchange and to pay stamp duty and penalty. The learned trial court ought to have allowed the application.

5. Per contra, Ms.Mishra, learned Additional Standing Counsel for the opposite parties 1 and 2 supports the impugned order.

6. Section 17 (1) (b) of the Registration Act, 1908 mandates that any document which has the effect of creating and taking away rights in respect of an immovable property must be registered. Section 49 of the Act imposes bar on the admissibility of an unregistered document and deals that documents that are required to be registered under Section 17 of the Act.

7. Section 35 of the Stamp Act, 1899 mandates that instrument not duly stamped inadmissible in evidence. The same is quoted below:-

> "35. *Instruments not duly stamped inadmissible in evidence, etc.*-No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority

to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that-

(a) any such instrument [shall] be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

xxx xxx xxx"

8. On a bare perusal of the said provision, it is pellucid that an authority to receive evidence shall not admit any instrument unless it is duly stamped.

9. The apex Court in the case of Omprakash Vrs. Laxminarayan and others (2014) 1 SCC 618 held that an instrument not duly stamped shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with penalty. In the case of Avinash Kumar Chauhan Vrs. Vijay Krishna Mishra, (2009) 2 SCC 532, the apex Court held that Section 33 of the Act casts a statutory obligation on all the authorities to impound a document. The court being an authority to receive a document in evidence is bound to give effect thereto. The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Since adequate stamp duty was not paid, it was held that the court, therefore, was empowered to pass an order in terms of Section 35 of the Act.

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

11. In the result, the order dated 8.7.2016 passed by the learned Civil Judge (Junior Division) Barpali C.S.No.7 of 2010 is quashed. The learned trial court shall proceed with the case in accordance with the observations made supra. The petition is allowed. No costs.

Petition allowed.

2017 (I) ILR - CUT- 469

DR. A.K. RATH, J.

W.P.(C) NO. 4928 OF 2015

MANOJ KUMAR GARADA .....Petitioner

.Vrs.

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

SERVICE LAW – Disengagement – Personal hearing to the delinquent – If one person hears and another decides, then personal hearing becomes an empty formality.

In this case the Project Director, DRDA Koraput (O.P.No.3) issued the show cause notice to which the petitioner submitted his reply – However the Collector (O.P.No.2) passed the order of disengagement – No opportunity of hearing is provided to the petitioner by O.P.No.2 – So personal hearing became an empty formality – Held, impugned order passed by O.P.No.2 is quashed – Direction issued to O.P.No.2 to issue fresh show cause notice to the petitioner and after affording opportunity of hearing, pass necessary order. (Paras 7,8,9)

For Petitioner : Mr. A.Kanungo
For Opp. Parties : Mr. P.C.Panda, A.G.A.
Mr. B.K.Nayak

Date of Hearing : 01.11.2016
Date of Judgment: 09.11.2016

JUDGMENT

DR. A.K.RATH, J.

By this writ application under Article 226 of the Constitution of India, challenge is made to the order dated 28.2.2015 passed by the Collector-cum-DPC, MGNREGA, Koraput, opposite party no.2, vide Annexure-9, terminating the petitioner from the post of Gram Rozgar Sevak.

2. The case of the petitioner is that he was selected as Multi Purpose Assistant (GRS) by the Project Director, DRDA, Koraput, opposite party no.3. Agreement was executed by him. Thereafter order of appointment was issued by the Sarapanch, Burja G.P. on 2.3.2008. Pursuant to the same, he joined the post. On 20.3.2014 he was appointed as Polling Officer. Thereafter, on 20.12.2014 he was directed to take over the additional charges of Odiapentha G.P. in addition to his own at Burja G.P. There was no blemish in his service career. While the matter stood thus, a show cause notice was issued by opposite party no.3 to him on 24.2.2015, vide Annexure-7, to the effect that no labour was engaged on the day when

opposite party no.3 visited the G.P. and reviewed the performance. It was found that MGNREGA Work had not touched 40% of the target. He submitted the reply on 27.2.2015 stating therein that due to additional charge, it was not possible to achieve the target. There might be some inadvertent lapses. The same is not intentional or deliberate. While the matter stood thus, opposite party no.2 issued the order of disengagement on 28.2.2015.

3. Pursuant to issuance of notice, a counter affidavit has been filed by opposite party no.3 stating therein that the post of Multi Purpose Assistant (Gram Rozgar Sevak) has been created under MGNREGA Scheme for effective implementation of the different beneficial programmes for the rural people particularly, to provide them work and wages throughout the year. For manning the post, modalities have been prescribed under the Scheme. The post is temporary. The GRS is engaged for on yearly basis by executing an agreement subject to renewal on satisfactory performance. He can be terminated on non-performance or unsatisfactory performance. GRS should maintain registers like application for registration register, employment register, job card issue register, asset register, muster roll receipt register, work register etc. As per the agreement, the GRS is required to spend 100% of the fund provided to GP during one financial year. In the present case, besides the spot visit by the Project Director, DRDA, the ABDO, Laxmipur Block has submitted a report, which speaks volumes about the poor performance of the petitioner. It is further stated that the petitioner was engaged as Multi Purpose Assistant (Gram Rozgar Sevak) of Burja G.P. on contractual basis upon execution of an agreement, which empowers the authority to disengage him as per Clause-9 of the said agreement. Since there is an express clause in the agreement for removal, the same can be done even without serving of a show cause notice. The petitioner was given a show cause notice, vide letter no.1450 dated 24.2.2015 and also being given an opportunity of being heard on 27.2.2015, the order of disengagement was passed. The order of disengagement was issued by following due procedure of law. During the visit of Project Director, DRDA, Koraput, opposite party no.3 on 24.2.2015, it was found that not a single wage seeker was engaged and due to such carelessness of the petitioner, the financial performance of Burja G.P. was less than 40% against the target of 81.77 lakhs.

4. The petitioner has filed rejoinder controverting the allegations made in the counter affidavit. He has also filed an additional affidavit annexing the

circular dated 21.3.2013 issued by the Government of Orissa, Panchayati Raj Department, vide Annexure-13 that the Collector, Koraput has power to disengage the GRS after following due procedure i.e., asking for show cause and giving the opportunity of hearing.

5. Mr. Kanungo, learned counsel for the petitioner submitted, that the petitioner was in charge of two Gram Panchayats. It was neither possible nor feasible on his part to achieve target. He further submitted that the Collector, Koraput is the appropriate authority to disengage the GRS after following due procedure, but in the instant case, show cause notice was issued by the Project Director, DRDA, Koraput. He further submitted that the Collector, Koraput has passed the order mechanically.

6. Per contra, learned Additional Government Advocate supported the order and reiterated the stand taken by the opposite party no.3 in the counter affidavit.

7. In Gullapalli Nageswara Rao and others Vrs. Andhra Pradesh State Road Transport Corporation and another, AIR 1959 SC 308, the apex Court held that personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. (emphasis laid)

8. Admittedly, opposite party no.3 has issued the show cause notice. The petitioner submitted his reply, but then the order of disengagement has been passed by opposite party no.2. From the impugned order, it is evident that no opportunity of hearing was provided to the petitioner by opposite party no.2. Thus, hearing became an empty formality.

9. In the wake of aforesaid, the order dated 28.2.2015 passed by the Collector-cum-DPC, MGNREGA, Koraput, opposite party no.2, vide Annexure-9 is quashed. The opposite party no.2 shall issue a fresh show cause notice to the petitioner and after affording opportunity of hearing, pass necessary order.

10. The writ application is allowed to the extent indicated above.

Writ application allowed.

2017 (I) ILR - CUT- 472

DR. A. K. RATH, J.

W.P.(C). NO.10967 2016

ANUP BHATTACHARYA & ORS. ……..Petitioners

.Vrs.

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

EXAMINATION – Allegation of large scale malpractice – A committee was constituted to ascertain the veracity of the allegations – Committee submitted report after verifying CCTV footage that some invigilators were involved in assisting the students in malpractice – Centre was scratched and banned for five years – Hence the writ petition – Education is a preparation for the future – The teachers whom the society adores as "Guru Bramha, Guru Bishnu and Gurudev Maheswar" are the beacon light of knowledge – No body will perceive the idea that a teacher will actively engage in malpractice – Students those who have indulged in doing malpractice have filed the writ petition – As the petitioners have approached this Court with unclean hands they are not entitled to any discretionary as well as equitable remedy – Writ petition is bound to be dismissed.

(Para 16)

For Petitioner : Mr. P.K. Samantray
For opposite parties : Mr. V. Narasingh & P.K.Sahoo

Date of hearing :08.02. 2017
Date of Judgment:20.02.2017

JUDGMENT

DR.A.K.RATH, J.

By this writ application the petitioners have challenged, inter alia, the notification dated 16.6.2016, vide Annexue-1, issued by the Member Secretary-cum-Controller of Examination, Odisha State Board of Pharmacy, opposite party no.3, cancelling the result of D.Pharma Part-I and Part-II Examination 2015(II) of Seemanta Institute of Pharmaceutical Sciences, Jharpokharia, Mayurbhanj.

2. Shorn of unnecessary details, the case of the petitioners is that they were students of Diploma in Pharmacy. They prosecuted studies in the Institute of Pharmaceutical Sciences, Jaleswar in the district of Balasore. After completion of course, they appeared in the examination centre, namely, Seemanta Institute of Pharmaceutical Sciences, Jharpokharia, Mayurbhanj in the year 2015. The result of D.Pharma Examination 2015(II) was published on 18.3.2016, but then their results have been withheld. The Principal of the

college sent an application on 3.4.2016 to know the result of the examination. The Member Secretary-cum-Controller of Examination, Odisha State Board of Pharmacy, opposite party no.3 issued a notification cancelling the result of D.Pharma Part-I and Part-II Examination 2015 (II) of Seemanta Institute of Pharmaceutical Sciences, Jharpokharia, Mayurbhanj due to centre scratch as per the decision of the Government, vide Annexure-1. The said notification is impugned in this writ application.

3. Pursuant to issuance of notice, opposite parties 1 to 3 have entered appearance and filed counter affidavit. The sum and substance of the case of the opposite parties is that the examination in question i.e., D.Pharma Part-I and Part-II, 2015 Second Examination was conducted throughout the State simultaneously in twelve different examination centers including Seemanta Institute of Pharmaceutical Sciences, Jharpokharia. The petitioners, students of Institute of Pharmaceutical Sciences, Jaleswar along with the students of other institutions appeared at Part-I and Part-II D.Pharma Examination in the said centre. Before publication of the result of the examination, a complaint was received by the Drugs Controller, Odisha. Thereafter the Drugs Controller, Odisha in its letter dated 15.2.2016 instructed the Member Secretary, Odisha State Board of Pharmacy, Bhubaneswar to conduct an enquiry into the allegations. Accordingly, a committee under the Chairmanship of Professor S.K.Behera, O.S.D. Office of the D.M.E.T., Odisha was constituted to enquire into the veracity of the allegations. The enquiry committee reviewed the CCTV footage and submitted a report. The report of the enquiry committee was considered in the meeting held on 22.4.2016 presided over by D.M.E.T., Odisha, Bhubaneswar. It was unanimously resolved to constitute a sub-committee for micro analysis of the CCTV footage. The report of micro analysis dated 28.4.2016 was submitted to the D.M.E.T., Odisha. On perusal of the said report, it was found that there was large scale malpractice. The D.M.E.T. by its letter dated 7.5.2016 recommended for appropriate action. The Additional Secretary to Government in the Department of Health and Family Welfare in its letter dated 7.6.2016 directed the D.M.E.T. to take immediate follow up action against the Seemanta Institute of Pharmaceutical Sciences Centre, Jharpokharia, Mayurbhanj. A copy of the said letter was sent to opposite party no.3 on 10.6.2016. In terms of the said letter, the impugned notification, vide Annexure-1 dated 16.6.2016 was issued. The decision to cancel the examination was taken after due enquiry and deliberation. The allegation of violation of principles of nature justice is misconceived inasmuch as the

Center Superintendent and the Invigilators were examined by the enquiry committee. They had denied the allegations regarding irregularities notwithstanding video footage which clearly established their complicity. There was large scale irregularity in the conduct of the examination. Thus it was not possible to follow the principles of natural justice. Further steps had already been initiated to handover the matter for investigation to the Crime Branch. Opposite party no.3 visited the centre only on 28.11.2015 during Part-II examination. There was no irregularity on 28.11.2015. Because of adoption of dubious methods, the sanctity of the examination process had been thrown to the wind and the entire exercise of conducting an examination had become farcical. It is further stated that in response to the notification, vide Annexure-1, reexamination had been conducted. Petitioner nos.1 and 2 appeared and failed in the said examination.

4. Opposite party no.5 has also filed a counter affidavit stating therein that he had no knowledge of irregularities or complaint during conduct of the examination. He, being the Centre Superintendent, conducted the examination as per the guidelines and supervision of the Board Authorities. The CCTV footage has been recorded during the course of examination and the same has been submitted as per the rule without any manipulation.

5. Heard Mr.Samantray, learned Advocate for the petitioners, Mr.V.Narasingh, learned Advocate for opposite parties 2 & 3 and Mr.Sahoo, learned Advocate for opposite party no.5.

6. Mr.Samantray, learned Advocate for the petitioners submitted that the petitioners had appeared in D.Pharma Examination Part-I and Part-II, 2015 (II) at Seemanta Institute of Pharmaceutical Sciences, Jharpokharia, Mayurbhanj. The examination was conducted in a fair manner. There was no allegation before the competent authority or the local police about the adoption of unfair practice by the students. Neither the Centre Superintendent nor the Principal had submitted any report to the Odisha State Board of Pharmacy. On 28.11.2015 opposite party no.3 visited the centre. He had also not submitted any report with regard to the alleged malpractice. No show cause notice was issued by opposite parties 1 to 3 before cancellation of result and, as such, the order is an infraction of principles of nature justice. To buttress his submission, he relied on the decisions of this Court in the case of Board of Secondary Education, Orissa, Cuttack Vrs. Gayatri Hota and others, 2001(I) OLR-398, Governing Body, Jambeswar Mahavidyalaya, Balasore Vrs. Council of Higher Secondary Education, Orissa and another, 2005 (II) OLR-518 and Governing Body of Evening College, Angul Vrs. State of Orissa and two others, 2010(I) OLR-335 and the decision of the

Apex Court in the case of Board of Higher School and Intermediate Education, U.P. Allahabad Vrs. Ghansyam Das Gupta and others, AIR 1962 SC 1110.

7. Per contra, Mr.Narasingh, learned Advocate for the opposite parties 2 and 3 submitted that the examination in question i.e. D.Pharma Part-I and Part-II, 2015 was conducted throughout the State simultaneously in twelve different centers as per the schedule including Seemanta Institute of Pharmaceutical Sciences, Jharpokharia. Pursuant to the complaint dated 2.2.2016 alleging gross malpractice, the Drugs Controller, Odisha instructed opposite party no.3 to enquire into the same and submit a report. After due enquiry, report was submitted. As the future of large number of students was involved, it was resolved by the Odisha State Board of Pharmacy to constitute a Sub-Committee for micro analysis of CCTV footage. Opposite party no.2 on 7.5.2016 recommended for initiation of appropriate proceeding basing upon report on review of CCTV footage. By letter dated 7.6.2016, the Additional Secretary to Government in the Health and Family Welfare Department directed the D.M.E.T. to take immediate action in cancelling the examination by scratching the centre and to handover the matter to Crime Branch. The matter is under investigation of Crime Branch. In terms of the said communication, the impugned notification dated 16.6.2016 was issued. The decision to cancel the examination was taken after due enquiry and deliberation keeping in view the adoption of unfair means on a large scale. It is further stated that on a review of CCTV footage, vide Annexure-E/3, it is evident that not only the students, but also the invigilators were involved in the malpractice. On 18.11.2015, 19.11.2015 and 20.11.2015 copies had been supplied by the invigilators to the students. On the other dates i.e., on 16.11.2015, 17.11.2015 and 21.11.2015 relating to Part-I, complicity of the invigilators is clearly borne out. Dubious role of the invigilators also came to the fore during the Part-II examinations on 23.11.2015 26.11.2015 and 27.11.2015. In view of large scale malpractice, it was not possible to follow the principles of natural justice. Six petitioners had appeared in D.Pharma Part-I examination of 2016 (1) (Regular) and their results were likely to be published shortly. Though every endeavor was made to segregate the tainted from non-tainted candidates, but due to interchanging of seat as well as hall arrangements, it was well neigh impossible to separate the untainted from tainted, for which the authorities were constrained to cancel the whole examination to preserve the sanctity of the examination. Adoption of unfair means on a large scale had been firmly established from enquiry report as

well as CCTV footage analysis. He placed reliance on the decision of the Apex Court in the case of Nidhi Kaim Vrs. State of Madhya Pradesh and others, (2016) 7 SCC 615.

8. Before delving deep into the matter, it is apt to refer to the decisions cited by the learned Advocates for the parties. In Ghansyam Das Gupta (supra), the Apex Court held that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasijudicial act provided the authority is required by the Statute to act judicially. In Governing Body, Jambeswar Mahavidyalaya, Balasore (supra), the petitioner assailed the notification dated 25.6.2004 cancelling the examination held in English Paper-II in second sitting of Higher Secondary Examination, 2004 on 11.3.2004 on the ground that there was no material before the examination committee. The supervisor's report does not disclose that the Higher Secondary Examination (+2) held on 11.4.2004 in English Paper-II in the petitioner's centre was not conducted in accordance with the norms prescribed and that the examinees in the centre were adopting mal malpractice. This Court allowed the writ application. In Board of Secondary Education, Orissa, Cuttack (supra), the Division Bench of this Court had an occasion to deal with the cancellation of result of HSC Examination-2002 of eleven students of a high school. The result of the examination was cancelled on the ground that they resorted to malpractice. The candidates took a positive stand that they had not resorted to any malpractice or unfairness in course of examination inasmuch as no allegation of malpractice was reported by the Invigilators, Centre Superintendent or Flying squad. No incriminating material whatsoever was seized from them. Notice to show cause was vague for which they could not give any proper reply. This Court held that there was infraction of principles of natural justice and, accordingly, quashed the notification. In Governing Body of Evening College, Angul (supra), the petitioner assailed the cancellation of results of 41 regular students who had appeared at +2 HSC Examiantion-2007. The Court on perusal of the report of the Examination Committee found that the committee before taking a decision to cancel the result of the students had not applied its mind and allowed the application.

9. A bare reading of the decisions, however, show that there is a significant difference in the factual matrix in which the said cases arose for consideration. The reliance upon the said decisions, therefore, is of no assistance to the petitioners.

10. In the case of Nidhi Kaim (supra), the Apex Court delved deep into the matter and summarized the principles relating to usage of unfair means on a large scale. The relevant paragraphs of the report are quoted below:-

> "39.1 Where there are allegations that students resorted to "unfair means on a large scale" at an examination, this court would not insist upon registration of a formal complaint. Any reliable information suggesting the occurrence of such malpractice in the examination is sufficient to authorize the examining body to take action because examining bodies are "responsible for their standards and the conduct of examinations" and "the essence of the examination is that the worth of every person is appraised without any assistance from an outside source".
>
> 39.2. A lone circumstance could itself be sufficient in a given case for the examining body to record a conclusion that the students resorted to "unfair means on a large-scale" in an examination. This Court approved the conclusion of the Bihar School Examination Board that the students had resorted to unfair means on a large scale in one examination centre and also approved the decision making process of the Board on the basis of circumstantial evidence. The lone circumstance that the success rate of the students who appeared for the examination from the centre in question is too high in comparison to other centres.
>
> 39.3. In such cases, the examining body need not hold "a detailed quasi-judicial inquiry with a right to its alumni to plead and lead evidence etc." and the examining body's "appreciation of the problem must be respected."
>
> 39.4 To insist on the observance of the principles of natural justice, i.e. giving notice to each student and holding enquiry before cancelling the examination in such cases would 'hold up the functioning' of the educational institutions which are responsible for maintenance of the standards of education, and "encourage indiscipline, if not, also perjury".
>
> 39.5 Compliance with the rule of audi alteram partem is not necessary not only in the cases of employment of 'unfair means on large scale' but also situations where there is a 'leakage of papers' or 'destruction of some of the answer books' etc.

