SUPREME COURT OF INDIA

DIPAK MISRA, J. & AMITAVA ROY J.

CRIMINAL APPEAL NO. 1144 OF 2016
(@ SPECIAL LEAVE PETITION (CRL.) NO. 5478 OF 2015)

THE STATE OF TELANGANA ……..Appellant(s)

.Vrs.

HABIB ABDULLAH JEELANI & ORS. ……..Respondent(s)

CRIMINAL PROCEDURE CODE, 1973 – S. 482

Whether the High Court, while refusing to exercise inherent powers U/s 482 Cr. P.C. to interfere in an application to quash an investigation, can restrain the investigating agency not to arrest the accused persons during the course of investigation ? Held, No

In this case, the High Court while disposing of an application U/s 482 Cr.P.C., directed the investigating agency not to arrest the accused persons – This direction amounts to an order U/s 438 Cr.P.C., *albeit* without satisfaction of the conditions of the said provision, which is legally unacceptable – Held, it is the duty of a Judge to sustain the judicial balance and not to think of an order which can cause trauma to the process of adjudication – The impugned order passed by the High Court is setaside – Direction issued that the investigation shall proceed in accordance with law.

(Paras 25,26)

Case Laws Referred to :-

1. AIR 1945 PC 18 : King Emperor v. Khwaja Nazir Ahmad[1]
2. (2014) 2 SCC 1 : Lalita Kumari v. Government of Uttar Pradesh & Ors[2]
3. AIR 1992 SC 604 : State of Haryana and Ors. v. Bhajan Lal and Ors.[3]
4. (2005) 6 SCC 1 : Jacob Mathew v. State of Punjab[4].
5. (1970) 1 SCC 595 : P. Sirajuddin v. State of Madras[5]
6. (2003) 6 SCC 175 : CBI v. Tapan Kumar Singh[6]
7. (1972) 1 SCC 452 : Hazari Lal Gupta v. Rameshwar Prasad[7]
8. AIR 1974 SC 1146: Jehan Singh v. Delhi Administration[8]
9. (1977) 4 SCC 137 : AIR 1977 SC 2185 Amar Nath v. State of Haryana[9]
10. (1977) 4 SCC 451 : AIR 1977 SC 2229 : Kurukshetra University v. State of Haryana[10]
11. AIR 1980 SC 326 : State ofBihar v. J.A.C. Saldanha[11]
12. AIR 1982 SC 949 : State of West Bengal v.Swapan Kumar Guha[12]
13. AIR 1976 SC 1947: Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi[13]
14. (1988) 1 SCC 692 : AIR 1988 SC 709 Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre[14]
15. (1988) 4 SCC 655 : AIR 1989 SC 1 : State of Bihar v. Murad Ali Khan[15]
16. (2012) 5 SCC 690 : Rashmi Rekha Thatoi and Anr. v. State of Orissa and Ors.[16]

17. (1980) 2 SCC 565 : AIR 1980 SC 1632: Gurbaksh Singh Sibbia v. State of Punjab[17]
18. Savitri Agarwal[18]
19. Bay Berry Apartments (P) Ltd. v. Shobha[19]
20. U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey[20]."
21. (2013) 16 SCC 797: Ranjit Singh v. State of Madhya Pradesh &Ors.[21]
22. (2014) 4 SCC 453 : Hema Mishra v. State of Uttar Pradesh and Ors.[22]
23. (1994) 3 SCC 569 : Kartar Singh v. State of Punjab[23]
24. 2000 Cri LJ 569 (All) : Satya Pal v. State of U.P.24, Ajeet
25. 2007 Cri LJ 170 (All) : Singh v. State of U.P.[25]
26. 1998 Cri LJ 2366 (All): Lalji Yadav v. State of U.P.[26]
27. 1997 Cri LJ 2705 (All) : Kamlesh Singh v. State of U.P. [27]
28. 1994 Cri LJ 1919 (All) : Natho Mal v. State of U.P. [28]
29. 2005 Cri LJ 755 (All) : Amarawati v. State of U.P.[29]
30. (2009) 4 SCC 437 : Lal Kamlendra Pratap Singh v. State of U.P.[30]

Appellant : Mr. S. Udaya Kumar Sagar
Respondents : M/s. Nilofar Khan

Date of judgment : 06.01.2017

JUDGMENT

DIPAK MISRA, J.

The seminal issue that arises for consideration in this appeal, by special leave, is whether the High Court while refusing to exercise inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) to interfere in an application for quashment of the investigation, can restrain the investigating agency not to arrest the accused persons during the course of investigation.

2. The facts lie in a narrow compass. On the basis of a report by the informant under Section 154 CrPC, FIR No. 205/2014 dated 26.07.2014 was registered at Chandrayanagutta Police Station, Hyderabad for the offences punishable under Sections 147, 148 149 and 307 of the Indian Penal Code (IPC). Challenging the initiation of criminal action, the three accused persons, namely, accused Nos. 1, 2 and 5, (respondent Nos. 1, 2 and 3 herein) invoked inherent jurisdiction of the High Court in Criminal Petition No. 10012 of 2014 for quashing of the FIR and consequential investigation. As the impugned order would show, the learned single Judge referred to the FIR and took note of the submissions of the learned counsel for the petitioners therein that all the allegations that had been raised in the FIR were false and they had been falsely implicated and thereafter expressed his disinclination to interfere on the ground that it was not appropriate to stay the investigation of the case. However, as a submission had been raised that the accused persons were innocent and there had been allegation of false implication, it would be

appropriate to direct the police not to arrest the petitioners during the pendency of the investigation and, accordingly, it was so directed.

3. It is submitted by Mr. Harin P. Raval, learned senior counsel appearing for the State that the informant had sustained grievous injuries and was attacked by dangerous weapons and custodial interrogation of the accused persons is absolutely essential. According to him, the High Court in exercise of inherent power under Section 482 CrPC can quash an FIR on certain well known parameters but while declining to quash the same, it cannot extend the privilege to the accused persons which is in the nature of an anticipatory bail. Learned senior counsel would submit that the nature of the order passed by the High Court is absolutely unknown to the exercise of inherent jurisdiction under Section 482 CrPC and, therefore, it deserves to be axed.

4. Ms. Nilofar Khan, learned counsel appearing for the respondent Nos. 1 to 3 in support of the order passed by the High Court submitted that the custodial interrogation is not necessary in the facts of the case. She would further submit that the plentitude of power conferred on the High Court under Section 482 CrPC empowers it to pass such an order and there being no infirmity in the order, no interference is warranted by this Court.

5. The controversy compels one to visit the earlier decisions. In ***King Emperor v. Khwaja Nazir Ahmad***[1] while deliberating on the scope of right conferred on the police under Section 154 CrPC, Privy Council observed:-

> "… so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas

[1] AIR 1945 PC 18

> corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then."

6. Having stated what lies within the domain of the investigating agency, it is essential to refer to the Constitution Bench decision in ***Lalita Kumari v. Government of Uttar Pradesh and Ors***[2]. The question that arose for consideration before the Constitution Bench was whether "a police officer is bound to register a first information report upon receiving any information relating to commission of a cognizable offence under Section 154 CrPC or the police officer has the power to conduct a 'preliminary inquiry' in order to test the veracity of such information before registering the same"? While interpreting Section 154 CrPC, the Court addressing itself to various facets opined that Section 154(1) CrPC admits of no other construction but the literal construction. Thereafter it referred to the legislative intent of Section 154 which has been elaborated in ***State of Haryana and Ors. v. Bhajan Lal and Ors.***[3] and various other authorities. Eventually the larger Bench opined that reasonableness or credibility of the information is not a condition precedent for the registration of a case. Thereafter there was advertence to the concept of preliminary inquiry. In that context, the Court opined thus:-

> "103. It means that the number of FIRs not registered is approximately equivalent to the number of FIRs actually registered. Keeping in view the NCRB figures that show that about 60 lakh cognizable offences were registered in India during the year 2012, the burking of crime may itself be in the range of about 60 lakhs every year. Thus, it is seen that such a large number of FIRs are not registered every year, which is a clear violation of the rights of the victims of such a large number of crimes. 104. Burking of crime leads to dilution of the rule of law in the short run; and also has a very negative impact on the rule of law in the long run since people stop having respect for the rule of law. Thus, non-registration of such a large number of FIRs leads to a definite lawlessness in the society.
>
> 105. Therefore, reading Section 154 in any other form would not only be detrimental to the scheme of the Code but also to the society as a whole. It is thus seen that this Court has repeatedly held in various decided cases that registration of FIR is mandatory if the information given to the police under Section 154 of the Code discloses the commission of a cognizable offence."

[2] (2014) 2 SCC 1
[3] AIR 1992 SC 604

7. While dealing with the likelihood of misuse of the provision, the Court ruled thus:-

> "114. It is true that a delicate balance has to be maintained between the interest of the society and protecting the liberty of an individual. As already discussed above, there are already sufficient safeguards provided in the Code which duly protect the liberty of an individual in case of registration of false FIR. At the same time, Section 154 was drafted keeping in mind the interest of the victim and the society. Therefore, we are of the cogent view that mandatory registration of FIRs under Section 154 of the Code will not be in contravention of Article 21 of the Constitution as purported by various counsel."

8. The exceptions that were carved out pertain to medical negligence cases as has been stated in ***Jacob Mathew v. State of Punjab***[4]. The Court also referred to the authorities in ***P. Sirajuddin v. State of Madras***[5] and ***CBI v. Tapan Kumar Singh***[6] and finally held that what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence.

9. Be it noted, certain directions were issued by the Constitution Bench, which we think, are apt to be extracted:-

> "120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.
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> 120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

[4] (2005) 6 SCC 1, [5] (1970) 1 SCC 595, [6](2003) 6 SCC 175

(a) Matrimonial disputes/family disputes
(b) Commercial offences
(c) Medical negligence cases
(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

10. We have copiously referred to the aforesaid decision for the simon pure reason that at the instance of the informant the FIR was lodged and it was registered which is in accord with the decision of the Constitution Bench.

11. Once an FIR is registered, the accused persons can always approach the High Court under Section 482 CrPC or under Article 226 of the Constitution for quashing of the FIR. In ***Bhajan Lal*** (supra) the two-Judge Bench after referring to ***Hazari Lal Gupta v. Rameshwar Prasad***[7], ***Jehan Singh v. Delhi Administration***[8], ***Amar Nath v. State of Haryana***[9], ***Kurukshetra University v. State of Haryana***[10], ***State of Bihar v. J.A.C. Saldanha***[11], ***State of West Bengal v. Swapan Kumar Guha***[12], ***Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi***[13], ***Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre***[14], ***State of Bihar v. Murad Ali Khan***[15] and some other authorities that had dealt with the contours of exercise of inherent powers of the High Court, thought it appropriate to mention certain category of cases by way of illustration wherein the

[7] (1972) 1 SCC 452, [8] AIR 1974 SC 1146, [9] (1977) 4 SCC 137 : AIR 1977 SC 2185
[10] (1977) 4 SCC 451 : AIR 1977 SC 2229, [11] AIR 1980 SC 326, [12] AIR 1982 SC 949[13] AIR 1976 SC 1947, [14] (1988) 1 SCC 692 : AIR 1988 SC 709, [15] (1988) 4 SCC 655 :AIR 1989 SC 1

extraordinary power under Article 226 of the Constitution or inherent power under Section 482 CrPC could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends ofjustice. The Court also observed that it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad cases wherein such power should be exercised. The illustrations given by the Court need to be recapitulated:-

> "(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> (4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
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> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
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> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a

> view to spite him due to private and personal grudge." It is worthy to note that the Court has clarified that the said parameters or guidelines are not exhaustive but only illustrative. Nevertheless, it throws light on the circumstances and situations where court's inherent power can be exercised.

12. There can be no dispute over the proposition that inherent power in a matter of quashment of FIR has to be exercised sparingly and with caution and when and only when such exercise is justified by the test specifically laid down in the provision itself. There is no denial of the fact that the power under Section 482 CrPC is very wide but it needs no special emphasis to state that conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the Court.

13. In this regard, it would be seemly to reproduce a passage from ***Kurukshetra University*** (supra) wherein Chandrachud, J. (as His Lordship then was) opined thus:-

> "2. It surprises us in the extreme that the High Court thought that in the exercise of its inherent powers under Section 482 of the Code of Criminal Procedure, it could quash a first information report. The police had not even commenced investigation into the complaint filed by the Warden of the University and no proceeding at all was pending in any court in pursuance of the FIR. It ought to be realised that inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. That statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases."

14. We have referred to the said decisions only to stress upon the issue, how the exercise of jurisdiction by the High Court in a proceeding relating to quashment of FIR can be justified. We repeat even at the cost of repetition that the said power has to be exercised in a very sparing manner and is not to be used to choke or smother the prosecution that is legitimate. The surprise that was expressed almost four decades ago in ***Kurukshetra University's*** case compels us to observe that we are also surprised by the impugned order.

15. In the instant case, the High Court has not referred to allegations made in the FIR or what has come out in the investigation. It has noted and correctly that the investigation is in progress and it is not appropriate to stay the investigation of the case. It has disposed of the application under Section 482 CrPC and while doing that it has directed that the investigating agency

shall not arrest the accused persons. This direction "amounts" to an order under Section 438 CrPC, *albeit* without satisfaction of the conditions of the said provision. This is legally unacceptable.

16. To appreciate the nature of the order passed, it is necessary to have a survey of the authorities that deal with grant of anticipatory bail. In ***Rashmi Rekha Thatoi and Anr. v. State of Orissa and Ors.***[16] the High Court while rejecting the application for anticipatory bail had directed that if the accused persons surrender, the trial magistrate shall release them on bail on such terms and conditions as he may deem fit and proper. Analysing the scope of Section 438 CrPC as expressed by the Constitution Bench in ***Gurbaksh Singh Sibbia v. State of Punjab***[17] and other decisions, the Court held thus:-

> "33. We have referred to the aforesaid pronouncements to highlight how the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* had analysed and explained the intrinsic underlying concepts under Section 438 of the Code, the nature of orders to be passed while conferring the said privilege, the conditions that are imposable and the discretions to be used by the courts. On a reading of the said authoritative pronouncement and the principles that have been culled out in ***Savitri Agarwal***[18] there is remotely no indication that the Court of Session or the High Court can pass an order that on surrendering of the accused before the Magistrate he shall be released on bail on such terms and conditions as the learned Magistrate may deem fit and proper or the superior court would impose conditions for grant of bail on such surrender. When the High Court in categorical terms has expressed the view that it is not inclined to grant anticipatory bail to the petitioner-accused it could not have issued such a direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest. It is in clear violation of the language employed in the statutory provision and in flagrant violation of the dictum laid down in *Gurbaksh Singh Sibbia (supra)* and the principles culled out in *Savitri Agarwal (supra)*. It is clear as crystal the court cannot issue a blanket order restraining arrest and it can only issue an interim order and the interim order must also conform to the requirement of the section and suitable conditions should be imposed."

Elaborating further, the Court held:-

[16] (2012) 5 SCC 690 , [17] (1980) 2 SCC 565 : AIR 1980 SC 1632. ,[18] (2009) 8 SCC 325

> "36. In the case at hand the direction to admit the accused persons to bail on their surrendering has no sanction in law and, in fact, creates a dent in the sacrosanctity of law. It is contradictory in terms and law does not countenance paradoxes. It gains respectability and acceptability when its solemnity is maintained. Passing such kind of orders the interest of the collective at large and that of the individual victims is jeopardised. That apart, it curtails the power of the regular court dealing with the bail applications.
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> 37. In this regard it is to be borne in mind that a court of law has to act within the statutory command and not deviate from it. It is a well-settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. This has been so stated in ***Bay Berry Apartments (P) Ltd.*** **v.** ***Shobha***[19] **and** ***U.P. State Brassware Corpn. Ltd.*** **v.** ***Uday Narain Pandey***[20]**."**

17. In ***Ranjit Singh v. State of Madhya Pradesh and Ors.***[21] the High Court had directed that considering the nature of the allegation and the evidence collected in the case-diary, the petitioner shall surrender before the competent court and shall apply for regular bail and the same shall be considered upon furnishing necessary bail bond. The said order was challenged before this Court. The two-Judge Bench was constrained to observe:-

> "It is the duty of the superior courts to follow the command of the statutory provisions and be guided by the precedents and issue directions which are permissible in law. We are of the convinced opinion that the observations made by the learned Single Judge while dealing with second application under Section 438 CrPC were not at all warranted under any circumstance as it was neither in consonance with the language employed in Section 438 CrPC nor in accord with the established principles of law relating to grant of anticipatory bail. We may reiterate that the said order has been interpreted by this Court as an order only issuing a direction to the accused to surrender, but as we find, it has really created colossal dilemma in the mind of the learned Additional Sessions Judge. We are pained to say that passing of these kind of orders has become quite frequent and the sagacious

[19] (2006) 13 SCC 737, [20] (2006) 1 SCC 479, [21] (2013) 16 SCC 797

saying, "a stitch in time saves nine" may be an apposite reminder now. We painfully part with the case by saying so."

18. At this juncture, we are obliged to refer to the decision in ***Hema Mishra v. State of Uttar Pradesh and Ors.***[22] . In the said judgment, the Court was dealing with the power of the High Court of Allahabad pertaining to grant of pre-arrest bail in exercise of extraordinary or inherent jurisdiction and it is significant, for in the State of Uttar Pradesh Section 438 CrPC has been deleted by the State Legislature. Be it noted that constitutional validity of the said deletion was challenged before the Constitution Bench in ***Kartar Singh v. State of Punjab***[23] wherein it has been held that deletion of the application of Section 438 CrPC in the State of Uttar Pradesh is constitutional. The Constitution Bench has ruled held that claim for pre-arrest protection is neither a statutory nor a right guaranteed under Article 14, Article 19 or Article 21 of the Constitution of India. The larger Bench has further observed thus:-

"368. (17) Though it cannot be said that the High Court has no jurisdiction to entertain an application for bail under Article 226 of the Constitution and pass orders either way, relating to the cases under the 1987 Act, that power should be exercised sparingly, that too only in rare and appropriate cases in extreme circumstances. But the judicial discipline and comity of courts require that the High Courts should refrain from exercising the extraordinary jurisdiction in such matters."

19. The Allahabad High Court has taken similar view in several judgments, namely, ***Satya Pal v. State of U.P.***[24], ***Ajeet Singh v. State of U.P.***[25], ***Lalji Yadav v. State of U.P.***[26], ***Kamlesh Singh v. State of U.P.***[27] and ***Natho Mal v. State of U.P.***[28].

20. In ***Hema Mishra*** (supra) the Court referred to the decision in ***Amarawati v. State of U.P.***[29] which has been affirmed by this Court in ***Lal Kamlendra Pratap Singh v. State of U.P.***[30]. In ***Lal Kamlendra Pratap Singh*** (supra) it has been held thus:-

"6. The learned counsel for the appellant apprehends that the appellant will be arrested as there is no provision for anticipatory bail in the State of U.P. He placed reliance on a decision of the Allahabad High Court in *Amarawati* v. *State of U.P. (supra)* in which a seven-

[22] (2014) 4 SCC 453 ,[23] (1994) 3 SCC 569, [24] 2000 Cri LJ 569 (All) ,[25] 2007 Cri LJ 170 (All)
[26] 1998 Cri LJ 2366 (All), [27] 1997 Cri LJ 2705 (All), [28] 1994 Cri LJ 1919 (All)
[29] 2005 Cri LJ 755 (All), [30] (2009) 4 SCC 437

Judge Full Bench of the Allahabad High Court held that the court, if it deems fit in the facts and circumstances of the case, may grant interim bail pending final disposal of the bail application. The Full Bench also observed that arrest is not a must whenever an FIR of a cognizable offence is lodged. The Full Bench placed reliance on the decision of this Court in ***Joginder Kumar* v. *State of U.P.***[31]"

21. After referring to the same, Radhakrishnan, J. opined thus:-

"I may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pinpoint what are the appropriate cases, which have to be left to the wisdom of the Court exercising powers under Article 226 of the Constitution of India."

22. Sikri, J. in his concurring opinion stated that though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well-established principles, so much so that while entertaining writ petitions for granting interim protection from arrest, the Court would not go on to the extent of including the provision of anticipatory bail as a blanket provision. It has been further observed that such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a device to advance justice and not to frustrate it. The powers are, therefore, to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by the authorities indiscriminately making pre-arrest of the accused persons. In entertaining such a petition under Article 226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Article 226 is not to be exercised liberally so as to convert it into Section 438 CrPC proceedings, keeping in mind that when this provision is specifically omitted in the State of Uttar Pradesh, it cannot be resorted to as back door entry via Article 226. On the other hand, wherever the High Court finds that in a given case if the protection against pre-arrest is

[31] (1994) 4 SCC 260

not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its power under Article 226 of the Constitution. Keeping in mind that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified.

23. We have referred to the authority in ***Hema Mishra*** (supra) as that specifically deals with the case that came from the State of Uttar Pradesh where Section 438 CrPC has been deleted. It has concurred with the view expressed in ***Lal Kamlendra Pratap Singh*** (supra). The said decision, needless to say, has to be read in the context of State of Uttar Pradesh. We do not intend to elaborate the said principle as that is not necessary in this case. What needs to be stated here is that the States where Section 438 CrPC has not been deleted and kept on the statute book, the High Court should be well advised that while entertaining petitions under Article 226 of the Constitution or Section 482 CrPC, exercise judicial restraint. We may hasten to clarify that the Court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, has the jurisdiction to quash the investigation and may pass appropriate interim orders as thought apposite in law, but it is absolutely inconceivable and unthinkable to pass an order of the present nature while declining to interfere or expressing opinion that it is not appropriate to stay the investigation. This kind of order is really inappropriate and unseemly. It has no sanction in law. The Courts should oust and obstruct unscrupulous litigants from invoking the inherent jurisdiction of the Court on the drop of a hat to file an application for quashing of launching an FIR or investigation and then seek relief by an interim order. It is the obligation of the court to keep such unprincipled and unethical litigants at bay.

24. It has come to the notice of the Court that in certain cases, the High Courts, while dismissing the application under Section 482 CrPC are passing orders that if the accused-petitioner surrenders efore the trial magistrate, he shall be admitted to bail on such terms and conditions as deemed fit and appropriate to be imposed by the concerned Magistrate. Sometimes it is noticed that in a case where sessions trial is warranted, directions are issued that on surrendering before the concerned trial judge, the accused shall be enlarged on bail. Such directions would not commend acceptance in light of the ratio in ***Rashmi Rekha Thatoi*** (supra), ***Gurbaksh Singh Sibbia*** (supra), etc., for they neither come within the sweep of Article 226 of the Constitution of India nor Section 482 CrPC nor Section 438 CrPC. This Court in ***Ranjit Singh*** (supra) had observed that the sagacious saying "a stitch in time saves nine" may be an apposite reminder and this Court also painfully so stated.

25. Having reminded the same, presently we can only say that the types of orders like the present one, are totally unsustainable, for it is contrary to the aforesaid settled principles and judicial precedents. It is intellectual truancy to avoid the precedents and issue directions which are not in consonance with law. It is the duty of a Judge to sustain the judicial balance and not to think of an order which can cause trauma to the process of adjudication. It should be borne in mind that the culture of adjudication is stabilized when intellectual discipline is maintained and further when such discipline constantly keeps guard on the mind.

26. In view of the aforesaid premises, we allow the appeal, set aside the impugned order of the High Court and direct that the investigation shall proceed in accordance with law. Be it clarified that we have not expressed anything on any of the aspects alleged in the First Information Report.

Appeal allowed.

2017 (I) ILR - CUT- 187 (S.C.)

SUPREME COURT OF INDIA

A.K. SIKRI, J. & N.V. RAMANA, J.

CIVIL APPEAL NO. 6223 OF 2016
WITH
CIVIL APPEAL NO. 10187-88 OF 2016
(ARISING OUT OF SLP(C) NOS. 29105-29106 OF 2011)
WITH BATCH

LANCO ANPARA POWER LTD. ……..Appellant (s)

.Vrs.

STATE OF UTTAR PRADESH & ORS. ……..Respondent (s)

BUILDING AND OTHER CONSTRUCTION WORKERS (REGULATION OF EMPLOYMENT AND CONDITIONS OF SERVICE) ACT, 1996 – S.2 (d)
r/w Sec.4 of Welfare Cess Act, 1996.

CONSTRUCTION WORKERS – Legislation for payment of cess to them – Appellants are in the process of construction of civil works where they planned to setup factories – Due to non-payment of cess, show cause notice issued to the appellants under the BOCW Act, 1996, demanding cess – Action challenged in writ petitions before the High

Courts – Writ petitions dismissed – Hence the appeals – In the absence of any "Manufacturing process" the project of the appellants do not come within the definition of "factory", merely because they have obtained licence U/s 6 of the factories Act, 1948 – Both BOCW Act and welfare cess Act have been made for the social security and welfare of the unorganized labour class involved in construction activities – Held, the construction of the projects of the appellants is covered by the definition of "building or other construction work" as defined under the BOCW Act – Construction workers engaged by the appellants for construction of buildings are not covered by the factories Act – The welfare measures specifically provided for such workers under the BOCW Act, 1996 and welfare cess Act, 1996 can not be denied to them – Appeals filed by the appellants are dismissed with costs.

(Paras 33,34,35)

Case Laws Referred to :-

1. (1990) 3 SCC 682 : Punjab Land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labour Court, Chandigarh & Ors[1]
2. (1979) 1 SCC 361 : B.N. Mutto v. T.K. Nandi[2]
3. 1957 SCR 121 : Shri Hariprasad Shivshanker Shukla & Anr. v. Shri A.D. Divelkar & Ors.[3]
4. (1985) 1 SCC 218 : Regional Director, Employees State Insurance Corporation,Trichur v. Ramanuja Match Industries[4]
5. (2001) 7 SCC 71 : Dadi Jagannadham v. Jammulu Ramulu & Ors[5]
6. (2001) 8 SCC 24 : Shyam Sunder and others v. Ram Kumar & anr.[6]
7. (2002) 4 SCC 297 : Grasim Industries Ltd. v. Collector of Customs, Bombay.[7]
8. (2004) 5 SCC 385 : Deepal Girishbhai Soni and Others v. United India Insurance Co. Ltd., Baroda[8]
9. 1964 SCR (1) 860 : Bhikusa Yamasa Kshatriya (P) Ltd. v. Union of India & anr.[9]
10. (2012) 1 SCC 101 : Dewan Chand Builders and Contractors v. Union of India & Ors[10]
11. (1979) 4 SCC 573 : Organo Chemical Industries v. Union of India[11].
12. (1988) 4 SCC 284 : Atma Ram Mittal v. Ishwar Singh Punia[12]:
13. AIR 1960 SC 1068 : In M.P. Mineral Industry Association v. Regional Labour Commr. (Central)[13]
14. (1980) 4 SCC 443 : Surendra Kumar Verma v. The Central Government Industrial Tribunal[14]
15. (1985) 4 SCC 71 : Workmen of American Express v. Management of American Express[15]
16. (1975) 2 SCC 791 : Carew and Co. Ltd. v. Union of India[16]:
17. (2009) 9 SCC 61 : Bombay Anand Bhavan Restaurant v. Deputy

Director, Employees' State Insurance Corporation & Anr.[17]

18. (2000) 4 SCC 406 : Allahabad Bank v. Canara Bank[18]

19. 2016 (1) SCALE 1 : Pegasus Assets Reconstruction P. Ltd. v. M/s. Haryana Concast Limited & Anr.[19]

20. (2016) 4 SCC 179 at Page No.197 : Richa Mishra v. State of Chhattisgarh & Ors.[20]

21. (2016) 3 SCC 619 – Para 31 Shailesh Dhairyawan v. Mohan Balkrishna Lulla[21].

Appellant : Mr. Umesh Kumar Khaitan
Respondents : Mr. Ravi Prakash Mehrotra

Date of judgment: 18.11.2016

JUDGMENT

A.K. SIKRI, J.

Leave granted in SLP (C) Nos. 29105-29106 of 2011, SLP (C) No. 26363 of 2016 and SLP (C) No. 26330 of 2016. Since pure question of law is involved, we allow the transfer petition and transfer cases and also take up, along with these appeals, the writ petitions which were filed before the respective High Courts.

2. These appeals are filed by the appellants challenging the orders passed by different High Courts i.e. High Court of Allahabad, High Court of Orissa, High Court of Madhya Pradesh and High Court of Karnataka. These High Courts, however, are unanimous in their approach and have reached the same conclusion. In all these cases, appellants were issued show cause notices by the concerned authorities under the provisions of the Building And Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter referred to as 'BOCW Act') and Buildings And Other Construction Workers Welfare Cess Act, 1996 (hereinafter referred to as 'Welfare Cess Act'). They had challenged those notices by filing writ petitions in the High Courts on the ground that the provisions of BOCW Act or Welfare Cess Act were not applicable to them because of the reason that they were registered under the Factories Act, 1948. It may be mentioned that at the relevant time no manufacturing operation had commenced by the appellants. In fact, all these appellants were in the process of construction of civil works/factory buildings etc. wherein they had planned to set up their factories. As the process of construction of civil works was undertaken by the appellants wherein construction workers were engaged, the respondent authorities took the view that the provisions of the aforesaid Acts

which were meant for construction workers became applicable and the appellants were supposed to pay the cess for the welfare of the said workers engaged in the construction work. The appellants had submitted that Section 2(d) of the BOCW Act which defines 'building or other construction work' specifically states that it does not include any building or construction work to which the provision of the Factories Act, 1948 or the Mines Act, 1952 apply. Since the appellants stood registered under the Factories Act, they were not covered by the definition of building or other construction work as contained in Section 2(d) of the Act and, therefore, said Act was not applicable to them by virtue of Section 1(4) thereof. All the High Courts have negated the aforesaid plea of the appellants on the ground that the appellants would not be covered by the definition of factory defined under Section 2(m) of the Factories Act in the absence of any operations/ manufacturing process and, therefore, mere obtaining a licence under Section 6 of the Factories Act would not suffice and rescue them from their liability to pay cess under the Welfare Cess Act.This is, in nutshell, the subject matter of all these appeals. However, in order to understand the full implication of the issue involved and to answer the said issue, it would be apt to take note of certain facts from one of these appeals. This factual canvass is suitably available in the events that have occurred leading to the filing of Civil Appeal No. 6223/2016.