39.6 This Court drew a distinction between action against an individual student on the ground that the student had resorted to unfair means in the examination and the cancellation of the examination on the whole (or with reference to a group of students)
because the process itself is vitiated.

xxx xxx xxx

42.1 Normally, the rule of audi alteram partem must be scrupulously followed in the cases of the cancellation of the examinations of students on the ground that they had resorted to unfair means (copying) at the examinations.

42.2 But the abovementioned principle is not applicable to the cases where unfair means were adopted by a relatively large number of students and also to certain other situations where either the examination process is vitiated or for reasons beyond the control of both students and the examining body, it would be unfair or impracticable to continue the examination process to insist upon the compliance with audi alteram partem rule.

42.3 The fact that unfair means were adopted by students at an examination could be established by circumstantial evidence.

42.4 The scope of judicial review of the decision of an examining body is very limited. If there is some reasonable material before the body to come to the conclusion that unfair means were adopted by the students on a large scale, neither such conclusion nor the evidence forming the basis thereof could be subjected to scrutiny on the principles governing the assessment of evidence in a criminal court."

11. Be it noted that since there was cleavage of opinion as to whether the appellants should be disentitled to retain the benefits of the training in medical course which they secured by virtue of their being beneficiaries of a tainted examination process conducted for the purpose of admitting them for training in medical colleges, the matter was referred to the Larger Bench. The Larger Bench held that it would not be proper to legitimize the admission of students to the MBBS course, in exercise of power of the Apex Court under Article 142 of the Constitution of India. But then the principles enunciated in paragraphs 39 & 42 of the report are still holding the field.

12. The instant case may be examined on the anvil of the decision in the case of Nidhi Kaim (supra). D.Pharma Part-I and Part-II Examination, 2015 (ii) was held in Seemanta Institute of Pharmaceutical Sciences, Jharpokharia

from 16.11.2015 to 30.11.2015. The petitioners appeared at the examination. On receipt of complaint, the Drugs Controller, Odisha sent a letter on 15.2.2016 to the Member Secretary, Odisha State Board of Pharmacy to enquire into the matter and submit a report. A committee under the Chairmanship of Professor S.K.Behera, O.S.D. Office of the D.M.E.T., Odisha was constituted to ascertain the veracity of the allegation. The committee submitted its report after reviewing CCTV footage to D.M.E.T., Odisha. The report indicates that some Invigilators were involved in assisting the students in malpractice and when they were questioned on such visual clippings, they remained silent. The Centre Superintendent/Dy.Centre Superintendent also remained silent on such visual clippings. The committee found that though all the students were not involved in malpractice, but some invigilators were involved in assisting the students in malpractice. Both the Center Superintendent and Dy. Center Superintendent had not supervised the examination process. It recommended that entire mass of students should not suffer for the circumstances created by some students. The invigilators, who were involved, would not be allowed to be a part of the examination process and the centre may be banned for a consecutive period of five years. Thereafter a meeting was held on 22.4.2016 under the Chairmanship of Odisha State Board of Pharmacy, wherein Heads of Department Pharmacology, Vimsar, Burla, Prof. Pharmacology, S.C.B. Medical College, Cuttack, Principal, Gayathri College of Pharmacy, Sambalpur, Principal, Mayurbhanj Medical Academy, Baripada and the Member Secretary-cum-Controller of Examination, Odisha State Board of Pharmacy were present. The committee unanimously decided to constitute a sub-committee consisting of four members for micro analysis of CCTV footage. The subcommittee after examining the CCTV footage submitted the report, vide Annexure-E/3. Thereafter, D.M.E.T., who is the Chairman of the Odisha State Board of Pharmacy sent a letter on 7.5.2016 to the Principal Secretary, Health and Family Welfare Department, Government of Odisha requesting for taking appropriate action against the institution for promoting malpractice in an organized manner. On 7.6.2016, the Additional Secretary to Government, Health and Family Welfare Department sent a letter to D.M.E.T., Odisha directing to cancel the examination held from 16.11.2015 to 30.11.2015, scratch the centre and ban it for a period of five years, handover the matter to Crime Branch, Odisha, take immediate steps to conduct re-examination of candidate and debar the invigilators involved in malpractice. While the matter stood thus, the Member Secretary-cum-Controller of Examination, Odisha State Board of Pharmacy cancelled the examination on 16.6.2016. The report

on review of CCTV footage (Part-I and II of D.Pharma examination) held in Seemanta Institute of Pharmaceutical Sciences, Jharpokharia from 16.11.2015 to 30.11.2015, vide Annexure E/3, depicts a sordid picture. In fact on 16.11.2015 and 17.11.2015 in some halls the invigilators used to supply copies to the students. The time of supply of copies by the invigilators had also been recorded. On 19.11.2015, the invigilators involved themselves in supplying copies to the students in all halls. Apart from that the students resorted to malpractice in different halls.

13. The submission of Mr.Samantray, learned Advocate for the petitioners that principles of natural justice have not been followed has no legs to stand. The Apex Court in the case of Nidhi Kaim (supra) held that normally, the rule of audi alteram partem must be scrupulously followed in the cases of the cancellation of the examination of the students on the ground that they had resorted to unfair means (copying) at the examinations. But the abovementioned principle is not applicable to the cases where unfair means were adopted by a relatively large number of students and also to certain other situations where either the examination process is vitiated or for reasons beyond the control of both students and the examining body, it would be unfair or impracticable to continue the examination process to insist upon the compliance with audi alteram partem rule. The fact that unfair means were adopted by students at an examination could be established by circumstantial evidence.

14. The Apex Court in the case of the Chairman, Board of Mining Examination and Chief Inspector of Mines and another, Vrs. Ramjee, A.I.R.1977 SC 965 held thus:

> "……...Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt that is the conscience of the matter."
>
> (emphasis laid)

15. The Apex Court in the case Nidhi Kaim (supra) in no uncertain terms held that the scope of judicial review of the decision of an examining body is very limited. If there is some reasonable material before the body

to come to the conclusion that unfair means were adopted by the students on a large scale, neither such conclusion nor the evidence forming the basis thereof could be subjected to scrutiny on the principles governing the assessment of evidence in a criminal court. The matter has been handed over to Crime Branch. The Crime Branch is investigating into the matter. Further some of the students have appeared at the examination and their results have been declared.

16. Malpractice is a malady. Its tentacle spread over all branches of education. Education is a preparation for the future. The teachers whom the society adores as "Guru Bramha, Guru Bishnu and Gurudev Maheswar" are the beacon light of knowledge. Can any one perceive the idea that a teacher will actively engage in malpractice ? The unfortunate students, who have polluted the stream of examination, have approached the portals of this Court. Writ is a discretionary as well as equitable remedy. The petitioners have approached this Court with unclean hands. They are not entitled to any equitable relief.

17. As a sequel to the above conclusion, the writ application is dismissed.

Writ application dismissed.

2017 (I) ILR - CUT- 481

DR. A.K. RATH, J.

C.M.P. NO. 761 OF 2016

SARAT CH. MOHAPATRA .....Petitioner

.Vrs.

NARASINGHA MOHAPATRA & ANR. .....Opp. Parties

(A) CIVIL PROCEDURE CODE, 1908 – S.151

Application U/s. 151 C.P.C., seeking production of additional evidence after closure of evidence – When such power can be exercised – No provision in C.P.C. after deletion of Order 18, Rule 17A from the code w.e.f. 01.07.2002 – However the trial court can exercise the inherent discretionary power to consider, whether evidence sought to be produced would assist the court for a just and effective adjudication and non-production of such evidence earlier was for valid and sufficient reasons.

In this case plaintiff filed application stating that the documents were kept in an old trunk of the deceased plaintiff and he could trace the same very recently, without mentioning the date when he could able to trace – No reasons as to why the old trunk was not opened before commencement of trial – Section 151 C.P.C. can not be used for re-opening of evidence or recalling of the witness at the sweet will of the plaintiff after closure of evidence without any valid cause – Moreover the plaintiff made repeated interlocutory applications for the same relief which though not resjudicata in stricto sense, it amounts to abuse of the process of the court – Held, section 151 C.P.C. cannot be routinely invoked for reopening of evidence or recalling witnesses – The impugned application having been filed to protract the litigation is liable to be dismissed. (Paras 8, 9, 10)

(B) CIVIL PROCEDURE CODE, 1908 – S.151

Inherent powers of Court – It is not a substantive provision which creates or confers any power or jurisdiction on Courts – It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is "wrong", that is to do all things necessary to secure the ends of justice and to prevent abuse of its process. (Para 8)

(C) CIVIL PROCEDURE CODE, 1908 – S.151

Inherent powers of Court – How to use – When the code does not expressly or impliedly cover any particular procedural aspect governing the matter the inherent power U/s. 151 C.P.C. can be used to deal with such situation, where it is absolutely necessary in the ends of justice. (Para 8)

Case Laws Referred to :-

1. AIR 1996 SC 2687: Dr. Buddi Kota Subbaro v. K. Parasaran & Ors.

For Petitioner : Mr. A.K.Parija, Sr. Advocate
Mr. V.Mohapatra
For Opp. Parties : Mr. A.Mohanty, Sr. Advocate
Miss L.Pradhan

Date of hearing : 25.01.2017
Date of judgment: 03.02.2017

JUDGMENT

DR. A.K.RATH, J.

This petition challenges the order dated 16.4.2016 passed by the learned Civil Judge (Senior Division), Puri in C.S. No.495 of 2012. By the

said order, learned trial court rejected the applications of the plaintiff to examine him and to prove the documents after closure of evidence.

2. Since the petition is to be disposed of on a short point, the facts need not be stated in detail. Suffice it to say that Kunimani Mohapatra, mother of the plaintiff, instituted C.S. No.495 of 2012 in the court of the learned Civil Judge (Senior Division), Puri for declaration of right, title and interest, cancellation of sale deed and permanent injunction impleading opposite parties as defendants. During pendency of the suit, she died, whereafter, the petitioner was substituted. After closure of evidence from both the sides, on 2.2.2015 the plaintiff filed two applications seeking leave of the court to file documents and to mark the same as exhibits. The defendants filed objections to the same. By order dated 12.02.2015, learned trial court rejected the applications. Thereafter, he filed CMP No.227 of 2015 before this Court. The same was listed on 7.12.2015 before a Bench of this Court. In course of hearing, learned counsel for the petitioner sought liberty of the Court to raise the said point at the appellate stage and to withdraw the petition. Accordingly, the petition was withdrawn. While the matter stood thus, on 21.3.2016 the plaintiff filed two applications along with certain documents seeking leave of the Court to accept the same and lead evidence to prove those documents. The defendants filed objection to the same. Learned trial court assigned the following reasons and rejected the petition.

> "….Taking into account their submissions it is noticed that by virtue of order Dtd.12.02.15 a detailed analysis has been made with regard to all the documents filed by the substituted plaintiff. Since a detailed order has been passed after due reasoning, for rejection of the petition seeking permission of the court to mark and to exhibit the same, I do not find any further plausible reason to allow the present petition as a previous petition has already been rejected on merit by this very court. Accordingly, both the petitions dtd.21.3.16 stands rejected being devoid of any merit. Accordingly, the petitions filed by the substituted plaintiff to examine himself and to lead evidence stands rejected. Similarly the petition seeking leave of the Court to file documents as per list on 21.03.16 also stands rejected as it will certainly cause more irreparable loss to the defendant who will not be in a position to cross examine the original plaintiff with respect to those documents, as she is already dead. Moreover, these documents have been filed at the stage of argument i.e. at the fag end of the trial just to patch up the lacunae…"

3. Heard Mr.Ashok Parija, learned Senior Advocate along with Mr.V. Mohapatra, learned counsel for the petitioner and Mr.Ashok Mohanty, learned Senior Advocate along with Miss. L. Pradhan, learned counsel for the opposite parties.

4. Mr. Parija, learned Senior Advocate for the petitioner, submitted that the court, at any stage of the suit, may recall any witness and may put the questions to him. The court may, in exercise of its inherent power under Section 151 CPC, permit the production of such evidence if it is relevant and necessary in the interest of justice. If a document is filed in late and the party assigns the reasons for its non-production, the court has to be satisfied that the explanation offered by the party is satisfactory and the documents are relevant. He submitted that the learned trial court has rejected the petition on the ground that the earlier application of the plaintiff was rejected. Rejection of earlier application, per se, is not a ground to consider the application on merit. He further submitted that some of the documents are public documents and needs no formal proof. He relied on the decision of the apex Court in the case of K. K. Velusamy v. N. Palanisamy, (2011) 11 SCC 275.

5. Per contra, Mr. Mohanty, learned Senior Advocate for the opposite parties, submitted that after closure of evidence, two applications were filed seeking same relief. The same having been rejected, the petitioner filed CMP No.227 of 2015 before this Court. Subsequently, he withdrew the same. For the self-same relief, again two petitions have been filed without assigning any valid reason. The petitions have been filed to protract the litigation. No reason has been assigned as to why those documents have not been tendered into evidence, when the plaintiff was examined. Learned trial court has rightly rejected the petitions. He relied on the decision of the Privy Council in the case of Kanda and others v. Waghu, AIR (37) 1950 PC 68 and K. K. Velusamy (supra).

6. Order 7 Rule 14 CPC provides for production of document on which plaintiff sues or relies. Sub-Rule (3) of Rule 14 of Order 7 CPC provides that a document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

Order 13 Rule 1 CPC provides that the parties or their pleader shall produce, on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with the plaint or

written statement. The Code had a specific provision in Order 18 Rule 17A CPC for production of evidence not previously known or which could not be produced despite due diligence. The said provision was deleted with effect from 1.7.2002.

7. In Kanda (supra), the Privy Council held that when it is a matter of admitting public records at a late stage, the Court has a discretion, and while generally speaking it will be a wise exercise of the discretion to admit such evidence, the question must be decided in each case in the light of the particular circumstances.

8. In K. K. Velusamy (supra), the apex Court in paragraphs 9 to 14 held as follows;

> "9. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. (Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate)
>
> 10. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.
>
> 11. There is no specific provision in the Code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross- examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent

powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re-open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.

12. The respondent contended that section 151 cannot be used for re-opening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of section 151 has been explained by this Court in several decisions (See Padam Sen v. State of UP, Manohar Lal Chopra v. Seth Hiralal, Arjun Singh v. Mohindra Kumar, Ram Chand and Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava, Nain Singh v. Koonwarjee, Newabganj Sugar Mills Co. Ltd. v. Union of India, Jaipur Mineral Development Syndicate v. CIT, National Institute of Mental Health & Neuro Sciences v. C. Parameshwara and Vinod Seth v. Devinder Bajaj]. We may summarize them as follows:

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is `right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

13. The Code earlier had a specific provision in Order 18 Rule 17A for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the court to permit a party to produce any evidence even at a late stage, after the conclusion of his evidence if he satisfied the court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. That provision was deleted with effect from 1.7.2002. The deletion of the said provision does not mean that no evidence can

be received at all, after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence.

14. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for re-opening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose."

9. Reverting to the facts of the case at hand and keeping in view the aforesaid principles, this Court finds that in the application for production of documents, it is stated that the documents were kept in an old trunk of the deceased plaintiff. The plaintiff could trace those documents very recently and the same are relevant for final and complete adjudication of dispute between the parties.

10. During pendency of the suit, the mother of the plaintiff died. Thereafter, her son-present plaintiff has been substituted. Number of witnesses have been examined on his behalf including himself. The defendants have also examined witnesses. In course of trial, both the parties have exhibited number of documents. Evidence from both the sides is closed. The plaintiff has filed two applications. By a detailed order dated 12.2.2015, learned trial court rejected the petition. Assailing the said order, he filed CMP No.227 of 2015 before this Court. For the reasons best known to him, he withdrew the same seeking leave of the Court to raise the issue in appeal. Thereafter, two applications have been filed seeking the same relief. The petitions also do not disclose the date on which the plaintiff could trace the documents from the old trunk. No reason has been assigned as to why the old

trunk was not opened before commencement of trial. Using the word 'recently' is not suffice. Ignorance of the plaintiff would not provide sufficient excuse for the delay in making the application. Section 151 CPC cannot be used for re-opening the evidence or recalling the witness at the sweet will of the plaintiff after closure of evidence, without any valid cause. No good cause was shown to the satisfaction of the Court for not filing the documents on or before the settlement of issues. The object of Order 13 Rule 1 CPC is to lay down the stage when a party shall file documentary evidence so that each knows on what document the other seeks to rely and gets ready for trial. The principle of res judicata in stricto sensu does not apply in an interlocutory proceeding. But then, repeated applications for the self-same relief made on the same basis amount to abuse of process of the court. As has been proclaimed by the apex Court in Dr. Buddi Kota Subbaro v. K. Parasaran and others, AIR 1996 SC 2687 no litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. The applications have been filed to protract the litigation and are ruse.

11. In the wake of the aforesaid, the petition, sans merit, deserves dismissal. Accordingly, the same is dismissed.

Petition dismissed.

2017 (I) ILR - CUT- 489

DR. B.R. SARANGI, J.

O.J.C. No. 4380 of 1998

SMT. ANNAPURNA DEI .....Petitioner

.Vrs.

MANAGING DIRECTOR, ORISSA AGRO INDUSTRIES CORPORATION LTD. & ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Art , 226

Quasi-judicial order must be supported by reasons – Where an authority makes an order in exercise of a quasi-judicial function, it must record reasons in support of the same, which is the basic principle of natural justice.

In this case the appellate authority rejected the appeal without assigning reasons which can not sustain in the eye of law – Held, the impugned order is quashed and the matter is remitted back to decide the same afresh. (Paras 11,12)

Case Law Referred to :-

1. AIR 1976 SC 1785 : Siemens Engg. Mfg. Co. of India Ltd. v. Union of India.
2. AIR 1978 SC 597 : Maneka Gandhi v. Union of India.
3. AIR 1967 SC 1435 : CIT v. Walchand & Co. (P) Ltd.
4. AIR 1990 SC 1984 : N. Mukherjee v. Union of India.
5. AIR 1974 SC 87 : Union of India v. Mohan Lal Capoor

For Petitioner : Mr. G.A.R. Dora, Sr.Counsel, M/s V.Narasingh, J.K. Lenka & G.R. Dora.

For Opp. Parties: Mr. N.K. Mishra, Sr.Counsel, M/s S.K. Mishra & Sudhir Kumar Mishra.

Dateof judgment : 27.02.2017

JUDGMENT

DR.B.R.SARANGI,J.

The petitioner, while working as Senior Assistant, was instructed, vide office reference no.1617 dated 18.12.1996 of the District Manager, Orissa Agro Industries Corporation Limited (OAICL), to keep the records of Agro Machinery Division under the control of R.K. Parida, Asst. Manager. On receipt of the said office order, she entered into the office chamber of the District Manager, OAICL, Ganjam and requested him in a loud voice to cancel the order, in presence of Branch Manager, Parlakhemundi, Sri B.Rajguru and one outsider. In spite of repeated advice of the District Manager to give her problem for consideration in writing, the petitioner left the chamber by tearing office order. She, while leaving the chamber of the District Manager, scolded him at a loud voice outside the chamber in office premises by using rough language. Further, even though she was asked for an explanation, vide office order no.3732 dated 08.07.1996, by the D.G.M. (Admn.) for disobedience of office order, she did not submit the same.