3. In this appeal, the appellant proposed to set up a 2X600 Megawatt capacity coal-based thermal power project namely “Anpara C” at Anpara in District Sonebhadra, Uttar Pradesh (“the Project”), pursuant to being selected in a tariff-based competitive bidding initiated by the Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd. (UPRVUNL) on behalf of the Uttar Pradesh Power Corporation Ltd. (UPPCL). The project consists of two Steam Turbine Generators (STG) each having capacity of 600 MW and two pulverised coal fired steam generators and the balance of plant. The appellant, in respect of the aforesaid project, made an application to the Director of Factories, Uttar Pradesh, submitting the layout/drawings of the proposed plants and requesting for registration of the project as a factory under the provisions of the Factories Act, 1948 and the Uttar Pradesh Factories Rules, 1950. The appellant was granted registration and licence under Section 6 of the Factories Act, 1948 read with Uttar Pradesh Factories Rules, 1950 for the said Project, as a factory. Respondent No. 1 notified the Uttar Pradesh Building and other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2009 (for short 'BOCW Rules') on 04.02.2009. Immediately thereafter, the appellant received a notice of even date issued by

respondent No. 2, intimating that the Chief Secretary, Government of Uttar Pradesh had directed that "establishments" engaged in construction activities were required to get themselves registered under the provisions of the BOCW Act and the BOCW Rules. Simultaneously, a letter of even date was also received from the District Collector, Sonebhadra, Uttar Pradesh, calling upon the appellant to get itself/its contractors registered under the provisions of the BOCW Act and the BOCW Rules. The appellant, vide its letter of even date, replied to the aforesaid communication dated 19.04.2010 of the District Collector, Sonebhadra, stating that the appellant was undertaking the construction activity of the Project under the provisions of the Factories Act and as such, in view of Section 2(1)(d) of the BOCW Act, the Project was exempted from the application of the BOCW Act, and consequently the Welfare Cess Act and BOCW Rules inasmuch as the provisions of the Factories Act apply to the Project.

4. The respondents were not satisfied with the aforesaid stand taken by the appellant. Thus, show cause notice dated 17.02.2011 was issued by respondent No. 2 as to why action be not taken against the appellant for failing to get itself registered under BOCW Act. It was followed by another notice of even date stating that the appellant had not furnished requisite information relating to construction activities undertaken by it as required under Section 4 of the Welfare Cess Act read with Rule 6 of the Welfare Cess Rules. Some more notices were issued to the similar effect with regard to the construction activities in respect of the township in Anpara, undertaken by the appellant. Insofar as township is concerned, appellant got itself registered through its principal contractors under Welfare Cess Act and started paying the cess. However, in respect of construction activity and factory premises, the appellant reiterated its stand that by virtue of Section 2(1)(d) of the BOCW Act, it was excluded from the coverage thereof. The contention of the appellant was rejected by the respondents which led to issuance of further notices demanding cess.

5. At this juncture, the appellant filed the writ petition in the High Court of Judicature at Allahabad challenging the validity of notices dated 14.03.2011 and 02.04.2011 demanding payment of cess, on the following grounds:

(i) That the appellant is not amenable to assessment of liability under the Welfare Cess Act inasmuch as the Factories Act is applicable to the Project, and the Project is as such, exempt from the applicability of the said Act by

virtue of the exclusionary cause contained in Section 2(1)(d) of the BOCW Act.

(ii) That respondent No. 2, vide impugned notice dated 02.04.2011, was proceeding to calculate the alleged cess payable by the appellant on the basis of the cost of the Project, and not on the cost of construction of the said Project, whereas under the scheme of the Cess Act, cess is payable only on the cost of construction incurred annually, and not on the entire project cost, which includes several other components apart from civil construction works.

6. The respondents filed their counter affidavit contesting the petition. After hearing, the writ petition has been dismissed by the High Court vide judgment dated 28.04.2015, gist whereof has already been taken note of above.

7. Emphatic submissions were made by Mr. Sundaram, learned senior counsel appearing in some of these appeals, questioning the approach and conclusion reached by the High Court. Other senior counsel Mr. Gaurab Banerji and Mr. Akhil Sibal supplemented those submissions lending their candour thereto. These submissions were further supplemented by M/s. Prashant Shukla, Arunabh Chowdhury and K. Raghava Charyulu, Advocates. It may not be necessary to take note of individual submissions made by these counsel. Instead, for the sake of brevity, we are reproducing the submissions of these counsel in consolidated form hereinafter.

8. These counsel have led two prong attacks on the demands raised by the respondents for payment of cess under BOCW Act read with Welfare Cess Act, which is as under:

i) In the first instance, it is argued that BOCW Act does not apply to those undertakings which are registered under the Factories Act. To support this submission, emphasis was laid on the definition of "building or other construction work" as contained in Section 2(1)(d) of BOCW Act, which reads as under:

> "**Section 2(1)(d)** : "building or other construction work" means the construction, alternation, repairs, maintenance or demolition of or, in relation to, buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works (including storm water drainage works), generation, transmission and distribution of power, water works (including channels for distribution of water), oil and gas installations, electric lines, wireless, radio, television, telephone, telegraph and overseas

> communication dams, canals, reservoirs, watercourses, tunnels, bridges, viaducts, aquaducts, pipelines, towers, cooling towers, transmission towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), apply.
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> (emphasis added)"

(ii) Second submission, which in fact flows from first submission noted above, was that the approach of the High Court in dealing with the matter was contrary to law. In this behalf, it was pointed out that the High Court has rejected the case of the appellants herein on the ground that even if the appellants had obtained a licence under the Factories Act for registration to work a factory, the appellants were still not excluded from the provisions of Welfare Cess Act as no manufacturing process or factory operation had started by the appellants and, therefore, appellants did not answer the description of 'factory' within the meaning of Factories Act. As per the High Court, since the appellants had only undertaken the process of construction of premises which are to be ultimately used as factories, and since such power project has not started and there was no operation for which the licence was obtained under the Factories Act till the production commences, it could not be said that "factory" has come into existence and, therefore, the appellants were not entitled to take advantage of mere registration under the Factories Act.

Dubbing the aforesaid approach as erroneous, it was the argument of the appellants that the High Court ignored the pertinent aspect that even when the building was under construction, the establishments which were covered by the Factories Act stood excluded by virtue of definition contained in Section 2(d) of BOCW Act which pertained to construction of building and, therefore, specifically covered the stage of construction itself. It was argued that matter should have been seen from that angle. Advancing this argument further, it was also submitted that the Legislature is alive to the fact that the factory is not running at the stage when building or other construction work is going on. However, it still chose to exclude those buildings or other construction work to which the provisions of Factories Act apply.

9. Expanding the aforesaid submissions, the appellants even gave the rationale in couching the definition of Section 2(d) of the BOCW Act in that specific manner by submitting that once the provisions of Factories Act

apply, all the benefits which are admissible to the workers under the BOCW Act and Welfare Cess Act are granted under the Factories Act as well. This submission was buttressed by pointing out the provisions/conditions stipulated while granting the permission under the Factories Act. It was submitted that the safety measures and facilities which the appellants were obligated under those conditions were the same as stipulated in BOCW Act.

10. Taking support of interpretative tools to support the aforesaid twin submissions, it was submitted by the counsel for the appellants that Section 2(d) had to be given literal meaning, in the absence of any ambiguity in the said provision and number of judgments were cited in this behalf. Some of those judgments are as under:

i) In ***Punjab Land Development and Reclamation Corporation Ltd., Chandigarh*** v. ***Presiding Officer, Labour Court, Chandigarh and Others***[1], this Court while interpreting the word 'means' observed that if the definition has used the word 'means', it shall include certain things or acts and the definition has used the word 'means', it shall include certain things or acts and the definition is a hard-and-fast definition and no other meaning can be assigned to the expression than is put down in definition. This Court further observed that if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law. This Court after making reference to its judgment in ***B.N. Mutto*** v. ***T.K. Nandi***[2] observed that "the Court has to determine the intention as expressed by the words used. If the words of a statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense". It was further observed that "the cardinal rule of construction of statute is to read statutes literally, that is, by giving to the words their ordinary, natural and grammatical meaning."

ii) In ***Shri Hariprasad Shivshanker Shukla and another*** v. ***Shri A.D. Divelkar and others*** [3], it was held that "there is no doubt that when the Act itself provides a dictionary for the words used, we must look into that dictionary first for an interpretation of the words used in the statute. We are not concerned with any presumed intention of the legislature; our task is to get at the intention as expressed in the statute".

iii) In ***Regional Director, Employees State Insurance Corporation, Trichur*** v. ***Ramanuja Match Industries*** [4], the Court pointed out that "there

[1] (1990) 3 SCC 682, [2] (1979) 1 SCC 361, [3] 1957 SCR 121, [4] (1985) 1 SCC 218

is no doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme".

iv) In ***Dadi Jagannadham*** v. ***Jammulu Ramulu and Others***[5], this Court, while interpreting the provisions that fell for consideration, made the following observations in paragraph 13:

> "13. …. The settled principles of interpretation are that the court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the court would not go to its aid to correct or make up the deficiency. The court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."

v) In ***Shyam Sunder and others*** v. ***Ram Kumar and another*** [6], this Court explained as to how to interpret the provisions of an enactment in the following words:

> "... when the words used in a statute are capable of only one meaning. In such a situation, the courts have been hesitant to apply the rule of benevolent construction. But if it is found that the words used in the statute give rise to more than one meaning, in such circumstances, the courts are not precluded from applying such rule of construction. The third situation is when there is no ambiguity in a provision of a statute so construed. If the provision of a statute is plain, unambiguous and does not give rise to any doubt, in such circumstances the rule of benevolent construction has no application."

vi) Similarly in **Grasim Industries Ltd.** v. ***Collector of Customs, Bombay***[7], the Constitution Bench of this Court explained the principle of literal interpretation as under:

> "10. No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not

[5] (2001) 7 SCC 71, [6] (2001) 8 SCC 24, [7] (2002) 4 SCC 297

concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sententia legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or alternating (*sic* altering) the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so, what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the Privy Council in *Crawford* v. *Spooner* [(1846) 6 Moore PC 1 : 4 MIA 179] "we cannot aid the legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there". In case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. This principle is too well settled and reference to a few decisions of this Court would suffice. (See: *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd.* v. *Custodian of Vested Forests* [1990 Supp SCC 785 : AIR 1990 SC 1747], *Union of India* v. *Deoki Nandan Aggarwal* [1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248 : (1992) 19 ATC 219 : AIR 1992 SC 96] ,*Institute of Chartered Accountants of India* v. *Price Waterhouse* [(1997) 6 SCC 312] and *Harbhajan Singh* v. *Press Council of India* [(2002) 3 SCC 722 : JT (2002) 3 SC 21])"

vii) In ***Deepal Girishbhai Soni and Others*** v. ***United India Insurance Co. Ltd., Baroda***[8], while interpreting the provisions that fell for consideration, the principle was applied even in the context of beneficial legislation, when the language was plain, depicting clear intention of the legislature, in the following terms:

> **"**53. Although the Act is a beneficial one and, thus, deserves liberal construction with a view to implementing the legislative intent but it

[8] (2004) 5 SCC 385

> is trite that where such beneficial legislation has a scheme of its own and there is no vagueness or doubt therein, the court would not travel beyond the same and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered thereby. (See *Regional Director, ESI Corpn.* v. *Ramanuja Match Industries* [(1985) 1 SCC 218 : 1985 SCC (L&S) 213 : AIR 1985 SC 278])."

Relying upon all the aforesaid judgments, the forceful exhortation was to follow this literal construction while interpreting Section 2(d) of BOCW Act in the manner appellants suggested to us.

11. Mr. Rana and Mr. Srivastava countered the aforesaid submissions giving equally salubrious response. Their fervent plea was that the view taken by the High Court while interpreting the provisions of Section 2(d) of BOCW Act was perfectly justified and any other interpretation as suggested by the appellants would defeat the very purpose of these Acts. It was argued that mere registration under the Factories Act would be of no consequence inasmuch as definition of 'factory' contained in Section 2(m) of the Act unambiguously suggest that the provisions of the said Act would apply only when manufacturing process is actually carried on. It was further submitted that the definition of 'worker' under the Factories Act does not include construction workers and, therefore, construction workers would not be entitled to various benefits which are contained in different provisions of the Factories Act. It is for this reason at the stage of construction of the building, which is to be ultimately used as a factory, the provisions of BOCW Act would be applied. It was also emphasised that while interpreting the provisions of these two Acts, "superior purpose" behind therein had to be kept in mind and this enactment which is for the welfare of the weaker section, i.e. workers of unorganised sector, had to be liberally construed by giving that construction which accords them the benefit eschewing the other approach which would preclude them from getting the benefit under the Acts. In this hue, the learned counsel strongly urged upon this Court to invoke the principle of purposive interpretation, which is in vogue, to do complete justice in the matter. It was also argued that exclusion provision contained in Section 2(d) of BOCW Act had to be construed narrowly as per the settled proposition of law.

12. We have bestowed our due and serious consideration to the submissions made of both sides, which these submissions deserve. The central issue is the meaning that is to be assigned to the language of Section 2(d) of the Act, particularly that part which is exclusionary in nature, i.e.

which excludes such building and construction work to which the provisions of Factories Act apply. Before coming to the grip of this central issue, we deem it appropriate to refer to the objectives with which the Factories Act and BOCW Act were enacted, as that would be the guiding path to answer the core issue delineated above.

13. Insofar as Factories Act is concerned, its Preamble mentions that it is an Act to consolidate and amend the law regulating labour in factories. It is enacted primarily with the object of protecting workers employed in factories against industrial and occupational hazards. For that purpose it seeks to impose upon the owners or occupiers certain obligations to protect workers unwary as well as negligent and to secure for them employment in conditions conducive to their health and safety. This Act also requires that the workers should work in healthy and sanitary conditions and for that purpose it provides that precautions should be taken for the safety of workers and prevention of accidents. Incidental provisions in Factories Act are made for securing information necessary to ensure that the objects are carried out and the State Governments are empowered to appoint Inspectors, to call for reports and to inspect the prescribed registers with a view to maintain effective supervision. The duty of the employer under this Act is to secure the health and safety of workers and extends to providing adequate plant, machinery and appliances, supervision over workers, healthy and safe premises, proper system of working and extends to giving reasonable restrictions. Detailed provisions are, therefore, made in diverse chapters of the Act imposing obligations upon the owners of the factories to maintain inspecting staff and for maintenance of health, cleanliness, prevention of overcrowding and provision for amenities such as lighting, drinking water, etc. Provisions are also made for safety of workers and their welfare, such as restrictions on working hours and on the employment of young persons and females, and grant of annual leave with wages. In ***Bhikusa Yamasa Kshatriya (P) Ltd.*** v. ***Union of India and another***[9], this Court highlighted the necessity and rationale behind legislating this Act and the objectives which it sought to achieve, in the following manner:

> "9. The Factories Act, as the preamble recites, is an Act to consolidate and amend the law regulating labour in factories. The Act is enacted primarily with the object of protecting workers employed in factories against industrial and occupational hazards. For that purpose it seeks to impose upon the owners or the occupiers certain obligations to

[9] 1964 SCR (1) 860

protect workers unwary as well as negligent and to secure for them employment in conditions conducive to their health and safety. The Act requires that the workers should work in healthy and sanitary conditions and for that purpose it provides that precautions should be taken for the safety of workers and prevention of accidents. Incidental provisions are made for securing information necessary to ensure that the objects are carried out and the State Governments are empowered to appoint Inspectors, to call for reports and to inspect the prescribed registers with a view to maintain effective supervision. The duty of the employer is to secure the health and safety of workers and extends to providing adequate plant, machinery and appliances, supervision over workers, healthy and safe premises, proper system of working and extends to giving reasonable instructions. Detailed provisions are therefore made in diverse chapters of the Act imposing obligations upon the owners of the factories to maintain inspecting staff and for maintenance of health, cleanliness, prevention of overcrowding and provision for amenities such as lighting, drinking water, etc. etc. Provisions are also made for safety of workers and their welfare, such as restrictions on working hours and on the employment of young persons and females, and grant of annual leave with wages. Employment in a manufacturing process was at one time regarded as a matter of contract between the employer and the employee and the State was not concerned to impose any duties upon the employer. It is however now recognised that the State has a vital concern in preventing exploitation of labour and in insisting upon proper safeguards for the health and safety of the workers. The Factories Act undoubtedly imposes numerous restrictions upon the employers to secure to the workers adequate safeguards for their health and physical well-being. But imposition of such restrictions is not and cannot be regarded, in the context of the modem outlook on industrial relations, as unreasonable...."

14. Coming to BOCW Act, its Statement of Objects and Reasons, depicting the legislative intent, reads as under:

"(1) It is estimated that about 8.5 million workers in the country are engaged in building and other construction works. Building and other construction workers are one of the most numerous and vulnerable segments of the unorganised labour in India. The building and other construction works are characterized by their inherent risk to the life

and limb of the workers. The work is also characterised by its casual nature, temporary relationship between employer and employee, uncertain working hours, lack of basic amenities and inadequacy of welfare facilities. In the absence of adequate statutory provisions, the requisite information regarding the number and nature of accidents is also not forthcoming. In the absence of such information, it is difficult to fix responsibility or to take any corrective action.

(2) Although the provisions of certain Central Acts are applicable to the building and other construction workers yet a need has been felt for a comprehensive Central Legislation for regulating their safety, health, welfare and other conditions of service. It had been considered necessary to levy a cess on the cost of construction incurred by the employers on the building and other construction works for ensuring sufficient funds for the Welfare Boards to undertake the social security schemes and welfare measures."

15. In the Statement of Objects and Reasons of this Act itself, it was considered necessary to levy a cess on the cost of construction incurred by the employers while constructing building etc. This led to passing of Welfare Cess Act. The Statement of Objects and Reasons behind this Act was to provide for the levy and collection of a cess on the cost of construction incurred by the employers for augmenting the resources of the Building, and Other Construction Workers' Welfare Boards constituted by the State Governments under the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Ordinance, 1995.

16. Scheme of BOCW Act came up for consideration by this Court in the ***Dewan Chand Builders and Contractors*** v. ***Union of India and Others***[10]. Recognising that the noble purpose behind the said Act is to ensure welfare of the building and construction workers in order to provide basic human dignity enshrined in Article 21 of the Constitution, the Court observed as under:

"10. It is thus clear from the scheme of the BOCW Act that its sole aim is the welfare of building and construction workers, directly relatable to their constitutionally recognised right to live with basic human dignity, enshrined in Article 21 of the Constitution of India. It envisages a network of authorities at the Central and State levels to ensure that the benefit of the legislation is made available 'to every

[10] (2012) 1 SCC 101

> building and construction worker, by constituting Welfare Boards and clothing them with sufficient powers to ensure enforcement of the primary purpose of the BOCW Act. The means of generating revenues for making effective the welfare provisions of the BOCW Act is through the Cess Act, which is questioned in these appeals as unconstitutional.
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> 17. It is manifest from the overarching schemes of the BOCW Act, the Cess Act and the Rules made thereunder that their sole object is to regulate the employment and conditions of service of building and other construction workers, traditionally exploited sections in the society and to provide for their safety, health and other welfare measures. The BOCW Act and the Cess Act break new ground in that, the liability to pay cess falls not only on the owner of a building or establishment, but under Section 2(1)(i)(iii) of the BOCW Act "in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor";
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> The extension of the liability on to the contractor is with a view to ensure that, if for any reason it is not possible to collect cess from the owner of the building at a stage subsequent to the completion of the construction, it can be recovered from the contractor. The Cess Act and the Cess Rules ensure that the cess is collected at source from the bills of the contractors to whom payments are made by the owner. In short, the burden of cess is passed on from the owner to the contractor."
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> (emphasis supplied)

17. Keeping in view the aforesaid objective of the respective Acts, we now deal with the scope and ambit of Section 2(d) of BOCW Act. As noticed above, one of the submissions of the appellants is that literal interpretation needs to be given to the said provision as it categorically excludes those building or construction work to which Factories Act apply. In this very hue, it is argued that as the benefit under the Factories Act are already given to the construction workers who are involved in the construction work, there is no need for covering the construction workers who are engaged in building or construction work of the appellants under BOCW Act or Welfare Cess Act.

18. Before dealing with the argument predicated on literal construction, we would like to deal with the second aspect as the answer to that would

facilitate the answer to this aspect as well. Section 2(m) of the Factories Act defines 'factory' in the following manner:

> "(m) "factory" means any premises including the precincts thereof-
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> (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
>
> (ii) Whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-
>
> but does not include a mine subject to the operation of [the Mines Act, 1952 (35 of 1952)] or [a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place].
>
> [Explanation [I] - For computing the number of workers for the purposes of this clause all the workers in [different groups and relays] in a day shall be taken into account;]
>
> [Explanation II - For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;]..."

19. Section 2(k) of the Factories Act defines 'manufacturing process' in the following manner:

> (k) "manufacturing process" means any process for- (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or
>
> (ii) [pumping oil, water, sewage or any other substance; or]
>
> (iii) generating, transforming or transmitting power; or
>
> (iv) [composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding;] [or]

> (v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels;[or]
>
> (vi) [preserving or storing any article in cold storage;]

20. It is also necessary to take note of the definition of 'worker', which is contained in Section 2(l) of the Factories Act. It reads as under:

> (l) "worker" means a person 8[employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not], in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process 7[but does not include any member of the armed forces of the Union];

21. On the conjoint reading of the aforesaid provisions, it becomes clear that "factory" is that establishment where manufacturing process is carried on with or without the aid of power. Carrying on this manufacturing process or manufacturing activity is thus a prerequisite. It is equally pertinent to note that it covers only those workers who are engaged in the said manufacturing process. Insofar as these appellants are concerned, construction of building is not their business activity or manufacturing process. In fact, the building is being constructed for carrying out the particular manufacturing process, which, in most of these appeals, is generation, transmission and distribution of power. Obviously, the workers who are engaged in construction of the building also do not fall within the definition of 'worker' under the Factories Act. On these two aspects there is no cleavage and both parties are at *ad idem*. What follows is that these construction workers are not covered by the provisions of the Factories Act.

22. Having regard to the above, if the contention of the appellants is accepted, the construction workers engaged in the construction of building undertaken by the appellants which is to be used ultimately as factory, would stand excluded from the provisions of BOCW Act and Welfare Cess Act as well. Could this be the intention while providing the definition of 'building and other construction work' in Section 2(d) of BOCW Act? Clear answer to this has to be in the negative.

23. We may mention at this stage that High Court is right in observing that merely because the appellants have obtained a licence under Section 6 of the Factories Act for registration to work a factory, it would not follow

therefrom that they answer the description of the "factory" within the meaning of the Factories Act. We have reproduced the definition of 'factory' and a bare reading thereof makes it abundantly clear that before this stage, when construction of the project is completed and the manufacturing process starts, 'factory' within the meaning of Section 2(m) of the Factories Act does not come into existence so as to be covered by the said Act.

24. We now advert to the core issue touching upon the construction of Section 2(d) of the BOCW Act. The argument of the appellants is that language thereof is unambiguous and literal construction is to be accorded to find the legislative intent. To our mind, this submission is of no avail. Section 2(d) of the BOCW Act dealing with the building or construction work is in three parts. In the first part, different activities are mentioned which are to be covered by the said expression, namely, construction, alterations, repairs, maintenance or demolition. Second part of the definition is aimed at those buildings or works in relation to which the aforesaid activities are carried out. The third part of the definition contains exclusion clause by stipulating that it does not include 'any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), applies'. Thus, first part of the definition contains the nature of activity; second part contains the subject matter in relation to which the activity is carried out and third part excludes those building or other construction work to which the provisions of Factories Act or Mines Act apply.

25. It is not in dispute that construction of the projects of the appellants is covered by the definition of "building or other construction work" as it satisfies first two elements of the definition pointed out above. In order to see whether exclusion clause applies, we need to interpret the words 'but does not include any building or other construction work **to which the provisions of the Factories Act ..... apply'**. The question is as to whether the provisions of the Factories Act apply to the construction of building/project of the appellants. We are of the firm opinion that they do not apply. The provisions of the Factories Act would "apply" only when the manufacturing process starts for which the building/project is being constructed and not to the activity of construction of the project. That is how the exclusion clause is to be interpreted and that would be the plain meaning of the said clause. This meaning to the exclusion clause ascribed by us is in tune with the approach adopted by this Court in ***Organo Chemical Industries*** v. ***Union of India***[11].

[11] (1979) 4 SCC 573

Two separate, but concurring, opinions were given by Justice V.R. Krishna Iyer and Justice A.P. Sen, and we reproduce here below some excerpts from both opinions:

> " **Justice A.P. Sen** (para 23)
>
> Each word, phrase or sentence is to be considered in the light of general purpose of the Act itself. A bare mechanical interpretation of the words *'devoid of concept or purpose'* will reduce much of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole.
>
> **Justice V.R. Krishna Iyer** (para 241)
>
> A policy-oriented interpretation, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to assign to 'damages' a larger, fulfilling meaning."

26. The aforesaid meaning attributed to the exclusion clause of the definition is also in consonance with the objective and purpose which is sought to be achieved by the enactment of BOCW Act and Welfare Cess Act. As pointed out above, if the construction of this provision as suggested by the appellants is accepted, the construction workers who are engaged in the construction of buildings/projects will neither get the benefit of the Factories Act nor of BOCW Act/Welfare Cess Act. That could not have been the intention of the Legislature. BOCW Act and Welfare Cess Act are pieces of social security legislation to provide for certain benefits to the construction workers.

27. Purposive interpretation in a social amelioration legislation is an imperative, irrespective of anything else. This is so eloquently brought out in the following passage in the case of ***Atma Ram Mittal*** v. ***Ishwar Singh Punia***[12]:

> "9. Judicial time and energy is more often than not consumed in finding what is the intention of Parliament or in other words, the will of the people. Blackstone tells us that the fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs most natural

[12] (1988) 4 SCC 284

and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or *the spirit and reason of the law*. (emphasis by the court) See *Commentaries on the Laws of England* (facsimile of 1st Edn. of 1765, University of Chicago Press, 1979, Vol. 1, p. 59). Mukherjea, J. as the learned Chief Justice then was, in *Poppatlal Shah* v. *State of Madras* [AIR 1953 SC 274 : 1953 SCR 677 : 1953 Cri LJ 1105: (1953) 4 STC 188] said that each word, phrase or sentence was to be construed in the light of purpose of the Act itself. But words must be construed with imagination of purpose behind them said Judge Learned Hand, a long time ago. It appears, therefore, that though we are concerned with seeking of intention, we are rather looking to the meaning of the words that the legislature has used and the true meaning of what words [**Ed.**: Lord Reid in the aforecited case had observed: (All ER p. 814) "We often say that we are looking for the intention of Parliament, but this is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."] as was said by Lord Reid in *Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G* [1975 AC 591, 613 : (1975) 1 All ER 810: (1975) 2 WLR 513] . We are clearly of the opinion that having regard to the language we must find the reason and the spirit of the law."

28. How labour legislations are to be interpreted has been stated and restated by this Court time and again. In ***M.P. Mineral Industry*** [12] (1988) 4 SCC 284 ***Association*** v. ***Regional Labour Commr. (Central)***[13], this Court while dealing with the provisions of the Minimum Wages Act, 1948, observed that this Act is intended to achieve the object of doing social justice to workmen employed the scheduled employments by prescribing minimum rates of wages for them, and so in construing the said provisions the court should adopt what is sometimes described as a beneficent rule of construction. In ***Surendra Kumar Verma*** v. ***The Central Government Industrial Tribunal***[14], this Court reminded that semantic luxuries are misplaced in the interpretation of 'bread and butter' statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions.

29. We would also like to reproduce a passage from ***Workmen of American Express*** v. ***Management of American Express***[15], which provides

[13] AIR 1960 SC 1068, [14] (1980) 4 SCC 443, [15] (1985) 4 SCC 71

complete answer to the argument of the appellants based on literal construction:

> "4. The principles of statutory construction are well settled. Words occurring in statutes of liberal import such as social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Liliputian dimensions. In construing these legislations the imposture of literal construction must be avoided and the prodigality of its misapplication must be recognised and reduced. Judges ought to be more concerned with the "colour", the "content" and the "context" of such statutes (we have borrowed the words from Lord Wilberforce's opinion in *Prenn* v. *Simmonds* [(1971) 3 All ER 237]). In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not to be interpreted purely on internal linguistic considerations..."

30. In equal measure is the message contained in ***Carew and Co. Ltd.*** v. ***Union of India***[16] :

> "21. The law is not "a brooding omnipotence in the sky" but a pragmatic instrument of social order. It is an operational art controlling economic life, and interpretative effort must be imbued with the statutory purpose. No doubt, grammar is a good guide to meaning but a bad master to dictate..."

31. The sentiments were echoed in ***Bombay Anand Bhavan Restaurant*** v. ***Deputy Director, Employees' State Insurance Corporation & Anr.***[17] in the following words:

> "20. The Employees' State Insurance Act is a beneficial legislation. The main purpose of the enactment as the Preamble suggests, is to provide for certain benefits to employees of a factory in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. The Employees' State Insurance Act is a social security legislation and the canons of interpreting a social legislation are different from the canons of interpretation of taxation law. The courts must not countenance any subterfuge which would defeat the provisions of social legislation and

[16] (1975) 2 SCC 791, [17] (2009) 9 SCC 61

> the courts must even, if necessary, strain the language of the Act in order to achieve the purpose which the legislature had in placing this legislation on the statute book. The Act, therefore, must receive a liberal construction so as to promote its objects.

32. In taking the aforesaid view, we also agree with the learned counsel for the respondents that 'superior purpose' contained in BOCW Act and Welfare Cess Act has to be kept in mind when two enactments – the Factories Act on the one hand and BOCW Act/Welfare Cess Act on the other hand, are involved, both of which are welfare legislations. (See ***Allahabad Bank*** v. ***Canara Bank*** [18], which has been followed in ***Pegasus Assets Reconstruction P. Ltd.*** v. ***M/s. Haryana Concast Limited & Anr.***[19] in the context of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Companies Act, 1956. Here the concept of 'felt necessity' would get triggered and as per the Statement of Objects and Reasons contained in BOCW Act, since the purpose of this Act is to take care of a particular necessity i.e. welfare of unorganised labour class involved in construction activity, that needs to be achieved and not to be discarded. Here the doctrine of Purposive Interpretation also gets attracted which is explained in recent judgments of this Court in ***Richa Mishra*** v. ***State of Chhattisgarh and Others*** [20] and ***Shailesh Dhairyawan*** v. ***Mohan Balkrishna Lulla*** [21].