2. Due to above lapses on her part, charges were framed on 06.01.1997 for misconduct, disobedience of office order and insubordination, as well as causing disruption in smooth office work. She was called upon to submit explanation within 30 days as to why she would not be proceeded due to above lapses. In response to the same, she submitted explanation on 16.05.1997. Consequentially, an enquiry was conducted and, by following due procedure as per Rule 13 of the Orissa Civil Services (C.C.A.) Rules, the

disciplinary authority imposed punishment to the effect that the petitioner be censured, her one increment be withheld without cumulative effect and her period of suspension from 13.12.1996 to the date of joining as per reinstatement order dated 19.06.1997 be treated as such, vide office order dated 05.08.1997 passed by the Managing Director of the Corporation. Against the said order passed by the Managing Director, the petitioner preferred an appeal on 28.11.1997, which was rejected by the Chairman by the impugned order dated 23.12.1997 in Annexure-5, which is the subject-matter of challenge before this Court in the present writ application.

3. Mr.G.A.R. Dora, learned Senior Counsel appearing for the petitioner, by referring to the order impugned, strenuously urged before this Court that the appellate authority has rejected the appeal without assigning any reason by passing a cryptic order, which cannot sustain in the eye of law. It is further contended that even though the writ application was filed in the year 1998, till date no counter affidavit has been filed to controvert the contention raised in the writ application. Therefore, the writ application may be allowed by applying the doctrine of non-traverse, and the impugned order being cryptic one be set aside.

4. Mr. N.K. Mishra, learned Senior Counsel appearing for the opposite parties states that since the petitioner misconducted herself, the punishment imposed by the disciplinary authority is well within its competence and, as such, the appellate authority having rejected the appeal no illegality or irregularity has been committed so as to warrant interference by this Court.

5. Heard Mr. G.A.R. Dora, learned Senior Counsel for the petitioner and Mr. N.K. Mishra, learned Senior Counsel for the opposite parties, and perused the records.

6. It reveals from the records that though the writ application was filed in the year 1998, no counter affidavit has been filed by the opposite parties in controverting the averments made in the writ application. Therefore, applying the doctrine of non-traverse this Court has to proceed to decide the case on the basis of the pleadings available on records.

7. Coming to the impugned order passed by the appellate authority, a careful perusal of the same would reveal that the same has been passed without any reason and the order is a cryptic one, namely, it is an one line order wherein it has been stated "the appeal petition cited above has been considered and rejected by the Chairman, O.A.I.C. Limited as it has no merit."

8. If the order passed by the adjudicating authority is subject to appeal or revision, the appellate or revisional Court will not be in a position to understand what weighed with the authority and whether the grounds on which the order was passed were relevant, existent and correct; and the exercise of the right of appeal would be futile.

In ***Siemens Engg. Mfg. Co. of India Ltd. v. Union of India***, AIR 1976 SC 1785 the apex Court held that the rule requiring reasons to be recorded by quasi-judicial authorities in support of the orders passed by them is a basic principle of natural justice.

Hon'ble Justice Bhagwati (as he then was), speaking for the Court, observed as follows:

> *"If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law."*

The same view has been reiterated in ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597.

9. In ***CIT v. Walchand & Co. (P) Ltd.***, AIR 1967 SC 1435 the apex Court observed:

> *"The practice of recording a decision without reasons in support cannot but be deprecated."*

10. In ***S.N. Mukherjee v. Union of India***, AIR 1990 SC 1984 the apex Court observed:

> *"Except in cases where the requirement of recording reasons has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial*

functions must record reasons in support of their decisions. The considerations for recording reasons are :1) such decisions are subject to the appellate jurisdiction of the Supreme Court under Article 136 as well as supervisory jurisdiction of the High Courts under Article 227; 2) it guarantees consideration by the adjudicating authority; 3) it introduces clarity in the decisions; and 4) it minimizes chances of arbitrariness and ensures fairness in the decision-making process."

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.

In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87 it has been held:

"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."

12. In view of the aforesaid facts and circumstances, as well as the settled position of law noted above, this Court is of the opinion that the impugned order passed by the appellate authority, having not been assigned with any reasons, deserves to be quashed and is accordingly quashed. The matter is remitted back to the appellate authority to decide the same afresh, as expeditiously as possible, in compliance of the provisions of law.

13. The writ petition stands allowed. No order to cost.

Writ petition allowed.

2017 (I) ILR - CUT- 494

D. DASH, J.

W.P.(C) NO. 23057 OF 2015

TARINI THAKURANI VIDYAPITHA, KEONJHAR ……..Petitioner

.Vrs.

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

EDUCATION ACT, 1969 – S.6-B

Withdrawal of recognition granted in favour of the petitioner-School – District Education Officer-O.P.No.4 recommended to the Board of Secondary Education-O.P.No.3 for such withdrawal – Moreover, such decision was taken before expiry of the period given to the Petitioner-School – Action challenged – In this case O.P.No.4 is neither the prescribed authority in terms of sub-section 2 of section 6-B of the Act nor a decision has been taken by the Committee for withdrawal of recognition of the School for consideration by the Board – Even the decision was taken before expiry of the period given to the management of the Petitioner-School – Non-compliance of clause 14 of chapter 9 of the Board of Secondary Education Regulation – Held, the impugned order is quashed – The Petitioner-School is treated to have been continuing with recognition and entitled to all such facilities provided under law. (Paras 6,7,8)

For Petitioner : M/s. S.K.Samal, S.P.Nath
For Opp. Parties : Mr. B.Rout, Standing Counsel (S.&M.E. Dept.)
Mr. S.S.Rao.

Date of hearing : 26.10.2016
Date of judgment : 02.01.2017

JUDGMENT

D. DASH, J.

The petitioner-school through its Headmaster has filed this writ application for quashment of an order dated 05.08.2015 under Annexure-7 issued by the opposite party no.3 in withdrawing the recognition granted in favour of the petitioners-school under Annexures 2 and 3 series by issuance of writ in the nature of certiorari or any other writ, and for further direction to the opposite parties to restore the recognition granted in favour of the petitioner school treating it as the recognized school for all purposes and allowing the students to appear in the Annual H.S.C. Examination, 2016.

2. The petitioner-school got the permission under sub section 4 of section 5 of the Orissa Education Act (in short called as "the Act") from the State Government for its establishment as per order dated 26.09.1993. It next got the recognition under sub section 8 of section 6 of the Orissa Education Act. The petitioner-school thereafter as required got recognition from the Board of Secondary Education (opposite party no.3) for allowing the students to appear in the Annual H.S.C. Examination conducted by the Board. This state of affairs continued up till the first quarter of the year, 2015. When the matter stood thus on 23.04.2015 the District Education Officer (opposite party no.4) called for an explanation from the Secretary of the managing committee of the school styling it to be one under section 6-A(1)(2) of the Act, making some allegations as regards non-fulfillment of certain conditions and accordingly the managing committee was directed to file the written statement if any within a period of seven days from the date of receipt of said letter indicating therein that if in pursuance of receipt of said letter no such response comes, action as deemed fit would be so taken as per law. However, it appears that on the very next day i.e. 24.04.2015, the opposite party no.4 submitted a report to the opposite party no.3 ecommending for withdrawal of the recognition which had been earlier granted and continuing as such for as such a long period in favour of the petitioner- school, which is at Annexure-8. In the meantime, the managing committee having received the letter of the opposite party no.4 on 02.05.2015 submitted the compliance report under explanation (Annexure-6) dated 07.05.2015 in pursuance of letter dated 02.05.2015 as aforementioned. Then they waited for further communication in the matter.

At this juncture, on 05.08.2015 the opposite party no.3 in view of the recommendation of the opposite party no.4 as aforesaid in exercise of power purported to be one under section 6 (1) of the Act withdrew the recognition standing in favour of the petitioner-school. This has led the petitioner-school to file the present writ application praying before the Court for quashment of the above order passed by the opposite party no.3 regarding withdrawal of the recognition and for other consequential directions/actions to follow.

3. I have heard Mr. B.Routray, learned Senior Counsel for the petitioner-school, Mr. B.Rout, learned Standing Counsel for the School and Mass Education Department, Odisha and Mr. S.S.Rao, learned counsel for the opposite party no.3.

The averments of the writ application with all the annexures, counter and the rejoinder have been gone through.

4. The first ground of challenge to the order of opposite party no.3 dated 05.08.2015 under Annexure-7 are that the same is without jurisdiction in as much as power under section 6(B) (stated in the order as Rule-6(B) of the Act) to be without jurisdiction being beyond the power of the opposite party no.3 as not conferred to withdraw the recognition as stated. The second ground is that the opposite party no.4 being not the prescribed authority in terms of section 6(B) of the Act, the recommendation even without awaiting the explanation from the petitioner school as called for is not only violative of the provision of law but also the principle of natural justice.

The counter to the above by opposite party no.3, whose order is the subject matter of this writ application, is that the withdrawal of recognition as under Annexure-7 is for one year only and therefore when the petitioner school can make an application afresh to get it by obtaining no objection certificate from the State Government in the department of school and Mass Education and when by the said order, permission has already been granted to genuine students who have taken admission to appear in nearby school in the examination for the year 2016-17, there remains no further grievance as of now to be redressed herein this writ application.

5. For better appreciation, the same is reproduced herein below:-

"xxx xxx xxx.

7. The provision of section 6(B) in subsection 1 lays down the grounds upon which the recognition accorded under the Act may be ithdrawn and sub section 6 says that where the prescribed authority is satisfied on his own information or otherwise that circumstances exists for taking action for withdrawal of recognition of any educational institution, he shall make an enquiry or cause an enquiry to be made into the grounds on which the recognition as proposed to be withdrawn giving opportunity to the management of making representation within a period of 30 days against the proposed action and shall furnish his report and recommendation to the committee constituted under sub section 4 of section 6. The prescribed authority has been notified by the notification dated 20.07.1991 to be the Director of Secondary Education. It has further been provided in sub section 3 of section 6-B of the Act that the committee after considering record, report and recommendation of the prescribed authority and affording opportunity to the management of being heard, may pass an order either withdrawing as a whole or in part the recognition granted to the institution. This order is appealable as provided in sub section 5 of the said section."

6. Now Chapter 9 of the Board of Secondary Education Regulation deals with recognition of the institution by the Board. Clause 14 of Chapter 9 reads that the Director or any two members of the Board may being forward a proposal for depriving a school either in whole or in part of its recognition. The recognition and grant committee thereafter shall consider the proposal after affording the management authorities of the school all reasonable facilities for said objection to the proposal and transmit a copy of its proceeding including a copy of a representation which may be made by the managing authority to the Board and then the Board shall consider the proposal and decide as it thinks fit which would be final.

7. In the case in hand, neither the prescribed authority has submitted any report in terms of sub-section 2 of section 6(B) of the Act to the committee nor a decision has been taken by the committee for withdrawal of recognition of the school for consideration of the Board to decide. Here in the case, the District Education Officer, the opposite party no. 4 has sent his recommendation to opposite party no.3 for taking necessary action for withdrawal of recognition when admittedly opposite party no.4 is not prescribed authority under the Act either to recommend to opposite party no.3 or to take any decision himself for withdrawal of recognition. However it is seen that opposite party no.3 has acted upon that report of opposite party no.4. Thus the order is without jurisdiction.

8. In the instant case as is seen even the provision as contained under Clause 10 of Chapter 9 of the Board's regulation have not been complied with before passing the order under Anneuxre-7. It is admitted in the counter by opposite party no.4 that before expiry of the period given to the management of the petitioner school to submit the planation if any in the matter, the recommendation has been so made for withdrawal of recognition to opposite party no.4 and accordingly the resident of the Board simply basing upon such recommendation of opposite party no.4 has gone to pass the orderunder Annexuer-7. In view of the aforesaid discussion, the order under Annexure-7 is held to be unsustainable in the eye of law having not been so passed by the authority concerned in adherence to the mandatory provisions of law which have not been followed right from
the beginning till end.

In the result, the writ application is allowed and order under Annexure-7 is hereby quashed. In view of above, the petitioner school has to be treated to have been continuing as having the recognition as before standing entitled to all such facilities and benefits as provided in law. It is

however made clear that the authority if so feels the need may proceed in the matter for a decision in that regard in accordance with law. No order as to cost is passed in the facts and circumstances of the case.

Writ application allowed.

2017 (I) ILR - CUT- 498

S. PUJAHARI, J.

CRA NO. 296 OF 1992

RAJENDRA PRASAD YADAV .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

ESSENTIAL COMMODITIES ACT, 1955 – S.7

Conviction of the appellant U/s. 7 of the Act for violation of clause-3 of the Odisha Rice and Paddy Control Order, 1965 – Conviction challenged – Seizure of 126 quintals and 10 kgs of rice from a moving truck – Evidence shows that the appellant was the owner of the truck but not the seized rice – Since he is not proved to have stored rice, he can not be said to be a dealer – Moreover, rice found from a moving truck can not amount to storage of rice and does not contravene the provisions of the control order – Held, the appellant cannot be said to be a dealer of rice without license, hence the impugned judgment of conviction and sentence is set aside.

(Paras 6 to 9)

Case Laws Relied on :-
1. 1996 (5) SCC 1 : Bijaya Kumar Agarwala -V- State of Orissa

Case Laws Referred to :-
1. AIR 1954 Orissa 95 : Balabhadra Raja Guru Mohapatra -V- State
2. AIR 1978 Crl.L.J. 683 : Prem Bahadur -V- The State of Orissa.

Appellant : Mr. S. Das & Asso.
Respondent : Addl. Govt. Adv.

Date of hearing : 09.11.2016
Date of judgment: 09.11.2016

JUDGMENT

S. PUJAHARI, J.

This appeal is directed against the judgment of conviction and order of sentence dated 20.08.1992 passed by the learned Special Judge, Mayurbhanj, Baripada in Vig. G.R. Case No.25 of 1989. The learned Special Judge, Mayurbhanj, Baripada vide the impugned judgment and order, held the appellant (hereinafter referred to as "the accused") guilty of the charge under Section 7 of the Essential Commodities Act (hereinafter referred to as "the Act") and sentenced him to undergo R.I. for a period of six months for violation of Clause-3 of the Orissa Rice and Paddy Control Order, 1965 (hereinafter referred to as "the Order"), an order promulgated under Section 3 of the Act, as allegedly he was found to be in possession of 126 quintals and 10kgs of rice without any license, as such, a dealer without license.

2. Prosecution placed a case before the trial court that on 10.05.1989, while the Vigilance Inspector, Rairangpur along with A.C.S.O., Rairangpur were performing patrolling duty in the border area to check illegal movement of essential commodities, at about 8 PM, found a Truck bearing no.ORM 6036 coming from Bahalda side towards Bihar and chased the said Truck which suddenly stopped as one of its tire was punctured. On verification, they found that the Truck was having 130 bags of rice, but the occupants of the said Truck including the driver except the helper fled away from spot. Subsequently, it was found that the said Truck was belonging to the accused and on being asked, the helper, who was there, disclosed that one Md. Kayum was driving the Truck, but could not produce any license or permit in support of transportation of the rice stock from Orissa to Bihar. As no license was there for transportation of the aforesaid articles, seizure of the aforesaid Truck and rice were made by the Vigilance Police, necessary investigation was taken up and on completion of investigation, charge sheet was filed against the accused and the driver of the truck.

3. The accused pleaded not guilty to the charge though admitted to be the owner of the truck. The prosecution, as such, examined as many as nine witnesses and also exhibited certain documents in order to establish the charge. But in his defence, the accused did not adduce any evidence. The trial court on conclusion of the trial, taking into consideration the evidence of the seizure of the Truck along with the rice, held that rice seized was found in the Truck of the accused and he was in possession of the same, as such, a dealer without license and violated Clause-3 of the Order punishable under Section 7 of the Act and returned the judgment of conviction and order of sentence assailed herein this appeal, but acquitted the co-accused driver.

4. Learned counsel appearing for the accused submits that the accused's Truck might have been used in the alleged offence, but there being no convincing materials indicating the ownership of the accused over the rice and the possession thereof, as such, he could not have been said to be a dealer without license by the trial court. Hence, the conviction of the accused was without any substance.

5. Learned counsel for the State, on the other hand, submits that since from the Truck in question 130 bags of rice were found as evident from the evidence of the P.W.1, an independent witness; P.W.2 and accompanying official witness and the evidence of P.W. 7 i.e. A.C.S.O. that the helper of the Truck in question told that the seized Truck and rice belonging to the accused which is also corroborated and complemented by the testimony of the Investigating Officer P.W. 9, the contention advanced on behalf of the accused is devoid of merit.

6. The evidences of the P.Ws.1, 2, 7 & 9 would go to show that 130 bags of rice were seized from the truck in question. The truck belonging to the accused is not disputed. The evidence of P.Ws.7 & 9 disclose that P.W. 8 stated that the rice belongs to the accused. But the same has not been proved in this case inasmuch as P.W. 8 has not supported the case of the prosecution in this regard and P.Ws.7 & 9 have no direct knowledge about the accused to be the owner of the rice. But, fact remains that the truck of the accused was carrying the rice has since been proved. Since the accused's truck was found transporting with the rice, the accused cannot be attributed with the possession of rice and as such, a dealer. Therefore, there is no legally acceptable evidence indicating the fact that the accused was transporting the rice in question without any authority and as such a dealer without license. Even for the sake of argument, it is held that the possession of rice is attributable to the accused, but still the same is not sufficient enough to hold him to have violated the Clause-3 of the Order inasmuch as unless a person stored the paddy/rice, he cannot be said to be a dealer. The aforesaid is clear from the bare reading of Clause-2(b) and Clause-3 of the Order which reads as follows:

> "2(b). *"Dealer"* means a person engaged in the business of purchase or sale of rice or paddy or rice and paddy taken together in quantities exceeding five quintals or of storage for sale of rice or paddy or rice and paddy taken together in quantities exceeding ten quintals at any time but does not include a cultivator or landlord in respect of rice or paddy, being the produce of the land cultivated or owned by him."

Clause-3 of the Order speaks as follows:

"3. Licensing of persons (1) No person shall [act] as a dealer except under and in accordance with a license issued in that behalf by the licensing authority:

Provided that the Government may, by a special or general order, exempt, subject to such conditions as may be specified in the order, any class of persons from the operation of this Sub-clause.

[(2) For the purpose of this clause person who stores rice or paddy or rice and paddy taken together in quantity exceeding ten quintals inside the State of Orissa [x x x] shall, unless the contrary is proved, be deemed to act as a dealer.]

7. The Apex Court in the case of **Bijaya Kumar Agarwala vs. State of Orissa**, *reported in 1996 (5) SCC 1,* analyzing the two contrary decisions of this Court one is in the case of **Balabhadra Raja Guru Mohapatra v. State**, *reported in AIR 1954 Orissa 95* wherein it has been held that goods in transit in a truck were held to be 'storage' within the meaning of the Orissa Food Grains Control Order, 1947 and other decision is in the case of **Prem Bahadur v. The State of Orissa**, *reported in AIR 1978 Crl.L.J. 683* wherein it has been held that possession of stock of rice in a moving vehicle does not amount to 'storage' under the Orissa Rice & Paddy Control Order, 1965 and the definition of dealer as well as storage, held that merely as someone is found to have kept paddy in excess of the quantity permitted to be stored in a moving truck that itself cannot amount to storage of goods and as such does not contravene any of the provision of the Order.

8. Since no evidence is there indicating the fact the accused to be the owner of the rice seized in this case which was found in his moving truck, he could not have possessed the rice and as such a dealer of the aforesaid rice. Otherwise, in this case, the rice was found in a moving truck even if the same belonging to the accused, the accused cannot be attributed with the storage of the same and as such held to be a dealer without any license in view of the law laid down in the case of **Bijaya Kumar Agarwala** (supra).

9. In view of the aforesaid, this Court is of the view that the conviction of the accused holding him to be dealer of rice without license as such indefensible and accordingly, the same cannot be sustained. I would, therefore, allow this criminal appeal and set aside the impugned judgment of conviction and order of sentence. Accordingly, the accused is acquitted of the

charge and consequently, his bail bonds stand discharged. LCR received along with the copy of this judgment be returned forthwith.

Appeal allowed.

2017 (I) ILR - CUT- 502

B.RATH, J.