33. We are left to deal with the argument of the appellants that while granting permission under the Factories Act, various conditions are imposed which the appellants are required to fulfill and these conditions are almost the same which are contained in BOCW Act. We are not convinced with this submission either. It is already held that provisions of Factories Act are not applicable to these construction workers. Registration under the Factories Act becomes necessary in view of provisions contained in Section 6 of the said Act as this Section requires taking of approval and registration of factories even at preparatory stage i.e. at the stage when the premises where factory is to operate has to ensure that construction will be done in such a manner that it takes care of safety measures etc. which are provided in the Factories Act. This means to ensure that construction is carried out in such a manner that provisions in the Factories Act to ensure health, safety and provisions relating to hazardous process as well as welfare measures are taken care of. It is for this reason that even after the building is completed before it is occupied, notice under Section 7 is to be given by the occupier to the Chief Inspector of

[18] (2000) 4 SCC 406, [19] 2016 (1) SCALE 1,
[20] (2016) 4 SCC 179 at Page No. 197 [21] (2016) 3 SCC 619 – Para 31

Factories so that a necessary inspection is carried out to verify that all such measures are in place. Therefore, when the permissions for construction of factories is given, the purpose is altogether different.

34. It is stated at the cost of repetition that construction workers are not covered by the Factories Act and, therefore, welfare measures specifically provided for such workers under the BOCW Act and Welfare Cess Act cannot be denied.

35. We, thus, hold that all these appeals are bereft of any merit. Accordingly, these appeals, along with the writ petitions filed before this Court as also those which are the subject matter of the transfer petition and transfer cases, are dismissed with cost. We, however, make it clear that insofar as objection to the calculation of cess as contained in the show cause notices is concerned, it would be open to the appellants to agitate the same before the adjudicating authorities. No costs.

Appeals dismissed.

2017 (I) ILR - CUT-209

FULL BENCH

VINEET SARAN, C.J., DR. A.K.RATH, J. & DR.B.R.SARANGI, J.

W.P.(C) NOS. 11817 & 12427 OF 2016

M/S. MOHAPATRA BINDERS & ORS. ……..Petitioners
M/S. INNPRINT & ORS.

.Vrs.

STATE OF ODISHA & ORS. ……Opp. Parties

TENDER – Director, Text Book Production and Marketing, Bhubaneswar issued tender call notice Dt. 09.06.2016 inviting national tender for printing and binding of nationalized text books for the academic session 2017-18 – The petitioners, who are small book binding units of the state of Odisha challenged such national tender on the ground that they have exclusive right of State Government work of book binding and printing under the provisions of Industrial Policy Resolutions issued by the State Government as well as under MSMED

Act, 2006 and Odisha MSMED Policy, 2009 – Petitioners cited two judgments of this Court reported in AIR 2010 Ori 154 (Orissa Printers case) and 2014 (Supp.I) OLR 490 (Mohapatra Binders case) where national tenders for the academic session 2010-11 and 2014-15 were quashed – Admittedly the petitioners are not only doing Government works but also other private works and they were neither in the "rate contract list" nor in the "exclusive purchase list" under any of the IPRs – There is also no finding in the above judgments that the petitioners were covered under the IPRs – Further, in the above judgments though some questions raised by the Government, the same were not answered properly so those decisions can not be cited as precedent – Even in the case of Mohapatra Binders, the Division Bench had simply followed the judgment of Orissa Printers and quashed the national tender for the academic session 2014-15 with certain directions – Particularly, the above judgments were passed on sympathy, on the ground that if there will be national tender, thousands of workers would be job less – Moreover such decisions being commercial decisions, involving crores of rupees, principle of equity and natural justice should stay at a distance – Held, the judgments passed in the cases of Orissa Printers and Mohapatra Binders have not been pronounced on principles of law, after considering the legal objections raised by the State Government but on the basis of misplaced sympathy, which have no binding force – The petitioners are also not entitled to the protection of the IPRs issued by the State Government as well as MSMED Act, 2006 and Odisha MSMED Policy 2009 – Writ petitions filed by the petitioners are dismissed.

(Paras 27 to 57)

Case Laws Referred to :-

1. AIR 2010 Ori 154 : Orissa Printers & Binders Mahasangha -V- State of Orissa
2. 2014 (Supp.1) OLR 490 : Mohapatra Binders -V- State of Orissa
3. AIR 1956 Bombay 332 : Parappa Ningappa Khaded v. Mallappa Kallappa,
4. (2009) 5 SCC 694 : State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha
5. 1979 (1) SCC 295 : Maharaja Book Depot v. State of Gujarat
6. 1986 (1) SCC 11 : Scientific Engineering House (P) Ltd. v. Commissioner of I.T., A.P.
7. 2005 (7) SCC 118 : Commissioner of Customs (General), New Delhi v. Gujarat Perstorp Electronics Ltd. etc.
8. (2000) 5 SCC 488 : Arnit Das v. State of Bihar
9. (1987) 1 SCC 5 : Sarguja Transport Service v. State Trpt. Appellate

Trib., M.P., Gwalior
10. (2010) 6 SCC 303 :Shimnit Utsch India Private Ltd. v. West Bengal Transport Infrastructure Development Corporation Ltd.
11. (2012) 8 SCC 216 : Michigan Rubber (India) Limited v. State of Karnataka
12. (2014) 3 SCC 760 : Maa Binda Express Carrier v. North-East Frontier Railway
13. (1998) 2 SCC 1 : Malpe Vishwanath Acharya vs. State of Maharashtra
14. AIR 1964 SC 1179 : State of M.P. vs. Bhopal Sugar Industries
15. AIR 1992 SC 443 : Mithilesh Garg vs. Union of India
16. AIR 1968 SC 647 : State of Orissa v. Sudhansu Sekhar Misra,
17. (1986) 1 SCC 11 : Parappa Ningappa Khaded v. Mallappa Kallappa
18. AIR 1956 Bombay 332 : Scientific Engineering House (P) Ltd. V. Commissioner of Income Tax,
19. (2005) 7 SCC 118 : Andhra Pradesh, Commissioner of Customs (General), v. Gujarat Perstorp Electronics Ltd,
20. (2003) 6 SCC 1 : Kapila Hingorani (I) v. State of Bihar
21. (2009) 5 SCC 694 : State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha.

Petitioners : Mr. R.K.Mohanty, Sr. Advocate.
M/s.D.Mohanty, S.Mohanty, D.Baradwaj & A.Mohant
Mr. R.K.Rath, Sr. Advocate.
M/s.Digambara Mishra, S.K.Satapathy

Opp. Parties : Mr. S.P.Misahra, Advocate General
Mr. Sisir Ku. Das, Sr. Standing Counsel
Mr. A.K.Pandey, Standing Counsel

Date of Hearing : 15.12.2016
Date of Judgment**:** 13.01.2017

JUDGMENT

VINEET SARAN, C.J.

The dispute involved in these writ petitions is whether the petitioners herein, who are small book binding units and cover/text printers of the State of Odisha, would be entitled to exclusive right of State Government work of book binding and printing, under the provisions of Industrial Policy Resolutions *(for short 'IPR')* issued by the State Government, as well as the Micro, Small and Medium Enterprises Development Act, 2006 *(for short 'MSMED Act')*, and the Odisha MSMED Policy of 2009 *(for short 'OMSMED Policy)* issued there under by the State Government; or can such work be awarded by way of inviting national tender.

2. The petitioners claim benefit under the various IPRs issued from time to time, as well as the MSMED Act and the policy framed there under and contend that in case the benefit of exclusive work/purchase (of book binding/printing) is not accorded to them, it would amount to frustrating the objectives of the IPRs as well as the MSMED Act and the policy of the State Government issued there under.

3. The petitioners in the leading writ petition No. 11817 of 2016 are proprietors of small book binding units covered under the definition of "micro industries" under the MSMED Act, and the petitioners in the other writ petition No. 12427 of 2016 are covers and text printers registered with the District Industries Centres *(for short 'DIC')* and carry on their business as Small Scale Industries *(for short 'SSI')* defined under the IPR 1980 and subsequent IPRs issued by the State Government. The challenge in these writ petitions is to the tender call notice dated 09.06.2016 issued by the Director, Textbook Production and Marketing, Bhubaneswar inviting national tender for *"Printing and Binding of Nationalised Textbooks for the academic session 2017-18"*.

4. In the State of Odisha, there are as many as 5000 printing press and binding units, which are set up under the approval of respective District Industries Centres *(for short "DICs")* under the Industrial Policy framed by the Industries Department, Government of Odisha. Thereby, they are all covered as SSI units as per IPR 1980 and subsequent IPRs issued from time to time by the Government of Odisha. The respective proprietors of such units, as per the schemes, have modernized their printing and binding units by installing modern equipments by incurring huge loans from different banks as well as non-banking organizations. Most of them are technicians, skilled and unskilled labourers, who are maintaining their livelihood from the printing and binding work of nationalized text books. A large number of skilled workers/labourers are being engaged in such type of micro industries so as to earn their livelihood.

5. The State Government continued to procure the nationalized text books from the small scale industrial (SSI) units of the State for a period not less than 18 years, facilitating thousands of workers to maintain their livelihood. However thereafter, the opposite party no.1, deviating from the said procurement policy of the Government, vide Resolution dated 25.08.2009, decided to procure nationalized text books through national tender for the first time for the academic session 2010-11 and, accordingly, the national tender was floated on 11.02.2010.

6. For about two decades, till the academic session 2009-10, the benefit of exclusive purchase from small book binding and cover/text printing units of the State was being given to such units, without open competitive tenders, which benefit, the petitioners were enjoying.

7. Then the nationalised tender, which was issued for *"Printing and Book binding"* for the academic session 2010-11, was challenged by the petitioners in W.P.(c) No. 2862 of 2010. By judgment and order dated 19.05.2010 in the case of ***Orissa Printers and Binders Mahasangha* v. *State of Orissa*** **AIR** 2010 Ori 154, the said tender was quashed, which was not challenged and the same benefit of tender limited to SSI units of the State, as given to the petitioners up to the academic session 2009-10, was continued till the year 2013-14.

8. Then on 07.06.2013, for the academic session 2014-15, the State Government again resorted to and issued a national tender. The same was challenged by the petitioners and others in W.P.(C) No. 13203 of 2013. The Division Bench of this Court, vide its judgment and order dated 20.12.2013 passed in the aforesaid writ petition of ***Mohapatra Binders v. State of Odisha*** 2014 (Supp.1) OLR 490, quashed the tender dated 07.06.2013 after rejecting the view of the State Government relating to change of circumstances and held that *"there is no need to re-examine the issue which has already been decided by this court vide its order dated 19.05.2010 passed in W.P.(C) No. 2862 of 2010 and has attained finality."* However while parting with the case certain directions were issued, which are reproduced hereunder:

(i) Opposite parties shall entrust the Printing and Binding Works of Nationalized Text books to the petitioners like the preceding years;

(ii) For the purpose of negotiation of rate, the petitioners/their representatives shall present themselves before the competent authority, i.e., opposite party no.2-Director of Text Book Production and Marketing, Bhubaneswar on 26th of this month;

(iii) Opposite parties must ensure timely supply of papers to the Printers, who in turn complete their printing work in time. The binders must ensure timely completion of their binding work.

(iv) It is open to the opposite parties to take necessary action as permissible if delay is attributable to any Printers and/or Binders in completing their work in time.

As such, for the academic session 2014-15, the State Government decided to start the work with the petitioner at the previous year rates. For the

subsequent academic session 2015-16 also the State floated tender for SSI units only.

9. The judgment of this Court dated 20.12.2013 was challenged before the apex Court, and on 01.07.2015, the apex Court granted interim relief in the SLP filed by the State, staying the implementation of the judgment of the High Court dated 20.12.2013 until further orders. Then on 22.08.2015, while the stay order granted by the Apex Court was in force, the State Government again floated National Tender for the year 2016-17.

In the meantime, on 24.08.2015, another IPR 2015 was issued, which also provided for similar incentives for micro and small enterprises, enlisting the items for purchase from such units, but the said list again did not include printing and binding.

Then on 22.09.2015, the SLP filed by the State was disposed of as having become infructuous, with the observation that *"However, it would be open to the petitioner to reconsider its policy with regard to getting its text books printed and bound and to take appropriate decision after having due deliberation on the subject matter of these petitions."*

10. After the disposal of SLP by the apex Court, the petitioners and others challenged the National Tender dated 22.08.2015 (issued for the academic session 2016-17) before this Court in W.P.(C) No. 19062, 19099 and 20138 of 2015. On 26.10.2015, this Court, as an interim measure, directed that in view of the earlier decision of this Court dated 20.12.2013, the tender process may continue, but it shall not be finalised without leave of the Court. However, for just and proper adjudication, the matter was referred to Larger Bench of three Judges. The Larger Bench, vide its order dated 18.01.2016, vacated the interim order dated 26.10.2015, assigning reasons in paragraphs 14, 15 and 16 of its order, which are extracted below:

> *"14. It is accordingly submitted that as the policy decision to procure the Nationalised Text Books through process of tender on All India basis is bona fide and in the interest of the students, the interim orders be vacated and the State be permitted to finalise the tender, to ensure supply of books to the concerned schools before beginning of the academic session 2016-17.*
>
> *15. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the*

power of judicial review is invoked in matters relating to tenders or award of contracts certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review, will not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances wounded pride and business rivalry, to make mountains out of molehills of some technical/ procedural violation or some prejudice to self and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a Court would interfere in a tender or contractual matters in exercise of its power of judicial review, only if the process adopted or decision taken by the authority is found to be mala fide or arbitrary or irrational, which affects public interest. (See- Jagdish Mandal v. State of Orissa and others, (2007) 14 SCC 517). 11

16. In the present case, inspite of repeated opportunities, the petitioners have not been able to show as to what is the basis of their claim to be awarded the work of printing and binding of text books, especially when they are admittedly not rate contract holders. Merely because they have been issued with the work orders for printing and binding of text books for last many years, which may have been due to the judgments of this Court, the same does not give them a vested right to claim that the work of printing and binding of text books should be exclusively awarded to them, without inviting tenders. The petitioners having failed to establish that the issue of the impugned Tender Notice is in any way arbitrary or unreasonable or contrary to any statutory rules or policy of the State Government, we do not find any prima facie case to allow continuance of the interim orders, to the detriment of the students."

However, writ petitions remained pending and the National Tender dated 22.08.2015 for the academic session 2016-2017 was given effect to. After the work for the academic session 2016-17 was completed and a fresh National Tender for the academic session 2017-18 was issued on 09.06.2016, the petitioners moved an application for withdrawal of the aforesaid three writ petitions, which were pending before the larger Bench, as having become infructuous. Larger Bench of this Court vide its order dated 05.08.2016 allowed the prayer of the petitioners and dismissed the writ petitions.

11. By means of this writ petition, the petitioners have now challenged the fresh National Tender Call Notice dated 09.06.2016 for printing and binding of nationalized text books for the academic session 2017-18.

12. By order dated 09.08.2016, a Division Bench of this Court passed an interim order to the effect that *"tender process may go on, but no final decision with regard to awarding of contract shall be taken till the next date."* The said interim order was extended from time to time and is still continuing.

These petitions were then heard by Division Bench of this Court and considering the earlier judgments of this Court passed on 19.05.2010 and 20.12.2013 in the cases of ***Orissa Printers*** *(supra)* and ***Mohapatra Binders*** *(supra)* as well as the order dated 18.01.2016 of the Larger Bench passed in W.P.(C) No. 19062 of 2015 and 2 other petitions, the Division Bench of this Court, by detailed order dated 27.9.2016, framed three questions and referred the matter to a Larger Bench for consideration.

13. It is in the aforesaid facts and circumstances that this matter has come up before this Bench. During the course of hearing, learned counsel for the parties had urged that the writ petitions may themselves be heard and disposed of by this Bench after deciding the questions which were, with the consent of the learned counsel for the parties, reframed as below:-

(i) *Whether the ratio decided by this Court in* ***Orissa Printers and Binders Mahasangha*** *and* ***M/s. Mohapatra Binders*** *still holds the field or requires reconsideration?*

(ii) *Whether the petitioners, which are the binders and printers of the books and registered under the District Industries Centre as Small Scale Industries are entitled to get any benefit under the IPRs of the State vis-à-vis MSMED Act, 2006 and Policy framed thereunder in 2009?*

(iii) If any relief can be granted to the petitioners?

14. We have heard Mr. R.K.Mohanty, learned Senior Counsel appearing along with Mr. D.Mohanty for the petitioners in W.P.(C) No. 11817 of 2016 and Mr. R.K.Rath, learned Senior Counsel appearing along with Mr. D.Mishra for the petitioners in W.P.(C) No. 12427 of 2016; as well as Mr. S.P.Mishra, learned Advocate General appearing along with Mr. Sisir Kr. Das, learned Senior Standing Counsel and Mr. A.K.Pandey, learned Standing Counsel, for all the opposite parties.

Mr. R.K.Mohanty, learned Senior Counsel appearing for the petitioners has submitted that the case of the petitioners is covered by the various IPRs issued by the State Government, which are statutory in nature, and the petitioners would be entitled to the benefits under such IPRs, even though the petitioners may not be in the *'rate contract list'* or *'exclusive purchase list'*. It has been contended that because of not being enlisted in the rate contract or exclusive list, the petitioners, at best may not be entitled to the prescribed benefits attached to the listed items, but would still be entitled to the benefits provided to the SSI unit under the IPRs, which benefits are applicable to the industries not so listed. It is contended that the marketing support or benefit would be distinct from fiscal benefits, and to deprive the petitioner of the marketing benefit would frustrate the very purpose of IPRs as well as the Legislative intent behind the MSMED Act, 2006 and Policy framed there under in the year 2009. The purpose of the said Policies and the Act is to promote the SSI/MSM units and thus, if the benefits provided under the IPRs are limited only to the enlisted industries/units, it would be against the State Policy so loudly proclaimed in all the IPRs.

Learned counsel has contended that such objection of non-inclusion of printers and binders was first raised in the case of ***Orissa Printers*** (supra), but did not find favour of the Court and the writ petition was allowed after quashing the nationalised tender for the academic session 2010-2011 challenged in the said writ petition. The said decision was followed by another Division Bench in the case of ***Mohapatra Binders*** (supra) wherein the nationalized tender for the academic session 2014-15 was under challenge, and the same was also quashed, with certain directions.

The contention thus is that the earlier two decisions of this Court do not suffer from any legal infirmity requiring correction or review of the same, whatsoever. Learned counsel also submitted that the order dated 18.01.2016 passed by the Larger Bench, while vacating the interim order, would not be binding as it was not a final decision, and the Larger Bench only considered

the application for vacation of the interim order, and the issues involved in the said writ petitions had not been finally adjudicated. Learned counsel also contended that the apex Court, while disposing of the SLPs preferred by the State Government against the judgment dated 20.12.2013 in the case of ***Mohapatra Binders*** (supra), had vide its order dated 22.09.2015, directed the State Government to reconsider its policy and take appropriate decision after due deliberation, which has not been complied with by the State, and instead it acted contrary to the said order by issuing impugned national tender call notice dated 09.06.2016. The State Government, having withdrawn the SLP before the apex Court, actually accepted the Division Bench judgments of this Court in the cases of ***Orissa Printers*** and ***Mohapatra Binders*** (supra), and that now the State Government could not have issued national tender in teeth of the two Division Bench decisions of this Court.

Learned counsel has relied on the various provisions of IPRs, as well as the MSMED Act, 2006 and Policy of 2009 framed there under, in support of his submission that national tender could not have been issued in the present case, as the same would defeat the very purpose of the Act and the Policies.

Mr. Mohanty, learned Senior Counsel has further urged that by virtue of the impugned tender call notice, small entrepreneurs, like the petitioners, would not only become absolutely ineligible to participate in the same, but at the same time, they would not be able to compete with units outside the State, which would frustrate the purpose of the IPRs, the Act of 2006 and Policy of 2009. As regards the apprehension of delay in supplying books by the petitioners (which has been raised by the State in its counter affidavit), because of which nationalized tender is said to have been floated, Mr. Mohanty has submitted that the same has no basis, as the paper for printing is supplied by the State, and that in fact in the past there had been delay on the part of the State authorities in providing paper to the successful tenderers, and thus delay, if any, in printing (which may have been there) cannot be attributed to the petitioners. He thus submitted that in the interest of justice and fair play, the impugned tender call notice is liable to be quashed.

In support of his submission, he has relied on the judgments of the apex Court in ***Parappa Ningappa Khaded v. Mallappa Kallappa*****, AIR 1956 Bombay 332,** ***State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha*****, (2009) 5 SCC 694.**

15. Mr. R.K. Rath, learned Senior Counsel appearing for the petitioners in the second writ petition, while adopting the submissions advanced by Mr.

R.K. Mohanty, further contended that the IPRs issued by the Government of Odisha from time to time are with the objective of extending opportunities to the persons of Odisha and to protect the micro, small and medium scale industries located in the State. He submitted that the units of the petitioners are employing thousands of persons belonging to lower economic strata, who would suffer if the exclusive right to carry on the work of the State for printing and book binding is not assigned to the petitioners. It is submitted that the IPRs have been issued for giving purchase preference, price preference and marketing preference to the small scale industries of Odisha and, for nearly two decades, the protection under the said IPRs had been given to the units of the petitioners. It is thus urged that a practice which has been adopted by the State for such a long period would lay the foundation for legitimate expectation of the petitioners. It has further been submitted that the petitioners would be entitled to the benefit of the judgments passed by this Court in ***Orissa Printers*** **and** ***Mohapatra Binders*** *(supra).*

It is contended that book binding and printing press, which are included in the list of IPR 2007, are entitled for fiscal incentives and policy protection of reserving the goods and services. The basic objection of the State is that printing press and book binding have been allegedly excluded from the exclusive purchase list and that the State Government, in its clarificatory letter dated 08.01.2010 issued by the Director of Industries, Odisha clarified that the book binding and printing press are not in exclusive purchase list. Consequentially, the policy of protection imparted to SSI units of the State is no longer available to such type of industries. Learned counsel has raised a preliminary question with regard to the jurisdiction/competence of the Director to issue such type of clarificatory order, when the State Government in Clause-13.1(a) of IPR 2007, specifically states that comprehensive review of rate contract list, exclusive purchase list and open tender purchase list shall be undertaken by a committee consisting of Secretary, Industries Department; Director, Export Promotion and Marketing (EPM); Director, Industries and representatives of Industries Association, which shall submit its recommendation for Government approval in the Industries Department. But, no such committee has been constituted at any point of time, either for exclusion of printing press and book binding from the exclusive purchase list or to be treated in a different manner, and no such decision has been taken by the authority. More so, there is no Cabinet approval or approval of the State Government of such exclusion, as indicated in the clarificatory letter dated 08.01.2010 or letter dated 25.06.2013. Apart

from the same, both the letters dated 08.01.2010 and 25.06.2013 are not based on the recommendation made by the committee, as contemplated under Clause-13.1 of the IPR 2007/OMSMED Policy, 2009. The stakeholders, like the Printers and Binders Mahasangh (which is an association recognised by the opposite parties), has never been given any opportunity of hearing, as has been mandated in the IPR 2007.

It is further urged that certain information had been called for under the Right to Information Act, more particularly to provide documents/notesheets/ordersheets indicating whether any committee has been constituted to exclude printing press/book binding from exclusive list or from EPM contract list, and what was the decision of the said committee, has never been informed, rather it has been stated that "no such information is available in the Directorate". From the above, it can be construed that exclusion of book binding and printing press from exclusive list has never been notified.

Mr. Rath, learned Senior Counsel further contended that the Industry Department, vide order No.14835 dated 06.07.1998 notified the exclusive list of *'store items'*. Against Sl. No.11-*'Paper and Paper Products (excluding paper bag)'* has been notified. The Additional Secretary to Government, MSME Department issued letter dated 17.03.2015 to the Director, Export Promotion and Marketing (EPM), Odisha that the exclusive list of store items be updated, since it was made way back in 1998. The State Government, after consideration included 22 more items in this exclusive list of store items, making total 39 items vide letter dated 19.05.2015. Therefore, the exclusive list of the *'store items'*, vide Industry Department letter dated 06.07.1998, has not been varied in any manner and holds the field till date. Consequence thereof, based on the Industry Department order dated 06.07.1998, Government has been consistently giving printing orders to the SSI units of the State, except for a period of one year.

It is further contended that the books are prepared from *"paper and paper products (excluding paper bag)"* as mentioned in Sl. No.11 of exclusive list of *'store items'* indicated in letter dated 06.07.1998 of the Industries department. As per Rule 96 of the Orissa General Financial Rules (OGFR) (Volume-1), under the heading *"Rules and Instructions Governing the Purchase of Stores"*, all purchase of stores for use in the public service should be regulated in strict conformity with the Store Rules given in Appendix 6. The Appendix 6 of OGFR deals with Rules for the purchase and supply of articles (including Printing and Stationery Stores) for the Public

Service. As per the preamble, the policy of the Government of Orissa is to make their purchase of articles required for the State Service in such a way as to encourage the development of the industries of the Indian Union to the greatest possible extent, consistent with economy and efficiency. In order to give effect to this policy, preference in making purchase will be given as per the order mentioned therein. It is stated that preference will be given to the articles produced or manufactured in Orissa, over those produced in any other State of the Indian Union. In view of such provision, the petitioners, being the SSI units, preference will be given to the articles produced or manufactured in Orissa, over those produced in any other State of the Union of India.

To substantiate his contention, Mr. Rath, learned Senior Counsel has placed reliance upon the judgments of the apex Court in **Maharaja Book Depot v. State of Gujarat,** 1979 (1) SCC 295; ***Scientific Engineering House (P) Ltd. v. Commissioner of Income Tax, Andhra Pradesh*****,** 1986 (1) SCC 11 **and** ***Commissioner of Customs (General), New Delhi v. Gujarat Perstorp Electronics Ltd. etc***., 2005 (7) SCC 118.

16. Mr. S.P. Mishra, learned Advocate General, while justifying the action of the State-opposite parties in issuing the tender call notice dated 09.06.2016, has submitted that the earlier judgments rendered by this Court in the cases of ***Orissa Printers*** *(supra)* and ***Mohapatra Binders*** *(supra)* would not be binding, inasmuch as, the said judgments have not decided the issues involved in the present writ petition and, even though the submission of the State may have been recorded in the said judgment of ***Orissa Printers*** *(supra)*, but said submission or issues have not been dealt with, and the judgment rendered is on the basis of sympathy for the workers and the owners of the units of the petitioners, without taking into consideration the legal aspects of the matter, and without considering the provisions of the IPRs. In the subsequent judgment in *Mohapatra Binders (supra),* the Division Bench has simply followed the decision in the case of *Orissa Printers (supra)* and decided the matter.

The submission is that the petitioners are not doing government works exclusively, but are entitled to, and are actually doing other private works, and filing of the present writ petitions is not for survival of the units but for creating monopoly. It is contended that under the IPRs, certain benefits are to be given to the SSI units of the State, but only to such units which are under the *'rate contract list'* or *'exclusive purchase list'* and, admittedly, the petitioners do not fall in such category. Thus the petitioners would not be

eligible for *"fiscal incentives"* under the IPRs, but only to *"investment facilitation"*, such as allotment of land and recommendation to financial institutions for term loan and working capital or power facility. The benefit given to the petitioners for nearly two decades was not on the basis of the IPRs, but at the discretion of the Government which, with the change in time and circumstances, has rightly been withdrawn. Right from the IPR 1980 and the subsequent IPRs, the Government organizations were required to purchase the enlisted products from the SSI units of the State without inviting tender, but only where rate contract agreement had been entered into. Such benefit was not to all SSI units, which may be otherwise entitled to certain specified facilities or preferences but not *"fiscal incentives"*. It is contended that benefit once given for certain period cannot be perpetuated in the absence of any specific policy in that regard.

The contention is, that even though Schedule I of the Industries (Development and Regulation Act, 1951 *(for short 'IDR Act')* at Sl.24 "*paper and pulp including paper products*" may find place, but *'printing'* and *'book binding'* cannot be covered under the classification of *"paper and pulp including paper products"*. The latter cannot be related to the business of *'printing'* or *'book binding'*, because in any case the paper for printing is supplied by the Government.

It is contended that Section 11 of the MSME Act, 2006 speaks about procurement preference policy, which would mean that only preference is to be given, but not reservation. Even otherwise, the IPRs, which have been issued specifically for such small scale industries, would continue to have force in the case of the petitioners, even after issuance of the OMSMED Policy, 2009.

The further submission is that since binding and printing have never been included in any list under any IPR, Act or policy, thus, the question of exclusive right in favour of the petitioners would not arise.

As regards the submission of the learned Senior Counsel for the petitioners relating to the *"store items"* as mentioned in the OGFR Rules, it is contended that even though books may be prepared out of the *"paper and paper products (excluding paper bag)"*, but the same cannot be applicable in the present context, as Rule 96 of the OGFR does not provide for purchase of *'store items'* for use in public service which specifically includes books, which is the subject matter of the tender itself. It is further contended that the printing and book binding would not be included as *'store items'* so as to bring within the fold of the provisions contained in Rule 96, read with

Appendix 6 of OGFR. As such "paper" would not include "books", so far as paper products are concerned. It is further contended that the words "book", "paper" and "binding" have been explicitly defined in Press and Regulation Books Act, 1967, which still holds the field. Thereby the word "book" may have different meaning under different Act, on different context, and it would be wrong to adopt the meaning to the word "book" or "paper" in a particular context, to the meaning of the same terms in the present case.

It is further contended that the judgments in the cases of *Orissa Printers* and *Mohapatra Binders (supra)* relate to purchase for specific years, i.e., 2010-11 and 2013-14 and would not be binding for challenge to the policy for the year 2017-18. It is contended that if that be so, and the same was binding, then the petitioners would not have withdrawn the writ petition whereby they had challenged the policy for the academic session 2016-17 after the interim order for the said year was vacated on 18.01.2016 by the Larger Bench.

Learned Advocate General has thus contended that the writ petitions are devoid of merits and liable to be dismissed. In support his submissions, he has relied on the decisions in ***Arnit Das v. State of Bihar*****,** (2000) 5 SCC 488; ***Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior*****,** (1987) 1 SCC 5; ***Shimnit Utsch India Private Limited v. West Bengal Transport Infrastructure Development Corporation Limited*****,** (2010) 6 SCC 303; ***Michigan Rubber (India) Limited v. State of Karnataka***, (2012) 8 SCC 216 **and** ***Maa Binda Express Carrier v. North-East Frontier Railway***, (2014) 3 SCC 760.

17. We have carefully examined the submissions made by the learned counsel for the parties and perused the record.

18. Keeping in mind that the learned counsel for all the parties have stated that, besides answering the questions referred to this Larger Bench, the writ petitions themselves may be disposed of, we now proceed to consider the submissions of the learned counsel for the parties to decide the matter on merits, and also answer the questions referred.

19. For proper appreciation of the issues involved in these cases, a brief reference to the various IPRs, as well as the relevant provisions of MSMED Act, 2006 and the OMSMED Policy of 2009 and other provisions, as also a brief history of the litigation is given hereunder.

Industries (Development and Regulation) Act, 1951 *(for short 'IDR Act')* was enacted by the parliament to provide for development and regulation of certain industries. Section 2 of the said Act declares that the

Union Government shall take under its control the industries specified in its First Schedule. Entry 24 of the said Schedule relates to *"Paper and Pulp including Paper Products"*. In 1980, the State Government, in order to ensure accelerated growth in industrial sectors, issued the industrial policy know as Industrial Policy Resolution, 1980 *(IPR 1980)*. Clause-L of the said Policy relates to *"Price Preference"*, and it was provided that small scale industrial units registered with the Director of Industries shall be eligible to get a price preference up to 15 per cent for their products supplied to Government and semi-Government organisations. An additional price preference of 3% was provided for small scale industrial units having ISI certification for their products. Certain exemptions were also provided for, like payment of earnest money and also 50% of the security deposit. Sub-clause (iv) of the clause-L further provided that *"The Government and semi-Government organisations have been directed to purchase their requirement of products of S.S.I. units without inviting tenders wherever rate contract agreement has been entered into by the concerned units with the Directorate of Export Promotion and Marketing"*.

20. In furtherance of the aforesaid policy, in the year 1986, another IPR 1986 was issued with the objective to give adequate incentives to entrepreneurs and to introduce the administrative measures for quickening industrialisation. Clause-I of the IPR 1986 deals with *"Marketing support"*. The said clause makes it clear that protection was given during the initial phase of industrialisation to the nascent SSI units for which rate contract arrangement had been made, so as to prevent them from outside competition. However, it was felt that the *"perpetuation of a secured and sheltered market would not provide the incentive to S.S.I. units to improve the quality of their products, their overall competitiveness and explore outside markets"*. It was thus felt that for enhancing the competitiveness, there was need for revising the policy of rate contract, and taking measures which would be more conducive to improvement of quality and competitiveness. It was also provided that items for which rate contract had been fixed, would be purchased by the Government departments and State controlled agencies at prescribed rates without inviting tenders, and also that efforts would be made to encourage industrial units to produce at all-India market price, so that their products could find market outside the State.

21. Looking to the encouraging response from entrepreneurs to the IPRs announced in 1980 and 1986, the State Government issued the IPR 1989 with a twin objective of encouraging new industries and providing support to

industries which had come up in the State during the last few years. The said policy was to remain in force for five years. Clause 25 of the IPR 1989 relates to *"Marketing support"*, which provides that State Government departments and agencies under its control shall ensure purchase of their requirements of *'store items'* available from industries located inside the State. Clause 25.2 relates to *"Purchase from exclusive list"* and clause 25.3 relates to *"rate contract"*. Annexure-1 of the said IPR 1989 defines *"industrial unit"* and paragraph 3 of the said Annexure also provides for the units which would not be eligible for incentives as industrial units, and *'book binding'* was at Sl. No. 15 of such list.

Thereafter, the State Government issued IPRs of 1992 and 2001 on similar lines.

22. Then in the year 2006, the Central Government enacted the MSMED Act with an object to facilitate the promotion, development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto. Section 11 thereof, which provides for *"Procurement preference policy"*, reads as under:

> *"**11. Procurement preference policy.-** For facilitating promotion and development of micro and small enterprises, the Central Government or the State Government may, by order notify from time to time, preference policies in respect of procurement of goods and services, produced and provided by micro and small enterprises, by its Ministries or departments, as the case may be, or its aided institutions and public sector enterprises."*

23. Then in the year 2007, the State Government issued IPR 2007. Clause 13 of the said policy relates to *"Marketing support to micro and small scale enterprise in government procurement"*. Clause 13.2 provides for the State Government to ensure that requirement of *"store items"* of Government departments and agencies under its control are procured from industries located within the State, and such local units shall get price preference for the purpose, and efforts would be made to ensure that local products are cost effective and meet overall quality requirement for competitiveness.

Annexure-II of the said IPR 2007 provided for Industries listed under the First Schedule of the IDR Act, 1951 to be included as industrial units. However, paragraph 3 of the said Annexure-II of the Schedule provided for the units which shall not be eligible for *'fiscal incentives'* as industrial units, but shall only be eligible for *'investment facilitation'* such as allotment of

land under normal rules and recommendations to the financial institutions for term loan and working capital and, if necessary, for recommendation to the Power Distribution Corporation. Items No. 29 and 32 of the list are *"Book binding"* and *"Printing Press"* respectively, which units would be ineligible for *'fiscal incentives'* but eligible for *'investment facilitation'*.

24. On 17.02.2009 the State Government issued the Orissa MSME Development Policy, 2009 (OMSMED Policy, 2009), which was in conjunction with IPR 2007. Clause 7 of the said Policy provided for *"Marketing"*. Clause 7.2(d)(i) thereof provided that goods and services, other than those in the *'rate contract list'* or *'exclusive purchase list'*, may be purchased by the State Government departments and agencies under the control of State Government through open tender. Price preference of 10% was given to certain units and additional price preference of 3% was also provided for, as was provided under the IPR 1980.

It is not disputed that the units of the petitioners have never been under the *'rate contract list'* or *'exclusive purchase list'* under the said policies.

Then, on 24.08.2015, another IPR 2015 was issued, which also provided for similar incentives for micro and small enterprises, enlisting the items for purchase from SSI units, but the said list again did not include printing and book binding units.

25. The primary contention of learned counsel for the petitioners is that the petitioners are entitled to the benefit of various IPRs issued by the State Government from time to time, and such benefit, which was provided to them for nearly two decades, has now wrongly been withdrawn. The anchor sheet of their submission is the judgment of this Court in the case of ***Orissa Printers*** *(supra)* wherein, it is submitted that after considering the provisions of the IPRs, the petitioners were found entitled to the benefit of the same, and the nationalized tender issued for the academic session 2010-11 was thus quashed, still holds the field, and thus the nationalized tender issued again now on 09.06.2016 for the academic session 2017-18 is also bad in law, and liable to be quashed.

26. We have gone through the said judgment of the Division Bench in the case of ***Orissa Printers*** *(supra)*. What we notice is that only the contention of the petitioners therein, that they were covered under the IPRs, was recorded in the said judgment, but no finding in this regard has been given in the said judgment. It is admitted by the parties, and also recorded in the said

judgment, that the petitioners were not in the *'rate contract list'* or *'exclusive purchase list'* under any of the IPRs. The benefit which was being provided to the petitioners up to the academic session 2009-10, was not because they were in the *'rate contract list'* or *'exclusive purchase list'* of any of the IPRs, but on independent decisions taken by the State Government in that regard, as the policies framed by the State Government were applicable only to such units which fulfilled the conditions of the IPRs, which alone were entitled to its benefits as of right.

27. The objections taken by the State in the said writ petition were duly recorded in para-6 of the said judgment of *Orissa Printers (supra).* However, the said objections, though noted, had not been considered in the judgment. It was specifically contended by the State that under the IPRs and the OMSMED Policy of 2009, issued under the MSMED Act of 2006, it was mandatory for the State Government departments and the agencies under its control to procure all the goods and services only from *"EPM Rate Contract Holders"* or from the list of goods and services reserved for *"Exclusive Purchase"* from Micro and Small Enterprises, located within the State. "*Printing press*" and "*book binding*" were neither included in the *'rate contract list'* nor *'exclusive purchase list'*. It was also the case of the State that Schedule of Annexure-II of IPR 2007 excluded such "*printing press*" and "*book binding*" industries from the eligible list of industries which could claim any kind of *'fiscal incentives'*. It was also contended that the cost of outsourcing of private printing/book binding had gone up to nearly Rs.6.00 crores and since the spending of such a large amount of public money was involved, it was decided to go for a composite printing and binding nationalized tender.

28. Although the said contentions were recorded in the judgment of the Division Bench in the case of *Orissa Printers* (supra), but nowhere have the same been dealt with, and instead the Court allowed the writ petition and quashed the nationalized tender, primarily on the ground that such marketing support was being given to the petitioners for last 18 years, and that by virtue of national tender, the small entrepreneurs, as well as those workers who earn their livelihood by printing and binding of books, will lose their jobs, and that the small entrepreneurs could not be expected to compete with big industries, which will come forward to participate in the national tender. Without considering the contentions raised by the State Government, the Court assumed that several incentives were given to the SSI units under the IPRs for grant of marketing support, which included facility of preferential

purchase of the products manufactured by such industries, and that incentives given under the IPRs had never been withdrawn by the State Government, and thus the national tender issued for the academic session 2010-11 was quashed.

29. Perusal of the said judgment would show that the Bench was swayed by the fact, that if such benefit given to the petitioners was withdrawn, then thousands of workers would be rendered jobless. On a plain reading of the said judgment, it is apparent that the case was decided on ground of sympathy, and not on legal issues which had been raised by the State.

30. Benefit which may have been given to certain class of persons, without they being covered under any policy of the Government for grant of such benefit, can be withdrawn with the change of time and circumstances. It is well settled law that what may have been reasonable at one stage or point of time, may, with the change in circumstances and passage of time, become unreasonable, and thus need to be changed. The Supreme Court has, in the case of ***Malpe Vishwanath Acharya vs. State of Maharashtra (1998) 2 SCC 1,*** in paragraph 8, held that *"with the passage of time a legislation which was justified when enacted may become arbitrary and unreasonable with the change of circumstances."* Earlier also, the Apex Court in the case of ***State of M.P. vs. Bhopal Sugar Industries*** *AIR 1964 SC 1179,* while dealing with a question whether geographical classification due to historical reasons would be valid, observed that "*by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid."*

31. In the present case, the benefit or protection was not given to the petitioners on the basis of any policy of the State Government. The same appears to have been independently given to provide impetus to such units to establish themselves. About two decades back, when the State Government had decided to supply books and other materials to schools of the State, then the demand for books may not have been much. With the passage of time, the quantum of work, as well as cost of the same has, over the past about two decades, increased manifolds. Besides the financial aspect, timely supply of the books would also be a material consideration. Thus, it was within power and discretion of the State Government to take a decision to issue open nationalized tender, in which the petitioners as well as the others would compete. If advantage had been given to one set of industries for some time, which may have been for certain reasons other than under any policy of the

State, the said advantage cannot be allowed to be perpetuated, and with change in time, providing a level playing field to all similar industries may be in the interest of the State, financially, and also otherwise, to maintain proper supply. Thus protection once given to the petitioners for certain reasons about two decades back, cannot be permitted to continue for all times to come, especially after circumstances for grant of such protection may have changed.

32. While dealing with a case where the existing transport operators had challenged the grant of fresh transport permits, the Supreme Court in the case of ***Mithilesh Garg vs. Union of India AIR 1992 SC 443*** has in paragraph 47, held that-

> "*.....As mentioned above the petitioners are permit holders and are existing operators. They are plying their vehicles on the routes assigned to them under the permits. They are in the full enjoyment of their fundamental right guaranteed to them under Article 19(1) (g) of the Constitution of India. There is no threat of any kind whatsoever from any authority to the enjoyment of their right to carry on the occupation of transport operators. There is no complaint of infringement of any of their statutory rights. Their only effort is to stop the new operators from coming in the field as competitors. We see no justification in the petitioners' stand. More operators mean healthy competition and efficient transport system.....*"

What we notice is that the petitioners herein also want to have their upper hand in business by getting the benefit and protection of exclusive purchase, without any competition. It is not the case of the petitioners that they are not permitted to, or cannot do private printing and book binding works, and that they are only supposed to exclusively do Government works. The fact remains that the petitioners are at liberty to do private works, and by insisting on such protection to be continued, they are actually not fighting for the survival of their units, but for creating their monopoly in business.

33. Unless the petitioners are found to be covered under any policy framed by the State Government for grant of certain benefits, they would not, as of right, be entitled for the same, only on the ground that such benefit was given to them earlier for some years. With change in circumstances, such benefits can always be withdrawn, unless the petitioners are found entitled to the same under the provisions of any policy of the Government. Admittedly, the benefit of *'fiscal incentives'* is to be granted under the IPRs only to those who are covered under the *'rate contract list'* or *'exclusive purchase list'*, which is not so in the case of the petitioners. It needs to be reiterated here that

the judgment in the case of ***Orissa Printers*** (supra) has nowhere held that the units of the petitioners would be covered by the IPRs.

34. In the case of ***Mohapatra Binders*** *(supra)*, what we notice is that the Division Bench has simply followed the judgment in the case of *Orissa Printers (supra)* and quashed the national tender call notice for the academic session 2014-15, but with certain directions. By issuing such directions in the judgment, the Division Bench had accepted that there were certain shortcomings in the performance of the petitioners, which required rectification.

35. The constitution Bench of the apex Court in ***State of Orissa v. Sudhansu Sekhar Misra,*** **AIR 1968 SC 647** held as follows:

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."*

Applying the above principle to the case in hand, neither the case of ***Orissa Printers*** *(supra)* nor ***Mohapatra Binders*** *(supra)* has decided the questions which arose before the Court, and in our view, benefit has been extended to the petitioners therein on the basis of the misplaced sympathy, which is not in conformity with the provisions of law.

36. In ***Parappa Ningappa Khaded v. Mallappa Kallappa***, AIR 1956 Bombay 332, the Division Bench of Bombay High Court held as follows:

> *"A decision of a Full Bench, or of any Court for the matter of that, is binding provided it is a considered decision. But when a decision has been given without the pros and cons of the question being considered, it cannot possibly be urged that such a decision acquires a finality which cannot be interfered with by any subsequent decision."*

In ***Arnit Das*** (supra) the apex Court held that where a particular point of law is not consciously determined by the Court, that does not form part of *ratio decidendi* and is not binding, and the same is hit by rule of *sub silentio*.

In view of such position, we are of the considered opinion that the judgments of this Court in ***Orissa Printers*** *(supra)* and ***Mohapatra Binders*** *(supra)* cannot be stated to be binding judgments, as these are not considered decisions, because the questions which had been raised before the Court were not answered in proper perspective.

37. Further, we are unable to accept the submission of learned Counsel for the petitioners that *"paper and paper products"* which are included in the exclusive list at Sl. No. 11 of IPR 2001 would cover the units of the petitioners. It is not understood as to how, under the said heading of "*paper and paper products", "printing"* and "*book binding"* could also be included. There can be no dispute of fact that printing work is distinct from "*paper and paper products"*, hence, there could be no question of printing units being covered under the aforesaid clause. The contention that "*book binding"* is directly concerned with *"paper and paper products*", and thus the same would be included in the exclusive list, also cannot be accepted. "*Book" or "book binding"* both would be distinct from "*paper and paper products*", as paper may be used for book binding or for preparing a book, but book binding would be a separate business, and even though it may be related to paper, it would not mean to cover book binding unit as small scale industries related to '*paper and proper products*'.

38. Reliance has been placed by the learned Advocate General on the definition given to *"Book"*, *"Paper"* and *"Printing"* under The Press and Registration of Books Act, 1867, to support his contention that the units of the petitioners would not be covered under *'paper and paper product'*. The definitions given in Section 1 of the said Act are reproduced below:

> ***"Book"*** *includes every volume, part or division of a volume, and pamphlet, in any language, and every sheet of music, map, chart or plan separately printed.*
>
> ***"Paper"*** *means any document, including a newspaper, other than a book.*
>
> ***"Printing"*** *includes cyclostyling and printing by lithography.*

39. In our view, such submission has force. Even if we consider that the definition of a word or phrase given in one context could be different in another context, but in our opinion, under no definition or meaning, *'printing'* and *'book binding'* units can be considered to be covered as "*paper and paper product"* units.

40. Under the various policies of the State Government, marketing support and price preference has been provided for to SSI units, but it was also recorded in the said policies that:

> *"perpetuation of a secured and sheltered market would not provide the incentive to S.S.I. units to improve the quality of their products, their overall competitiveness and explore outside markets".*

As such, it was never the intention of the Government to guard all the SSI units from the open market competition but only to certain SSI units which were in the *'exclusive purchase list'* or *'rate contract list'* of the IPRs, which provide that:

> *"The Government and semi-Government organisations have been directed to purchase their requirement of products of S.S.I. units without inviting tenders* ***wherever rate contract agreement has been entered into*** *by the concerned units with the Directorate of Export Promotion and Marketing".*

41. It may be noted that *"fiscal incentives"* or *"marketing support"* of exclusive purchase from such SSI units, may have been provided to such units which were enlisted, but the rest of the SSI units could, at best be only eligible for *"investment facilitation"*, under which facilities such as allotment of land, recommendation for terms loan and working capital loans etc. is contemplated. Annexure II of the Schedule of IPR 2007 gives the list of units which shall not be eligible for *"fiscal incentives"*, and *'book binding'* and *'printing press'* are at item no. 29 and 32 of such list. As such, when there is a specific provision or a direct clarification given in the policy itself, then there would be no question of reading something more than what is there, or to take indirect support to bring in something within its fold, which item is not there.

42. Further, clause 7.2(d)(i) of the OMSMED Policy 2009 also clearly provides that goods and services, other than those in the *'rate contract list'* or *'exclusive purchase list'*, may be purchased by the State Government departments and agencies under the control of State Government through open tender. Thus, the units of the petitioners which are admittedly not covered under the *'rate contract list'* or *'exclusive purchase list'* would also not be entitled to any protection under the OMSMED Policy. It may also be noted here that even the Director of Industries, Odisha has clarified, vide communication dated 08.01.2010, that *'printing press'* and *'book binding'* units are not included in the *'rate contract list'* or *'exclusive purchase list'*.

43. Much reliance has been placed on judgment of the apex Court in ***Scientific Engineering House (P) Ltd. V. Commissioner of Income Tax, Andhra Pradesh***, (1986) 1 SCC 11 wherein, while answering the question of acquisition of depreciable assets under the Income Tax Act, the definition of *"book"* has been taken into consideration, taking into account the dictionary meaning of that word. But, the context of using the word *"book"* in the said judgment has no application to the present case.

Similarly, in ***Commissioner of Customs (General), v. Gujarat Perstorp Electronics Ltd***, (2005) 7 SCC 118, while considering the provision of Section 25 (1) of the Customs Act, 1962, the word *"book"* occurring under the exemption notification and scope thereof was considered by the apex Court, wherein the meaning of *"book"* has been considered in paragraphs 44 to 49. The apex Court observed that, when the expression of word *"book"* is not defined in the Act, natural and ordinary meaning of the said expression must be kept in view. So far as the meaning of *"book"* mentioned in the said judgment, there is no dispute at all with regard to its natural and ordinary meaning, but the same has to be considered in the facts and circumstances of a particular case. For the case in hand, considering the provisions of IPRs and MSME Act, read with OGFR, as discussed above, we are of the considered view that the reference made to the judgments by the learned Senior Counsel for the petitioners has no bearing.

44. Learned counsel for the petitioners has also contended that under para-13.2 of the IPR 2007, the State Government was required to ensure that the *'store items'* for the State Government and its agencies should be procured from the SSI and other local units at *'price preference'*. Firstly, we are of the opinion that the printing press items and book binding would not be covered under the various products of the *'store items'*. Secondly, even if included, it is only the *'price preference'* which has to be given (and not the right of exclusive purchase) in case of the *'store items'*.

45. As per the Industry Department Order No.14835 dated 06.07.1998, the list of *'store items'* have been notified wherein at Sl. No.11 *"paper and paper products (excluding paper bag)"* has been mentioned. The Additional Secretary to Government, MSME Department issued letter dated 17.03.2015 to the Director, Export Promotion and Marketing (EPM), Odisha that the exclusive list of *'store items'* be updated, since it was made way back in 1998. Subsequently, pursuant to letter dated 19.05.2015, the State Government, after consideration, included 22 more items in this exclusive list of store items, making it total of 39 items. Therefore, the exclusive list of the *'store items'* vide Industry Department letter dated 06.07.1998 has not been varied in any manner and holds the field till date. But, that *ipso facto* cannot be construed that the petitioners are covered under the *'store items'* and entitled to get protection under the OGFR. Rule 96 under the heading *"Rules and Instructions governing the purchase of stores"* clearly deals with all purchase of stores for use in the public service and should be regulated in strict conformity with the *"Store Rules"* given in Appendix 6. The Appendix 6 of OGFR deals with Rules for the Purchase and Supply of Articles

(including Printing and Stationery Stores) for the Public Service. In the preamble, it has been clearly mentioned that preference will be given to the articles produced or manufactured in Odisha, over those produced in any other State of the Indian Union. Therefore, the policy preference in making purchase of goods is being given under Rule 96 and Appendix 6 of OGFR. The item of printing and binding of books has been indicated in the said Rules. Merely policy preference is to be granted, and that in itself cannot be said that the printing and binding are covered under the said policy, when it has not been specifically prescribed in the said Rules under the heading of *'store items'*.

In our considered view, in absence of any specific exclusive list items, *'printing press'* and *'book binding'* cannot be included as *"store items"* under OGFR, as urged before this Court. Consequently, we are not able to accept the argument so advanced by learned Senior Counsel for the petitioners.

46. The judgments in ***Mohapatra Binders*** and ***Orissa Printers*** (supra), and subsequent order passed by the Larger Bench of this Court, while vacating the interim order, cannot be termed as precedent, as these decisions have not decided any question which had been raised before this Court.

47. In ***Kapila Hingorani (I) v. State of Bihar***, (2003) 6 SCC 1, the apex Court while dealing with meaning of "precedent" has held as follows:

> *"A precedent is a judicial decision containing a principle, which forms an authoritative element termed as ratio decidendi. An interim order which does not finally and conclusively decide an issue cannot be a precedent. Any reasons assigned in support of such non-final interim order containing prima facie findings, are only tentative. Any interim directions issued on the basis of such prima facie findings are temporary arrangements to preserve the status quo till the matter is finally decided, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing."*

Similar view has also been taken by the apex court in ***State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha*****,** (2009) 5 SCC 694 wherein, it is further clarified that an interim order cannot be said to be a precedent. The interim directions issued on the basis of prima facie findings, are temporary arrangements to preserve the *status quo*, to ensure that the matter does not become either infructuous or a *fait accompli* before final hearing. This being the position, while vacating the interim order, no decision has been rendered by the Larger Bench of this Court, there by the order so passed cannot be

taken into consideration as no *ratio decidendi* to characterise as precedent for the present case. Therefore, to set at naught the issue for all times to come, this Court proceeded to delve into the matter in detail and decide the same by laying down the principle of law which will remain guiding force for the parties to this litigation.

48. Mr. S.P.Misra, learned Advocate General for the State, vehemently urged before this Court that policy of the Government, relating to printing and binding having changed, and it being well within the domain of the State authority, the same cannot be interfered with by the Court in exercise of its power of judicial review. The said submission has force.

In ***Shimnit Utsch India Private Limited*** (supra) the apex Court held that in exercise of power of judicial review, the Court cannot interfere with the policy or policy decision, or change of any policy framed by the Government.

In ***Michigan Rubber (India) Limited*** (supra) the apex Court held that the Government and their undertakings must have a free hand in setting terms of the tender and only if they are arbitrary, discriminatory, mala fide or actuated by bias, then alone the Court would interfere in exercise of its power of judicial review.

None of the conditions have been satisfied in the present case, so as to call for interference by this Court in exercise of power under judicial review.

49. In ***Maa Binda Express Carrier*** (supra) the apex Court held that submission of a bid or tender in response to a notice inviting tender is only an offer, which the State or its agencies are under no obligation to accept. Bidders participating in the tender process cannot insist that their bids/tenders should be accepted simply because a bid is the highest or lowest. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in evaluation of their bids/tenders. When the power is vested with the Government to fix its modalities, the same cannot be challenged before this Court, unless it comes within the parameters of arbitrariness or unreasonableness and, as such, in a matter of contract, it is within the complete domain of the Government to frame its own policies. In view of that, the Government has to be given a free hand to act fairly, reasonably and non-discriminatorily, so as to achieve the avowed objective of tender process.

50. We are of the considered opinion that the scope of the Court, for interference in a tender process in exercise of power under judicial review being limited one, as such, in the present context, as discussed above, we

have to examine the question as to whether any arbitrary exercise of power has crept in while issuing notice inviting tenders for printing and binding of books.

51. The IPRs and the Policy of 2009 have been issued by the State Government with the objective to give adequate incentives to entrepreneurs, and to introduce the administrative measures for quickening industrialisation in the State. Protection is to be given to nascent SSI units during the initial phase so as to encourage new industries. Even though not covered under the policy for such protection, the units of the petitioner were given the benefit, so as to protect them from outside competition, which was at the discretion of the Government, and not under any policy. The same was not as of right, but only to help the units establish themselves. Such protection, which is not as of right under any policy, and meant only for encouraging new units, cannot be perpetuated, and can be withdrawn with change of time.

52. Sympathy may be a ground for grant of benefits in certain cases, but not in commercial transactions. The magnitude of work of printing and binding which is now to be awarded by the State Government runs in crores of rupees. Books are now to be distributed by the Government to the schools in large numbers, within a specified time. The Government has taken a specific stand that for proper distribution of books, and in the interest of the economy of the State, nationalized tender should be issued. Such decisions are essentially commercial decisions, and principles of equity and natural justice would stay at a distance in such cases.

53. In our view, a judgment passed on sympathy, in such a matter, would be a case of misplaced sympathy, and not in accordance with law. The submission that, if the protection which was given earlier was not continued, the units of the petitioners would close down, and the workers engaged in such units would be rendered jobless, does not have much force. It is not the case of the petitioners that they are not free to do private business, or that they are not doing so, and that they are obliged to do the works of the Government exclusively. In a competitive world of business, some protection can be given to a certain class of industry for some time, so as to enable it to establish itself. If the same is perpetuated and the units are not allowed to compete in the open market, they would, in fact, be kept away from making progress and the need of improving their quality, as well as their efficiency, to make their products and prices competitive. If, after having been given protection for nearly two decades, the small scale industries of the petitioners have not come up to stand on their own and compete with the outside market,

then what they are actually wanting is, not preference but reservation of exclusive purchase from their units, which cannot be permitted in the facts of the present case.

54. We are of the firm view that the protection given to the petitioners at an earlier point of time was because of discretion exercised by the Government in their favour, and not under any policy of the Government. Such discretion, which was enjoyed by the petitioners for a long period of time, cannot be perpetuated. If perpetuated, the small scale industries would become totally dependent and would not be able to rise and be a part of the general industrial progress and development. It is like a child, who is given protection by his guardian during his growing years, and then after he grows up and matures, he is to be left to fend for himself and face the world, and make his own place in the society. If not so allowed, and always kept under the protective umbrella of his guardian, no man will ever be able to be self reliant or be independent in life. Similarly, a small scale industry may be given protection and support for some time, which may be a few years, but not for all times to come. Thereafter, unless required in law, no further protection, concession or preference should be continued.

In the present case, the petitioners have not been able to establish that the law requires continuation of such protection or concession, which was earlier given at the discretion of the Government, and not under any policy of the Government.

55. We have already clarified hereinabove that the judgments in the cases of ***Orissa Printers*** *(supra)* and ***Mohapatra Binders*** *(supra)* have not been pronounced on principles of law, after considering the legal objections raised by the State Government, but on the basis of misplaced sympathy. The same would, thus, not be binding. Even otherwise, said judgments relate to the tenders of particular years and would not be binding for subsequent years, unless any ratio has been laid down which would bind the parties on the legal principles, which is not so. It is, however, also true that the order of the Larger Bench dated 18.01.2016, wherein observations have been made against the interest of the petitioners, was only with regard to vacation of interim order and since the writ petitions were not decided by the said order, the same would not have binding force.

56. In view of the aforesaid, we answer all the three questions in favour of the State-opposite parties and against the petitioners, and hold that the ratio decided by this Court in the cases of ***Orissa Printers*** *(supra)* and ***Mohapatra Binders*** *(supra),* would not have binding force and the petitioners would not

be entitled to the protection of the IPRs issued by the State Government, as well as MSMED Act, 2006 and the OMSMED Policy framed there under in 2009. We also hold that the petitioners would not be entitled to grant of any relief in these writ petitions. The writ petitions are, accordingly, dismissed. No order as to cost.

Writ petitions dismissed.

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2017 (I) ILR - CUT- 238

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

W.P.(C) NO. 8816 OF 2016

M/S. MESCO STEEL LTD. & ANR. ……..Petitioners

.Vrs.

GOVT. OF INDIA & ANR. ……..Opp. Parties

MINES AND MINERALS (DEVELOPMENT & REGULATION) ACT, 1957 – S.10-A(2)(C)

Whether, after the amendment of the Act, 1957 by Act 10 of 2015 w.e.f. 12.01.2015 and coming into force of the Rules, 2016, approval of the Central Government is required for grant of mining lease with regard to iron ore ? – Held, No

In this case the decision to grant mining lease in favour of the petitioner having already been taken by the State Government for the reduced area of 475.457 hectares, which is final, no further approval of the Central Government is required – Held, the impugned order Dt. 12.04.2016 passed by the Central Government making queries and clarifications is quashed – Direction issued to the State Government to execute the lease deed in favour of the petitioner-company in accordance with law. (Para 20)

Case Laws Referred to :-

1. AIR 1987 SC 537 : The Comptroller and Auditor General of India, Gian Prakash, New Delhi -V- K.S.Jagannathan
2. AIR 1981 SC 711 ; State of Tamil Nadu -V- M/s. Hind Stone etc. etc.
3. 2013(Supp.II)OLR 563 : AIR 2013 Ori 80 : M/s. K.P.Granite Industries -V- State of Orissa
4. AIR 1964 SC 1680 : Tewari -V- Dt. Board

5. (1994) 1 SCC 44 : Ram Chand -V- Union of India
6. (1985) 2 All ER 327 : R. -V- IRC Exparte Preston
7. AIR 2006 SC 182 : Punjab Electricity Board -V- Zora Singh

Petitioners : Mr. Sanjit Mohanty, Senior Advocate
M/s. I.A.Acharya, R.R.Swain & A.Dash

Opp. Parties : Mr. Bibekananda Nayak, Central Govt. Counsel
Mr. B.P.Pradhan, Addl. Govt. Adv.