W.P. (C) NO. 18171 OF 2016

LAKSHMI RANI KACHHAP ……..Petitioner

.Vrs.

THE COMMISSIONER-CUM-SECY.,
REV. & DISASTER MANAGEMENT,BBSR. & ORS. …… Opp. parties

ODISHA LAND REFORMS ACT, 1960 – Ss 2 (14), 22, 73 (C)

Disputed land, originally belonged to a scheduled tribe – Such land was converted from agricultural status to home stead U/s 8(A) of the Act and a house is standing over the same – Sale of land to the petitioner – Petitioner applied for registration – Registering authority refused registration for violation of section 22 of the Act – Hence the writ petition – Held, since the land in question is merged with the Urban town planning authority Sambalpur by virtue of Gazette notification Dt 14. 07.1972 with reference to section 73 (c) of the Act, provision of section 22 of the Act have no application in the present case – Writ of mandamus issued directing the registering authority to register the instrument placed by the petitioner. (Paras 8,9,10)

For Petitioner : M/s. Kousik Ananda Guru,
A.K. Mohanty, S.K. Mohapatra.

For Opp.parties : Mr. K.K. Mishra,(Additional Standing Counsel)

Date of hearing : 6.12. 2016
Date of Judgment : 14.12.2016

JUDGMENT

BISWANATH RATH, J.

This writ petition has been filed by the petitioner seeking a mandamus for directing the registering authority to register the sale deed presented for registration.

2. Short background involved in this case is that the petitioner is a registered tenant in respect of a house standing over the area measuring Ac.0.054 decimals of Major Settlement Plot No.808/4291, appertaining to Major Settlement Khata No.644/1176. Presently, the kissam of the land is Gharbari-I. The petitioner purchased the said house under a Registered Deed of Sale vide RSD No.11621303761 dated 7.10.2013. The house is situated within the Sambalpur Municipal Corporation i.e. an urban area. Sri Guru, learned counsel for the petitioner claims that following the provision contained in Section 73-C of the Orissa Land Reform Act, the land situated in Municipal Corporation area is exempted from the purview of the O.L.R. Act. Therefore, there is no application of any of the provisions contained under the O.L.R. Act involving the disputed land having already merged in the Corporation. Learned counsel for the petitioner further submitted that the petitioner presented the sale deed for registration on 26.9.2016, even though the instrument was accepted but later on, the registering authority refused to register the same on the premises of violation of the provisions contained under Section 22 of the O.L.R. Act, which action since bad and against law, request is being made for interfering in the impugned action and issuing appropriate mandamus.

3. Learned counsel for the petitioner further contended that the transfer involved is made by a Scheduled Tribe in favour of a non-Scheduled Tribe. Taking resort to a notification in the Orissa Gazettee on 14th July, 1972 bringing the area involving the petitioner's land to the fold of town planning authority and further relying on decisions as reported in 1st -**1999 (II) OLR(SC)182**, 2nd- **Vol.71(1991) CLT 390** and 3rd- **Vol.43 (1977) CLT, 61,** Sri Guru, learned counsel for the petitioner contended that for the conversion of the land from agricultural status to homestead by the competent authority and for the notification in the Orissa Gazettee on 14th July, 1972, it becomes clear that the authorities went wrong in refusing to register the instrument.

4. Learned Additional Government, advocate in his opposition, even though did not refute the claim of the petitioner that at some stage there was permission by the competent authority for conversion of the status of the land from agricultural to homestead following the provision contained in O.L.R. Act but refuted the claim of Sri Guru, learned counsel for the petitioner on

the premises that for no notification under Section 73 of the O.L.R. Act bringing the particular land under the purview of the Municipal/Urban authority, the provision contained in Section 22 of the O.L.R. Act is very much applicable to the present case and therefore, contended that there is no illegality in the impugned order.

5. Considering the rival contentions of the parties, this Court finds, there is no dispute that the land originally belongs to a Scheduled Tribe. There is no dispute that basing upon an application under Section 8(A) of the O.L.R. Act, there has been conversion of the scheduled land from the status of agricultural to the status of homestead. This Court also finds that basing upon the conversion of the land, there is a building standing over the disputed property and at no point of time, any objection was being raised for construction of the building.

6. Considering the above, this Court finds the moot question to be considered herein is whether Section 22 of the O.L.R. Act has any application to the present case or not? From the pleadings of the respective parties and the arguments, this Court finds, firstly there is already a permission for conversion of the land applying the provision at Section 8(A) of the O.L.R. Act. From the document produced before this Court, this Court finds, their stands a Notification in the Orissa Gazettee dated 14th July, 1972 bringing a patch of land involving the disputed land to the fold of the urban town planning and the land is already included in the master plan for Sambalpur. There is no dispute to this aspect by the learned State Counsel. The only dispute as against this by the State is that such notification cannot be treated as a notification under Section 73 of the O.L.R. Act.

7. Section 22 of the O.L.R. Act as well as the Section 73 (C) of the O.L.R. Act since are relevant for the purpose of effective adjudication of the matter, the same read as follows:

> "**22. Restriction on alienation of land by Scheduled Tribes** (1) [Any transfer] of holding or part thereof by a raiyat, belonging to a Scheduled Tribe shall be void except where it is in favour of –
>
> (a) A person belonging to a Scheduled Tribe; or
>
> (b) A person not belonging to a Scheduled Tribe when such transfer is made with the previous permission in writing of the Revenue Officer :
>
> Provided that in case of a transfer by sale, the Revenue Officer shall not grant such permission unless he is satisfied that a purchaser

belonging to a Scheudled Tribe willing to pay the market price for the land is not available, and in case of a gift unless he is satisfied about the *bona fides* thereof."

xx xx xx

Section 73 (c) reads as follows :

"(c) to any area which the Government may, from time to time by notification in the *Official Gazettee* specify as being reserved for urban, non-agricultural or industrial development or for any other specific purposes; and"

8. Now looking to the provision contained in Section 73 (C) of the Act, this becomes clear that the O.L.R. Act shall not be applicable to the lands to which the Government may from time to time by notification in Official Gazettee specify as being reserved for urban area xx xx xx etc.

9. Going through the Gazettee Notification dated 14th July, 1972, this Court finds, there remains no doubt that even though the notification did not refer to the provision under Section 73 of the O.L.R. Act but from the language therein, it is amply clear that the State Government by virtue of the notification has already included the land belonging to Sakhigopinath (part) revenue village which includes the land of the petitioner merged with the town planning authority, Sambalpur. This being the position, this Court finds, for the notification involved herein, the provision of Section 22 of the O.L.R. Act have no application in the present case.

10. Now coming to the decision cited at Bar, this Court finds, for the difference in the fact scenario that the disputed land has already become a homestead land by virtue of an order of conversion under the O.L.R. Act, particularly the land is no more available for being used or capable or being used for agricultural purpose within the municipal area and as this Court finds, the disputed land vis-à-vis the notification brings the land in the locality to the fold of the urban authority, the view of the registering authority is not appropriate and as such, there is no Bar for registering the instrument placed by the petitioner. The contentions of the petitioner in this regard and the view of this Court indicated hereinabove gets the support of a decision of this Court as reported in **Vol.43(1977) CLT, 681** as a result of which while allowing the writ petition, this Court issues a mandamus to the registering authority-opposite party No.3 for registering the instrument placed by the petitioner involved in the writ petition, which exercise be concluded within a period of fifteen days from the date of communication of this order.

11. The writ petition stands allowed but with the direction indicated hereinabove. Parties to bear their respective costs.

Writ petition allowed.

2017 (I) ILR - CUT-506

S. K. SAHOO, J.

W.P.(C). NO.13759 OF 2016

GAMBHARIMUNDA GRAMA PANCHAYAT ……..Petitioner

.Vrs.

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

ODISHA PUBLIC DISTRIBUTION SYSTEM (CONTROL) ORDER, 2016 – CLAUSE, 4 (3) &(6)

Reforms in Public Distribution System – B.D.O., Banpur (O.P. No 4) vide order under annexure -1 allotted PDS items in favour of private dealers i.e. O.P. Nos 5 and 6 for distribution amongst beneficiaries – Action challenged in writ petition by the Sarpanch Gambharimunda – Clause 4 (6) of the 2016 order clearly states to replace private dealers with institutional dealers like Grama Panchayats, Municipalities, Women self help groups and Co-operative Societies – Moreover, when the Grama Panchayat is fairly under taking public distribution system and there is no material that Grama Panchayat or other self-help groups declined to distribute the essential commodities in respect of the ration card holders assigned to O.P. Nos 5 and 6, the authorities should not have favoured the private dealers merely because they were old retailers, after coming into force of 2016 order – Held, the impugned order under annexure- 1 is set aside – The petitioner shall continue to distribute the PDS items, rice and wheat allotted to O.P. Nos 5 and 6.

(Paras 8,9,10)

Case Law Referred to :-

1. AIR1936 PC 253 Nazir Ahmad -V- Kind emperor

For Petitioner : Mr. Sukanta Kumar Dalai

For opposite parties : Mr Deepak Kumar (A.S.C.)
Pradipta Kumar Mohanty (Sr.Adv)
D.N. Mohapatra, Smt. J. Mohanty,
P.K..Nayak,A.Das,P.K.Nayak, A.Das
& P.K.Pasayat

Date of Hearing : 11.01.2017
Date of Judgment: 13.01.2017

JUDGMENT

S.K. SAHOO, J.

Heard Mr. Sukanta Kumar Dalei, learned counsel for the petitioner, Mr. Deepak Kumar, learned counsel for the State and Mr. Pradipta Kumar Mohanty, learned Senior Advocate for the opposite parties nos. 5 and 6.

The petitioner Gambharimunda Grama Panchayat represented through its Sarpanch Kanchan Dei has filed this writ application challenging the office order no.1943 dated 27.07.2016 (Annexure-1) issued by opposite party no.4, Block Development Officer, Banapur for allotment of stock of PDS items rice and wheat in favour of two private retailers i.e. opposite parties nos.5 and 6, for distribution among the PHH and AAY beneficiaries under National Food Security Act, 2013 (hereafter 'NFS Act') for the month of August 2016 with a further prayer to direct the concerned opposite parties to allow the petitioner Grama Panchayat to carry on distribution of PDS items.

2. It is the case of the petitioner that as per the licence given by the competent authority for distribution of PDS items, the petitioner Grama Panchayat was distributing such items smoothly among the villagers entitled to get the same. As per impugned order under Annexure-1, the opposite party no.4 allotted rice and wheat from the monthly quota of the Grama Panchayat for distribution in favour of opposite parties nos. 5 and 6 to some families of village Gambharimunda without the knowledge of the Grama Panchayat which is contrary to the provisions of the Orissa Public Distribution System (Control) Order, 2016 (hereafter "2016 Order"). It is the further case of the petitioner that since the Grama Panchayat was dealing with PDS items of more than 150 quintals, as per the notification dated 21.04.2012 issued by Government of Odisha, Food Supplies and Consumer Welfare Department, the petitioner appointed one Jogan Sahayak for management of the distribution affairs. The Hon'ble Supreme Court while adjudicating Writ Petition (C) 196 of 2001, passed an order constituting a committee to be headed by Hon'ble Mr. Justice D.P. Wadhwa, Former Judge, Supreme Court of India, to look into the maladies affecting the proper functioning of the public distribution system (PDS) and to suggest remedial measures. Justice Wadhwa committee visited the State of Odisha and made nineteen recommendations to improve the public distribution system in the State. It was suggested, inter alia, that the appointment of the dealers has to be made

in a transparent manner and the system of appointment of private dealer has to be abolished. It is further case of the petitioner that the NFS Act which came into force on 05.07.2013 was enacted to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto. It is stated that Chapter V of NFS Act deals with reforms in targeted public distribution system and section 12(2)(e) states that the Central and State Government shall endeavour to progressively undertake necessary reforms in the targeted public distribution system in consonance with the role envisaged for them in the Act and the reforms shall include preference to public institutions or public bodies such as Panchayats, self-help groups, co-operatives, in licensing of fair price shops and management of fair price shops by women or their collectives. It is the case of the petitioner that the opposite party no.4 has contravened the provisions of NFS Act and 2016 Order and appointed private retailers like opposite parties nos. 5 and 6 for distribution of PDS items in village Gambharimunda. It is also highlighted that similar provisions are available in the Targeted Public Distribution System (Control) Order, 2015 (hereafter '2015 Order') relating to giving preference to public institutions or public bodies such as Panchayats, self help groups, cooperative societies in the matter of licensing of fair price shops. Therefore, in the matter of grant of licence and appointment of dealer, preference has to be given to the institutional dealers like Grama Panchayats, followed by woman self-help groups, co-operative society and other self-help groups. It is stated that on extraneous consideration, two private persons like opposite parties nos. 5 and 6 have been appointed as retailers and allotted with PDS items for distribution by the opposite party no. 4 which is contrary to the sprit of the Constitution of India and also in gross violation of the recommendations made by Hon'ble Justice Wadhwa Committee as well as the provisions of NFS Act and 2015 Order and 2016 Order and therefore, Annexure-1 should be quashed as illegal, arbitrary, malafide and unconstitutional.

3. Counter affidavit was filed on behalf of opposite party no. 2, Collector, Khurda and opposite party no.3, Sub-Collector, Khurda on dated 25.08.2016 wherein it is stated that the allotment under NFS Act for the month of August 2013 were issued in favour of opposite parties nos. 5 and 6 who had got licences as per the recommendation of the opposite party no.4 and both of them were dealing with the PDS commodities as per Government

guidelines. It is stated that as per Clause-4 of 2016 Order, both the institutional dealers as well as private individuals can be issued with PDS licence for dealing with PDS Commodities. A further affidavit was filed on 11.01.2017 by the opposite parties nos. 2 and 3 in Court indicating therein that the opposite parties nos. 5 and 6 are old retailers operating within Gambharimunda Grama Panchayat for distribution of PDS Commodities. The opposite party no.5 is a retailer functioning since 2010-11 and opposite party no.6 is functioning as such since 2011-12 and their licences have been renewed from time to time. It is further stated in the counter affidavit that in the letter no.20784 dated 26.10.2015 issued by Food Supplies and Consumer Welfare Department, instructions were issued to keep the monthly quota of food grains for fair price shop at least 75 quintals to make it viable. Subsequently, the State Government issued another letter no.7925 dated 12.04.2016 reducing the monthly quota from 75 quintals to 50 quintals. It was directed in that letter to complete the process of rationalization in the district where it has not been completed. Since in the district of Khurda, the process of rationalization could not be completed by 30.03.2016, in respect of Gambharimunda Grama Panchayat which comes under the district of Khurda, the opposite party no.6 was found eligible having 322 numbers of PHH Card Holders and five numbers of AAY Card Holders and total allotment of rice and wheat came to 70.70 quintals which was in excess of 50 quintals limit as fixed under the letter dated 12.04.2016. It is further indicated in the affidavit that another letter no.12159 dated 09.06.2016 was issued by the State Government further reducing the minimum quantum of food grains allocation from 50 quintals per month to 30 quintals keeping in view the complaints received from the beneficiaries relating to the distance of the fair price shop and especially geographical barriers. The opposite party no.5 was found eligible as he was having 159 beneficiaries of PHH categories and 16 numbers of AAY Card Holders who opted to lift their PDS Commodities from him. It is further stated in the counter affidavit that under the new ration card management system, consumers are required to fill up the applications for issuance of ration cards provided under Form-G as stipulated under Clause-27 of the 2016 Order and under Clause-4 of the said Form, the consumer has got the option to change the fair price shop from which they were lifting their food grains or express their intention to retain the same retailer. It is stated that a conjoint reading of Clauses- 3 and 4 provided under Form-G suggest that consumer is the sole authority to decide as to from which of the fair price shops, he intends to lift his stocks. It is further stated in the counter affidavit that so far as the list of beneficiaries are concerned,

the petitioner Grama Panchayat is distributing PDS commodities of Q.296.80 to 1264 ration card holders whereas the opposite party no.5 has been allotted to distribute PDS commodities of Q.40.05 to 183 numbers ration card holders and opposite party no.6 has been allotted to distribute PDS commodities of Q.68.70 to 317 ration card holders. It is further stated in the affidavit that Gambharimunda Grama Panchayat consists of 15 numbers of revenue villages and the opposite parties nos.5 and 6 belonged to village Godijhara and Panchugaon respectively and the beneficiaries allotted to those two opposite parties mostly hail from the said two revenue villages. It is further stated that both the villages are situated at least more than two kilometers from Gambharimunda Grama Panchayat and the beneficiaries of both the retailers have opted to lift their stocks from them. It is further stated that all the three retailers i.e. the petitioner and opposite parties nos. 5 & 6 were existing retailers under 2008 Control Order and their licenses were renewed following the process laid down under 2016 Control Order.

4. The opposite parties nos. 5 and 6 have filed their joint counter affidavit indicating therein that the petitioner Kanchan Dei was the Sarpanch of Gambharimunda Grama Panchayat who was declared disqualified by the Collector, Khurda to continue as Sarpanch and was directed to vacate the Office with immediate effect vide order dated 02.02.2016 and therefore, the writ petition at her instance representing the Grama Panchayat is not maintainable. It is further stated that both the opposite parties are continuing as retailers since long and their licences were renewed from time to time and they were having no adverse record against them. It is stated that the opposite parties nos. 5 and 6 are rightly continuing as retailers under 2016 Order and the writ petition has been filed due to personal grudge in the name of Grama Panchayat even though she has not been authorized by the Grama Panchayat. It is stated that the petitioner is having no locus standi to file the writ petition and accordingly, the same should be dismissed.

5. The petitioner filed a rejoinder affidavit to the counters filed by opposite parties nos. 2, 3 5 and 6 wherein it is mentioned that as per the due resolution of the Grama Panchayat, the petitioner filed the writ petition representing the Grama Panchayat and there is no individual decision or any political vendetta behind the filing of the writ petition. The petitioner relied upon the constitutional provisions under 243-G and 243-N of the Constitution of India so also section 44 of the Orissa Grama Panchayats Act, 1964 (hereafter '1964 Act').

6. The very crux of the matter which is to be decided in this case is whether after the enactment of the National Food Security Act, 2013, the Targeted Public Distribution System (Control) Order, 2015 and the Odisha Public Distribution System (Control) Order 2016, it was proper, justified and legal on the part of opposite party no.4, Block Development Officer, Banapur to allot PDS items like rice and wheat for distribution to the private retailers like opposite parties nos. 5 and 6 among the PHH and AAY beneficiaries?

7. Adverting to the contentions raised regarding the preliminary objection to the locus standi of the petitioner to file the writ petition, there is no dispute that Kanchan Dei @ Jani is the Sarpanch of Ghambharimunda Grama Panchayat. Even though in pursuance of the order passed in G.P. Case No.9 of 2013 filed in the Court of Collector and District Magistrate, Khurda and the provisions laid down under section 26(3) of the 1964 Act, the petitioner was stated to have vacated the office of Sarpanch with immediate effect as per the order dated 02.02.2016 passed by Collector, Khurda, but the petitioner challenged the said order before this Court by filing a writ petition bearing W.P.(C) No.1442 of 2016 and vide order dated 18.02.1016 passed in Misc. Case No.2483 of 2016, this Court has been pleased to stay operation of the order as well as the operation of the judgment dated 08.01.2016 passed in G.P. Case No.9 and 10 of 2013. Therefore, by virtue of the order of this Court passed in W.P.(C) No.1442 of 2016, the petitioner is deemed to be continuing as Sarpanch of Gambharimunda Grama Panchayat as on the date of filing of this writ petition i.e. 05.08.2016. The petitioner has specifically stated in the writ petition that as per the due resolution of the Gram Panchayat and as directed by the Grama Panchayat, the petitioner has approached this Court challenging the action of the opposite parties in encouraging the private dealers which is not permissible in view of the mandates of the Constitution of India and contrary to the prevailing law for the time being. In the rejoinder affidavit also, the same thing has been repeated and it is stated that the petitioner is representing the Grama Panchayat. The locus standi of the petitioner to file the writ petition has not been challenged by the State. Though the opposite party nos. 5 and 6 have stated in their counter affidavit that the petitioner has not been authorized by the Grama Panchayat to file the writ application, I am not inclined to accept such contentions in absence of any documentary evidence to that effect and particularly when the State of Orissa has not challenged the same.