Date of Judgment : 24.10.2016

JUDGMENT

VINEET SARAN, C.J.

The present petition relates to grant of mining lease for certain area in favour of the petitioner company, which has set up a steel plant and the mining lease of iron ore was to be granted for such purpose. Although this matter has a chequered history, we are condensing the facts to only those, which are relevant for the purpose of the present case.

2. The petitioner no.1, M/s. Mesco Steel Ltd. is a company registered under the provisions of the Companies Act, 1956, of which petitioner no.2 is its Director. The petitioner company had applied for grant of mining lease of iron ore over an area of 1519.980 hectares under the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (for short "the Act, 1957), which has subsequently been amended by Act 10 of 2015 with effect from 12.01.2015. In accordance with the provisions of Section 5(1) of the Act, 1957, as it then stood, on 21.10.1997, the Government of Odisha made recommendation to the Central Government for grant of prior approval of mining lease for iron ore over an area of 1011.480 hectares in village Kadakala and Luhakala and 508.500 hectares in village Sundara and Pidapokhari of Keonjhar district (total area 1519.980 hectares) in favour of the petitioner company. Then on 07.01.1999, the Government of India accorded approval under Sections 5(1) and 11(4) of the Act, 1957 read with Rule 27(3) of Mineral Concession Rules, 1960 with relaxation provided under Section 6(1)(b) of the Act, 1957 for grant of mining lease of iron ore over the entire area of 1519.980 hectares for a period of 30 years, for which the petitioner company had applied. Then, certain conditions were laid down on 08.02.1999 by the Government of Odisha for grant of such mining lease, which was accepted by the petitioner company on 15.02.1999. Then on 17.03.1999, the Government of Odisha issued a grant order for granting

mining lease of iron ore over the entire area for a period of 30 years. However, the lease deed could not be executed.

While the matter remained pending before the State Government for execution of the lease deed, the State Government intended to reduce the area of lease of the petitioner company on the ground that there was some overlapping and that the area of lease granted in favour of the petitioner was in excess of the captive requirement of the petitioner's steel plant. Challenging the same, the petitioner filed writ petition bearing W.P.(C) No. 14044 of 2006, which was allowed by a Division Bench of this Court vide judgment and order dated 16.05.2008 and a direction was issued to the State Government for execution of the mining lease deed for the entire area of 1519.980 hectares. It may be mentioned that during pendency of the writ petition, a notice dated 06.02.2007 under Rule 27(5) of Mineral Concession Rules, 1960 was issued to the petitioner company to show cause as to why the area for mining lease granted in favour of the petitioner company on 17.03.1999 be not reduced. Since the matter was pending consideration before the High Court in W.P.(C) No.14044 of 2016, the petitioner company did not submit any reply to the said show cause notice.

Challenging the judgment and order dated 16.05.2008 passed by the High Court in W.P.(C) No. 14044 of 2006, whereby the prayer of the petitioner company had been granted, the State Government filed SLP(c) No. 16139 of 2010 before the apex Court. Keeping in view that the show cause notice had already been issued to the petitioner company during pendency of the writ petition, which was not taken note of by the High Court, the apex Court set aside the judgment of the High Court and allowed the appeal preferred by the State, vide judgment dated 06.03.2016 with the direction that the petitioner company shall submit its reply to the show cause notice whereupon the State Government shall pass a reasoned order. The operative portion of the judgment of the apex Court in paragraph-19 is reproduced below:

> *"In the result we allow this appeal, set aside the judgment and order passed by the High Court and direct that the respondent-company shall submit its reply to the show cause notice dated 6th February, 2007 issued by the State Government within three months from today.* ***The Government may then upon consideration of the reply so submitted pass a reasoned order on the subject within two months thereafter under intimation to the respondent****. If the order so made is, for any reason found to be unacceptable by the respondent-*

company, it shall have the liberty to take recourse to appropriate proceedings before an appropriate forum in accordance with law."

(emphasis supplied)

Pursuant to the direction issued by the apex Court, the petitioner company submitted its reply to the notice on 04.06.2013. Then by order dated 24.02.2015, the State Government held that the petitioner company was entitled to only 47.6 million ton reserve of iron ore for its 1.2 MTPA Steel Plant, but the exact specified area of mineable reserve was not decided by the State Government. The petitioner company then again approached the Supreme Court by filing Contempt Petition(C) No. 35 of 2015 and by order dated 20.03.2015, the apex Court directed the State Government to complete the exercise of re-assessing the mineable reserve area in terms of the order dated 24.02.2015 within two months and inform the petitioner company of the same. The State Government issued a corrigendum letter dated 09.04.2015 correcting its order dated 24.02.2015 and then in terms of the Supreme Court order dated 20.03.2015, the Government of Odisha, vide its order dated 06.06.2015, recommended an area of 475.457 hectares as mineable reserve of 47.6 MT for a period of 30 years. By the said order, the mining area of the petitioner company was reduced from 1519.980 hectares to 475.457 hectares, for which prior approval of the Central Government was again sought for by the State Government. Immediately thereafter on 11.06.2015, after noticing the discrepancy in the proposal dated 06.06.2015, where the lease period was mentioned as 30 years instead of 50 years, as required by the amended Section 8A(2) of the Act, 1957 (amended by Act 10 of 2015) the proposal was amended to state that the grant of mining lease in favour of the petitioner company was to be for a period of 50 years instead of 30 years.

The petitioner company had thereafter on 26.11.2015 accepted the State Government's decision with regard to reduction of the area from 1519.980 hectares to 475.457 hectare. Then on 10.12.2015, the Government of India, in response to the communication of the State Government dated 06.06.2015 sought some information/clarification, to which the State Government responded on 14.01.2016 requesting the Central Government to allow the State Government to proceed in accordance with the provisions of the amended Section 10A(2)(c) of the Act, 1957, which now did not require the permission of the Central Government for grant of mining lease of iron ore. The Central Government, instead of allowing the State Government to proceed to execute the lease deed in favour of the petitioner company in

terms of the amended provision of the Act, 1957, on 12.04.2016 raised certain queries for clarification from the State Government. At this stage, when the lease deed was not being executed in favour of the petitioner company, even for the reduced area, and clarification was being sought by the Central Government which, according to the petitioners, was not necessary after the amendment came into effect from 12.01.2015, the petitioners approached this Court with the prayer for quashing the communication dated 12.04.2016 issued by the Central Government raising certain queries and clarifications. A further prayer has also been made for a direction in the nature of mandamus commanding the State Government to execute the lease deed in accordance with the Minerals (Other than Atomic and Hydro Carbons Energy Minerals) Concession Rules, 2016 (for short "the Rules, 2016") which had come into force w.e.f. 04.03.2016, whereafter the Mineral Concession Rules, 1960 stood repealed.

It may be noted here that in response to the communication dated 12.04.2016, the State Government submitted its reply to the Central Government on 23.08.2016 (during pendency of this writ petition), but no orders have been passed by the Central Government as yet.

3. We have heard Mr. Sanjit Mohanty, learned Senior Counsel appearing along with Mr. I.A. Acharya, learned counsel for the petitioners; Mr. B. Nayak, learned Central Government Counsel appearing for opposite party no.1; and Mr. B.P. Pradhan, learned Addl. Government Advocate appearing for opposite party no.2 and perused the records. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties, this petition is being disposed of at the stage of admission.

4. Mr. S. Mohanty, learned Senior Counsel for the petitioners has submitted that the urgency in the matter is because according to Rule 8(4) of the Rules, 2016, where an order for grant of mining lease has already been issued, the mining lease shall be executed and registered on or before 11th January, 2017, i.e., within two years of the coming force of the Amendment Act 10 of 2015, which has amended the various provisions of the Act, 1957 w.e.f. 12.01.2015. It is stated that since the case of the petitioner company would be governed by the amended provisions of the Act, 1957 and the freshly famed Rules, 2016 (after the Mining Concession Rules, 1960 has been repealed), in case the lease deed is not executed on or before 11.01.2017 the matter would become infructuous, and merely because of the inaction on the part of the opposite parties, the petitioner company should not be made to suffer.

On merits it has been submitted that by Amendment Act 10 of 2015, Proviso to Section 5(1) has been inserted and, according to the said Proviso, there would be no necessity of prior approval being taken from the Central Government with regard to mining leases relating to iron ore. It was next submitted that as per the amended Section 10A(2)(c) of the Act, 1957 also, prior approval of the Central Government would not be required, as admittedly the case of the petitioner company is covered under clause (c) of Sub-section (2) of Section 10A and not clause (b), for which alone prior approval of the Central Government would be required.

Learned Senior Counsel for the petitioners has further contended that though the prior approval of the Central Government is no longer required, but even then, in the case of the petitioner company, approval of the Central Government under the unamended Section 5(1) of the Act, 1957 for the entire area of 1519.980 hectares had already been granted on 07.01.1999 and no fresh approval would in any case be required after the area has been reduced to 475.457 hectares, as the reduced area is only a part of the larger area for which the approval had already been granted by the Central Government. This argument has been made by Sri Mohanty without prejudice to his right that the approval of the Central Government is no longer required. In support of his contention, Mr. S. Mohanty, learned Senior Counsel relied upon the judgment of the apex Court in ***The Comptroller and Auditor General of India, Gian Prakash, New Delhi v. K.S. Jagannathan,*** AIR 1987 SC 537.

5. Sri B. Nayak, learned Central Government Counsel appearing for opposite party no.1 has submitted that even after the coming into force of the Rules, 2016 and the amending Act 10 of 2015 (whereby the provisions of the Act,1957 have been amended), then, since the application for grant of mining lease of the petitioner company was pending consideration prior to such amendment, the requirement of prior approval of the Central Government would still be there and, as such, the State Government had rightly sought for clarification from the Central Government on 10.12.2015, which is pending consideration before the Central Government. It is also contended that on 14.01.2016 the communication issued by the State Government would not be relevant, as the Central Government has already issued certain queries seeking clarifications from the State Government on 12.04.2016, to which the clarification has already been given by the State Government on 23.08.2016, which is pending consideration before the Central Government. It is further contended that the petitioners' case is to be considered according to the Rules

in force on the date of application. To substantiate the same, reliance has been placed on ***State of Tamil Nadu v. M/s. Hind Stone etc. etc.,*** AIR 1981 SC 711 and ***M/s. K.P. Granite Industries v. State of Orissa,*** 2013 (Supp. II) OLR 563: AIR 2013 Ori 80.

6. Mr. B.P. Pradhan, learned Additional Government Advocate appearing for the State opposite party has not disputed the fact that after the amendment of the Act, 1957 by Act 10 of 2015 and the coming into force of the Rules, 2016, there is no requirement for any approval to be taken from the Central Government with regard to mining lease relating to iron ore and has stated that the communication dated 06.06.2015 had been inadvertently sent by the State Government to the Central Government seeking their approval, whereas in terms of Proviso to the amended Section 5(1) of the Act, 1957, such approval was not required. The State Government had then written to the Central Government on 14.01.2016 for allowing the State Government to proceed in accordance with the amended provisions of Section 10A (2)(c) of the Act, 1957, as such approval was no longer required from the Central Government. It is submitted that as a matter of abundant precaution, the State Government has also given its reply on 23.08.2016 to the queries raised by the Central Government on 12.04.2016.

7. The petitioner company does not challenge the reduction of its area from 1519.980 hectares to 475.457 hectares and as such the same has become final. The only question required to be considered by this Court now is:-

> "*Whether, after the coming into force of the Rules, 2016 with effect from 04.03.2016 and the amendment in the Act,1957 with effect from 12.01.2015 by Act 10 of 2015, the State Government would still be required to take permission or approval of the Central Government prior to execution of lease deed with regard to iron ore* ?"

If the answer to the above question is against the petitioners, this Court would then be required to consider the other question raised by the learned counsel for the petitioners that, if the prior approval is still required for grant of approval of mining lease of iron ore, then would the approval granted for the larger area on 07.01.1999 still hold good for reduced area out of the same larger area.

8. For proper appreciation of this case, the following relevant provisions are being extracted below:

> ***THE MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957***

"5. Restrictions on the grant of prospecting licences or mining leases. -

(1) A State Government shall not grant a reconnaissance permit, prospecting licence or mining lease to any person unless such person
(a) is an Indian national, or a company as defined in clause (20) of section 2 of the Companies Act, 2013; and

(b) satisfies such conditions as may be prescribed:
Provided that in respect of any mineral specified in Part A and Part B of the First Schedule, no reconnaissance permit, prospecting licence or mining lease shall be granted except with the previous approval of the Central Government."

"10-A. Rights of existing concession holders and applicants. -
(1) All applications received prior to the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, shall become ineligible.

(2) Without prejudice to sub-section (1), the following shall remain eligible on and from the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015:—
(a) applications received under section 11A of this Act;

(b) where before the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 a reconnaissance permit or prospecting licence has been granted in respect of any land for any mineral, the permit holder or the licensee shall have a right for obtaining a prospecting licence followed by a mining lease, or a mining lease, as the case may be, in respect of that mineral in that land, if the State Government is satisfied that the permit holder or the licensee, as the case may be,—

(i) has undertaken reconnaissance operations or prospecting operations, as the case may be, to establish the existence of mineral contents in such land in accordance with such parameters as may be prescribed by the Central Government;

(ii) has not committed any breach of the terms and conditions of the reconnaissance permit or the prospecting licence;

(iii) has not become ineligible under the provisions of this Act; and

(iv) has not failed to apply for grant of prospecting licence or mining lease, as the case may be, within a period of three months after the expiry of reconnaissance permit or prospecting licence, as the case may be, or within such further period not exceeding six months as may be extended by the State Government;

(c) where the Central Government has communicated previous approval as required under sub-section (1) of section 5 for grant of a mining lease, or if a letter of intent (by whatever name called) has been issued by the State Government to grant a mining lease, before the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, the mining lease shall be granted subject to fulfilment of the conditions of the previous approval or of the letter of intent within a period of two years from the date of commencement of the said Act:

Provided that in respect of any mineral specified in the First Schedule, no prospecting licence or mining lease shall be granted under clause (b) of this subsection except with the previous approval of the Central Government."

THE MINERAL CONCESSION RULES, 1960.

"27. Conditions :-

(1)	*xx*	*xx*	*xx*
(2)	*xx*	*xx*	*xx*
(3)	*xx*	*xx*	*xx*
(4)	*xx*	*xx*	*xx*

(5) If the lessee makes any default in the payment of royalty as required under section 9 or payment of dead rent as required under section 9A or commits a breach of any of the conditions specified in sub-rules (1), (2) and (3), except the condition referred to in clause (f) of sub-rule (1), the State Government shall give notice to the lessee requiring him to pay the royalty or dead rent or remedy the breach, as the case may be, within sixty days from the date of the receipt of the notice and if the royalty or dead rent is not paid or the breach is not remedied within the said period, the State Government may, without prejudice to any other proceedings that may be taken against him, determine the lease and forfeit the whole or part of the security deposit."

THE MINERALS (OTHER THAN ATOMIC AND HYDRO CARBONS ENERGY MINERALS) CONCESSION RULES, 2016.

"8. Rights under the provisions of clause (c) of sub-section (2) of section 10A –

(1) xx xx xx
(2) xx xx xx
(3) xx xx xx

(4) Where an order for grant of mining lease has been issued under sub-rule (2), the mining lease shall be executed with the applicant in the formant specified in Schedule VII and registered on or before 11th January, 2017, failing which the right of such an applicant under clause (c) of sub-section (2) of section 10A for grant of a mining lease shall be forfeited and in such cases, it would not be mandatory for the State Government to issue any order in this regard.

12. Terms and conditions of a mining lease – *(1) Every mining lease shall be subject to the following conditions.*

(a) xx xx xx
(b) xx xx xx

(c) the lessee shall commence mining operations within two years from the date of execution of the lease deed and shall thereafter conduct such operations in a proper skilful and workman like manner;

Explanation.- For the purpose of this clause, mining operations shall include the erection of machinery, laying of a tramway or construction of a road or any other operation undertaken for the purpose of winning of minerals;

"55. Repeal and saving.- *(1) On the commencement of these rules, the Mineral Concession Rules, 1960 shall cease to be in force with respect to all minerals for which the Minerals (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2015 are applicable, except as regards things, done or omitted to be done before such commencement.*

(2) On the commencement of these rules, with respect to the minerals to which these rules apply, any reference to the Mineral Concession Rules, 1960 in the rules made under the Act or any other document

shall be deemed to be replaced with Minerals (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2015, to the extent it is not repugnant to the context thereof."

9. From the plain reading of proviso to Section 10A(2) of the Act 1957, as inserted by Act 10 of 2015 with effect from 12.01.2015, it is clear that the restriction regarding grant of prospecting licence of mining lease with the previous approval of the Central Government is only with regard to cases covered under clause (b) of sub-section (2) of section 10A of the Act and not with regard to those leases covered by clause (c). It is not the case of any of the parties that the present case is covered by clause (b). The parties admit that the present case of the petitioner company would be covered by clause (c). According to the petitioner company, the previous approval of the Central Government was already granted on 07.01.1999. The letter of intent was also granted by the State Government in favour of the petitioner company for the entire area on 08.02.1999 and the same was accepted by the petitioner company on 15.02.1999. Both these dates are prior to coming into force of the Amendment Act, 2015. It is also noteworthy (and not disputed by the parties) that on 17.03.1999 the State Government had issued the order for grant of mining lease for iron ore over the entire area of 1519.980 hectares. As such, the mining lease in the case of the petitioner company should be granted within a period of two years from the date of commencement of the Amendment Act, 2015 (which is 12.01.2015), subject to the fulfilment of the conditions by the petitioner company. This fact is not disputed by the parties.

10. Rule 55 of the Rules, 2016 clearly specifies that on the commencement of these Rules with effect from 04.03.2016, the Mineral Concession Rules, 1960 shall cease to be in force with respect to all minerals for which the minerals under the said Rules are applicable. As such, the conditions laid down with regard to grant of license under the Mineral Concession Rules, 1960 would no longer be applicable, as the case of the petitioner company is to be now considered under the Rules, 2016 and not the Mineral Concession Rules, 1960.

11. Sub-rule (4) of Rule 8 of the Rules, 2016 clearly specifies that where an order for grant of mining lease has been issued under Sub-rule (2), the mining lease shall be executed with the applicant (the petitioner company herein) in the specified format and registered on or before 11th January, 2017. Thus, delay on the part of the opposite parties, either in the grant of mining lease or execution of lease deed, would adversely affect the interest of the petitioner company. As we have already noticed, the State Government had

vide order dated 17.03.1999 granted the mining lease for the entire area of 1519.980 hectares, which was, after the judgment of the Supreme Court on 06.03.2013, reconsidered by the State Government in terms of the show cause notice dated 06.02.2007 issued by the State Government and on 06.06.2015 the State Government had, in terms of Supreme Court's direction, recommended a reduced area of 475.457 hectares, which was accepted by the petitioner company on 26.11.2015. The grant of mining lease was already in existence for the larger area and the State Government does not dispute that the lease stood granted for the reduced area on 06.06.2015. The question at present is not for grant of mining lease or execution of mining lease for the entire area, but it is only with regard to execution of mining lease in respect of the reduced area, as has been already accepted by the petitioner company. As we have discussed herein above, the question of consideration of the execution of lease with regard to the reduced area is after the amendment in the Act, 1957 by Act 10 of 2015 with effect from 12.01.2015, and after such amendment, the prior approval of the Central Government is not required.

12. Section 5(1) proviso clearly specifies that previous approval of the State Government would be required to be taken only in respect of minerals specified in Part A and Part B of the First Schedule of the Act of 1957. The Part A of the said schedule deals with Hydrocarbons/Energy Minerals and Part B deals with Atomic Minerals. The case of the petitioners falls in Part C, as it relates to iron ore, which is specified at Sl. No.6 of Part C. As such, in the case of iron ore, the prior approval of the Central Government cannot be said to be necessary.

13. Reliance has been placed on the judgment of the apex Court in ***M/s Hind Stone*** (supra) by Mr. B. Nayak, learned Central Government Counsel to the extent that the lease has to be granted according to the Rules in force on the date of application made by the petitioner company. However, it has been held by the said judgment as follows:

> *"In the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application despite the fact that there is a long delay since the masking of the application."*

The ratio of the said judgment is squarely applicable to the case of the petitioner company and has no assistance to the contention raised by the learned Central Government Counsel. The reason being, by granting a larger area a vested right has already accrued in favour of the petitioner company. That vested right cannot be divested, the area being reduced subsequently.

As such, the Rules of 2016, in force on the date of disposal of the application, would be applicable to the present context. Consequentially, the Amended Act, 1957 read with the Rules, 2016 would be fully applicable to the present context. In view of the applicability of the said Act and Rules, there is no need of prior approval of the Central Government for the reduced area.

14. In so far as the case of ***M/s K.P. Granite Industries*** (supra) is concerned, where the question of giving reasonable opportunity of hearing before passing the order of cancellation of mining lease was under consideration by this Court, factually the said case is not applicable to the present context. While considering the same, this Court held that opportunity has to be given to the petitioner therein before cancellation of the lease. Therefore, the ratio of the said judgment has no application to the present context, as the case at hand is not a case of cancellation of lease.

15. Mr. S. Mohanty, learned Senior Counsel for the petitioners has relied upon ***The Comptroller and Auditor General of India*** (supra) with regard to jurisdiction of the Court under Article 226 in exercise of power to issue writ of mandamus. He has specifically referred to paragraph 20 of the said judgment, which reads thus:

> *"There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."*

The proposition of law, so far as jurisdiction of the Court under Article 226 for issuance of writ of mandamus is concerned, no longer remains res integra, as the same has been dealt with from time to time by the apex Court in various judgments.

16. In ***Tewari v. Dt. Board***, AIR 1964 SC 1680, the apex Court held that where a statutory authority acted in breach of mandatory obligation imposed by the statute, in that case the Court can compel the said authority to proceed according to law.

17. In ***Ram Chand v. Union of India***, (1994) 1 SCC 44, the apex Court held that statutory authority has a duty to perform statutory duty within a reasonable time.

18. In ***R. v. IRC exparte Preston***, (1985) 2 All ER 327 it was held that delay in exercising statutory power may throw doubt on the motive of the decision maker to exercise a power or its reasonableness.

19. In ***Punjab Electricity Board v. Zora Singh***, AIR 2006 SC 182, the apex Court held to the extent that if no action is taken within a reasonable time and it is proved that the inaction was intended for a purpose not germane for achieving the object, an inference of *mala fide* can be drawn.

20. In view of the aforesaid discussion, we answer the question in favour of the petitioners and hold that after the amendment in the Act, 1957 by Act 10 of 2015 and the coming into force of the Rules, 2016, no approval of the Central Government is required for grant of mining lease with regard to iron ore. As such, the decision to grant mining lease in favour of the petitioner having already been taken by the State Government for reduced area of 475.457 hectares, which has become final, no further approval of the Central Government is required. The queries and clarifications required by the Central Government vide order dated 12.04.2016 are thus quashed, being without any authority as it was in response to the communication of the State Government seeking approval of the Central Government, which was not required in law. The State Government is thus directed to execute the lease deed in favour of the petitioner company with regard to 475.457 hectares in accordance with law, without waiting for any approval from the Central Government, as expeditiously as possible, but not later than six weeks from the date a certified copy of this order is furnished before the Principal Secretary to the Government of Odisha, Department of Steel and Mines. The writ petition stands allowed to the extent indicated. No order as to cost.

Writ petition allowed.

2017 (I) ILR - CUT-252

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

W.P.(C) NO. 2355 OF 2009

BIJAY KUMAR PAIKARAY .....Petitioner

.Vrs.

STATE OF ODISHA AND ORS. .....Opp. Parties

REGISTRATION ACT, 1908 – S. 22 A

Sale of land in favour of the petitioner – State Government issued notification U/s 22 A of the Registration Act, 1908 declaring the transaction invalid being opposed to public policy –"public policy" not defined in the Act – Petitioner was not given opportunity of hearing before issuance of the notification, affecting valuable right accrued in his favour – Though the provision did not provide notice to the affected party but justice of common law will supply the ommisson of the Legislature and the same has to be read down in the said provision – Since the whole aim of the Act is to govern documents and not at the transactions embodied therein, any document issued pursuant to the impugned notification would not be sustainable and if any document executed by means of fraudulent transaction, the same has to be established by following due procedure of law by a competent Civil Court – Held, the declaration made by the impugned notification Dt. 27.06.2008 is quashed being unjustified – The petitioner has got an alternative remedy to approach the competent Court of law to declare the document as void. (Paras10 to 17)

Case Law Relied on :-

1. AIR 2005 SC 3401 State of Rajasthan v. Basant Nahata.

Case Laws Referred to :-

1. AIR 1967 SC 1269 : State of Orissa v. Dr. (Miss) Binapani Dei.
2. AIR 1970 SC 150 : A.K. Kraipak v. Union of India.
3. (1988) 2 SCC 602 : A.R. Antulay v. R.S. Nayak.
4. AIR 1989 SC 1038 : R.B. Shreeram Durga Prasad and Fatechand Nursing Das v. Settlement Commission (I.T. & W.T.)
5. AIR 1978 SC 597 : Smt. Menaka Gandhi v. Union of India.
6. (2016) 10 SCC 767: Satya Pal Anand v. State of Madhya Pradesh.

For petitioner : M/s. R.K. Mohanty, Sr. Advocate
along with Sri B. Mohanty, B. Mohapatra,
S. Nanda, S.K.Sahoo & S.S. Kashyap.

For opp. parties : Mr. B.P. Pradhan, (Addl. Govt. Advocate)
M/s.Yasobant Das, Sr. Advocate along with
Sri Rajeet Roy,S.K. Singh and S. Sourav,

Decided on : 03.01.2017

VINEET SARAN, C.J.

By means of this writ petition, the petitioner has challenged the notification dated 27.06.2008 being SRO No.336/2008 issued by the Revenue Disaster Management Department of the State Government.

2. Facts of the case, as stated by the petitioner are, that opposite party no.2 Sushanta Kumar Patra purchased an area of Ac.1.020 dec. pertaining to plot no.831/2077 under Khata no.224/856 of Mouza Sompur, district Khurda, on 27.06.1988 through a registered sale deed. A general power of attorney is said to have been issued thereafter by opposite party no.2 in favour of opposite party no.3 Suryakanta Pattnaik on 16.10.1990. On the strength of the said power of attorney, opposite party no.3 transferred the property (belonging to opposite party no.2) in favour of M/s Rirtch Investment and Holding Private Limited (RIH) by means of a registered sale deed. Thereafter, the Chairman of M/s RIH Pvt. Ltd. gave a power of attorney in favour of opposite party no.4 Pratap Kumar Mohanty on 19.01.2005. In turn, opposite party no.4 Pratap Kumar Mohanty sold the property to the present petitioner on 04.06.2005. It is stated that the petitioner, prior to purchase of the said property, obtained encumbrance certificate and '*yadast'* regarding the property. The property in question is said to have been mutated in favour of the petitioner on 07.07.2005. The opposite party no.2 thereafter filed Civil Suit No.639 of 2007 in the court of the Civil Judge (Sr. Division), Bhubaneswar, which was for grant of injunction regarding possession. It is stated at the Bar by learned counsel for opposite party no.2 that the said suit has been dismissed in default. Then, on some application filed by opposite party no.2, the impugned notification dated 27.06.2008 was issued declaring the chain of transactions over the property in question to be contrary to law and opposed to public policy. The said order was issued in exercise of power conferred under Section 22A of the Indian Registration Act, 1908, which provides that "The State government may, by notification, declare that the registration of any document or class of documents is opposed to public policy." Aggrieved by the said order, this writ petition has been filed.

3. We have heard Mr. R.K. Mohanty, learned Senior Counsel appearing along with Mr. B. Mohanty learned counsel for the petitioner; Mr. B.P.

Pradhan, learned Addl. Govt. Advocate appearing for State-opposite party no.1 and Mr. Y. Das, learned Sr. Counsel appearing along with Mr. Rajeet Roy, learned counsel for contesting opposite party no.2. The other opposite parties are not represented through any counsel. Pleadings between the petitioner and the contesting opposite party no.2 have been exchanged. The State-opposite party has chosen not to file any counter affidavit. By consent of learned counsel for the parties, this writ petition is being heard and disposed of at this stage.

4. The submission of Mr. R.K. Mohanty learned Senior Counsel for the petitioner is that the transaction, on the basis of the power of attorney dated 16.10.1990 was perfectly valid and the sale deed executed on 13.12.1991 in favour of M/s RIH Pvt. Ltd. was duly registered and possession was also handed over, and thereafter the subsequent owner executed a power of attorney in favour of opposite party no.4- Pratap Kumar Mohanty, who sold the property in favour of the petitioner vide sale deed dated 04.06.2005, on the basis of which the mutation has also been made in favour of the petitioner on 07.07.2005, and possession has also been handed over to the petitioner. It is further contended that opposite party no.2 did not raise any objection with regard to the earlier transactions, and the petitioner herein was the bona fide purchaser of the property by a valid sale deed and in possession of the property. The submission of learned counsel for the petitioner is that it was only in the year 2007 that for the first time opposite party no.2 raised the issue by filing Civil Suit No. 639 of 2007, in which the petitioner entered appearance and filed written statement, and thereafter opposite party no.2 chose not to contest and allowed the civil suit to be dismissed in default.

5. The specific case of the petitioner is that the power under Section 22A of the Indian Registration Act, 1908 could not have been exercised in the present case, as the said power only entitled the State Government to declare the registration of any document or class of documents to be opposed to public policy and in the absence of the public policy having been defined and also in the absence of any cogent reason given in the notification, the same cannot be sustained in the eye of law. He has further submitted that by the said notification valuable rights of the petitioner have been affected and that the said notification could not have been issued without giving opportunity of hearing to the petitioner. In support of his submission, he has relied on a decision of the apex Court in the case of ***State of Rajasthan v. Basant Nahata,*** AIR 2005 SC 3401, wherein the matter before the Supreme Court was with regard to vires of Section 22A of the Indian Registration Act, 1908,

which was inserted for the State of Rajasthan by Rajasthan Act no. 16 of 1976 and was *pari materia* to the said Section 22A inserted in Odisha by Odisha Act No. 8 of 2002. By the said judgment, the said Section 22A has been held to be ultra vires. Mr. Mohanty submitted that even though in the present petition the vires of the said Section 22A has not been challenged, but since the facts of the said case are similar to the facts of the present case, the ratio of the said judgment would be fully applicable to the present case. He has specifically relied on para-55 of the said judgment, wherein it is held that:

> *"The Act only strikes at the documents not at the transactions. The whole aim of the Act is to govern documents and not the transactions embodied therein. Thereby only the notice of the public is drawn".*

It is thus contended that the impugned notification dated 27.06.2008 issued by the Government of Odisha is wholly illegal and liable to be quashed.

6. Per contra, Mr. Y. Das, learned Senior Counsel for opposite party no.2 has submitted that opposite party no.2 had never executed any power of attorney in favour of anybody with regard to property in question, and that the alleged power of attorney dated 16.10.1990 was forged and fabricated. It is contended that even otherwise, the property in question was situated in Bhubaneswar, Odisha, whereas the power of attorney and the sale deed both are stated to have been executed in Mumbai, which was contrary to the provisions of the Indian Registration Act, as the Sub-Section (2) of Section 30 has been omitted by Odisha Act No. 19 of 1991. According to learned counsel for opposite party no.2, prior to 1991, the Registrar of a district could receive and register any document of the property which was situated at any part of India, but by the omission of the said Sub-Section (2) that right of the Registrar to register a document relating to the property, not situated within its district, was not permissible in law and, as such, the entire transaction on the basis of power of attorney dated 16.10.1990, and the registration made thereafter in Mumbai, of the property situated in Bhubaneswar, was nullity in the eye of law and was also against the public policy. It is also submitted that the said transaction, being a fraudulent one, was a nullity, as fraud vitiates everything and nothing more is needed to be proved, when it is a case of fraud in law. As regards the filing of the suit in the Court of the Civil Judge (Sr. Division), Bhubaneswar in the year 2007, it has been submitted that the same was done on wrong advice, and opposite party no.2 thereafter rightly did not pursue the same, and approached the government by filing an application under Section 22A of the Indian Registration Act, 1908.

7. It is further contended that when the initial sale deed dated 13.12.1991 itself was result of fraud and nullity in the eye of law, the subsequent transfer made in favour of the petitioner on 04.06.2005 would also be a nullity, as no better title can be transferred than the one which is held by the transferor and when there was no right transferred in favour of opposite party no.3 by the sale deed dated 13.12.1991, the question of petitioner acquiring any right on the basis of subsequent sale deed would not arise. It has also been stated that during pendency of the writ petition, opposite party no.2 filed an FIR under Sections 465/468/467/471/420 read with Section 34 of Indian Penal Code against Surya Kanta Pattnaik (opposite party no.3), Ranjit Kumar Pattnaik (opposite party no.6) and officials of the Sub-Registrar, Mumbai, in which, according to opposite party no.2, certain investigation has been made and findings recorded in favour of opposite party no.2. It is further submitted that on the basis of the impugned notification dated 27.06.2008 the initial sale deed dated 13.12.1991 has been declared as invalid by order dated 19.04.2010 by the Sub-Registrar, Mumbai. Such order has admittedly been passed on the basis of the impugned notification.

8. Although no counter affidavit has been filed by the State-opposite party, learned Additional Government Advocate has submitted that the prohibition by the impugned notification dated 27.06.2008 is with regard to registration of future transactions. On being questioned, learned counsel could not point out the reasons and the basis on which the impugned notification has been issued. Learned counsel also could not state as to whether any opportunity was afforded to the parties concerned before passing of the impugned order.

9. We carefully examined the submissions made by learned counsel for the parties and perused the records. Section 22A of the Indian Registration Act, 1908, inserted by Odisha Act No. 8 of 2002 with effect from 24.05.2002, reads as under:

> *"22-A. Document registration of which is opposed to public policy- (1) The State Government may, by notification, declare that the registration of any document or class of documents is opposed to public policy.*
>
> *(2) Notwithstanding anything contained in this Act, the registering officer shall refuse to register a document to which a notification issued under sub-section (1) is applicable."*

10. Though the submission made by learned counsel for opposite party no.2 is that the said provision does not contemplate affording opportunity before issuance of notification under Section 22A, but we are of the opinion that any order or notification issued by the Government affecting the rights of any party could be issued only after complying with the principles of natural justice. It is settled law that once a right has accrued in favour of a person, the same can be withdrawn only after affording the party concerned adequate opportunity of hearing and complying with the principles of natural justice.

The apex Court in ***State of Orissa v. Dr. (Miss) Binapani Dei***, AIR 1967 SC 1269 held that if there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. Similar view has also been taken in ***A.K. Kraipak v. Union of India,*** AIR 1970 SC 150, ***A.R. Antulay v. R.S. Nayak,*** (1988) 2 SCC 602, ***R.B. Shreeram Durga Prasad and Fatechand Nursing Das v. Settlement Commission (I.T. & W.T.),*** AIR 1989 SC 1038.

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

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

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

Admittedly, in the present case, it is not disputed that certain rights had accrued in favour of the petitioner on the basis of sale deed dated 04.06.2005 and, according to the petitioner, they are also in actual physical possession of the property in question, yet the impugned order has admittedly been passed without giving notice to the petitioner and without affording any opportunity. In our view, on this sole ground, the impugned order/notification dated 27.06.2008 deserves to be quashed.

11. Even otherwise, a plain reading of the impugned notification would make it clear that it has been passed without ascertaining the correct facts of the case. What we notice is that even the execution of initial power of attorney dated 16.10.1990 has wrongly been stated to have been executed by

Susanta Kumar Patra (opposite party no.2) in favour of Mihir Kumar Patra, whereas it was issued in favour of opposite party no.3. In the said notification, it is also stated that the power of attorney was executed in violation of Sub-Section (2) of Section 30 of Indian Registration Act, 1908, whereas admittedly, on the date of issuance of notification, the Sub-Section (2) of Section 30 had already been omitted. This shows complete non-application of mind by the authority issuing the notification.

12. It is recorded that opposite party no.2 has alleged that the documents executed at Mumbai were forged and fictitious, as they were not executed by opposite party no.2, and without giving any reason or stating as to what inquiry or investigation was conducted, it has been stated that "*a prima facie examination has revealed the contention of Sri S.K. Patra to be true*". If the rights of a party are affected by an order, the least that is expected by the authority passing the order is that reasons should be recorded as to on what basis the allegations made by one party against the other are established. The order does not, in any way, state that any proper investigation was carried out by the State authorities. What is meant by "prima facie examination" is not understood by this Court. All that we can understand from the contents of the order is that what was examined were merely allegations made by opposite party no.2, which were taken to be true on the face of it and the final order was passed, holding that the documents were contrary to law and opposed to public policy. If an order is said to be opposed to public policy, then an authority is expected to specify as to what offends the public policy, and also that which public policy is offended. Nothing of that kind has been mentioned in the impugned order. If a transaction is to be declared as a result of a fraud, or if a power of attorney is said to have been executed, which is alleged to have not been signed by a person executing the power of attorney, then the said issue can only be examined in a court of law, and not in such a cursory manner, without making any inquiry and examining any witness, or even without giving opportunity of hearing to the parties affected.

13. Although it is contended that the transaction with regard to a property situated in Bhubaneswar could not have taken place and registered in Mumbai, as sub-section (2) of Section 30 of Indian Registration Act, 1908 had already been omitted, in the impugned order the same has not been stated to be a reason for passing the order. Mr. Das, learned Senior Counsel appearing for opposite party no.2 has vehemently argued, that since the entire action was in violation of the provisions of Section 30 of the Act, hence this Court should not exercise its extraordinary discretionary jurisdiction under

Article 226 of the Constitution of India in favour of a person, who has acquired the rights over a property on the basis of a fraudulent transaction. The petitioner before us is not a person, who was part of the transaction, which had taken place in the year 1990 or 1991. He is a subsequent purchaser and claims that he purchased the property after making necessary enquiries and that he is a bona fide purchaser and in possession of the property. Though the opposite party no.2 also claims to be in possession of the property, but at the same time it has been argued that even though there was an order of status quo passed by this Court, the petitioner continued to raise construction, which would mean that actual physical possession was not with opposite party no.2. He had also filed a Civil Suit regarding possession, which he did not contest after written statement was filed by the petitioner.

14. In addition to the above reasons, now what is to be examined is the issue involved in the present case, on the basis of the law laid down by the apex Court in the judgment rendered in ***Basant Nahata*** (supra). In the said judgment, the vires of the Section 22A of the Indian Registration Act, which was inserted in the State of Rajasthan by Rajasthan Act no. 16 of 1976 and was *pari materia* to Section 22A inserted in Odisha by Odisha Act No. 8 of 2002, was under consideration. The apex Court in paragraphs 39, 40, 55, 67, 69 and 70 held as follows:

> *"39. It may not be necessary for us to deal with extensively the case laws dealing with the relevant provisions of the said statutes but it would not, in our opinion, be correct to contend that public policy is capable of being given a precise definition. What is 'opposed to public policy' would be a matter depending upon the nature of the transaction. The pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept as to what is for public good or in the public interest or what would be injurious or harmful to the public good or the public interest at the relevant point of time as contra-distinguished from the policy of a particular government. A law dealing with the rights of a citizen is required to be clear and unambiguous. Doctrine of public policy is contained in a branch of common law, it is governed by precedents.*
>
> *40. The principles have been crystallized under different heads and though it may be possible for the courts to expound and apply them to different situations but it is trite that the said doctrine should not be taken recourse to in 'clear and incontestable cases of harm to*

the public though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world'. (See Gherulal Parakh vs. Mahadeodas Maiya and Others AIR 1959 SC 781 : 1959 (2) SCR 406).

XX XX XX

55. The Act only strikes at the documents and not at the transactions. The whole aim of the Act is to govern documents and not the transactions embodied therein. Thereby only the notice of the public is drawn.

XX XX XX

67. The contention raised on behalf of the Appellants herein that the State, being higher authority, having been delegated with the power of making declaration in terms of Section 22-A of the Act, would not be abused is stated to be rejected. Such a question does not arise herein as the provision has been held to be ultra vires Articles 14 and 246 of the Constitution of India.

XX XX XX

69. For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly. No costs.

70. So far as amendments made by other States are concerned, we are of the opinion that any order passed by a Sub-Registrar or Registrar refusing to register a document pursuant to any notification issued under Section 22-A of the Act would not be reopened."

15. In view of the above, the apex Court declared Section 22A of the Rajasthan Act no.16 of 1976 as ultra vires Articles 14 and 246 of the Constitution of India. Even if the petitioner has not sought for any relief declaring the Section 22A of Odisha Act No. 8 of 2002 as ultra vires, but the underlying principle clearly held in paragraph 55 is that the Act only strikes at the documents, and not at the transaction. The whole aim of the Act is to govern documents and not the transactions embodied therein. Therefore, any document issued pursuant to the impugned notification under Section 22A of the Act would not be sustainable. If any document has been procured/executed by means of fraudulent transaction, the same has to be established by following due procedure of law by the competent Civil Court.

16. Coming to the contention raised that the documents have been executed fraudulently and, therefore, the fraud vitiates the entire proceeding, nothing is made available on record to indicate how any fraud has been played in executing the document itself. If the fraud has been executed deceitfully to cause loss and harm to other party to the deed, it would be a question of fact, which must be pleaded and proved by the party making such allegation. That fact cannot be presumed. Therefore, party aggrieved by such registration of document is free to challenge its validity before the Civil Court. However, the authorities under Indian Registration Act, 1908 have no power in this regard. The apex Court in a recent decision of ***Satya Pal Anand v. State of Madhya Pradesh,*** (2016) 10 SCC 767 has taken the aforementioned view. Therefore, we are of the considered view that the petitioner has got an alternative remedy of approaching the competent Court of law to declare the document as void.

17. It is true that in case the sale deed executed on 13.12.1991 is declared null and void, then no right could thereafter be transferred in favour of the petitioner, by the subsequent sale deed dated 04.06.2005. But, the transaction or sale deed executed in 1991 is first to be examined by a competent Court of law, before it is declared to be void. The same has not been declared to be so by any competent Court of law. The declaration made by the notification dated 27.06.2008, impugned in this writ petition, has already been held to be unjustified, without proper reasons and without complying the principles of natural justice and is an outcome of non-application of mind, and thus liable to be quashed.

18. The writ petition accordingly stands allowed. The notification being SRO No.336/2008 dated 27.06.2008 is hereby quashed. No order as to cost.

Writ petition allowed.

2017 (I) ILR - CUT-262

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

W.P.(C) NO. 3231 OF 2016

SAMPAD SAMAL ……..Petitioner

.Vrs.

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

TENDER – O.P.No. 3 issued tender call notice Dt. 22.08.2015 for 21 works – Petitioner and others applied for work Nos. 1 & 2 – Tenders opened on 22.09.2015 and petitioner's bid was found to be lowest for both the works – Since there was delay in entrusting the work petitioner made a representation on 21.11.2015 – O.P.No. 3 cancelled the entire tender call notice on 03.02.2016 and rejected the representation of the petitioner on 04.02.2016 – Hence the writ petition – A tenderer can not be allowed to suffer because of the fault and inaction of the opposite parties – In this case, opposite parties sat over the matter and allowed 90 days to expire by resorting to clause 17 of the detailed tender call notice and clause 10 of the terms and conditions of tender papers – Nothing is there that conditions stipulated were not fulfilled by the petitioner or his tender was not the lowest – No justification for not awarding the work in favour of the petitioner and the tender was cancelled without any proper and adequate ground, rather the action was arbitrary – Held, the impugned orders are quashed with regard to work at Sl.Nos. 1 & 2 of the tender call notice Dt. 22.08.2015 – Direction issued to award the contract in favour of the petitioner. (Paras 7 to 15)

Case Laws Referred to :-

1. AIR 1962 SC 1543 : Madan Lal -V- Changdeo Sugar Mills
2. AIR 1955 SC 376 : Jugal Mishre -V- Raw Cotton Co. Ltd.
3. AIR 1955 SC 504 : Amar Singhji -V- State of Rajasthan

Petitioners : M/s. Anjan Kumar Biswal, P.K.Rout & R.K.Muduli

Opp. Parties : Mr. B.Bhuyan, Addl. Govt. Adv.

Date of Judgment : 02.01.2017

JUDGMENT

VINEET SARAN, C.J.

A tender call notice was issued by opposite party no.3, Integrated Tribal Development Agency (ITDA), Kaptipada, Udala on 22.08.2015, which was in respect of 21 works. The dispute in the present petition relates

to the works at serial no.1 and 2. The petitioner, along with several other persons, had filed their tenders for serial no. 1 and 2. As per the tender conditions, the tenders were opened on 22.09.2015 and the petitioner was found to be the lowest bidder in respect of both the works, i.e., at serial no.1 and 2, which was after having been given the benefit of the resolution of the State Government dated 11.10.1977, as the petitioner belongs to scheduled caste/schedule tribe community.

2. When the opposite parties did not finalize the tender in his favour, on 21.11.2015, the petitioner filed a representation before opposite party no.3. Since the representation was not decided, the petitioner filed W.P.(C) No. 21633 of 2015, which was disposed of on 15.12.2015 with the direction to opposite party no.3, the Project Administrator, ITDA to dispose of the representation within a period of two months. Then, instead of first deciding the representation of the petitioner, opposite party no.3 vide its order dated 03.02.2016 cancelled the entire tender call notice dated 22.08.2015. Then, a day thereafter, i.e., on 04.02.2016 the representation of the petitioner was decided and he was informed that the entire tender call notice has itself been cancelled. Challenging the order dated 04.02.2016, as well as cancellation of the tender call notice dated 22.08.2015 vide order dated 03.02.2016, this writ petition has been filed.

3. We have heard Mr. A. K. Biswal, learned counsel for the petitioner, as well as Mr. B. Bhuyan, learned Addl. Government Advocate appearing for the opposite parties, and perused the records. Pleadings having been exchanged and with the consent of learned counsel for the parties, this writ petition is being disposed of at this stage.

4. The submission of Mr. A.K. Biswal, learned counsel for the petitioner is that there is no dispute about the fact that the tenders of the petitioner with regard to work at serial no.1 and 2 were the lowest and, since the petitioner was otherwise fully qualified, he ought to have been awarded the work. It is contended that once the bids of the participants had been opened, the rates quoted by the petitioner have been disclosed, and in case a fresh tender for the same work is called then the petitioner would be prejudiced. It is also submitted that the representation of the petitioner ought to have been first decided by opposite party no.3 before the order dated 03.02.2016 was passed, cancelling the entire tender call notice. It is further contended that the reason assigned for rejecting the representation of the petitioner is frivolous and the impugned orders are liable to be quashed.

5. Per contra, learned Addl. Government Advocate has submitted that the primary reason for cancelling the tender call notice was that 90 days period had expired since the opening of the tenders, and invoking condition no.17 of the tender document, the tender call notice has been cancelled by resorting to clause-10 of the term and condition of the tender papers, in terms of which "*the authority reserves the right to reject any or all tenders without assigning any reason thereof*." It is also submitted that the opposite parties did not take a final decision relating to the finalization of the tenders, as one Kaptipada Contractors Association had filed a representation on 08.09.2015 praying for acceptance of the tender documents by hand instead of through registered post/speed post, as provided for in the tender notice. The said representation having not been considered, the Kaptipada Contractors Association filed W.P.(C) No. 16617 of 2015, which is pending. However, admittedly, no interim order has been passed in the said writ petition.

6. From the submissions advanced by learned counsel for the parties, it appears that primary reason for cancelling the tender call notice dated 22.08.2015 was that 90 days period had expired and that further time had not been extended. Clause 17 of the detailed tender call notice provides :

> *"All tenders received will remain valid for a period of 90 days from the last date prescribed for receipt of tenders and validity of tenders can also be extended if agreed by the tenderers and the Department."*

The tenders were admittedly opened on 22.09.2015. After the petitioner was found to be the lowest tenderer for the works at serial no.1 and 2 and his tender was not accepted even though found to be valid, within the period of 90 days, he made a representation to opposite party no.3 for accepting his tender. When the same was not decided, then he filed the writ petition (which was also within 90 days of the opening of the tenders). By order dated 15.12.2015 passed in W.P.(C) No.21633 of 2015 this Court directed that the representation of the petitioner be decided. Now instead of deciding the case of the petitioner, who had been pursuing the matter diligently and had even filed the representation within a period of 90 days and also filed a writ petition earlier, opposite party no.3 went on to first cancel the tender call notice on 03.02.2016 and then proceeded to decide the representation of the petitioner on 04.02.2016, giving such reason which was not existent on the date when the representation was filed, as the representation was filed within 90 days of the opening of the tender or even filing of the tender.

7. A tenderer cannot be allowed to suffer because of the fault and inaction of the opposite parties. In the present case, it is clear that the

opposite parties sat over the matter and allowed 90 days to expire, without there being any fault of the tenderer and then for cancelation of the tender call notice, gave the reason that 90 days period has expired. If this is permitted, then in every case, after the opening of tender, where the lowest bidder does not suit the opposite party, they can always sleep over the matter without taking any decision and resorting to clause 17 of the detailed tender call notice, cancel the notice itself, which in our opinion, cannot be justified. Had there been any fault on the part of the petitioner, the case would have been different. In the present case, the opposite parties have not stated anywhere that either the conditions stipulated were not fulfilled by the petitioner or that his tender was not the lowest. As such, not awarding the work to the petitioner in terms of the tender call notice, cannot be justified in law.

8. The other ground which has been taken for rejecting the representation of the petitioner, is pendency of the writ petition filed by the Kaptipada Contractors Association, in which admittedly no interim order has been passed. The tender documents clearly stipulate filing of the tenders by speed post/registered post, which the petitioner and several other bidders had complied. Merely because there was a challenge in a writ petition and prayer was made that tenders should be permitted to be received by hand, in which no positive order has been passed by the Court and the last date for filing of the tender had already expired, cancelling the tender, merely because of pendency of such frivolous petition cannot be justified in law.

9. Further, resorting to clause 10 of the terms and condition of tender papers, whereby right to reject is reserved by the authroity concerned without assigning any reason, can be justified only when there is proper and adequate ground for passing an order of cancellation and not in an arbitrary manner, as has been done in the present case.

10. In ***Madan Lal v. Changdeo Sugar Mills,*** AIR 1962 SC 1543, the apex Court held that the elementary rule is that words used in a section must be given their plain grammatical meaning.

11. In ***Jugal Kishore v. Raw Cotton Co Ltd.,*** AIR 1955 SC 376, the apex Court held as follows:

> *"That the cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the Legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another*

meaning, the court may adopt the same. But if no such alternative construction is possible, the court must adopt the ordinary rule of literal interpretation."

12. In ***Amar Singhji v. State of Rajasthan,*** AIR 1955 SC 504, the Supreme Court again observed as follows:

"Recourse to rules of construction would be necessary only when a statute is capable of two interpretations. Where the language is clear and the meaning plain, effect must be given to it."

13. In view of the law laid down by the apex Court, as discussed above, the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction only, then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.

14. Applying the aforesaid well settled principles to the present context and taking into consideration the conditions stipulated in clause-17 of the tender document read with clause-10 of the terms and conditions of the tender paper and giving them their plain meaning, as the authority concerned has passed the impugned order of cancellation, without any proper and adequate ground, rather, as it is clear, in an arbitrary manner because of pendency of frivolous petition, the same cannot be sustained in the eye of law.

15. In view of the aforesaid, this writ petition deserves to be allowed and is accordingly allowed. The orders dated 04.02.2016 and 03.02.2016 are quashed only to the extent with regard to work at serial no.1 and 2 of the tender call notice dated 22.08.2015. The petitioner would thus be entitled to be awarded the contract with regard to the works at serial no.1 and 2 of the said tender call notice, in accordance with the terms of the tender call notice, which should be complied with within six weeks from today. No order as to costs.

16. A copy of this judgment be given to learned Addl. Government Advocate for the State free of cost for necessary compliance. Urgent certified copy of this judgment be given to the petitioner on payment of usual charges.

Writ petition allowed.

2017 (I) ILR - CUT-267

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

W.P.(C) NO. 7394 OF 2016

STATE OF ODISHA & ORS. ……..Petitioners

.Vrs.

BIJAYA KU. SAMANTARAY & ANR. ……..Opp. Parties

SERVICE LAW – Transfer of O.P.No.1 on administrative ground – As he failed to obey the order, disciplinary proceeding started against him – Proceeding challenged in O.A. – Tribunal disposed of the O.A. with a direction to complete the enquiry within one year – Enquiry could not be completed in time – M.P. filed for extention of time, was rejected – Despite the same enquiry proceeded and O.P.No.1 was dismissed from service – Punishment challenged in O.A. – Tribunal set aside the punishment as enquiry could not be completed within the time stipulated – Hence this writ petition – No explanation by the petitioner as to why there was delay in disposal of the enquiry as directed by the Tribunal – When prayer for extention of time was refused and the same was not challenged it has reached its finality – Moreover in a proceeding for disobedience of transfer order, punishment is dismissal from service – Held, the impugned order passed by the learned Tribunal needs no interference.

(Paras 17,18)

Case Laws Referred to :-

1. (2013) 6 SCC 530 : Chairman, LIC of India & Ors. Vs. A. Masilamani
2. (2007) 14 SCC 49 : Government of Andhra Pradesh & Ors. Vs. V. Appala Swamy
3. 1994 Supp. (3) SCC 628 : Bharat Coking Coal Ltd. Vs. Bibhuti Kumar Singh & Ors.

Petitioners : Mr. M.S.Sahoo, Addl.Govt.Adv.
Opp. Parties : M/s. Deepali Mahapatra & Sandeep Parida

Date of hearing : 16.07.2016
Date of Judgment: 04.08.2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

In the captive writ petition the order of the learned Odisha Administrative Tribunal, Bhubaneswar (hereinafter called 'the Tribunal') is assailed by the petitioners arraying the said order as illegal and improper.

FACTS

2. The backdrop of the case of the petitioners is that opposite party No.1 was transferred on administrative ground but on the plea of his wife's illness did not obey the order of transfer for which disciplinary proceeding vide Proceeding No.32 of 2007 was started against him. While the proceeding was pending, the opposite party No.1 filed O.A. No.296 of 2010 before the Tribunal and the learned Tribunal disposed of the same directing the petitioners to complete the enquiry within a period of one year from the date of receipt of the order.

3. It is stated that the Enquiring Officer after receiving the order of the Tribunal conducted enquiry but the opposite party No.1 refused to participate in the enquiry and finally the enquiry was delayed and could not be completed as per the order of the Tribunal. So, M.P. No.378 of 2014 was filed by the petitioners before the Tribunal praying for extension of time to complete the enquiry but that was rejected being not maintainable. Then the enquiry proceeded. After closure of the enquiry a show cause notice was issued to opposite party No.1. On consideration of the written submission, second show cause notice was issued to the opposite party No.1. After second show cause reply received the final order was passed on 11.2.2015 imposing major penalty of dismissal from service upon the opposite party No.1 but the opposite party No.1 filed O.A. No.717 of 2015 challenging the major penalty. Learned Tribunal disposed of O.A. No.717 of 2015 by setting aside the order of punishment on the ground that the enquiry could not be completed within the time framed by the Tribunal and as such the punishment is illegal. Arraying the order of the Tribunal as illegal and improper, the present writ petition is filed to set aside the same.

SUBMISSIONS

4. Mr. M. Sahoo, learned Additional Government Advocate submitted that the petitioners have preferred the present writ petition against the order dated 14.8.2013 passed in O.A. No.296 of 2010 and order dated 24.8.2015 passed in O.A. No.717 of 2015 on the ground that same have been passed on irrelevant consideration and without applying the proposition of law. The Tribunal has exceeded the jurisdiction by not allowing six months time to complete the enquiry. He further submitted that the Tribunal has committed error by observing that the disciplinary proceeding has been quashed even after the final orders have been passed. The Tribunal erred in law by not considering the decision of the Hon'ble Apex Court in **Chairman, LIC of India & others Vs. A. Masilamani: (2013) 6 SCC 530,** where the Hon'ble

Apex Court have observed that the Court must take into consideration all relevant facts and to balance and weigh the same, so as to determine for it is in fact in the interest of clean and honest administration, that the judicial proceedings are allowed to be terminated only on the ground of delay in their conclusion.

5. Mr. Sahoo, learned Additional Government Advocate further submitted that the order passed by the learned Tribunal is against the principles of law decided by the Hon'ble Apex Court in the case of **Government of Andhra Pradesh & others Vs. V. Appala Swamy: (2007) 14 SCC 49.** Also the order of the Tribunal is erred in law being contrary to the decision of the Hon'ble Apex Court in **Bharat Coking Coal Ltd. Vs. Bibhuti Kumar Singh and others: 1994 Supp. (3) SCC 628**. Due to administrative processes the matter was filed in delay but petitioners have got good case on merit. He submitted to quash both the orders passed by the learned Tribunal.

6. Ms. D. Mahapatra, learned counsel for the opposite party No.1 submitted that on vexatious allegations the disciplinary proceeding was started against opposite party No.1 and Opposite party No.1 had to file O.A. No.296 of 2010 challenging charge made against him because of wrong procedure followed by the disciplinary authority and in fact the Tribunal quashed the show cause notice and enquiry report and remanded the matter to the disciplinary authority to have a de novo enquiry right from the stage of charge and complete the same within a period of one year. That order was passed on 14.8.2013. She further submitted that the disciplinary authority failed to complete the enquiry in spite of cooperation of the opposite party No.1. Instead of completing enquiry as per the order of the Tribunal the petitioners approached the Tribunal praying for extension of time to complete enquiry but the same was rejected vide M.P. No.378 of 2014. She further submitted that the allegation made by the State against the opposite party No.1 is only to harass him and there is no base with their allegations. She further submitted that against the order of the Tribunal in O.A. No.296 of 2010 and M.P. No.378 of 2014 the State has not preferred any writ petition before this Court to quash the same but instead filed the present writ petition challenging the recent order of the Tribunal and the earlier order passed in O.A. No.296 of 2010. The challenge to the earlier order by the State Government is to be defeated for delay and laches. Moreover, she submitted that the impugned order of the Tribunal being passed thoroughly after hearing the parties should not be interfered with. In support of her submission, she

also submitted a letter of the Directorate of Prisons and Correctional Services, Odisha addressed to the Senior Superintendent, Circle Jail, Sambalpur where the apex Jail authority has observed that the punishment awarded to opposite party No.1 is not in accordance with rule and it should be disposed of according to rule. When the authority superior to the disciplinary authority has observed as such on 19.2.2015 and the order of the disciplinary authority has been passed by not giving proper opportunity to the opposite party No.1, the punishment has been rightly quashed by the Tribunal and accordingly writ petition should be dismissed.

7. The points for consideration:-

(i) Whether the Tribunal can quash the Departmental Proceeding when it was not concluded within the time framed earlier by the Tribunal.

DISCUSSIONS
POINT NO.(i) :

8. It is not disputed that there was disciplinary proceeding against the opposite party No.1 for not honouring the transfer order. It is also admitted fact that the opposite party No.1 has challenged the original disciplinary proceeding vide O.A. No.296 of 2010 and same was disposed of directing the petitioners to complete the enquiry within a period of one year. It is further admitted fact that within one year the enquiry could not be completed and the extension of time prayed by the petitioners was rejected by the Tribunal in a Misc. Case arising out of O.A. No.296 of 2010.

9. On perusal of the order, the relevant portion of the order dated 14.8.2013 passed in O.A. No.296 of 2010 is quoted below:

> "In view of the said position, the matter is remitted back to the disciplinary authority for conducting enquiry afresh right from the stage of charge allowing the applicant due time for filing his reply to the charge on the basis of the documents cited in the memo of evidence made over to the applicant as per letter No.3341 dtd.29.7.2013. The inquiry report at annexure-10 and show cause notice at annexure-12 are accordingly quashed. It is also directed that this departmental proceeding be completed within a period of one year from the date of receipt of these orders, failing which the charge at annexure-1 shall be deemed as quashed".