The powers, duties and functions of Sarpanch have been enumerated under section 19 of the Orissa Grama Panchayat Act, 1964. The executive

powers of the Grama Panchayat for the purpose of carrying out the provisions of the Act has to be exercised by none else than the Sarpanch who shall act under the authority of the said Grama Panchayat. Section 44 (z-3) of 1964 Act indicates that it shall be the duty of the Grama Panchayat within the limits of its funds to undertake, control and administer and be responsible for the public distribution system in respect of the Grama subject to the provisions of the Act and the rules made thereunder. Therefore, when as per section 19 of 1964 Act, the Sarpanch can exercise such other powers, discharge such other duties and perform such other functions as may be conferred or imposed on or assigned to him by or under this Act and when he is responsible to undertake and control the public distribution system in respect of the Grama and he finds some illegalities have been committed by the authorities in allotting PDS items from the quota fixed for the Grama Panchayat for distribution to the PHH and AAY beneficiaries in favour of the private retailers and the preferential legal right of the Grama Panchayat in the matter of distribution of essential commodities has been hampered, the Sarpanch being an aggrieved party has every locus standi to challenge the same under the authority of the Grama Panchayat. A person can be said to be aggrieved when he is denied of a legal right by someone who has a legal duty to do something or to abstain from doing something. Therefore, the preliminary objection raised by the opposite parties nos. 5 and 6 regarding the locus standi of the petitioner being devoid of merits cannot be accepted.

8. Coming to the main issue involved in the writ petition, discussions on the relevant provisions of different Act and orders are necessary.

Section 3 of the Essential Commodities Act, 1955 deals with the power of the Central Government to control production, supply, distribution etc. of essential commodities. The Central Government by passing appropriate order can provide for regulating or prohibiting the production, supply and distribution of the essential commodities and trade and commerce therein. The order can provide for regulating by licenses, permits or otherwise the production or manufacture of any essential commodity or for regulating by licenses, permits or otherwise the storage, transport, distribution, disposal etc. of any essential commodity.

Section 2(23) of the NFS Act defines "targeted public distribution system" which means the system for distribution of essential commodities to the ration card holders through fair price shops. According to section 2(4) of the NFS Act, "fair price shop" means a shop which has been licensed to distribute essential commodities by an order issued under section 3 of the

Essential Commodities Act, 1955 to the ration card holders under the targeted public distribution system. Section 12(2)(e) of NFS Act which deals with reforms in targeted public distribution system states that preference to the public institutions or public bodies such as Panchayats, self-help groups, co-operatives, in licensing of fair price shops and management of fair price shops by women or other collectives are to be given.

The 2015 Order which was enacted in exercise of powers conferred by section 3 of the Essential Commodities Act, 1955 states in clause 9(4) which deals with licensing and regulation of fair price shops that the State Government shall accord preference to public institutions or public bodies such as Panchayats, self-help groups, co-operative societies in licensing of fair price shops and management of fair price shops by women or their collectives.

The 2016 Order in clause 4(3) which deals with appointment of dealers and grant of license also states that preference for appointment and for grant of license as dealer shall be given to Grama Panchayats or Urban Local Body, as the case may be, followed by women self-help groups, co-operative societies and other self-help groups in that order.

Therefore, a conjoint reading of NFS Act, the 2015 Order and the 2016 Order would indicate that in the public distribution system, the first preference regarding appointment of dealers and grant of license has to be given to the Grama Panchayats followed by other institutional dealers. When the Grama Panchayats are interested for distribution of the P.D.S. commodities in the Grama and there is no allegation against such distribution on the other hand it is found that Grama Panchayats are distributing the PDS items to the beneficiaries properly, others should not be entrusted with such distribution role. On a plain reading of the aforesaid three enactments, there is no scope for any private retailers in the matter of distribution of PDS commodities. The order of preference in respect of institutional dealers has also been enumerated very clearly in Clause-4 of the 2016 Order relating to appointment of dealers and grant of license. It is further stipulated in Clause-4(6) that the authority competent to appoint and to grant or renew license under the 2016 Order shall make efforts to replace private dealers with institutional dealers like Grama Panchayats or Municipalities, as the case may be, women self-help group, co-operative societies and self-help groups, within a period of two years from the date of publication of the 2016 Order in the official gazette (which was published on 16.3.2016).

The second proviso to Clause-3 which deals with licensing of fair price shop dealers indicates that a license obtained under any of the relevant licensing order in force on the date of coming into force of 2016 Order shall be valid till the date of its expiry and a fresh license shall be obtained under the 2016 Order before the expiry of the date of such license. Clause 32 of the 2016 Order states that all applications for issue of license or renewal of license which have been filed under the provisions of Orissa Public Distribution System (Control) Order, 2008 and as amended by the Odisha Public Distribution System (Control) Amendment Order, 2013 but have not been disposed of on the date of coming into force of the 2016 Order, shall be disposed of in accordance with the provisions of the 2016 Order. Therefore, even if a private dealer was having a license to deal with any essential commodity as per the provisions under Odisha Public Distribution (Control) Order, 2008 as amended by Odisha Public Distribution System (Control) Order, 2013 and such license was in force as on 16.3.2016 when the 2016 Order came into force, it will remain valid till the date of its expiry. Thereafter, if the private dealer applies for a fresh license, the licensing authority shall consider the provisions of the 2016 Order which, inter alia, deals with preference for appointment and for grant of license in favour of institutional dealers and can pass appropriate order. If a fresh license has been granted in favour of a private dealer without taking note of the provisions under the 2016 Order then it would create serious prejudice to the institutional bodies that are to get preferential treatment. In view of section 44 (z-3) when the duty of the Grama Panchayat is to undertake, control and administer and be responsible for the public distribution system in respect of the Grama, if such valuable preferential legal right is taken away by engaging private dealers then the very purpose of the enactment of the NFS Act and 2015 Order and 2016 Order would be frustrated.

Article 243-G of the Constitution of India states that subject to the provisions of the constitution, the State Government shall make appropriate law empowering and authorizing and enabling the Panchayats to function as institutions of self-government. Article 40 of the Constitution of India which comes within Part IV which deals with Directive Principles of State Policy states that the State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Article 254 (1) of the Constitution of India indicates that if any provisions of a law made by the Legislature of a State is repugnant to any

provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void. Trade and commerce in, and the production, supply and distribution of foodstuffs, including edible oil seeds and oils finds place at Entry no.33 of the Concurrent List. The Essential Commodities Act is enacted under Entry no.33 of the Concurrent List. Therefore, there is nothing to prevent the State Legislature to legislate with respect to a Concurrent List subject merely because there is a Union law relating to the same subject.

Article 254 (2) of the Constitution of India is attracted only if the State law is "repugnant" to the Union Act, which means that the two cannot stand together. When a question of repugnance arises under Article 254, every effort should be made to reconcile the two enactments and to construe them so as to avoid there being repugnant to each other and care should be taken to see whether the two really operate in two different fields without encroachments.

Law is well settled as held in case of **Nazir Ahmad -Vrs.- Kind Emperor reported AIR 1936 PC 253** that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. When the legislature in its wisdom has fixed preferential treatment to be given in the matter of appointment of dealers and grant of license which obviously includes distribution of essential commodities to different institutional bodies and specifically mentioned that the private dealers would be replaced with institutional dealers like Grama Panchayats, women self-help groups etc., any order of appointment of private dealers for distribution of essential commodities would not be permissible.

In the present case, after the expiry of period of licenses of the opposite parties nos. 5 and 6 on 31.03.2016, as per Annexure-B/6 annexed to the joint counter affidavit of opposite parties nos.5 and 6, the licenses for the year 2016-17 has been renewed on 20.04.2016 which are to remain in force till 31.03.2017. The order of allotment has been made in favour of opposite parties nos.5 and 6 for distribution of PDS items like rice and wheat among the PHH and AAY beneficiaries vide impugned office order no.1943 dated 27.07.2016 of the opposite party no.4. There is no material whatsoever that the Grama Panchayats or the women self-help groups or co-operative

societies or other self-help groups declined to distribute the essential commodities in respect of the ration card holders assigned to opposite parties nos. 5 and 6. In fact the petitioner Grama Panchayat has been assigned to distribute PDS items of Q.296.80 to 1264 ration card holders of Gambharimunda Grama Panchayat. There appears to be no transparency in the allotment of PDS items in favour of opposite parties nos. 5 and 6. Merely because they were old retailers, they cannot be favoured with the allotment order after coming into force of 2016 Order. By allotting opposite parties nos. 5 and 6 to distribute the PDS items like rice and wheat in Gambharimunda Grama Panchayat, the preferential right of distribution in favour of the petitioner Grama Panchayat has been disturbed. Such allotment is based on malafide which is illegal and cannot be sustained in the eye of law.

9. On a conspectus analysis of the provisions of relevant Acts, Orders and law, I am of the humble view that the allotment of distribution of PDS items like rice and wheat in favour of the private retailers like opposite parties nos.5 and 6 by the opposite party no.4 vide office order no.1943 dated 27.07.2016 under Annexure-1 smacks of arbitrariness, is unfair and unreasonable, and cannot be allowed to stand in the eye of law. In the Directive Principles of State Policy, wherever there is arbitrariness and unreasonableness, there is denial of the rule of law.

10. For the forgoing reasons, the writ petition succeeds. The impugned order under Annexure-1 is hereby set aside. As per the order dated 11.08.2016 passed in Misc. Case No.12835 of 2016, it was directed that no further allotment shall be made in favour of the opposite parties nos. 5 and 6 till the next date and further ordered that the quota which was fixed in favour of opposite parties nos.5 and 6 shall be given to the petitioner which shall be distributed to the entitled persons in accordance with law. The interim order was extended from time to time. Therefore, the petitioner shall continue to distribute the quantities of PDS items rice and wheat allotted to the opposite parties nos. 5 and 6 as per Annexure-1 among the PHH and AAY beneficiaries. Accordingly, the writ application is allowed. Both the parties are directed to bear their own costs.

Writ application allowed.

2017 (I) ILR - CUT- 517

S.K. SAHOO, J.

CRLMC NO. 1320 OF 2012

RIAZ AHMED BAIG & ANR. …….Petitioners

.Vrs.

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

CRIMINAL PROCEDURE, 1973 – Ss 177,178

Place of inquiry and trial – Offence U/ss 498-A,304-B/ 109 I.P.C. and sections 3 & 4 of D.P. Act – Marriage solemnized at Asiana Colony under Bisra P.S. and death took place at Visakapatnam in Andhra Pradesh – Petitioners contend that since death occurred at Visakhapatnam, lodging of F.I.R. at Bisra P.S. is illegal and S.D.J.M. Panposh has no jurisdiction to take cognizance of the offence – Demand of dowry was made at the time of marriage under Bisra P.S. which resulted in unnatural death at Visakhapatnam for its non-fulfillment and such demand being a continuing offence, no illegality has been committed by Bisra P.S. in entertaining the F.I.R. and investigating the case and the learned S.D.J.M. Panposh is competent to take cognizance of the offence. (Para 5)

For Petitioners : Mr. Umesh Patnaik, Sarwar Ali Khan
For Opp. Parties : Mr. Jyoti Prakash Patra (ASC)

Date of Hearing : 23.08.2016
Date of Judgment:23.08.2016

JUDGMENT

S. K. SAHOO, J.

In this application under section 482 Cr.P.C., the petitioners Riaz Ahmed Baig and Nadia Baig have prayed to quash the order dated 13.11.2002 passed by the learned S.D.J.M., Panposh, Rourkela in G.R. Case No. 1044 of 1998 in taking cognizance of offences under sections 498-A/304-B/109 of the Indian Penal Code and sections 3 & 4 of the Dowry Prohibition Act as well as the entire criminal proceeding against them. The said case arises out of Bisra P.S. Case No.49 of 1998.

The petitioner no.1 is the brother-in-law of the husband of deceased Farjana Mujafer and petitioner no.2 is the wife of petitioner no.1.

2. As per the prosecution case, the marriage between the deceased Farjana Mujafer and Niyamutulla Khan was solemnized on 12.07.1998 at

Asiana Colony, Bisra and the unnatural death of the deceased took place on 14.07.1998 in the house of Niyamutulla Khan at Visakhapatnam. F.IR. was lodged on 19.07.1998 before the Officer in charge, Bisra Police station by one S. Tanvir Ahamad, the brother of the deceased.

It is the further prosecution case that the deceased was subjected to physical and mental torture in connection with demand of dowry and she committed suicide at Visakhapatnam and the post mortem report indicates that the cause of death was on account of asphyxia due to ante mortem hanging. After completion of Investigation, charge sheet was submitted on 04.10.2002 under sections 498-A/304-B/109 of the Indian Penal Code and sections 3 & 4 of the Dowry Prohibition Act against the petitioners and others.

3. The main ground taken by the petitioners in challenging the criminal proceeding is that the cause of action has arisen at Visakhapatnam and therefore, the police officials of Bisra police station have no jurisdiction to register the case and to take up investigation and similarly, the Court of learned S.D.J.M., Panposh, Rourkela lacks jurisdiction to take cognizance of offences and therefore, the impugned order is without jurisdiction and should be quashed.

It is contended by the learned counsel for the petitioners that in view of section 177 of the Cr.P.C., every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed and since the death has taken place at Visakhapatnam, Andhra Pradesh and not at Bisra, hence the F.I.R. at Bisra police station is not maintainable and therefore, the continuance of proceeding is not only vexatious but abuse of process of the Court.

4. The learned counsel for the State has produced the case diary and submitted that the materials available on record indicates that the father of the deceased namely Syed Ali Ahmed, the sister of the deceased namely Nausad Jasmin, cousin brother of the deceased namely syed Sahnaz Ahmed and neighbour of the deceased namely Mohd.Mumtaz have stated about the involvement of the petitioners in connection with demand of dowry which took place within the jurisdiction of Bisra police station.

Learned counsel for the State further submitted that in view of the statements available on record that the marriage was solemnized within the jurisdiction of Bisra police station and demand of dowry was also raised by the petitioners and others within the jurisdiction of Bisra police station, it

cannot be said that the F.I.R. lodged at Bisra police station is not maintainable or the Bisra police station officials have no jurisdiction to investigate the matter or the learned S.D.J.M., Panposh, Rourkela lacks jurisdiction to take cognizance of offences.

5. Section 178 of Cr.P.C. reads as follows:-

> "178. Place of inquiry or trial- (a) When it is uncertain in which of several local areas an offence was committed, or
> (b) where an offence is committed partly in one local area and partly in another, or
> (c) where an offence is a continuing one, and continues to be committed in more local areas than one, or
> (d) where it consists of several acts done in different local areas,
> it may be inquired into or tried by a Court having jurisdiction over any of such local areas".

Clause (c) of section 178 Cr.P.C. deals with a situation where an offence is a continuing one and continues to be committed in more local areas than one. In such case, the offence can be inquired into or tried by a Court having jurisdiction over any of such local areas. A "continuing offence" means if an act or omission on the part of the accused constitutes an offence and if that act or omission continues from day to day, then a fresh offence is committed every day on which the act or omission continues. Normally and in ordinary course, if an offence is committed from day to day, such offence can be described as "continuing offence".

Clause (b) of section 178 Cr.P.C. lays down that when an offence is committed partly in one local area and partly in another, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

In view of clause (b) of section 178 Cr.P.C., when the offence in the form of demand of dowry has been committed partly within the jurisdiction of Bisra Police Station which culminated with the unnatural death of the deceased on account of non-fulfillment of such demand of dowry within two days of marriage at Visakhapatnam, I am of the view no illegality has been committed by the Bisra police station officials in entertaining the First Information Report and investigating the case.

The contentions raised by the learned counsel for the petitioners would have certainly hold good if no part of the offence had been committed within the jurisdiction of Bisra police station or the learned S.D.J.M., Panposh. Since learned counsel for the State has pointed out from the case

diary that there are materials to show that not only the marriage was solemnized but also the demand of dowry was made within the jurisdiction of Bisra Police Station and within two days of marriage, the unnatural death of the deceased took place which has got connection with the demand of dowry, I am of the view that there was no legal hurdle for the informant to lodge an F.I.R. at Bisra police station and Bisra police station officials were justified in entertaining such FIR and investigating the case and submitting charge sheet and in view of the prima facie materials available on record against the petitioners, the learned S.D.J.M., Panposh, Rourkela is also competent and justified in taking cognizance of the offences on such charge sheet and therefore, I do not find any merit in this application under section 482 Cr.P.C. Accordingly, the CRLMC stands dismissed.

CRLMC dismissed.

2017 (I) ILR - CUT- 520

S.K. SAHOO, J.

CRLREV NO. 570 OF 1999

DURYODHAN MOHANTY ……..Petitioner

.Vrs.

REPUBLIC OF INDIA ……..Opposite party

CRIMINAL PROCESURE CODE, 1973 – S. 313

Examination of accused U/s 313 Cr.P.C. – Purpose – It is not a mere formality – It has got practical utility for the Criminal Courts to afford opportunity to the accused to explain the incriminating circumstances – Questions for the accused should be framed in an easily understandable manner which should not be lengthy and complicated and several distinct matters of evidence should not be rolled up in a single question.

In the present case many things have been put in question numbers 7 and 10 for which the accused failed to explain the same properly, which caused serious prejudice to him – Moreover, findings of facts recorded by the Courts below are not based on evidence on record – Held, the impugned judgments and orders of conviction being not sustainable in the eye of law are setaside.

(Paras 11,12)

Case Laws Referred to :-

1. AIR 2003 SC 3714 : Kailash Kumar Sanwatia -Vrs.- State of Bihar & Anr.

2. (1974) 3 SCC. 630 : Dadarao -Vrs.- State of Maharashtra.
3. (1997) 7 SCC. 156 : Tanviben Pankaj Kumar Divetia -Vrs.- State of Gujarat.
4. (2013) 5 SCC. 722 : Raj Kumar Singh @ Raju @ Batya -Vrs.- State of Rajasthan.
5. AIR 2003 SC 3714 : Kailash Kumar Sanwatia -Vrs.- State of Bihar & Anr.
6. (1974) 3 SCC. 630 : Dadarao -Vrs.- State of Maharashtra.
7. (1997) 7 SCC. 156 :Tanviben Pankaj Kumar Divetia -Vrs.- State of Gujarat
8. (2013) 5 SCC. 722 : Raj Kumar Singh @ Raju @ Batya -Vrs.- State of Rajasthan.

For Petitioner : Mr. Devashis panda,
For Opp. Parties : Mr. Anup Kumar Bose (Asst. Solicitor General)

Date of Hearing : 27.10.2016
Date of Judgment: 03.02.2017

JUDGMENT

S. K. SAHOO, J.

The petitioner Duryodhan Mohanty faced trial in the Court of learned Additional Chief Judicial Magistrate, Bhubaneswar in S.P.E. Case No.10 of 1990 for offence punishable under section 409 of the Indian Penal Code on the accusation that during the year 1984, he being the Branch Office Post Master of Damodarpur Branch post office and a public servant in the Department of Posts, Government of India and in such capacity being entrusted with Rs.22,000/- (rupees twenty two thousand only) in respect of S.B. Account No.906595 and S.B. Account No.906616 of Jamini Kanta Nayak and Sumitra Subhalaxmi Nayak respectively, committed breach of trust in respect of the aforesaid amount.

The learned Trial Court vide impugned judgment and order dated 11.04.1997 found the petitioner guilty under section 409 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for two and half years and to pay a fine of Rs.5000/- (five thousand only), in default, to undergo R.I. for one month more.