Although aforesaid order was passed on 14.8.2013, the above order was found to have received by the Senior Superintendent, Circle Jail,

Sambalpur on 11.9.2013 as per the averment in the writ petition. Thereafter on 13.1.2014 an Enquiry Officer was appointed to conduct enquiry but the enquiry proceeded with dilatory process and it was not closed within one year and before expiry of the one year on 8.8.2014 the Department filed M.P. No.378 of 2014 asking for six months time to complete the enquiry. That petition was also rejected on 3.12.2014 by the Tribunal against which no petition was filed before this Court and as such the order dated 14.8.2013 and 3.12.2014 reached finality. Only in 2016 the order dated 14.8.2013 passed in O.A. No.296 of 2010 has come to be challenged, there is no any explanation given by the State why there is delay in challenging such order of the Tribunal. When there is no challenge to order dated 3.12.2014 passed in M.P. No.378 of 2014, the order dated 14.8.2013 having been reached the finality, cannot be challenged in this writ petition for two reasons. Firstly due to non-challenge of order dated 3.12.2014, the order dated 14.8.2013 out of which the order dated 3.12.2014 of the Tribunal arises remained as such, secondly without having any explanation of delay and laches the said order dated 14.8.2013 of the Tribunal is defeated thereby.

10. Moreover, the relevant portion of the impugned order dated 24.8.2015 is placed below for better appreciation:

> "After hearing the learned counsel for both sides, the O.A. is disposed of with direction that since the departmental proceeding was not completed within one year i.e. by 11.9.2014, as per the order of the Tribunal in O.A. No.296/2010, the said departmental proceeding stands quashed. Accordingly the impugned order of punishment dated 11.2.2015 at Annexure-14 therefore cannot hold good and is accordingly quashed. The applicant shall be entitled to all consequential service benefits".

11. In the aforesaid order the Tribunal has quashed the Departmental Proceeding because it was not completed within a period of one year as per the order passed by the Tribunal in O.A. No.296 of 2010. In the aforesaid para we have observed that we are not inclined to interfere with the order in O.A. No.296 of 2010 which has reached finality. Since the order in O.A. No.296 of 2010 was neither being challenged nor time being extended to complete the enquiry vide M.P. No.378 of 2014, the observation of the Tribunal cannot be said wrong per se. Apart from this, the letter of the Director of Prisons dated 19.2.2015 can be also read to find out the case of the opposite party No.1 as same has been filed by the learned counsel for the opposite party No.1. The said letter is reproduced below:

"DIRECTORATE OF PRISONS AND
CORRECTIONAL SERVICES, ODISHA

No.6526 Date 19.2.2015
FE(B)LM-4/10

To
The Senior Superintendent,
Circle Jail, Sambalpur

Sub: Show cause notice in the Departmental Proceeding Case No.2/13 drawn of against you.

Sir,

In inviting a reference to your Memo No.17 dt.2.01.2015 on the subject cited above, I am directed to state that a copy of the enquiry report in D.P. Case No.2/2013 drawn up against Bijoy Kumar Samantaray, Warder has been furnished to the delinquent and simultaneously purposed punishment in the said case, which appears to be violative of the prescribed rules and done in a haste.

You are, therefore, requested to do the needful as per rules and dispose of the case within the stipulated date line.

Yours faithfully,
Sd/-
Establishment Officer (Field)"

From the letter, it appears that the Director of Prisons being superior authority above the disciplinary authority has observed that the punishment proposed is violating of prescribed rules for which it was directed to do the needful as per the rules. When the Tribunal and the superior authority do not favour the punishment as awarded and the State has failed to submit how the order of the Tribunal is irreversible, we are of the view that the impugned order of the Tribunal in O.A. No.296 of 2010 needs no interference.

12. It is reported in (2013) 6 SCC 530; Chairman, Life Insurance Corporation of India and others Vs. A. Masilamani where Their Lordships observed in the following paras:-

"16. It is a settled legal proposition, that once the Court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, the Court cannot reinstate the employee. It must remit the case concerned to the disciplinary authority, for it to conduct the

enquiry from the point that it stood vitiated, and conclude the same. **(Vide: ECIL v. B. Karunakar, AIR 1994 SC 1074; Hiran Mayee Bhattacharyya v. S.M. School for Girls, (2002) 10 SCC 293; U.P. State Spg. Co. Ltd. v. R.S. Pandey, (2005) 8 SCC 264 and Union of India v. Y.S. Sadhu (2008) 12 SCC 30).**

xxx xxx xxx xxx

18. The court/tribunal should not generally set aside the departmental enquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings, as such a power is de hors the limits of judicial review. In the event that the court/tribunal exercises such power, it exceeds its power of judicial review at the very threshold. Therefore, a charge-sheet or show cause notice, issued in the course of disciplinary proceedings, cannot ordinarily be quashed by the court. The same principle is applicable, in relation to there being a delay in conclusion of disciplinary proceedings. The facts and circumstances of the case in question have to be examined taking into consideration the gravity/magnitude of charges involved therein. The essence of the matter is that the court must take into consideration all relevant facts and to balance and weigh the same, so as to determine if it is in fact in the interest of clean and honest administration, that the judicial proceedings are allowed to be terminated, only on the ground of delay in their conclusion. **(Vide: State of U.P. v. Brahm Datt Sharma, AIR 1987 SC 943; State of M. P. v. Bani Singh, AIR 1990 SC 1308; Union of India v. Ashok Kacker, 1995 Supp (1) SCC 180; Prohibition & Excise Deptt. v. L. Srinivasan, (1996) 3 SCC 157;State of A. P. v. N. Radhakishan, AIR 1998 SC 1833; M.V. Bijlani v. Union of India, AIR 2006 SC 3475; Union of India v. Kunisetty Satyanarayana, AIR 2007 SC 906; and Ministry of Defence v. Prabhash Chandra Mirdha, AIR 2012 SC 2250).**

13. With due regard to the aforesaid enunciation of the Hon'ble Apex Court, we are of the view that the facts and circumstances of each case should be taken into consideration before terminating the Departmental Proceeding targeted to be completed within certain period by the Authority but not concluded within time schedule. It is also clear that the Court or Tribunal must apply the mind meticulously of each case and come to a conclusion.

14. In Government of Andhra Pradesh and others Vs. V. Appala Swamy: (2007) 14 SCC 49 where Their Lordships observed the following:-

> "12. So far as the question of delay in concluding the departmental proceedings as against a delinquent officer is concerned, in our opinion, no hard-and-fast rule can be laid down therefor. Each case must be determined on its own facts. The principles upon which a proceeding can be directed to be quashed on the ground of delay are:
>
> (1) where by reason of the delay, the employer condoned the lapses on the part of the employee;
>
> (2) where the delay caused prejudice to the employee.
>
> Such a case of prejudice, however, is to be made out by the employee before the inquiry officer".

15. With due respect to the aforesaid decision, we are of the view that there cannot be hard and first rule to quash the Departmental Proceeding on the ground of delay but delay should be taken into consideration to come to a conclusion whether the proceeding can be quashed.

16. It is also reported in 1994 Supp. (3) SCC 628; Bharat Coking Coal Ltd. Vs. Bibhuti Kumar Singh and others where Their Lordships observed at para-14:

> " xxx We are also of the view that considering the seriousness of the charges, the explanation offered by the appellant for the delay in concluding the enquiry, which cannot be said to be unsatisfactory and the fact that the enquiry has proceeded to some length the High Court ought not to have rejected the reasonable prayer of the appellant for extension of time".

17. With due regard to the aforesaid authority, no delay has been explained in this case as to why there was delay in disposal of the enquiry in spite of the time schedule as ordered by the Tribunal to conclude the same. Keeping in view of the aforesaid propositions of law, it has to be seen whether the order of the Tribunal in O.A. No.717 of 2015 can be affirmed or not. In the present case the opposite party No.1 had approached the Tribunal in O.A. No.296 of 2010 and order was passed to conclude the enquiry within one year. Normally the enquiry should be completed within a period of six months. But the Tribunal has given one year time from the stage of frame of charge afresh. It appears from the writ petition that there has been delay caused by the Disciplinary Authority in changing the Enquiry Officer and the Enquiry Officer took his own time to take over the proceeding and just before one year completed filed a petition before the Tribunal praying for extension of time. That was also rejected by the Tribunal in M.P. No.378 of 2014. But the Disciplinary Authority did not prefer any application before this Court to

challenge the same. On the other hand, the allegation of employer is that the employee did not participate but it appears from the impugned order the employer after having perused the show cause the punishment was awarded. We do not enter into all sorts of facts decided by the Tribunal but the operating portion of the impugned order speaks for itself, that in spite of refusal of extension of time the delay was caused and in the meantime the opposite party No.1 has retired. The proceeding continued for about five years. Moreover, the proceeding was for disobedience of transfer order but the punishment given in the proceeding is dismissal from service. Considering all such aspects and in view of the earlier order of the Tribunal which went unchallenged and only same being challenged now which is defeated by delay and laches at the instance of the State Government, we find that the order of the Tribunal passed in O.A. No.717 of 2015 is correct and proper. Hence, the order of the Tribunal quashing the Departmental Proceeding is intelligible.

CONCLUSION

18. From the foregoing discussion, it is found that the Tribunal has made judicial review of the order challenged before it by taking into the facts and circumstances of the case. In the meantime the opposite party No.1 has superannuated. When the Disciplinary Proceeding has taken long five years in spite of the direction of the Tribunal in earlier proceeding and the subsequent impugned order passed by the Tribunal are legal and proper, we do not interfere with the order passed in O.A. No.296 of 2010 and also order passed in O.A. No.717 of 2015. So, the impugned orders passed by the Tribunal are affirmed. In the result, the writ petition stands dismissed.

Writ petition dismissed.

2017 (I) ILR - CUT-275

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

O.J.C. NO. 10564 OF 1999

DIRECTOR GENERAL-CUM-INSPECTOR GENERAL OF POLICE & ORS. .....Petitioners

.Vrs.

KARTIKESWAR JENA & ANR. .....Opposite Parties

SERVICE LAW – O.P.No1, while working as Sub- Inspector of Police, was asked to Officiate as Inspector of Police – Whether, the Officiating posting of O.P.No1 can be said to be promotion to the Substantive post of Inspector of police ? – Held, No

In this case O.P. No1 was allowed to Officiate as Inspector of Police Subject to condition that he will be reverted to the rank of Sub-Inspector of Police at any time without assigning any reason – Subsequently when he has been considered for promotion by the Central Selection Board, he was not found fit and was directed to discharge his duties as Sub-Inspector of Police – However, in O.A. the learned Tribunal while holding the reversion as illegal directed the authorities to extend the benefit of promotion to O.P.No1 – Hence the writ petition – By an interim arrangement O.P.No1 was asked to discharge his duty as Inspector on adhoc basis and he has never been granted regular promotion – Held, the action taken by the authority not being "reversion", the impugned order passed by the learned Tribunal is quashed. (Para 8)

Case Laws Referred to :-

1. 1991 Supp(2) SCC 733 : Ramakant Shripad Sinai Advalpalkar v. Union of India & Ors.
2. 1996(1) SCC 562 : State of Rajasthan Vs. Fateh Chand Soni

For Petitioners : Addl. Government Advocate
For Opp.Parties : None

Date of hearing : 01.12.2016
Date of judgment : 01.12.2016

JUDGMENT

S. N. PRASAD, J.

The order dated 15.2.1999 passed by the Orissa Administrative Tribunal, Bhubaneswar in Original Application No.990 of 1988 has been assailed by the Director General of Police, State of Orissa, whereby and whereunder the learned Tribunal has allowed the Original Application and directed the authorities to extend the benefit of promotion to opposite party no.1 to the rank of Inspector holding the reversion as illegal.

2. The fact of the case in brief is that the opp.party no.1 entered into the Govt. Service as Sub-Inspector of Police in the year 1964. In the year 1986 recommendations were called for from the Superintendents of Police of the respective districts for promotion to the rank of Inspector. The opposite party

no.3 has been nominated for promotion to the rank of Inspector and during pendency of the final decision to be taken by the Departmental Promotion Committee, opposite party no.1 has been allowed to officiate in the rank of Inspector purely on ad hoc basis with immediate effect subject to condition that he will be reverted to the rank of Sub-Inspector of Police at any time without issuing any notice or assigning any reasons thereof. The case of opposite party no.1 has been considered for promotion to the rank of Inspector by the Central Selection Board, but he was not found fit to get promotion to the rank of Inspector and accordingly, his case has been rejected and in consequence he was directed to discharge his duties as Sub-Inspector of Police to which opp.party no.1 has challenged before the Orissa Administrative Tribunal, Bhubaneswar on the ground that before asking the opposite party no.1 to discharge his duties as Sub-Inspector of Police, the process under Article 311(2) of the Constitution of India has not been followed, this plea of opposite party no.1 has been accepted by the Tribunal, the order of restoring back the service of the opposite party no.1 as Sub-Inspector of Police has been recalled, he has been directed to discharge his duties as Inspector, which is under challenge in this writ application by the Director General-cum-Inspector General, State of Odisha on the ground that there is no question of reversion of the opposite party no.1 from the rank of Inspector to the rank of Sub-Inspector since opposite party no.1 has never been granted regular promotion of Inspector as would be evident from the order dated 24.4.1987 (Annexure-3) by which it is found that he was directed to discharge his duties as officiating Inspector and when he was found fit by the duly constituted Selection Committee, he was asked to discharge his duties in his substantive post and as such, there is no question of following the principle as laid down under Article 311(2) of the Constitution of India since it is not a punishment.

3. None appears for opposite party no.1. We have heard the learned counsel for the State and perused the documents available on record.

4. It is settled that ‘promotion’ means to advance to a higher position, grade or honour. It not only covers advancement to higher position or rank but also implies advancement to a higher grade. It is also settled that no one has a right to ask for or stick to a current duty charge. (See: **State of Rajasthan Vs. Fateh Chand Soni**, 1996(1) SCC 562)

5. The Hon’ble Apex Court in **Ramakant Shripad Sinai Advalpalkar v. Union of India and others**, 1991 Supp(2) SCC 733 has held as follows :

> "…… Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion. In such a case he does not get the salary of the higher post; but gets only what in service paralance is called a "charge allowance". Such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority does not enter into it. The person continues to hold his substantive lower post and only discharges the duties of the higher post essentially as a stop-gap arrangement."

6. The undisputed fact in this case is that the opposite party no.1, who was holding a substantive post of Sub-Inspector of Police, was nominated by the Selection Board in the year 1986 for promotion to the rank of Inspector and during the pendency of the final decision, which was to be taken by the duly constituted Selection Board, he was allowed to officiate in the rank of Inspector purely on ad hoc basis with immediate effect with the condition that he will be reverted to the rank of Sub-Inspector at any time without any notice or assigning any reason thereof. The case of opp.party no.1 was placed before the duly constituted Central Selection Board for consideration for promotion to the rank of Inspector, but the Central Selection Board on scrutiny of the service record of opposite party no.1 along with others have found that he was not fit to continue in view of the adverse entry in his service record, accordingly, he has been directed to go to his substantive post i.e.to the post of Sub-Inspector of Police, which has been challenged before the Orissa Administrative Tribunal on the ground that before passing such order of reversion, which amounts to punishment, a regular proceeding as contemplated under Article 311(2) of the Constitution of India ought to have been initiated. Since the same has not been followed, the decision of the authorities is absolutely illegal and as such the same is liable to be set aside. The learned Tribunal accepting the argument of the opp.party no.1 has allowed the Original Application and directed the authorities to restore him to function in the rank of Inspector of Police.

7. There is no dispute about the fact that an employee is entitled to be promoted to the higher rank and that is to be done by following a regular process i.e. by sending the name of one or the other employee intending to be promoted to the higher post before the duly constituted promotion committee which is generally known as "Departmental Promotion Committee", along with all records of one or the other employees, who has been authorised to scrutinize the service records before the final recommendation which is to be made by the Board before the appointing authority and in case of

recommendation for promotion that has to be accepted by the appointing authority and thereafter a formal order in the shape of notification has to be passed. Opposite party no.1 has been nominated for consideration of promotion to the rank of Inspector from the rank of Sub-Inspector of Police and during pendency of the said decision, for administrative exigencies he was allowed to officiate as Inspector, in which post he resumed his duties and started discharging the same. His case was placed before the Central Selection Board, but due to the adverse entry in the service record, he was not found fit to be promoted on substantive basis to the rank of Inspector of Police, as would be evident from the decision of the Central Selection Board as contained in Annexure-6 to the writ application. It transpires from the recommendation that he was not found fit to retain in the said post and accordingly, the competent authority after accepting the recommendation, directed the opposite party no.1 to go to his substantive post i.e. the post of Sub-Inspector of Police.

8. Now question arises that can the officiating posting of opposite party no.1 be said to be promotion to the substantive post of Inspector, the answer would be definitely in negative for the reason that no where in the order of the learned Tribunal, we find that the order of promotion on substantive basis in the rank of Inspector has been discussed, rather emphasis has been given upon Annexure-3 dated 24.41987, which according to us cannot be said to be an order of promotion on the substantive post of Inspector, rather it is by way of an interim arrangement by asking the opposite party no.1 to discharge his duty as Inspector of Police on ad hoc basis. It is also not in dispute that if an employee has been granted regular promotion to the higher post and the authorities have directed him to go the lower post, it will be said to be reversion being a punishment under the Discipline and Appeal Rule and in that situation, it is settled that before passing an order of reversion, a regular departmental proceeding is needed as contemplated under the Discipline and Appeal rule read with Article 311(2) of the Constitution of India, but here this is not the case. Since opposite party no.1 has never been granted regular promotion as Inspector of Police, asking the opposite party no.1 to go to his substantive post cannot be said to be reversion in the true sense of reversion and merely by using the word ‘reversion’ in Annexure-3, it cannot be said that it is reversion in the eye of law. This legal as well as factual aspect has not been taken into consideration by the learned Tribunal while passing the impugned order. Accordingly, in our considered view the impugned order suffers from infirmity. Hence, it is not sustainable and accordingly quashed. The writ petition stands allowed. Writ petition allowed.

2017 (I) ILR - CUT-280

B. K. NAYAK, J.

MISC. CASE NO. 29 OF 2016
(Arising out of ELPET NO. 17 of 2014)

JOGESH KUMAR SINGH ……..Petitioner

.Vrs.

AJAY KUMAR PATEL & ORS. ……..Opp. Parties

ODISHA CASTE CERTIFICATE (FOR SCHEDULED CASTES AND SCHEDULED TRIBES) RULES, 1980

Election case – Caste Certificate produced by the returned candidate (Respondent No. 1) is alleged to be forged – Certificate was not challenged either in appeal or revision under the Rules, 1980 – Whether, the High Court while hearing an election petition can decide the question of caste ? – Held, yes. (Paras 15,16)

Case Laws Relied on :-

1. AIR 2006 SC 543 : Satrucharla Vijaya Rama Raju -V- Nimmaka Jaya Raju & Ors.

Case Laws Referred to :-

1. 1999 2 SCC 217 : H.D.Revanna -V- Puttaswamy Gowda
2. (2004) 9 SCC 512 : Liverpool & London S.P. & I Assn. Ltd. -V- M.V. Sea Success
3. (2005) 13 SCC 511 : Harkirat Singh -V- Amrinder Singh
4. (2007) 3 SCC 617 : Virender Nath Gautam -V- Satpal Singh
5. (2008) 11 SCC 740 : Umesh Challiyil -V- Rajendran
6. (1994) 6 SCC 241 : Kumari Madhuri Patil & Anr. -V- Additional Commissioner, Tribal Development & Ors.
7. (1986) 4 SCC 78 : Bhagwati Prasad Dixit 'Gorewala' -V- Rajeev Gandhi

Petitioner : Mr. Upendra Kumar Samal
Opp. Parties : Mr. Rama Ch. Sarangi
Mr. Gopal Agarwal

Date of hearing : 01.09.2016
Date of order : 28.10.2016

JUDGMENT

B.K.NAYAK, J.

This misc. case has been filed by respondent no.1 in ELPET No.17 of 2014, under Order-6, Rule-16 and Order-7, Rule-11 of the Code of Civil Procedure read with Section 86 of the Representation of the People Act (in

short, 'the Act') praying to strikeout the pleadings in paragraphs-9 (A) to 9 (O) of the election petition and to reject the election petition itself, on the ground that the pleadings are vague, scandalous, vexatious and lack in material particulars and do not disclose any cause of action.

2. For convenience, the petitioner in the misc. Case is described as respondent no.1 and opposite party no.1-Election petitioner is described as the petitioner in this order.

3. The petitioner has filed ELPET No.17 of 2014 challenging respondent no.1's election to 9-Sundargarh (ST) Assembly Constituency. The election to the said constituency was held on 10.04.2014 and the result thereof was published on 16.5.2014 declaring respondent no.1 elected. The petitioner, an elector of the constituency, has challenged the election of respondent no.1 on the ground that respondent no.1 does not belong to Scheduled Tribe and as such he was not eligible to file nomination and contest the election from 9-Sundargarh (ST) Assembly Constituency, which was reserved for Scheduled Tribes only. It is alleged that he filed his nomination by submitting false and fabricated caste certificate (Scheduled Tribe Certificate), which was obtained by him from the office of the Tahasildar, Lephripara by practising fraud and misrepresentation. It is also alleged that his nomination was illegally and improperly accepted by the Returning Officer, which materially affected the result of election. A further prayer has been made in the election petition to declare respondent no.2 elected from the Constituency concerned.

4. On receipt of notice of the election petition, respondent no.1 appeared and filed his written statement denying the allegations. On the basis of the pleadings, issues were settled on 04.12.2014 and trial of the election petition proceeded analogously with ELPET No.20 of 2014, which has been filed by an unsuccessful candidate challenging the very election of respondent no.1, almost on similar grounds. While the trial was at the fag end, this misc. case has been filed by respondent no.1.

5. It is alleged in the miscellaneous petition that the averments made in the election petition are not in conformity with the requirements of Section 83 of the Act. In particular, it is alleged that the petitioner has not supplied concise statement of material facts as required under Section 83 (1) (a) of the Act and as such the election petition does not disclose any cause of action and, hence it is liable to be rejected under Order-7 Rule-11 of the C.P.C. It is also stated in the petition that the caste certificate was granted in favour of respondent no.1 by the competent authority in accordance with the provisions of the Orissa Caste Certificate (for Scheduled Castes and Scheduled Tribes)

Rules,1980 after making thorough enquiry, on the basis of which respondent no.1 filed his nomination. The aforesaid Rules incorporate a complete code with provisions to file appeal, revision etc. by person aggrieved and, therefore, neither the Returning Officer nor this Court, while hearing the election petition, is competent to decide the question of caste of an elected candidate and hence there is no cause of action for filing the election petition. It is also stated that in the past, issue of caste of respondent no.1 had been raised before this Court in a writ petition and as per order of this Court the matter was enquired into by the Collector, Sundargarh, who has already held that the petitioner is a Scheduled Tribe belonging to 'Bhuyan' community. It is also stated that in paragraph-10 of the election petition, the petitioner alleged that respondent no.1 has adopted corrupt practice, but full particulars and the details of the corrupt practice have not been furnished, nor affidavit to that effect as per Form-25 read with Rule 94-A of the Conduct of Election Rules,1961 (in short, 'the Rules) has been filed and, therefore, the election petition is liable to be rejected and the pleadings in paragraphs-9 (A) to 9 (O) of the Election Petition being vexatious and frivolous are liable to be struck off.

6. The learned counsel for the petitioner made oral objections to the miscellaneous application stating that concise statement of material facts and full particulars have been furnished in the election petition with regard to obtaining of Scheduled Tribe certificate by respondent no.1 by practising fraud and misrepresentation and suppressing material facts. Even though the majority of documents, particularly record of rights of properties belonging to respondent no.1 and his family and predecessors go to show that respondent no.1 belongs to 'Khandayat Bhuyan', which is not a Scheduled Tribe, respondent no.1 by resorting to fraudulent means obtained the Certificate indicating that he belongs to 'Bhuyan' (ST) Community and, therefore, it cannot be said that the election petition does not disclose cause of action. It is also stated that it is trite law that the High Court hearing an election petition is competent to go into the question as to whether the returned candidate belongs to a particular caste, where his caste would determine his/her eligibility or qualification to contest the election. It is also stated by him that the petitioner has not alleged adoption of any corrupt practice as defined in Section 123 of the Act by respondent no.1 in the election and, therefore, no full particulars of any corrupt practice was required to be furnished, nor affidavit in Form-25 as per Section-94-A of the Act was required to be filed. It is stated that the cause of action for the election petition is that respondent

no.1 was not qualified to contest the election from a constituency, which was reserved for Scheduled Tribes, but he contested by filing false and fabricated Scheduled Tribe Certificate obtained by fraudulent and corrupt means and, therefore, the result of election has been materially affected.

7. Paragraph-9 containing sub-paragraphs-9 (A) to 9 (O) of the election petition describe that respondent no.1 and his father and ancestors are 'Khandayat Bhuyan' by caste and belong to a Jamindar family and that 'Khandayat Bhuyan' is not a Scheduled Tribe as per the Schedule Castes and Schedule Tribes Order 1950, as amended from time to time. It is stated that respondent no.1 by fraudulent means and by suppressing material documents managed to get a certificate from the Tahasildar, Lephripara to the effect that he belonged to 'Bhuyan' Tribe, which is a Scheduled Tribe and on the basis of such certificate he filed the nomination, though he was not qualified to contest from the reserved constituency. Therefore, it is stated that the averments made in para-9 of the election petition are neither fraudulent nor malicious nor vexatious, but, on the other hand, they give detail particulars describing the cause of action for the election petition.

8. In the case of ***H.D. Revanna v. G. Puttaswamy Gowda: 1999 2 SCC 217***, the Hon'ble Supreme Court has held that an election petition can be dismissed for non-compliance with Sections 81, 82 and 117 of the Representation of the People Act,1951 but it may also be dismissed if the matter falls within the scope of Order 6 Rule 16 or Order-7 Rule 11, C.P.C.

9. In the case of ***Liverpool & London S.P. and I Assn. Ltd. V. M.V.Sea Success :(2004) 9 SCC 512***, the Hon'ble Supreme Court held that the disclosure of a cause of action in the plaint is a question of fact and the answer to that question must be found only from the reading of the plaint itself. The court trying a suit or an election petition shall while examining whether the plaint or the petition discloses a cause of action, to assume that the averments made in the plaint or the petition are factually correct. It is only if despite the averments being taken as factually correct, the court finds no cause of action emerging from the averments that it may be justified in rejecting the plaint.

In ***Harkirat Singh v. Amrinder Singh :(2005) 13 SCC 511*****,** the Hon'ble apex Court stated the distinction between material facts and particulars and declared that material facts are primary and basic facts which must be pleaded by the plaintiff while particulars are details in support of those facts meant to amplify, refine and embellish the material facts by giving distinct touch to the basic contours of a picture already drawn so as to make it

more clear and informative. To the same effect are the decisions in ***Virender Nath Gautam v. Satpal Singh: (2007) 3 SCC 617 and Umesh Challiyill v. K.P. Rajendran: (2008) 11 SCC 740.***

10. The main plank of argument of the learned counsel for respondent no.1 is that the election petition does not disclose any cause of action. It is further highlighted by him that the only ground urged by the petitioner is that respondent no.1 is not a Scheduled Tribe person and, therefore, he is not qualified to file nomination and contest the election. It is submitted further that the High Court while deciding an election case has no jurisdiction go into the question of caste of a candidate and that the decision on the question of caste is within the jurisdiction of the State Level Scrutiny Committee as decided by the apex Court in the case of ***Kumari Madhuri Patil and another v. Additional Commissioner, Tribal Development and others: (1994) 6 SCC 241***. It is submitted that since the question of caste of respondent no.1 is pending before the State Level Scrutiny Committee which has not decided that respondent no.1 does not belong to Schedule Tribe, and that respondent no.1 has already got a Scheduled Tribe Certificate under the relevant Rules from the competent authority, this Court cannot decide the issue relating to the caste of respondent no.1 in this election petition. In this connection, the learned counsel for respondent no.1 placed reliance on the decision of the apex Court reported in ***(1986) 4 SCC 78 : Bhagwati Prasad Dixit 'Ghorewala' v. Rajeev Gandhi*****,** wherein the election of late Mr.Rajeev Gandhi to the Lok Sabha from Amethi Parliamentary Constituency was challenged on the ground that because of his marriage with an Italian lady and acquisition of property in his own name as well in the name of his wife in Italy, late Mr. Gandhi had ceased to be a citizen of India in terms of Section 9 (2) of the Citizenship Act,1955 and, therefore, he was disqualified to be a candidate for election under Article 102 (1) (d) of the Constitution. Interpreting the provisions of the Citizenship Act, the Hon'ble apex Court in that case held that when the question whether a person has acquired the citizenship of another country arises before the High Court in an election petition filed under the Representation of the People Act, 1951, the High Court while trying the petition will have no jurisdiction to decide that question. It was further observed that whatever may be the proceeding in which the question of loss of citizenship of a person arises for consideration, the decision in that proceeding on the said question should depend upon the decision of the authority constituted for determining the said question under Section 9 (2) of the Citizenship Act,1955. It was further held that Section 9 of

the Citizenship Act,1955 is a complete code as regards the termination of Indian citizenship on the acquisition of the citizenship of a foreign country. When the matter falls within Section 9 (2) of the Citizenship Act, all other provisions of law are excluded.

11. Taking a cue from the aforesaid decision, the learned counsel for respondent no.1 submitted that since the Orissa Caste Certificate (for Scheduled Castes and Secluded Tribes) Rules,1980 provide a complete code for grant of caste certificate and also makes provision for filing appeal and revision against the order of the competent authority either allowing or refusing to issue caste certificate and that the caste certificate granted in favour of the present respondent no.1 having not been challenged and set aside in appeal as per the provision of the said Rules, this Court hearing the election petition cannot decide the question of caste.

Similarly taking a cue from the directions issued in the case of ***Kumari Madhuri Patil*** (supra), learned counsel for respondent no.1 submitted that it is the State Level Scrutiny Committee which is competent to decide the social status of a person and the final decision of the Scrutiny Committee is only subject to the writ jurisdiction of the High Court. It is submitted that the State Level Scrutiny Committee having not yet decided the social status of respondent no.1, the High Court hearing the election petition is not competent to decide the social status of respondent no.1.