The petitioner preferred an appeal in the Court of Session which was heard by learned Addl. Sessions Judge, Bhubaneswar in Criminal Appeal No.14 of 1997. The learned Appellate Court vide impugned judgment and order dated 04.09.1999 upheld the impugned judgment and order passed by the learned Trial Court and dismissed the appeal, hence the revision.

2. The prosecution case, in short, is that the petitioner was working as Branch Post Master in Damadorpur Branch Post office during the year 1984. He was entrusted with the work of transaction of S.B. Accounts and to maintain the relevant postal records i.e., the Branch Office S.B. Journals, Branch Office Accounts Book and Branch Office Daily Account etc. The petitioner was also in charge of receipt of deposits under different pass books and to make entries therein on receipt of cash under pay-in-slip from different account holders.

It is the further case of the prosecution is that the petitioner received an amount of Rs.11,100/- (rupees eleven thousand one hundred only) from one Jamini Kanta Nayak on 02.04.1984 against S.B. Account No.906616 standing in the name of his minor daughter Sumitra Subhalaxmi Nayak and another Rs.11,100/- (rupees eleven thousand one hundred only) against account no.906595 standing in the name of Jaminikanta Nayak along with pay-in-slips and pass books. The petitioner made entries in the pass books and returned both the pass books to Jamini Kanta Nayak along with the counterfoils of the pay-in-slips. The petitioner was bound to make correct entries with regard to the receipt of amount in the Branch Office Daily Account, Branch Office Account Books and Branch Office S.B. Journal etc. but he fraudulently obliterated the figure '11' and the word 'eleven thousands' in both the office copies of the pay-in-slips relating to S.B. Account Nos.906595 and 906616 and accounted for only Rs.100/- against each of those two accounts and thereby misappropriated a sum of Rs.22000/- (rupees twenty two thousand only) from the aforesaid two accounts.

3. On 30.03.1990 on the basis of the First Information Report (Ext.19) submitted by Sri Krushna Chandra Mohapatra (P.W.6), Sub-Inspector of Police, CBI, SPE, Bhubaneswar, R.C. Case No.17 (S) of 1990 was registered against the petitioner under section 409 of the Indian Penal Code. On the direction of Superintendent of Police, CBI, Bhubaneswar, P.W.6 took up investigation of the case, seized documents from the postal authority, examined the witnesses, collected specimen writing and signatures of the petitioner and sent them to the Govt. examiner of questioned documents (hereafter for short "GEQD"), Calcutta for examination and opinion. He also received the opinion from the GEQD, Calcutta. The charge of investigation was taken over by Sri B. Das, Inspector of Police, CBI, SPE, Bhubaneswar who on 30.10.1990 on completion of investigation submitted charge sheet under section 409 of the Indian Penal Code against the petitioner on the ground that the petitioner dishonestly misappropriated an amount of

Rs.22000/- (rupees twenty two thousand only) from the S.B. Accounts Nos.906595 and 906616.

4. The learned Trial Court framed charge under section 409 of the Indian Penal Code on 23.11.1993 against the petitioner and since the petitioner refuted the charge, pleaded not guilty and claimed to be tried, summons were issued to the witnesses.

5. During course of trial. the prosecution examined six witnesses.

P.W.1 T.S. Shambhogue was working as Deputy Divisional Manager, Vigilance Unit, Syndicate Bank, Hyderabad who stated about the taking of signatures and specimen handwritings of the petitioner in his presence by the Investigating Officer in some papers.

P.W.2 Kailash Chandra Mohanty was the Inspector of Post Offices (Complt. and Public Grievance, Bhadrak Postal Division) who produced certain documents before the Investigating Officer, CBI, as per the direction of the Superintendent of Police which was seized.

P.W.3 Shyam Sundar Sendha stated that he had given some cash to his son-in-law Jamini Kanta Nayak.

P.W.4 Sridhar Jena stated about the procedure relating to postal deposits in the Branch Post Office. He proved the handwritings and signatures of the petitioner in different documents like pay-in-slips, pass books, Branch Office Journals etc.

P.W.5 Amar Singh was the Asst. GEQD, in the GEQD Office, Calcutta and he examined the documents sent to the GEQD office by SP, CBI, Bhubaneswar in connection with the case and proved his report.

P.W.6 Krushna Chandra Mohapatra is the Investigating Officer.

The prosecution also exhibited nineteen documents.

Exts.1 to 1/55 are the specimen writing and signatures of the petitioner, Ext.2 is the pass book of Sumitra Subhalaxmi Nayak, Ext.3 is the counterfoil of the pay-in-slip, Ext.4 is the pay-in-slip corresponding to Ext.3, Ext.5 is the pass book of S.B. Account no.966565, Ext.6 is the counterfoil of pay-in-slip, Ext.7 is the pay-in-slip, Ext.8 is the entry made by the petitioner, Ext.9 is the account book, Ext.10 is the ledger card, Ext.11 to 13 are the leave applications, Ext.14 is the forwarding letter to GEQD, Ext.15 of the opinion of the GEQD, Ext.16 is the reasons for opinion, Ext.17 series are the photographs, Ext.18 is the negatives and Ext.19 is the F.I.R.

6. The defence plea of the petitioner is that he had never received Rs.11,100/- in respect of each of the accounts nor misappropriated the same but only Rs.100/- was deposited in each of the accounts and the case has been foisted at the instance of Jamini Kanta Nayak.

The defence exhibited four documents. Ext.A is the inquiry report of Superintendent of Post Offices, Bhadrak Division, Bhadrak, Ext.B is the letter no. BE-297 regarding selection of the petitioner as EDBPM at Damodarpur, Ext.C is the opinion of the GEQD and Ext.D is the statement of Jamini Kanta Nayak.

7. The learned Trial Court has been pleased to hold that granting of Ext.3 and Ext.6 (which are counterfoils of the pay-in-slips) to deceased Jamini Kanta Nayak on 02.04.1984 by the petitioner itself leads to the conclusion that on the same day, the deceased had entrusted the amounts to the petitioner. It was further held that in absence of the person who entrusted the money to the petitioner on 02.04.1984, who was the only competent witness to say if those four '11' were made by the petitioner on the same day when the counterfoils under Exts.3 and 6 were handed over by the petitioner to him along with two pass books under Ext.2 and Ext.5 and in absence of any definite opinion of P.W.5 regarding such entries and in view of the two entries at the top of Ext.4 and 7, the pay-in-slips is not sufficient to accept the contention of the defence counsel that the four '11' as noted in Ext.2/1 and Ext.5/1 are not in the hands of the petitioner but those were entered by Jamini Kanta Nayak subsequently. The learned Trial Court further held that from Ext.C, opinion of GEQD, it cannot be said that the four '11' under Exts.2/1 and 5/1 are not in the hands of the petitioner. It was further held that the entries under Exts.8/1 and 9/1 are sufficient to show that Rs.11,000/- against each of the accounts had not been accounted for by the petitioner, which amounts to criminal misappropriation by the petitioner. The learned Trial Court finally held that the prosecution has been able to establish that the petitioner committed criminal breach of trust in respect of Rs.11000/- against each of the accounts i.e., 906595 and 906616.

8. The learned Appellate Court held that it is clear that it is the petitioner who had entered deposit of Rs.11,100/- in each of the pass books and figure '11' and words 11,000/- have not been inserted subsequently in the counterfoils of the pay-in-slips. Obliteration of words in two pay-in-slips is intended to conceal original words as reflected in Ext.15 is another circumstance to go in favour of the prosecution. It is further held by the learned Appellate Court that entrustment of the deposited amount with the

petitioner by the depositors is well in evidence and there appears to be no contradiction in Ext.15 and Ext.C.

9. The learned counsel for the petitioner Mr. Devashis Panda while challenging the impugned judgment and order of conviction contended that the depositor Jamini Kanta Nayak has not been examined during trial on account of his death and his signatures and handwritings in the relevant documents have not been proved by any of his family members and therefore, the evidence of P.W.4 who never worked with the petitioner in one seat and was never a supervisor at Damodarpur Branch Post Office nor even knew the depositor Jamini Kanta Nayak should not have been accepted in proving the signatures and handwritings of the petitioner in different documents. The learned counsel for the petitioner further contended that complicated questions have been put to the petitioner vide question No.7 and question No.10 in the accused statement for which the petitioner has been seriously prejudiced. The Learned counsel placed the statement of the depositor Jamini Kanta Nayak which was recorded in the departmental proceeding which has been marked as Ext.D and placed reliance in the cases of **Kailash Kumar Sanwatia -Vrs.- State of Bihar and another reported in AIR 2003 SC 3714**, **Dadarao -Vrs.- State of Maharashtra reported in (1974) 3 Supreme Court Cases 630**, **Tanviben Pankaj Kumar Divetia -Vrs.- State of Gujarat reported in (1997) 7 Supreme Court Cases 156** and **Raj Kumar Singh @ Raju @ Batya -Vrs.- State of Rajasthan reported in (2013) 5 Supreme Court Cases 722.**

Mr. Anup Kumar Bose, learned Assistant Solicitor General on the other hand supported the impugned judgments and contended that there is no illegality or infirmity in the impugned judgments and therefore, it would not be proper to interfere with the same invoking the revisional jurisdiction. He further contended that the petitioner was the custodian of the relevant documents and he had made the relevant entries and therefore, the factum of entrustment and misappropriation of the amount is clearly established.

10. In case of **Kailash Kumar Sanwatia -Vrs.- State of Bihar and another reported in AIR 2003 SC 3714**, it is held as follows:-

> "7. Section 409 IPC deals with criminal breach of trust by public servant, or by banker, merchant or agent. In order to bring in application of said provision, entrustment has to be proved. In order to sustain conviction under Section 409, two ingredients are to be proved. They are:

(1) the accused, a public servant, or banker or agent was entrusted with property of which he is duty bond to account for; and

(2) the accused has committed criminal breach of trust.

8. What amounts to criminal breach of trust is provided in Section 405 IPC. Section 409 is in essence criminal breach of trust by a category of persons. The ingredients of the offence of criminal breach of trust are:-

(1) Entrusting any person with property, or with any dominion over property.

(2) The person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or willfully suffering any other person so as to do in violation –

(i) of any direction of law prescribing the mode in which such trust is to be discharged; or

(ii) of any legal contract made touching the discharge of trust.

9. The basic requirement to bring home the accusations under Section 405 are the requirements to prove conjointly (1) entrustment and (2) whether the accused was actuated by the dishonest intention or not misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime."

In the case of **Dadarao -Vrs.- State of Maharashtra reported in (1974) 3 Supreme Court Cases 630**, it is held that absence of evidence on a material and important aspect renders it unsafe to hold that the charge of breach of trust is brought home to the appellant. There is no direct evidence of entrustment to the appellant. On going through the record, there is no indirect evidence of entrustment. All that the prosecution did was to produce the books of account of the head office and of the branch office. There is a debit entry in the books of the branch office showing that a sum of Rs.7,000/- was given to the appellant on November 10, 1965 for being taken to the head office but the mere entry, unsupported by any oral evidence cannot prove entrustment. It is further held that section 34 of the Evidence Act says that entries in books of account, regularly kept in the course of business are

relevant but such statements shall not alone be sufficient evidence to charge any person with liability. The prosecution did not examine anyone even to show that the books of account were regularly kept in the course of business nor indeed was any attempt made to lead evidence apart from the production of the books of account to prove the entrustment of the amount to the appellant. In the vague state of the record, it is impossible to dismiss the explanation of the appellant as unreasonable. There is no evidence of entrustment, no evidence in regard to the mode and manner of keeping the accounts and not even a suggestion that the cash on hand was at any time tallied or checked. The Hon'ble Court has been pleased to hold that there was no credible evidence in support of the charge leveled against the accused and accordingly, set aside the order of conviction of the appellant under section 408 of the Indian Penal Code.

In the case in hand, though it is the prosecution case that on 02.04.1984 the petitioner received an amount of Rs.11,100/- (rupees eleven thousand one hundred only) from Jamini Kanta Nayak to deposit it in S.B. Account No. 906616 standing in the name of his minor daughter Sumitra Subhalaxmi Nayak and another sum of Rs.11,100/- (rupees eleven thousand one hundred only) for being deposited in S.B. Account No.906595 standing in his name but there is no direct evidence to that effect. Jamini Kanta Nayak could not be examined during trial on account of his death. None of his family members who were acquainted with his handwritings and signatures have also been examined.

The other account holder Miss. Sumitra Subhalaxmi Nayak has also not been examined. In the pass book Miss. Sumitra Subhalaxmi Nayak, her date of birth has been mentioned as 11th August 1983. P.W.3 who is the father-in-law of the petitioner stated that in the month of Baisakh 1985, his daughter married Jamini Kanta Nayak. If that be so, then obviously the S.B. Account No. 906616 which stands in the name of Miss. Sumitra Subhalaxmi Nayak showing the date of birth of the account holder as 11.08.1983 cannot be said to be that of the daughter of Jamini Kanta Nayak.

The only witness who has proved the handwritings and signatures of the petitioner in the pass books, counter foils of the pay-in-slips, pay-in-slips as well as Branch Office Journal and Account Books is none else than P.W.4 Sridhar Jena. P.W.4 has categorically stated that he did not know the depositor Jamini Kanta Nayak and he had never worked with the petitioner in one seat and he was not the supervisor at Damodarpur Branch Post Office. He further stated that Exts. 2, 3, 5 and 6 had never come to him in official

course of business for which he did not see them earlier and he has no personal or direct knowledge in respect of the allegation in the case. He has further stated that there were three postal people in Damodarpur Branch Post Office but none of them has been examined to identify the signatures and handwritings of the petitioner in the concerned documents. Therefore, when the competent witnesses who could have identified the handwritings and signatures of the petitioner have not been examined by the prosecution during trial and P.W.4 is not a competent witness to identify such handwritings and signatures in view of the statements made in his cross-examination, I am of the view that on the basis of the evidence of P.W.4, the factum of entrustment of money to the tune of Rs.11,100/- with the petitioner against each of the accounts i.e. 906595 and 906616 cannot be accepted.

Coming to the handwriting expert's opinion, law is well settled that since it is only opinion evidence, before acting on such evidence, the Court has a duty to see whether such evidence is corroborated either by clear direct evidence or by circumstantial evidence. Uncorroborated evidence of a handwriting expert is an extremely weak type of evidence **(Ref:- (2016) 65 Orissa Criminal Reports (SC) 592, S.P.S. Rathore -Vrs.- C.B.I.)**.

In the present case when there is absence of direct evidence and the circumstantial evidence adduced by the prosecution relating to entrustment of Rs.11,100/- with the petitioner against each of the accounts and the evidence of P.W.4 is not clinching, it is difficult to arrive at a conclusion that the petitioner was entrusted with Rs.11,100/- on 02.04.1984 against S.B. Account Nos. 906595 and 906616.

The Superintendent of Post Office, Bhadrak Division, Bhadrak submitted his inquiry report in connection with F.Misc 4-6/86 dated at Bhadrak-756100, the 28.10.1986 to the Post Master General, Orissa Circle, Bhubaneswar wherein it is mentioned as follows:-

> "From the above finding, it is clear that on both the pass books on 02.04.1984, there was deposit of Rs.100/- each and Sri J.K. Nayak with sole intention to blackmail and to trouble the Branch Post Master made manipulation in the pass books and counter foil pay-in-slips……. Though the pass books have been obtained from Sri J.K. Nayak, there is no reason to entertain the claims of Rs.22,000/-. The claims are therefore proposed to be rejected.

The enquiry report has been marked as Ext.A on 01.03.1997 as the learned Public Prosecutor, C.B.I. filed it along with other documents and submitted that he has no objection if those documents as marked as exhibits.

11. The question no. 7 and question no. 10 and the answers given by the petitioners to such questions are extracted herein below as follows:-

> "Q.7. It further transpires from his evidence that on 02.04.1984 she deposited Rs.11,100/- in her S.B. Account and you made entry and put your signature in her Pass Book vide Ext.2/1 and Ext.3 is the counter foil of the deposit and Ext.3/1 is your signature and Ext.4 is the pay-in-slip corresponding to Ext.3 and Ext.4/1 is your signature. What have you got to say?
>
> Ans:- She had deposited only Rs.100/- and not Rs.11,100/-
>
> Q.10. It further transpires from his evidence that on 02.04.1984 there was deposit of Rs.11,100/- in the said account and you made entry of the said deposit and put your signature vide Ext.5/1 and Ext.6 is the counterfoil and Ext.7 is the corresponding pay-in-slip and Ext.6/1 and Ext.7/1 are your signatures in the counter foil and pay-in-slip. What have you got to say?
>
> Ans:- No, it is false, only Rs.100/- was deposited."

Law is well settled that examination of the accused under section 313 of Cr.P.C. is not a mere formality. It has got practical utility for the criminal Courts in affording opportunity to the accused to explain the incriminating circumstances. The questions should be framed in an easily understandable manner and they should not be lengthy and complicated. Several distinct matters of evidence should not be rolled up in a single question. Long and involved questions embracing a number of matters are not to be put to the accused. The Court must frame the questions in a manner that the accused could be able to understand easily and to answer the same.

Looking at the questions nos. 7 and 10, it appears that so many things have been put in it and such type of questions will naturally prejudice the case of the accused inasmuch as if the questions are not properly put then the accused would not get any chance of explaining the same properly. Therefore, I am of the view that putting the questions in the manner as has been done in this case in respect of questions nos. 7 and 10 which are on very material aspects of the case, it has caused serious prejudice to the petitioner. The Hon'ble Supreme Court in the case of **Tanviben Pankaj Kumar Divetia -Vrs.- State of Gujarat reported in (1997) 7 Supreme Court Cases 156** held that the falsity of the defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea may be considered as an additional circumstance if other circumstances

proved and established point out the guilt of the accused. In case of **Raj Kumar Singh @ Raju @ Batya -Vrs.- State of Rajasthan reported in (2013) 5 Supreme Court Cases 722**, it is held that the statement under section 313 Cr.P.C. cannot be made a basis for conviction of the accused and it is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence laid by the prosecution, though it cannot be a substitute for the evidence of the prosecution and adverse inference can be made against the accused only and only if the incriminating material stands fully established and the accused is not able to furnish any explanation for the same. Of course, the accused has a right to remain silent as he cannot be forced to become a witness against himself.

12. Law is well settled that when the findings of facts recorded by the Courts below are not supportable on the evidence on record, the revisional Court would be justified for conducting an independent reassessment of evidence and to supplant a conclusion of his own. If there is any manifest illegality, perversity and miscarriage of justice, the High Court in exercise of its revisional jurisdiction can certainly interfere with the concurrent findings of facts.

In view of the above discussions, when the material evidence have been overlooked by both the Courts below which according to my opinion has resulted in causing serious miscarriage of justice and prejudice to the appreciation of evidence, I am of the humble view that the impugned judgments and orders of conviction are not sustainable in the eye of law.

Accordingly, the revision petition is allowed. The impugned judgment and order of conviction of the petitioner under section 409 of the Indian Penal Code and the sentence passed there under is hereby set aside. The petitioner is on bail by virtue of the order of this Court. He is discharged from the liability of his bail bond. The personal bond and surety bond stand cancelled.

Revision allowed.

2017 (I) ILR - CUT- 531

DR. D.P. CHOUDHURY, J.

W.P.(C) NO. 10845 of 2009

ACHYUTANANDA PARIDA ……..Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – Art-311

Retiral benefits – Delayed payment of pension and gratuity amount from 01.04.1997 till the year 2009 – Petitioner has no fault in furnishing required documents and in complying the direction of the department – Delay caused due to laches by the opposite party and there is no non co-operation by the petitioner as alleged by them – Opposite parties have not only violated the provisions of Orissa Civil Services (Pension) Rules, 1992 but also violated the right of the petitioner to get pension in time – Held, opposite parties are liable to pay interest on the delayed payment of pension – Direction issued to the opposite parties to award interest @ 9 % per annum on the delayed payment of pension and gratuity amount from 01.04.1997 till the date of actual payment in 2009 within eight weeks from the date of receipt of a copy of the order, failing which the same shall carry interest at the rate of 18% per annum. (Paras 27 to 34)

Case Laws Relied on :-

1. AIR 2014 SC 2861 : D.D. Tewari (D)Thr. LRs v. Uttar Haryana Bijli Vitran Nigam Limited and Ors.

For Petitioner : Mr. R.K.Rath, P.K.Satpathy, R.N.Parija, A.K.Rout & S.K.Pattnaik

For opp. parties : Mr. Prakash Kumar Mohanty (ASC)
M/s. B.K.Pattnaik & P.K.Mishra
Mr. Bibekananda Nayak, SC. (Central Govt)

Date of hearing : 22.11.2016
Date of Judgment:31.01. 2017

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge has been made to the inaction of the opposite parties for not sanctioning the interest on the delayed payment of the pension and gratuity.

FACTS

2. The factual matrix leading to the case of the petitioner is that the petitioner initially joined as Supervisor, telecommunication under erstwhile Orissa State Electricity Board (hereinafter called "the Board") and after rendering more than 28 years of service promoted to the rank of Assistant Engineer on 17.5.1996. At that time Board was re-designated as Grid Corporation of Orissa (GRIDCO) in accordance with the Orissa Electricity Reform (Transfer of undertaking, Assets, Liability and Personnel) Rules, 1996. Be it stated that the aforesaid Rule was framed under the Orissa Electricity Reform Act 1995 under which the services of all the Telecommunication Engineers including the petitioner appointed under the Board were transferred to GRIDCO for permanent absorption with effect from 1.4.1997.

3. It is the case of the petitioner that from 1.4.1997 the employees whose services seized with Board got absorbed with the GRIDCO would get pension after absorption under GRIDCO, petitioner submitted application for voluntary retirement and vide order No.72794 dated 22.12.1998 the authority under GRIDCO accepted the voluntary retirement of the petitioner and accordingly the petitioner got retired from GRIDCO voluntarily on 31.1.1999.

4. In the meantime Government of Orissa in the Department of Energy sought option from the petitioner whether he would draw the pension from the Government or not and the petitioner along with similarly situated Engineers opted to draw their pension from the Government till the date of their permanent absorption in GRIDCO. Pending consideration of such option, the petitioner was sanctioned payment of provisional pension with effect from 1.4.1997 but he was not paid with such provisional pension till 8.4.2009. After the Additional Secretary to Government in the Department of Energy issued a letter on 30.1.2009 to the District Treasury Officer, Khurda stating that the petitioner has not been paid with provisional pension, commuted value of pension and gratuity vide Annexure-6. Petitioner was paid with all his pensionary benefits, i.e., the pension from 1.4.1997 to 31.3.2009 amounting to Rs.10,44,116/- and gratuity of Rs.1,49,350/- on 8.4.2009. Such pension was only paid without any interest to the petitioner.

5. Be it stated that the petitioner is no way responsible for the delay occurred during the process of sanctioning and disbursing the pensionary benefits although the petitioner supplied all information in time when the authority sought for same in respect of pension. Due to the inaction of the

opposite parties petitioner had also filed a writ application vide O.J.C. No.9922 of 2001 with a prayer to fix up his pay in accordance with Rule 74 (b) of the Orissa Service Code which was disposed of on 6.8.2004 with a direction to the present opposite parties to inform the petitioner about the requirements for sanction of regular pension and after necessary compliance of the present petitioner, the opposite parties would take a decision within a period of two months. In spite of the order of this Court no communication was made by the opposite parties to the present petitioner about the requirements and formalities. However, later the Government sought for original service proofs of the petitioner from the GRIDCO. Since the order could not be complied, the petitioner had filed CONTC No.65 of 2005 before this Court and in that contempt petition the Principal Secretary to Government, Department of Energy informed the Court that vide letter No.3081 dated 9.3.2005 the pension, gratuity and commuted value of pension of the petitioner has been sanctioned and his pay has been fixed under Rule 74(b) of the Orissa Service Code. After this fact being informed to the Court, the Court passed order in the contempt petition to supply photo copy of the sanction letter dated 9.3.2005 to the petitioner. But despite such order to supply a copy in course of the day, i.e, on 17.8.2007, the opposite parties supplied the copy of the sanction order on 13.11.2007.

6. After receipt of the sanction order, the petitioner found that the opposite parties have failed to sanction appropriate scale of pay under Rule 74 (b) of the Orissa Service Code in favour of the petitioner for which he filed Misc. Case No.884 of 2007 in the disposed of writ application bearing O.J.C. No.9922 of 2001 which was dismissed by this Court on 14.2.2008. Since the opposite parties failed to pay the pensionary benefits right from 1.4.1997 to 31.3.2009 and the gratuity was also not paid for such period, the petitioner preferred this writ application for allowing payment of interest on the delayed payment of pension and gratuity @ 18% per annum.

7. Per contra, the opposite party No.1 filed counter affidavit stating that the writ petition is not maintainable and there is delay in sanctioning and disbursement of pension is attributable to the absolute non-cooperation of the petitioner in not furnishing the required certificates to enable the Department to draw and disburse his provisional pension sanctioned since 4.1.2002. On the other hand, due to non-cooperation of the petitioner, the delay was only caused in drawal and disbursal of the pensionary benefit. Be it stated that due to permanent absorption of the petitioner along with similarly placed persons under the provisions of the Orissa Electricity Reforms Act, 1995, a huge

exercise has to be purportedly undertaken by the opposite parties for payment of same and thereby causing delay in issuing letter of sanction in 2000. Only after receiving all the documents from GRIDCO, the Department of Energy sanctioned provisional pension and commuted value of pension on 4.1.2002. After sanction of the provisional pension, the petitioner was required to submit his non-employment certificate for which the same was called for vide letter dated 16.8.2002.

8. As the petitioner did not reconcile his minus G.P.F. balance out-lay before the Accountant General, the disbursal of his final pensionary benefit was again complicated. It is the further case of the opposite parties that the Accountant General, Orissa had intimated the Department of Energy to recover Rs.3,05,216/- from the petitioner towards minus balance of G.P.F. which was later finalized and reduced to Rs.1,57,647/- by the opposite party No.4 (Accountant General (A&E), Orissa) and this was intimated to the Department of Energy on 3.12.2004. In spite of the letter of the Accountant General (A & E), Orissa and the same being communicated to the petitioner by the opposite party No.1 to deposit the amount of negative balance of G.P.F. but the present petitioner failed to comply the same and submitted to adjust the recoverable amount from his gratuity/interest amount of his dues already accrued by law for delayed payment along with the rest of the provident fund accumulation. But the State Government being not empowered to adjust the minus G.P.F. balance, did not finalize the dispute. After receipt of the order from this Court in O.J.C. No.9122 of 2000 final pension of the petitioner was sanctioned vide letter No.3081 dated 9.3.2005 and the same was sent to the Accountant General, Orissa with a suggestion to recover Rs.1,57,647/- as minus balance of G.P.F. and Rs.37,563/- as excess payment made to the petitioner earlier due to wrong fixation of pay by way of Reducible Personal Pay. Accordingly the Accountant General, Orissa issued authorization in favour of pension and commuted value of pension vide letter dated 25.4.2005 to the opposite party No.1 with a copy to the petitioner.

9. Be it stated that as the petitioner did not take step for adjustment of the G.P.F. minus balance in spite of the subsequent letter dated 20.12.2005, the Accountant General, Orissa asked the Department of Energy to return the Pension Payment Order and Commutation Pension Order. Then the opposite party No.1 returned Pension Payment Order (hereinafter called 'PPO') and commuted value of pension to the Accountant General, Orissa on 10.1.2006. It is the case of the opposite party No.1 that due to sole attitude of non-cooperation on the part of the petitioner for not giving non-employment

certificate and other requirements like taking steps to reconcile the minus G.P.F. balance amount, the delay was caused in payment of the Pension and gratuity.

10. As per the order of the Court, the petitioner has not complied the formalities and resultantly the opposite party No.1 could not disburse the pensionary benefit. Had the petitioner cooperated well with the pension sanctioning authority and Accountant General, he could have received the substantial amount of pensionary benefit much before 13.1.2009. So, the opposite parties are no way responsible for delayed payment of the pensionary benefit of the petitioner and as such no interest can be payable for the delayed payment of the pensionary benefit to the petitioner.

11. The opposite party No.4 has filed the separate counter affidavit stating that after retirement of the petitioner from Government service, the pension papers of the petitioner were forwarded to the office of the opposite party No.4 by Pension Sanctioning Authority vide letter No.3081 dated 9.3.2005 and in that case also the Pension Sanctioning Authority had instructed to recover an amount of Rs.1,95,209.25 (Rs.1,57,647/- towards minus balance in G.P.F.+Rs.37,562.25 towards excess payment). So, the Pension Payment Order and Commutation Payment Order were issued by the opposite party No.4 authorising the petitioner to draw the same on 21.4.2005. Since the total admissible amount of DCRG of Rs.1,23,250/- being insufficient to adjust the suggested recovery of Rs.1.95,209.25, the opposite party No.4 intimated the opposite party No.1 to recover Rs.71,959/- from the petitioner.

12. Be it stated that the opposite party No.1 intimated the opposite party No.4 vide letter dated 5.8.2008 that due to increase of the pension on re-fixation of the scale of pay, recovery of excess payment of Rs.37,562.25 may not be necessary. After receipt of the Pension papers of the petitioner from the opposite party No.1 vide letter dated 9.9.2008 of opposite party No.1, the revised pensionary benefits as well as differential gratuity amount were calculated and accordingly the opposite party No.1 was intimated. Then Pension Sanctioning Authority submitted revised pension papers of the petitioner fixing his pay at Rs.10,500/- to opposite party No.4 with a request to issue a revised authority. So, the opposite party No.4 issued the revised pension and gratuity authority in 2015 after adjusting the recovery of the amount as intimated by the Pension Sanctioning Authority. It is stated that the opposite party No.4 has taken always prompt steps after the necessary pension papers received from the opposite party No.1. So, the opposite party No.4 is not liable towards payment of interest.

13. Petitioner has filed the rejoinder reiterating the stand taken in the petition. It is only added in the rejoinder that even if the petitioner with the knowledge of the opposite party has been absorbed in GRIDCO since 1.4.1997 and working there till his retirement, requirement of non-engagement certificate was uncalled for. Moreover, it is the case of the petitioner that for drawal of the provisional pension, the submission of the non-employment certificate is not required under the Orissa Civil Services (Pension) Rules, 1992 (hereinafter called "Pension Rules"). Moreover, the role of the petitioner in no way attributable for delayed payment of the provisional and final pension to the petitioner. Since there is delayed payment of the provisional pension and no formalities is required for payment of the provisional pension, the petitioner is entitled for interest on delayed payment for long after 12 years of the date of his retirement. So, the O.Ps. cannot wriggle out from the payment of interest on the delayed payment of the pension and gratuity.

SUBMISSIONS

14. Mr. P.K. Rath, learned counsel for the petitioner submitted that there is no fault on the part of the petitioner to comply the formalities on being asked by the opposite parties. He further submitted that whether it is provisional pension or regular pension including the gratuity under the Orissa Service Code, the employer is liable to pay the interest on the delayed payment of the pension or gratuity. Under Section 7 (3) of the Payment of Gratuity Act also the employee is entitled to the interest on the delayed payment of pension and gratuity. Learned counsel for the petitioner also relied upon the decision of the Hon'ble Supreme Court in the case of ***D.D. Tewari (D)Thr. LRs v. Uttar Haryana Bijli Vitran Nigam Limited and others,*** reported in ***AIR 2014 SC 2861***, where Their Lordships observed that where there is withholding of payment of gratuity erroneously under the Payment of the Gratuity Act, 1972 (hereinafter called "the Act"), the petitioner is entitled to pay the interest on the delayed payment of the gratuity. So, he submitted to allow the interest on the delayed payment of the pension including the provisional pension and gratuity.

15. Mr. P. K. Mohanty, learned Additional Standing Counsel for opposite party Nos.1 and 2, Mr. B. K. Pattnaik, learned counsel for opposite party No.3 and Mr. B. Nayak, learned Central Government Counsel for opposite party No.4 in order to meet the rival contention submitted that in the instant case after retirement of the petitioner from the Board with effect from 1.4.1997, the provisional pension has been sanctioned but the same could not

be disbursed due to non-cooperation by the present petitioner to submit the documents. They also submitted that the facts and circumstances of each case must be taken into consideration while awarding interest on delayed payment of the gratuity. They submit that this Court in W.P.(C) No.9883 of 2005 were to consider the claim of similarly situated employees to grant interest on the delayed payment of gratuity. In that case this Court has not relied upon the decision reported in ***D.D. Tewari (D) Thr. LRs v. Uttar Haryana Bijli Vitran Nigam Limited and others,*** (supra) by distinguishing the same on the facts and circumstances of that case. Relying upon such decision, he submitted that in the present case petitioner himself having not co-operated the opposite parties in finalizing the pension and gratuity, is not entitled to any interest on the delayed payment of gratuity and pension.

16. <u>The main points for consideration:-</u>

(i) Whether there is non-cooperation by the petitioner for sanctioning the pension and gratuity?

(ii) Whether the petitioner is entitled for interest on delayed payment of the pension, gratuity including the provisional pension and provisional gratuity?

<u>DISCUSSIONS</u>
<u>POINT NO.(i)</u> :

17. It is admitted fact that the petitioner was serving in the Board and after the establishment of GRIDCO, he was working as Assistant Engineer under GRIDCO with effect from 1.4.1997 till his retirement, i.e., on 31.1.1999 when he voluntarily retired from GRIDCO. It is not in dispute that he has sought for pension from the State Government with effect from 1.4.1997 as he has rendered more than ten years of service under the State Government. It is also admitted fact that he has not received provisional pension, pension and gratuity with effect from 1.4.1997 till year 2009 when the same were paid to the petitioner.

18. It is not in dispute that the petitioner has filed O.J.C. No.9922 of 2001 before this Court for payment of pension and this Court passed order on 6.8.2004 directing the opposite parties to take a decision for payment of regular pension within a period of two months. It is also not in dispute that due to non-compliance of the order, the petitioner had filed CONTC No.65 of 2005 before this Court for compliance of the order and this Court directed the State Government to supply the photocopy of the sanction order dated 9.3.2005 to the petitioner as the opposite parties took the plea that the State

Government has sanctioned the pension, gratuity and commuted value of pension vide letter No.3081 dated 9.3.2005 and there is fixation of pay under Rule-74(b) of Orissa Service Code. Again, the petitioner preferred W.P.(C) No.6707 of 2008 with a prayer to direct the opposite parties to sanction appropriate scale as per Rule-74(b) of the Orissa Service Code and the same is sub-judice.

19. There is only dispute between the parties when the petitioner claims that in spite of all efforts, he had not received the provisional pension which he ought to have received immediately after retirement from Government service and got regular pension after twelve years of his retirement whereas the opposite parties refuted the same by stating that the delay in making payment of the pensionary benefits occurred due to the non-cooperation by the petitioner to the opposite parties.

20. Both the parties have produced documents in support of their plea taken in the writ petition and counter affidavit. It will be worthwhile to discuss the documents in respect of their respective plea. Annexures-2, 3 and 4 show that pursuant to the provisions of the Orissa Electricity Reform Act, 1995 and the Orissa Electricity Reform (Transfer of undertakings, Assets, Liabilities, Proceedings & Personnel) Scheme Rules, 1996, the petitioner along with other Assistant Engineers working under the Board were absorbed with effect from 1.4.1997 and they were allowed to receive pension from the State Government with effect from 1.4.1997 as their services were seized as Government servant from 31.3.1997 after being absorbed in the GRIDCO with effect from 1.4.1997. Annexure-5 shows that on 4.1.2002, the petitioner was issued sanction order for provisional pension with effect from 1.4.1997. The same is also admitted by the opposite party no.1 to have been issued vide Annexure-A/1. The opposite party no.1 took the plea that they have issued the letter to the petitioner on 16.8.2002 and 17.1.2003 vide Annexure-B/1 and Annexure-C/1 to furnish non-employment certificate for drawal of provisional pension and arrear claim. These two documents go to show that they are draft for approval but not the office copy of issuance of the same to the petitioner. Moreover, when the provisional pension was sanctioned on 4.1.2002, it is not understood as to why much thereafter letters were issued for furnishing the non-employment certificate by the petitioner for drawal of the provisional pension arrear claim. Such Annexure-B/1 and Annexure-C/1 do not disclose for which period the non-employment certificate has been asked for. So, the plea of the opposite party no.1 as to failure on the part of

the petitioner to furnish the required documents as called for though such documents are not being satisfactorily proved.

21. It is revealed from the counter affidavit of opposite party no.3 that they have issued letter dated 19.4.2002 vide Annexure-C/3 to the effect that final GPF account arrived at a minus balance of Rs.3,05,216/- and the petitioner was asked to deposit said amount under appropriate Head of Account. At the same time, it has been mentioned in counter affidavit that they have asked the petitioner to file certain relevant documents and he has complied the same on 2.8.2000 and then all documents were forwarded to the Government of Orissa. If at all the petitioner has complied all the documents and all were sent to the State Government in the Department of Energy, the plea of the opposite parties that the petitioner did not comply the requirements is not correct. Moreover, the opposite party no.3 has not annexed any paper to show the minus balance of Rs.3,05,216/- arrived by the opposite party no.4. On the other hand, the opposite party no.1 filed a document vide Annexure-D/1 issued by the Sr. Accounts Officer, Orissa, Office of the Accountant General (A & E), Orissa, Bhubaneswar to show that they have sent letter to recover an amount of Rs.1,57,647/- as minus balance in GPF account of the petitioner from the gratuity of the petitioner. This letter appears to have been issued on 3.12.2004 but again vide Annexure-E/1 to the counter of opposite party no.1, the opposite party no.1 showed the Office Note to show that the petitioner was asked to deposit the minus balance of GPF for Rs.2,55,127/- and to furnish LPC in original towards finalization of pension. Since the amount of minus balance in the GPF account of the petitioner varies from time to time, mistake on the part of the petitioner for non-compliance of the same cannot be said to be deliberate one or he intentionally avoided to pay the same.

22. Further, the opposite parties filed the copy of the documents vide Annexure-F/1, which goes to show that the opposite party no.1 sent all pension papers of the petitioner to opposite party no.4 vide letter no.3081 dated 9.3.2005 for sanctioning of the pension and in that letter, there is an endorsement to recover Rs.1,57,647/- as minus balance in GPF and Rs.37,561/- excess payment of RPP. The same document has also been admitted by the petitioner in his writ petition. So, it is the opposite party no.1 who sent all the pension papers only on 9.3.2005 to the Accountant General, Orissa, Bhubaneswar for sanctioning of regular pension to the petitioner. There is nothing found from the counter affidavit or the documents filed to show any provisional pension was disbursed to the petitioner in pursuance of the sanction of the provisional pension on 4.1.2002.

23. The opposite party no.1 filed the sanction of commutation of pension vide Annexure-G, which is part of the pensionary benefits of the petitioner stated to have been issued by opposite party no.4 on 12.4.2005. The opposite party no.1 also relied on Annexure-H/1 which shows that the Pension Payment Order and commuted value of pension order of the petitioner was called back since the DCRG amount payable to the petitioner falls short of Rs.34,397/- to meet the GPF minus balance amount and the revised pension payment for Rs.37,562/- and accordingly those papers were returned. But, there is no any instruction from the Accountant General (A & E) Orissa for non-disbursement of the provisional pension.

24. The opposite party no.4, in their counter affidavit, admitted all these documents and specifically stated that after receiving all pension papers of the petitioner from the opposite party no.1 on 9.3.2005, they made scrutiny and on their part, there is no delay in taking action. Rather, they have revised the pay of the petitioner from time to time as per the order of this Court vide Annexure-A/4 and accordingly pension has been revised. Finally on 5.1.2009, the pension was allowed for disbursement by PPO No.351394. On the other hand, the petitioner filed a letter dated 25.9.2004 whereunder he has informed that the State Government to deduct the minus balance shown in his GPF account vide letter dated 15.9.2004 to be adjusted from his gratuity/interest amount. The GRIDCO has also informed vide Annexure-11 to recover any amount towards the GPF minus balance from the terminal benefits of the petitioner. Not only this, but also the petitioner has also filed a copy of the letter dated 13.9.2004 vide Annexure-12 to show that since he has not been communicated with any letter to comply any formalities, he has nothing to comply in compliance of the order of this Court passed in OJC No.9922 of 2001.

25. It is the case of the petitioner that due to non-sanction of any provisional pension, regular pension, gratuity and other pensionary benefits, the petitioner had to file OJC No.9922 of 2001 before this Court and this Court, on 6.8.2009, passed an order directing the opposite parties to communicate the requirements and formalities to the petitioner within two weeks and then the petitioner would comply the same for the sake of sanction of the pension which was then kept under active consideration of the Government. So, it appears that the petitioner had knocked the door of this Court for direction to the opposite parties for disposal of the pensionary benefits. Not only this, but also it is revealed from the writ petition that since the order was not complied, the petitioner had to file CONTC No.65 of 2005

which was also disposed of on 17.8.2007 directing the learned State Counsel to supply the photocopy of the sanction order of the Government dated 9.3.2005 as to sanction of the pensionary benefits and it was complied on 13.11.2007. It is further revealed from the petition that since the salary of the petitioner was not revised as per the rules, he had filed a misc. case in OJC No. 9922 of 2001, but it was dismissed as not maintainable. Then, the petitioner preferred another writ petition, i.e, W.P.(C) No.6707 of 2008 to direct the opposite parties to sanction appropriate scale as per Rule-74(b) of the Orissa Service Code. But the present writ petition is unconnected with the relief asked in W.P.(C) No.6707 of 2008.

26. From the above marathon discussion, it is clear that the opposite parties have played hide-and-seek with the petitioner by not granting provisional pension, commutation of pension and gratuity because the provisional pension which ought to have been sanctioned without scrutiny of detailed formalities as per Rule 65 of the Orissa Civil Services (Pension) Rules, 1992 immediately after the retirement. But, the same was only sanctioned on 4.1.2002 and that to say it was not disbursed because of some vague objection which was only raised after issuance of the sanction letter. Moreover, it is felt necessary to observe that only after filing of the writ petition by the petitioner in the year 2001, the matter proceeded but with snail's pace**.** Since the petitioner was working in GRIDCO and asking for pension from the State Government in the Department of Energy, correspondence was made between the departments occasionally to show that the offices are busy in complying the process of payment of pension. It is made clear by the opposite party no.4 that only on 9.3.2005, all pension papers were sent. When the petitioner has given in writing, before hand that any amount to be recovered may be adjusted against his gratuity or pensionary benefit, there is no question of keeping his matter pending till 2009 when the Court has to again enter into the dispute in a contempt petition.

27. Apart from this, when the petitioner has already been absorbed in the GRIDCO after the necessary order passed by the State Government in consultation with GRIDCO vide Annexures-2, 3 and 4, the question of asking for non-employment certificate and non-drawal of the salary of the petitioner are otiose. It is lamentable to observe that the opposite parties have shown lackadaisical attitude which caused delay in making payment of the pensionary benefits including the provisional pension of the petitioner for no fault of him and the matter has been only expedited due to the intervention of

the Court from time to time, which is very sorry affairs on the part of the opposite parties. Be that as it may, it must be observed that there is no non-cooperation by the petitioner for the sanction of the provisional pension, regular pension and the gratuity. Point No.I is answered accordingly.

28. POINT No. (II)

Annexure-1 shows that in pursuance of the order of this Court passed in OJC No.6886 of 1999 on 8.9.1999, the State Government in Public Grievances and Pension Administration Department has issued instruction to all the Departments of Government and all Heads of Department in the following manner:

"xx xx xx xx

Authority	Duty of authority	Time Schedule	Relevant provisions/ notification
1	2	3	4
1.Head of Office	1. Verification of service particulars prior to retirement.	He shall verify the service of Government servant 5 years before the date of retirement or after 25 years service which is ordinarily extended	Finance Department O.M. No.5731/F., dated 5.2.1997
	2. Processing of pension papers.	2.He shall prepare pension papers 2 years before the date of retirement on superannuation	Sub-rule(1) of Rule 58 of the Rules.
		ii) He shall obtain the particulars from Govt. servant at least one year before the retirement and complete processing of pension papers not later than 8 months in advance of the date of retirement.	Sub-rule (2) of Rule 58 of the Rules
		iii) Where Head of Office is not the Appointing Authority, the pension papers shall be transmitted to the PSA one year before the date of retirement.	Sub-rule (3) of Rule 58 of the Rules
		iv) Head of Office shall complete part 1 of OCS (P) Form 7 not later than 6 months of the date of retirement and forward the same along with Form 6 to the Appointing Authority.	Rule 61 of the Rules.
2. Pension sanctioning Authority (Appointing Authority)	Sanction of pension	Appointing Authority shall sanction the pension and intimate the same to the A.G. not later than 4 months before the date of retirement of Govt. servant.	Rule 62(2) of the Rules.
3. Accountant General, Orissa	Authorisation of P.P.O/G.P.O.	A.G. shall issue the P.P.O./G.P.O. not later than one month in advance of the date of retirement.	Rule 64 (1) of the Rules.

2. For sake of ready reference the extract of the para.18 of the aforesaid judgment dated 8.9.99 of the Honourable High Court of Orissa is reproduced beblow:

"We dispose of this application with a direction to the State Government to administratively instruct all the Heads' of Department and the concerned officials to ensure that different steps prescribed to be taken under the Rules are rigidly followed and any non-observance thereof is to be strictly viewed. If there is any delay in payment of pension the pensioner shall be entitled to 18% interest per annum for the period of delay and this interest shall be recovered from the person/persons responsible for the delay. While fixing the rate of interest, we have kept in view the minimum bank rate of interest changed for borrowing from bank. This aspect shall also be notified to all concerned. We are sure, if such stringent steps in addition to those, which the State Government may feel necessary to impose, are taken there shall be aided compliance of the requirement of law and in future the old retired persons shall not be required to move in the corridors of the Court with tears in their eyes and a faint any of hope of getting remedy early, and not posthumous."

3. In pursuance of the above orders of the Hon'ble High Court, it is hereby instructed that all concerned should rigidly follow the time schedule for sanction of pension as mentioned above. Otherwise the pensioner will be liable to get interest @18% per annum for the period of delay and this interest shall be recovered from the person/persons responsible for such delay. In case there exist sufficient reasons for non-sanction of pension and gratuity by the date of retirement, the pension-sanctioning authority should see that the retiring govt. servant is sanctioned with provisional pension and provisional gratuity as provided under rule 65 of O.C.S. Pension Rules, 1992. For the purpose of grant of provisional pension and provisional gratuity in accordance with the aforesaid rule Pension Sanctioning Authority need not earlier insist on or wait for a formal application from the retiring Govt. servant.

4. At times pensions are not finalized on the plea that the information sought for from the office down below have not been received. At other times pleas are taken that for non-disposal of proceedings against the retired employees, pension payments are getting delayed. If the delay is caused due to non-furnishing of

> required particulars within the time, the persons concerned are also to be taken to task and held responsible for payment of interest in part or full. If the proceedings are not finalized within the stipulated time, the officer concerned should be taken to task and held responsible for payment of interest. These stipulations are, however, subject to the condition that the concerned employee who is due for retirement or has retired furnishes the required information/documents (like specimen signature, photo etc.) to the respective authorities for processing the pension papers as per the stipulated time. For this, the authority shall have to ask the concerned employee, in writing to furnishing such information as and when required specifying the time limit.
>
> xx xx xx xx"

29. From the aforesaid instruction issued by the Government on the line of the judgment of this Court, it appears that no such provision as enshrined in the Orissa Civil Services (Pension) Rules, 1992 read with aforesaid instruction of the State Government have been followed from the fact and circumstances as discussed above. Even the provisional pension which ought to have been sanctioned and disbursed without requiring any formality have also not been followed. It has already been observed in the aforesaid paragraphs that the petitioner has no fault in furnishing the documents and complying the direction of the Department. So, the opposite parties have not only violated the provisions of the Rules, 1992 but also have violated the right of the petitioner to get pension on time. It must be remembered that pension is not a bounty or charity but it is a right of every Government servant to receive the same.

30. Learned counsel for the petitioner relied upon the decision of the Hon'ble Supreme Court in the case of ***D.D. Tewari (D)Thr. LRs v. Uttar Haryana Bijli Vitran Nigam Limited and others, (Supra)*** where Their Lordships, at paragraphs-5 and 6, have observed as under:

> "5. It is needless to mention that the respondents have erroneously withheld payment of gratuity amount for which the appellants herein are entitled in law for payment of penal amount on the delayed payment of gratuity under the provisions of the Payment of Gratuity Act, 1972. Having regard to the facts and circumstances of the case, we do not propose to do that in the case in hand.
>
> 6. For the reasons stated above, we award interest at the rate of 9% on the delayed payment of pension and gratuity amount from the date of

entitlement till the date of the actual payment. If this amount is not paid within six weeks from the date of receipt of a copy of this order, the same shall carry interest at the rate of 18% per annum from the date of amount falls due to the deceased employee. With the above directions, this appeal is allowed."

31. From the aforesaid decision, it appears that for delayed payment of gratuity under the provisions of Payment of Gratuity Act, 1972, the interest is payable on the delayed payment of gratuity and not only this but also the interest is payable on the delayed payment of pension and gratuity from the date of entitlement till the date of actual payment.

32. Learned Central Government Counsel and the learned Additional Government Advocate, in contrast to the submission of the learned counsel for the petitioner, cited the decision of this Court passed in W.P.(C) No.9883 of 2005 disposed of on 8.1.2016 and submitted that in view of the judgment passed by this Court in W.P.(C) No.9883 of 2005, the present writ petition should be rejected because the facts and circumstances of that case is similar to the facts and circumstances of this case. He further submitted that the decision of the Hon'ble Supreme Court in the case of ***D.D. Tewari (D)Thr. LRs v. Uttar Haryana Bijli Vitran Nigam Limited and others (Supra),*** has not been followed by this Court for the reason that the facts and circumstances of ***D.D. Tewari (D)Thr. LRs v. Uttar Haryana Bijli Vitran Nigam Limited and others, (Supra)*** are different from the facts and circumstances of the case in W.P.(C) No.9883 of 2005. After going through the judgment of this Court, it appears that in that case, the petitioner has fault in not complying the requirements as asked and this Court has also observed that the petitioner in that case has not taken the recourse to any Court of law but demanded payment of interest after long time of regularization of service in the year 1968. Now, in the present case, it has already been observed that the petitioner has no latches in complying the requirements as asked by the opposite parties and the opposite parties are at fault in causing the delay in payment of pension and gratuity. Rather, the facts and circumstances of this case is more similar to the fact and circumstances in the case of ***D.D. Tewari (D)Thr. LRs v. Uttar Haryana Bijli Vitran Nigam Limited and others, (Supra).*** Hence, the decision of this Court in W.P.(C) No.9883 of 2005 is inapplicable to this case.

33. With due respect to the decision of the Hon'ble Supreme Court in the Case of ***D.D. Tewari (D)Thr. LRs v. Uttar Haryana Bijli Vitran Nigam Limited and others, (Supra)*** and in view of the facts and circumstances of

this case that the opposite parties have got laches in causing the delay in sanction the pension and gratuity of the petitioner long after twelve years of his retirement, this Court would like to award interest on the delayed payment of pension and gratuity from the date of entitlement till the date of actual payment. Point No.(II) is answered accordingly.

34. CONCLUSION

From the foregoing discussion and relying on the decision of the Hon'ble Supreme Court in the case of ***D.D. Tewari (D)Thr. LRs v. Uttar Haryana Bijli Vitran Nigam Limited and others (Supra)*****,** the writ petition is disposed of with a direction to the opposite parties to award interest @ 9% per annum on the delayed payment of pension and gratuity amount from 1.4.1997 till the date of actual payment in 2009. It is further directed that if this payment is not paid within eight weeks from the date of receipt of a copy of this order, the same shall carry interest at the rate of 18% per annum from the date the amount falls due to the petitioner.

Writ petition disposed of.

2017 (I) ILR - CUT- 546

DR. D.P. CHOUDHURY, J.

W.P.(C). NO.18908 OF 2013

RADHARANI SAMAL .....Petitioner

.Vrs.

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

ODISHA EDUCATION (RECRUITMENT AND CONDITION OF SERVICE OF TEACHERS AND MEMBERS OF THE STAFF AIDED EDUCATIONAL INSTITUTIONS) RULES, 1974 – RULE, 16 (2)

Petitioner passed B. A., Ratna and worked as Hindi Teacher in a Block Grant High School – She claimed Trained Graduate scale of pay on attaining the age of 48 years – Eligibility – Held, since the petitioner has passed revised common qualification i.e requisite qualification at par with Trained Graduate Teachers and similarly situated employees have already received the said benefit, she is entitled to receive Trained Graduate scale of pay – Direction issued to O.P. Nos 2 and 3 for fixing the scale of pay of the petitioner when she attained the age of 48 years. (Paras 8,9)

For Petitioner : M/s. Jyotirmay Gupta

Date of Order : 24.11 16

ORDER

DR. D.P. CHOUDHURY, J.

Heard Mr. Jyotirmay Gupta, learned counsel for the petitioner and Mr. Ajit Kumar Mohanty, learned Standing Counsel for the School and Mass Education Department.

2. Challenge has been made to the inaction of the opposite parties in not disbursing the differential arrear salary as well as current salary to the petitioner in trained graduate scale of pay from the date of attaining the age of 48 years.

3. It is submitted by the learned counsel for the petitioner that by virtue of Annexure-7, the clarification dated 16.4.2010 issued by the Joint Secretary to Government, School and Mass Education Department, the untrained graduate teachers in Government/Non-Government M.E. and High School on attaining the age of 48 years, are eligible to get trained graduate scale of pay. He drew the attention of the Court to Annexure-8, the letter issued by the Deputy Director (NGS), Orissa, Directorate of Secondary Education, Orissa to all the Inspectors of Schools to submit the proposal on the cases in which the Managing Committee of Block Grant High Schools have appointed persons against such posts to accord permission by the Government to approve such all such posts. He also further drew the attention of this Court to Annexure-9 where the Head Mistress of Banamali Brahmachari Girls' High School has recommended the case of the petitioner to the concerned Inspector of School to allow her to draw salary as trained teacher as the petitioner has attained the age of 48 years having requisites qualification in accordance with the circular as stated above. With reference to the rejoinder affidavit dated 3.9.2014 filed by the petitioner to the counter filed by opposite party no.3, he further submits that similarly situated persons have already been paid the necessary differential salary as well as current salary vide No.632 dated 6.2.2014 issued by the DEO, Kalahandi and Office Order No.11007 dated 3.9.2013 issued by the D.E.O., Cuttack. So, he submits that there should not be discrimination between the petitioner and her colleagues and accordingly, the petitioner should be paid the differential salary as well as current salary.

4. Learned Standing Counsel for the School and Mass Education Department submits that there was a clarification dated 6.5.2014 issued by

the Deputy Director (NGS), Directorate of Secondary Education, Odisha (Annexure-A/3) and the same is reproduced as under:

> "Copy of the Letter No.9270/S&ME Dt.6.5.2014 from Government of Odisha, Department of School & Mass Education addressed to the Director Secondary Education, Odisha.
>
> Sub:-Clarification regarding allowing Trained scale of pay to the untrained teachers including Hindi & Sanskrit Teachers continuing in Aided High Schools/Block Grant High Schools on attaining the age of 48 years.
>
> I am directed to invite a reference to your letter No.4428 dt.29.01.2014 on the above subject and to say that (I) Exemption from undergoing the training course and entitlement to financial benefits of a trained teacher is only applicable to such teachers recruited under O.E. Rules, 1974 & 1993 only.
>
> (ii) Since Block grant Teachers are not recruited under O.E. Rules-1974 & O.F. Rules-1993, the aforesaid provision is not applicable to them.
>
> (iii) Since Hindi & Sanskrit Teachers are not compulsorily deputed to any training programme, the aforesaid provision is not applicable to them.
>
> Sd/-
> Under Secretary to Government"

5. He further submits that by virtue of above notification, the petitioner is not entitled for the relief and similarly situated persons have been granted such relief before issuance of such clarification.

6. Considered the submission made by the learned counsel appearing for the respective parties. In view of the Office Order No.11340 dated 12.11.2008 (Annexure-3), the petitioner, having B.A., Ratna qualification since 16.7.2008, has been drawing the salary of Hindi teacher in a block grant high school as issued by the Inspector of Schools, Jajpur Circle, Jajpur. In the counter affidavit, at paragraph-7, it is clearly mentioned that vide Government Resolution No.3424/SME dated 18.2.2008, a bachelors degree from recognized university with Hindi in one of the elective subject or with Rastrabhasa Ratna from Rastrabhasa Prachar Samiiti, Wardha amongst others have been recognized as requisite qualification for the post of Hindi teacher. In paragraph-8 of the said counter affidavit, it is admitted that the post of such Hindi teacher has been upgraded to the status and scale of pay

of Trained Graduate Teachers as per the Government Resolution under Annexure-6 to the writ petition. Clause-13 of the aforesaid Resolution dated 18.2.2008 (Annexue-6) may be reproduced below for better appreciation:

> "13.The Hindi Teachers possessing the revised common qualification shall be entitled Scale of Pay at par with Trained Graduate Teachers Scale of Pay. The Pay of such Hindi Teachers shall be fixed notionally as per Rule 74(b) of Orissa Service Code.
>
> The Pay of Hindi Teachers, who have availed T.B.A. Scale of pay Rs.5,000-150-/,000 shall be fixed under Rule 74(d) of Orissa Service Code.
>
> The quantum of Block Grant Hindi Teachers continuing with the revised qualifications in Block Grant High Schools shall be determined at par with T.G. Teachers of same Schools G.I.A. Order, 2004, read with Amendment Order, 2007 with effect from the date of issue of this Resolution."

7. In view of the aforesaid Resolution, since the petitioner has possessed the requisite qualification to receive the scale of pay at par with trained graduate teachers, even if she is a block grant high school teachers and rejoinder affidavit dated 3.9.2014 shows that similarly situated employees, in other circles, have received the trained graduate scale of pay after attaining the age of 48 years, the petitioner, having attained the age of 48 years, there is no bar for her to receive the scale of pay of a trained graduate teacher. On the other hand, there could not be discrimination between the petitioner and her colleagues. However, the learned Standing Counsel for the School and Mass Education Department has placed clarification dated 6.5.2014 (Annexure-A/3) which has already been produced in the foregoing paragraphs and states that the Hindi and Sanskrit teachers who are not compulsorily deputed to any training programme, would not avail the benefit of scale of pay applicable to a trained graduate teacher.

8. Since the present petitioner has made her grievance to get the scale of pay of trained graduate teacher before such notification/clarification is issued, she is entitled to get the same because of the observation made above and there should not be discrimination between her and her other colleagues. Moreover, granting of similar benefits to other colleagues of the petitioner by the opposite parties, as mentioned in the rejoinder affidavit, did go uncontroverted by the opposite parties.

9. Keeping in view the aforesaid discussions, this Court is of the view that the petitioner is entitled to trained graduate scale of pay and consequences. Accordingly, the opposite parties 2 and 3 are directed to fix up the scale of pay of the petitioner in trained graduate scale of pay notionally when he attains the age of 48 years, i.e, July, 2011, calculate the differential salary and disburse the same as well as current salary within a period of two months from the date of production of a certified copy of this order failing which the petitioner is entitled for the same amount with interest at the rate of 9% per annum from the date of his entitlement till actual payment. The writ petition is accordingly disposed of.

Writ petition disposed of.