12. Relying on the decision of the apex Court in the case of ***Satrucharla Vijaya Rama Raju v. Nimmaka Jaya Raju & Ors : AIR 2006 SC 543***, learned counsel for the petitioner submitted that where the cause of action in an election petition relates to decision on the caste or Tribe of a particular candidate or returned candidate, the High Court hearing the election petition can decide such question.

In the said decision, a contention was raised on behalf of the returned candidate in election dispute that the caste certificate issued by the competent authority under the Andhra Pradesh (Scheduled Castes, Scheduled Tribes and Backward Classes) Regulation of Issue of Community Certificates Act,1993 that the candidate belongs to Scheduled Tribe, "Konda Dora" was final and binding on the court. The contention was repelled by the Hon'ble apex Court in paragraph-4 of the judgment where it has been held as follows :

> "**4.** … … … Though, he faintly raised the contention that the issue of the certificate under the Andhra Pradesh (Scheduled Castes, Scheduled Tribes and Backward Classes) Regulation of Issue of

> Community Certificates Act,1993 was conclusive and binding on the proceedings under the Representation of the People Act,1951, he did not seriously pursue that contention, obviously because of the fact that the certificate issued under that Act served a different purpose and could not stand in the way of an election petition filed under the Representation of the People Act,1951 being tried in accordance with law by the High Court … …. ..."

13. It was further held in the aforesaid decision of ***Satrucharla Vijaya Rama Raju*** (supra) that judgment in an earlier election petition deciding the issue of caste of a candidate or returned candidate is not a judgment in rem and, therefore, it does not operate as res judicata in respect of the question of caste of the candidate arising in a subsequent election petition, where the parties were not the same in both the election petitions. It was held that the election petition is not a representative action and that every election furnishes a fresh cause of action.

14. The decision of the apex Court in ***Satrucharla Vijaya Rama Raju*** (supra) leaves no room for doubt that the High Court hearing the election petition can decide the question of caste of the candidate where the cause of action is about the qualification or disqualification of the candidate to contest the election is based on his caste, in spite of the fact that a caste certificate as per the Act or Rules of the State has been issued by the authority thereunder. The decision in the case of ***Kumari Madhuri Patil*** (supra), which related to the question of caste of a candidate seeking admission to medical course on the basis of a caste certificate issued by the competent authority is no guidance for holding that the High Court hearing an election petition cannot go into the question of caste of the candidate, which is the issue before it.

Similarly, the decision in ***Bhagwati Prasad Dixit 'Ghorewala'*** (supra) cited by the learned counsel for respondent no.1 is of no assistance in as much as there the question involved was loss of Indian Citizenship of the returned candidate under the provisions of the Citizenship Act,1955 and not relating to eligibility of the candidate to contest election on the basis of his caste.

15. In the recent decision of the Hon'ble apex Court in the case of ***Mohammad Sadique v. Darbara Singh Guru : Civil Appeal No.4870 of 2015*** decided on 29.04.2016, the returned candidate contested the election as a Scheduled Caste candidate to a Constituency reserved for Scheduled Castes. His election was challenged on the ground that he was not qualified to file nomination and contest the election as because he did not belong to

any Scheduled Caste. The High Court decided the question of caste on merits in spite of grant of Scheduled Caste Certificate by the competent authority of the State Government of Punjab, and that appeal against the judgment of the High Court was heard by the apex Court on merits with regard to the caste of the candidate. Though specifically the question whether the High Court hearing an election petition can decide the question of caste of the returned candidate was not the issue, the issue relating to caste of the candidate which was determinative of his eligibility was decided by the High Court in the election petition as well as the Hon'ble Supreme Court in the Civil Appeal on merits on the basis of evidence led by the parties. This no doubt suggests that the High Court in an election petition can decide the question of caste of a candidate, if that is relevant to determine the eligibility of the candidate to contest election.

16. The election of respondent no.1 in the instant election petition has been challenged on the ground that respondent no.1 does not belong to Scheduled Tribe of 'Bhuyan' community, but he belongs to the community of 'Khandyat Bhuyan' which is not a Scheduled Tribe in the State of Orissa, and that by practising fraud and misrepresentation he managed to obtain the Scheduled Tribe Certificate from the Tahasildar and on that basis filed the nomination and contested the election for the constituency, which was reserved for Scheduled Tribes. Since the High Court hearing the election petition is competent to decide the question of caste of a candidate when such question is relevant for deciding his qualification or disqualification for contesting election, it must be said that the averments made in the petition do disclose a cause of action and, therefore, the election petition is not liable to be rejected in terms of Order-7, Rule-11 of the C.P.C.

17. Regarding the further contention raised on behalf of respondent no.1 that the election petitioner alleges corrupt practices adopted by respondent no.1, without furnishing full particulars of the corrupt practice as required under Section 83 (1) (b) of the Act, I am afraid, the learned counsel has misconstrued the averments made in paragraph-9 of the election petition. Though the words 'corrupt practice' has been used in the averments, such averments relate to practising fraud and misrepresentation and manipulation by respondent no.1 in obtaining the Scheduled Tribe Certificate from the Tahasildar. There is no allegation that respondent no.1 adopted corrupt practice in election as defined in Section 123 of the Act. Therefore, the use of the expression, 'corrupt practice' loosely in the election petition is of no

consequence, which does not require any separate affidavit in Form-25 read with Rule-94-A of the Rules to be filed by the petitioner.

18. A faint contention was also raised on behalf of respondent no.1 that the details of respondent no.2-Kusum Tete has not been furnished in the cause title of the election petition though the petitioner has sought for additional relief for declaring respondent no.2 as elected and as such the election petition is not in conformity with Section 82 of the Act and hence liable to be dismissed in terms of Section 86 (1) of the Act. With regard to the lack of detailed particulars of respondent no.2, it is submitted that her husband's name has not been furnished for the purpose of full identification of the said party.

19. There is no quarrel over the fact that respondent no.2 is none other than the wife of the election petitioner and she was a candidate in the election from the constituency concerned. She has already entered appearance in the election petition by engaging advocate. Therefore, mere non-mention of husband's name of respondent no.2 in the cause title of the election petition cannot be a ground to dismiss the election petition as being not in conformity with the requirement of Sections 82 or 83 of the Act.

20. The learned counsel for respondent no.1 has further relied upon a catena of decisions to highlight the principle that an election petition, which does not disclose a cause of action is liable to be dismissed in accordance with the provisions Order-7 Rule-11 of the C.P.C. Since, there is no quarrel over the proposition, it is not necessary to go into all those decisions in this order. In the light of the discussions made in the forgoing paragraphs. I find no merit in the misc. petition and accordingly, the misc. case is dismissed.

Application dismissed.

2017 (I) ILR - CUT- 289

S.K. MISHRA, J.

W.P.(C) NO. 24642 OF 2013

KAMAYA @ KAMEYA WADAKA ……Petitioner

.Vrs.

NEELAMADHAV HIKAKA & ANR. ……..Opposite parties

LIMITATION ACT, 1963 – S. 5

Election petition – Delay of six days – Application presented for condonation of delay – Application rejected – Hence this writ petition – For condonation of delay there must be "sufficient cause", which prevented the applicant to present the election petition within the period of limitation – In this case evidence shows that there was no negligence or inaction on the part of the applicant but the learned Court below failed to consider the same – Held, impugned order is setaside – The petition U/s 5 of the Act 1963 readwith section 44-B (1) of the Odisha Panchayat Samiti Act is allowed and the delay is condoned. (Paras 8,9.11)

Case Law Referred to :-

1. 102 (2006) CLT 710 : Maharagu Naik & Ors v. Civil Judge, Senior Division-cum-Election Commissioner, Boudh and Ors.
2. AIR 1987 SC 1353 : Collector, Land Acquisition, Anantnag and another v. Mst. Katiji & Ors.
3. AIR 2005 SC 2191 : State of Nagaland v Lipok AO & Ors.
4. AIR 1998 SC 2276 : P.K.Ramachandran v. State of Kerala & Anr.

For Petitioners : Ms. A.K. Nanda & G.N. Sahu
For Opposite parties : Ms. S.S. Mohapatra & P. Mohapatra, (Addl. Govt. Adv.)

Date of judgment :15th July, 2016

JUDGMENT

S.K.MISHRA, J.

This is the second journey of the petitioner to this Court. On earlier occasion, he has filed W.P.(C) No.2012 of 2013, which was disposed of in his favour. After remand by this Court in W.P.(C) No.2012 of 2013, the question of condonation of delay in filing of Election Petition No.12 of 2012 in the court of the Civil Judge (Senior Division), Gunupur was taken up and as per the order dated 08.10.2013, learned Civil Judge (Senior Division)

refused to condone the delay and rejected the application of the petitioner. Against such order, this writ petition has been filed.

2. The factual backdrop leading to filing of this writ petition may be succinctly described as follows:

The petitioner, hereinafter referred as the "election petitioner", was a candidate for the post of Samiti Sabhya of Thuapadi Samiti of Bissam-Cuttack Block. The result of which election was declared finally on 24.02.2014 and in such election, opposite party no.1-Nilamadhab Hikaka, hereinafter referred as the "returned candidate", was declared elected for the aforesaid office. Being aggrieved by such election, the election petitioner filed an election petition on 16.03.2012. It is alleged that the election petition was presented after the delay of seven days. Accompanied with the election petition, he filed a petition under Section 5 of the Limitation Act. Learned Civil Judge (Senior Division), Gunupur admitted the election petition and issued notice to the opposite party no.1 i.e. the returned candidate with the observation that the prayer relating to condonation of delay being a mixed question of fact and law will be dealt with at the time of final hearing of the election petition. Being aggrieved with the order, opposite party no.1 i.e. the returned candidate challenged the order before this Court in W.P.(C) No.7367 of 2012. This court while disposing of the said writ petition on 25.04.2012 set aside the order of the learned Civil Judge (Senior Division) passed on 03.04.2012 and remitted the matter to the trial court to consider the issue of limitation after giving opportunity of hearing to both the parties. Thereafter, both the parties led evidence and on behalf of the election petitioner, four witnesses were examined and three witnesses were examined on behalf of opposite party no.1, the returned candidate. After considering the materials on record, the learned Election Tribunal-cum-Civil Judge (Senior Division), Gunupur rejected the prayer of condonation of delay, as consequence thereof it was held that the Election Petition No.12 of 2012 was not entertainable. Aggrieved by the aforesaid order dated 17.01.2013, the present petitioner filed a writ petition before this Court in W.P.(C) No.2012 of 2013, which was disposed of on 12.07.2013. This Court on hearing both the parties and taking into consideration that the Election Tribunal had not considered the relevant evidence on record allowed the writ petition with a direction to the Election Tribunal to consider the relevant evidence afresh and pass an order within a period of 15 days.

However, the returned candidate preferred a Special Leave Petition (Civil) before the Hon'ble Apex Court, which was registered as S.L.P.

(Civil) No. 24812 of 2013 against the order passed by this Court. Said S.L.P. was dismissed on 16.08.2013. After disposal of the S.L.P. and rehearing of the parties, the learned Civil Judge (Senior Division) rejected the petitioner's prayer for condonation of delay, which is assailed in this writ petition.

3. Before looking into the materials on record to decide whether an application for condonation of delay should have been allowed by the Election Tribunal, it is appropriate to take note of the leading decisions of this Court on this issue. In **Maharagu Naik and others v. Civil Judge, Senior Division-cum-Election Commissioner, Boudh and others**, 102 (2006) CLT 710; a Division Bench of this Court held that Section 5 of the Limitation Act is also applicable to the election case under the Panchayat Samiti Act and has held as follows:

> ""Sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to the applicant. In the present case except advancing the plea that the plea of illness is false, Opp.Party No.1 did not tender any evidence from her side. In her deposition or in the deposition of any other witnesses examined from her side, she did not whisper if the petitioner was not ill or that she was well and the plea of illness is false. Under Such circumstances, approach of learned Civil Judge in assessment of evidence is found to be correct as against the hair-splitting interpretation of the evidence in the context of illness adopted by the learned Addl. District Judge. Therefore, the reasoning assigned and the conclusion arrived at by the learned Addl. District Judge in not condoning he delay (in M.J.C. No.14 of 2002) is illegal and accordingly set aside."
>
> *(emphasis supplied)*

In the off-quoted decision of the Supreme Court in **Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and others,** AIR 1987 SC 1353; Hon'ble Supreme Court has laid down the principles which guide applications under Section 5 of the Limitation Act. It is appropriate to quote the exact words used by the Hon'ble Supreme Court:

> "3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by deposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that

being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that :-

xxx xxx xxx

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious mater being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must b explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

xxx xxx xxx"

Same judgment has been relied upon by the Supreme Court again in the case of **State of Nagaland v Lipok AO and others,** AIR 2005 SC 2191, wherein the Supreme Court after taking into consideration a number of cases has held that the proof by sufficient cause is a condition precedent for exercise of the extraordinary restriction vested in the Court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion.

4. In this case learned counsel for the petitioner submits that there is six days delay, but the learned counsel for the opposite party no.1 says that there is seven days delay. Before going into those questions, it is appropriate to take into the facts and circumstances of the case i.e. the contention made in the application for condonation of delay. In the petition filed under Section 5 of the Limitation Act, the election petitioner took the plea that the delay was caused due to low backache and he was under treatment from 05.03.2012 to 12.03.2012 as an outdoor patient in Bissam Cuttack Medical and he went to Vaishnavi Hospital, Visakhapatnam for better treatment on 12.03.2012. He states that after four days he returned to his home and filed the election petition. The returned candidate on the other hand took a very short plea. According to him, the ground of ailment is a false plea taken by the petitioner. It is further pleaded that the O.P.D. ticket of C.H.C., Bissam Cuttack is a fraudulent document and the petitioner has never visited Vaishnavi Hospital, Visakhapatnam for treatment. It is further pleaded that the prescription obtained by him from Vaishnavi hospital, Visakhapatnam is a fraudulent document. So the petition for condonation of delay filed by the petitioner is liable to be dismissed. Opposite party no.2 has not filed any written objection.

5. In substantiating his plea, the election petitioner examined four witnesses; P.W. 1 is the election petitioner himself, who has specifically deposed that due to severe backache he went to Bissam Cuttack Medical where he contacted the doctor and expressed his health problem to him on 05.03.2012 and he prescribed him some medicines and accordingly he took those medicines regularly. He has further stated that as he was not recovered from illness, as advised by the Doctor he went to Visakhapatnam on 12.03.2012 for better treatment and he was treated at Vaishnavi Hospital and stayed there till 15.03.2012. After his return, the petitioner filed the election petition on 16.03.2012. In support of his treatment the petitioner filed prescription, which is marked as Ext.1. Similarly, in support of treatment in the Vaishnavi Hospital, Visakhapatnam, he has filed prescription, which is marked as Ext. 2.

6. Though no such plea has been taken, the returned candidate while cross-examining these witnesses has put forth a new case beyond his plea that the petitioner was a employee of the Nabin Vikash Charitable Trust which runs under the Vedant Foundation and he tried to introduce a story that during the period the election petitioner was allegedly ill, he has attended his official uty. How far such a suggestion beyond plea is

permissible ? This Court is of the opinion that in a Civil Case, the party should not be allowed to travel beyond his pleadings and the learned Civil Judge (Senior Division) has erred in law in allowing the suggestion of the returned candidate's Advocate and pleading a new case for the opposite party no.1.

7. On a sincere analysis of the evidence, it is seen that the P.W. 2 is an N.G.O. Chief, where the election petitioner was serving and his name is Bala Muklunda Palo. In his deposition, he states that the present petitioner is one of the Coordinator and is working under his supervision and that the petitioner did not attend his duty on 05.02.2012 till 16.02.2012 and for that absence he has obtained leave and he resumed his duty on 17.02.2012. He had also filed a leave application which is marked as Ext-7. P.W. 3 is a Medical Officer of C.H.C., Bissam-Cuttack. He states that while he was on duty he prescribed medicine for the petitioner Kameya Wadaka under Ext. 1 and his signature therein is Ext. 1/1. It is also deposed by P.W. 3 that he had prescribed certain medicines on 09.03.2012 and on 12.03.2012 he advised the petitioner for better treatment. The O.P.D. register of the C.H.C. Bissam Cuttack was admitted in evidence in support of his treatment given by the petitioner from 05.03.2012 to 12.03.2012.

P.W. 3 is a public servant being the Medical Officer of a Community Health Centre. He has no reason to tell lie on oath. Moreover, his statement is fortified by the entries made in the O.P.D. register, which is contemporaneous to the treatment given to the election petitioner.

P.W. 4 is a Public Relation Officer of Vaishnavi Hospital of Visakhapatna. His name is B.Sridhar. He has stated on oath that the petitioner was under treatment of Dr. G.N.Srinivas and he has issued prescription, which was marked as Ext. 2. He has given his statement before the Court on oath. This witness is an outsider and there is no reason to disbelieve his version.

8. In order to summaries the materials led before the Election Tribunal by the election petitioner, this Court finds that the petitioner himself has examined himself to prove all the documents. The doctor of the C.H.C., Bissam Cuttack has supported his statement and prescription. The P.R.O. Dr. B.Sridhar of Vaishnavi Hospital, Visakhapatna has supported the plea of treatment imparted by Dr. G.N.Srinivas of Vaishnavi Hospital, Visakhapatna. The Supervisor of the N.G.O. has also stated that the petitioner was on leave from 05.03.2012 till 16.03.2012. Opposite party no.1 is the returned candidate. He has not examined himself as a witness. If a

party is not examined himself as a witness, adverse inference has to be drawn against him. O.P.W. No.1 was said to be the Chief Coordinator of the N.G.O., where the petitioner was serving as a Coordinator. O.P.W. 2 was an employee of the N.G.O., but he is at present not working in the N.G.O. and doing business. O.P.W. No.3 was the Branch Manager of S.B.I., Bissam Cuttack Branch. In his evidence he has stated on oath that he has received summons from the court to depose in the Court with the documents in the matter of litigation between the parties. Further he has filed certain documents to prove that the election petitioner was serving at the relevant time and he was not unwell. Such documents have been marked as Ext. L by the O.P.W No.3. In those documents, he has admitted that the documents at Exts. D to H cannot be operational or without permission of the authorities. Although he has denied the documents to be admitted in an election dispute, he has submitted that the documents marked as Exts. D to H does not contain a single seal or signature of the authority, who was in charge of the N.G.O.

The O.P.W. No.2 –Gopaldas Bhatra, who was an employee of the N.G.O., has stated that if any employee has any inconvenience, then he shall submit leave application to Bal Mukunda Pal, who is the Unit Head of Naveen Vikash Charitable Trust. But he has stated that he cannot say how many days Kamaya Wadakka has worked in which month of the year. O.P.W. No. 3 is the Bank Manager, who has deposed that the petitioner has received his salary for the month of March, 2012.

9. In this background and in view of the materials available before the Court, learned Civil Judge (Senior Division) has adopted a perverse approach by allowing the third case to be introduced by the opposite party no.1 and in a hairsplitting appreciation of evidence, which is generally adopted in criminal cases, has come to the conclusion that the petitioner has not been able to prove that he was prevented, by sufficient cause from preferring the election petition in the court within the prescribed period of limitation.

10. Learned counsel for opposite party no.1 i.e. the returned candidate, has relied upon the case of **P.K.Ramachandran v. State of Kerala and another,** AIR 1998 SC 2276, wherein the Supreme Court has depreciated the High Court's order as it has not examined to the reply filed by the appellant. The Supreme Court further held that Law of Limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds.

This Court does not intend to extend the benefit on equitable grounds and the plea taken by the opposite party has been taken into consideration and after considering the case in a wholistic manner, the conclusions mentioned below has been arrived at. So the decision cited by the learned counsel for the returned candidate, i.e. **P.K.Ramachandran v. State of Kerala and another** *(supra)* is not applicable in this case.

11. In that view of the matter, this Court is of the opinion that the order dated 08.10.2013 passed by the learned Civil Judge (Senior Division), Gunupur in Election Petition No. 12 of 2012 should be set aside and the writ petition should be allowed. Accordingly, the writ petition is allowed but without any cost. The order dated 08.10.2013 passed by the learned Civil Judge (Senior Division), Gunupur in Election Petition No. 12 of 2012 is set aside. The petition under Section 5 of the Limitation Act read with Section 44-B(1) of the Panchayat Samiti Act filed by the petitioner on16.03.2012 before the learned Civil Judge (Senior Division), Gunupur is hereby allowed and the delay is condoned. The Civil Judge (Senior Division), Gunupur is directed to take up the matter of the Election Petition and try the same on day-to-day basis and dispose of the same within a period of three months from the date of receipt of this order. The Registry is directed to send the L.C.R. without any further delay.

Writ petition allowed.

2017 (I) ILR - CUT-296

DR.A.K.RATH, J.

S.A. NO. 42 OF 1996

SUDHANSU SEKHAR TRIPATHY ……..Appellant

.Vrs.

STATE OF ORISSA & ANR. ……..Respondents

CIVIL PROCEDURE CODE, 1908 – O-41, R-17

Whether the learned lower appellate Court was justified in allowing the appeal on merit in the absence of the appellant ? Held, No

When the appellant does not appear at the time of hearing of the appeal, the course open for the appellate Court is to dismiss the appeal for non-Prosecution or to adjourn the same to another date – In the present case, learned lower appellate Court has travelled beyond its jurisdiction in deciding the appeal on merit in the absence of the learned counsel for the appellant – Held, the impugned judgment and decree are setaside. (Paras 8,10)

For Appellant : Mr. S.P. Mohanty
For Respondents: Ms. S. Mishra, A.S.C.

Date of Hearing : 20.01.2017
Date of Judgment: 27.01.2017

JUDGMENT

DR.A.K.RATH, J.

The plaintiff is the appellant against a reversing judgment.

2. Since the appeal is to be disposed of on a short point, the facts need not be stated in detail. Suffice it to say that the plaintiff instituted T.S. No.18 of 1991 in the court of the learned Additional Munsif, Berhampur for permanent injunction impleading the respondents as defendants. The suit was decreed. Against the judgment and decree passed by the learned trial court, the defendant no.1 (respondent no.1 herein) filed Title Appeal No.10 of 1993 in the court of the learned District Judge, Berhampur, which was subsequently transferred to the court of the learned A.D.J., Berhampur and renumbered as T.A.No.10/93(T.A.11/92-GDC). On the date of hearing, the learned counsel for the appellant was not present, but then the learned appellate court decided the matter on merit and set aside the judgment and decree passed by the learned trial court.

3. This appeal was admitted on 11.3.1996 on the following substantial questions of law. They are:-

"(i) Whether the appellate court has interpreted the provisions of Order 41, Rule 17 C.P.C., correctly an whether there was justification to allow the appeal in absence of the appellant:

(ii) Whether assessment of holding tax by the Municipality amounts to concession of title in favour of the plaintiff ;

(iii) Whether respondent no.2 who was the respondent no.2 in Title Appeal could have canvassed the contentions on behalf of the State of Orissa the appellant no.1 in the Title Appeal;

(iv) Whether non-compliance of recruitment under Section 80 of the Civil Procedure Code and Section 349 of the Orissa Municipal Act make the plaintiff unsuited".

4. Heard Mr.S.P.Mohanty, learned counsel for the appellant and Ms.S.Mishra, learned Additional Standing Counsel for the State-respondent no.1. None appeared for respondent no.2.

5. Mr.Mohanty, learned counsel for the appellant submitted that since the learned counsel for the appellant was absent when the appeal was posted for hearing, the learned appellate court committed a manifest illegality and impropriety in deciding the appeal on merit. He further submitted that when an appeal is posted for hearing, the counsel for the appellant does not appear, the appellate court has to dismiss the appeal. The appellate court has no jurisdiction to decide the appeal on merit.

6. Order 41 Rule 17 C.P.C. provides :

> "(1)Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed.
>
> Explanation: Nothing this sub-rule shall be construed as empowering the court to dismiss the appeal on the merits.
>
> (2) Hearing appeal ex parte. — Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte."

7. The apex Court had the occasion to interpret the said provision in the case of *Abdur Rahman Vrs. Athifa Begum*, (1996) 6 SCC 62. Taking a cue from *Abdur Rahman* (supra), the apex Court in the case of *Harbans Pershad Jaiswal (Dead) by legal representatives Vrs. Urmila Devi Jaiswal (Dead) by legal representatives*, (2014) 5 SCC 723 held thus:-

> "11. It is clear from the above that whereas appeal can be heard on merits if the respondent does not appear, in case the appellant fails to appear, it is to be dismissed in default. The Explanation makes it clear that the court is not empowered to dismiss the appeal on the merits of the case. As different consequences are provided, in case the appellant does not appear, in contradistinction to a situation where the respondent fails to appear, as a fortiori, Rule 19 and Rule 21 are also differently worded. Rule 19 deals with readmission of appeal "dismissed for default", where the appellant does not appear at the

time of hearing, Rule 21 talks of "rehearing of the appeal" when the matter is heard in the absence of the respondent and ex parte decree made. In *Abdur Rahman case*, this Court made it clear that because of non-appearance of the appellants before the High Court, the High Court could not have gone into the merits of the case in view of specific course of action that could be chartered (viz. dismissal of the appeal in default above) continued in the Explanation to Order 41 Rule 17 CPC and by deciding the appeal of the appellants on merits, in his absence. It was held that the High Court had transgressed its limits in taking into account all the relevant aspects of the matter and dismissing the said appeal on merits, holding that there was no ground to interfere with the decision of the trial court.

12. In *Ajit Kumar Singh case* as well, the same legal position is reiterated as is clear from para 8 of the said judgment which is reproduced below:

"8. There can be no doubt that the High Court erroneously interpreted Rule 11(1) of Order 41 CPC. The only course open to the High Court was to dismiss the appeal for non-prosecution in the absence of the advocate for the appellants. The High Court ought not to have considered the merits of the case to dismiss the second appeal.(See: *Rafiq v. Munshilal*). The same view was reiterated in *Abdur Rahman v. Athifa Begum*."

8. The irresistible conclusion is that where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the course open to the appellate court is to dismiss the appeal for non-prosecution or to adjourn the same to another date. The learned appellate court has travelled beyond its jurisdiction in deciding the appeal on merit in absence of the learned counsel for the appellant. The substantial question of law enumerated in ground no.(i) has been answered in negative.

9. The next question is that even if the appeal was to be dismissed for non-prosecution, whether that order is to be recalled on the application made by the appellant. Under Rule 19 of Order 41 C.P.C., the appellant has to show sufficient cause for his non-appearance.

10. In the result, the judgment and decree dated 28.11.1995 and 11.12.1995 passed by the learned 1st Additional District Judge, Ganjam, Berhampur in Title Appeal No.10 of 1993 is set aside. The matter is remitted back to the learned appellate court. The learned appellate court shall decide

the application of the appellant for his non-appearance and then proceed with the hearing of the appeal. Accordingly, this appeal is allowed to the extent indicated above.

11. Since the appeal has been remitted back to the learned appellate court for de novo hearing, the substantial questions of law enumerated in ground nos.(ii) to (iv) are left open.

Aappeal allowed

2017 (I) ILR - CUT- 300

DR. A.K.RATH, J.

O.J.C. NO. 11705 OF 1997

BALARAM DAMBA & ANR. ……..Petitioners

.Vrs.

BHAGABAN NAIK & ORS. ……..Opp. Parties

ODISHA SCHEDULED AREAS TRANSFER OF IMMOVABLE PROPERTY (BY SCHEDULED TRIBES) REGULATIONS, 1956 – REGN. 3

Whether, the petitioners who are non-tribals can acquire title by way of adverse possession over the property belonging to O.P.Nos. 1 to 3, who are tribals ? – Held, No

A tribal may acquire title by adverse possession over the immovable property of another tribal but a non-tribal can neither prescribe nor acquire title by adverse possession over the property belonging to a tribal – Held, the petitioners being non-tribals can neither prescribe nor acquire title by way of adverse possession over the property belonging to O.P.Nos. 1 to 3-tribals.

(Paras 5,6)

Case Laws Relied on :-

1. AIR 2004 SC 3782 : Amrendra Pratap Singh -V- Tej Bahadur Prajapati & Ors.

Petitioners : Mr. P.K. Das.
Opp. Parties : Mr. H.S.Mishra
Miss S.Mishra, Addl.Standing Counsel

Date of Hearing : 07.12. 2016
Date of Judgment: 07.12. 2016

JUDGMENT

DR. A.K. RATH, J.

The petitioners call in question the legality and propriety of the order dated 19.4.1997 passed by the Additional District Magistrate (Gen.), Koraput, opposite party no.6, in OSATIPA No.22/95. By the said order, opposite party no.6 dismissed the appeal and confirmed the order dated 27.3.95 passed by the Tahasildar, Jeypore, opposite party no.5, in OSATIP No.21/93, whereby and whereunder opposite party no.5 allowed the application filed by the opposite party nos.1 to 3 under para 3-A of the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulations, 1956 (hereinafter referred to as "Orissa Regulation 2 of 1956") and restored possession of the land to the opposite party nos.1 to 3.

2. Opposite party no.1 along with predecessor of opposite party nos.2 and 3 filed an application under para 3-A of Orissa Regulation 2 of 1956 before the Sub-Collector, Jeypore, opposite party no.4, for restoration of land, which was registered as OSATIP Case No.21 of 1993. It is stated that the opposite parties are the absolute owner of the schedule property. But then the petitioners are in forcible possession of the land since five years. Pursuant to issuance of notice, the petitioners entered appearance and filed counter stating therein that they are in possession of the land for more than 45 years peacefully continuously and hostile animuns of the petitioners and as such they have perfected title by way of adverse possession. Parties have adduced oral and documentary evidence. The opposite party no.5 negatived the plea of adverse possession and directed for restoration of the land to the opposite parties. The petitioners unsuccessfully challenged the said order before the Additional District Magistrate (Gen.), Koraput, which was eventually dismissed.

3. Heard Mr. P.K. Das, learned counsel for the petitioners, Mr. H.S. Mishra, learned counsel for the opposite party no.1 and Ms. S. Mishra, learned Additional Standing Counsel for the opposite party nos.4 to 6.

4. The seminal point that hinges for consideration as to whether the petitioners can acquire title by way of adverse possession over the properties belonging to the opposite party nos.1 to 3, who are tribals ?

5. The subject matter of dispute is no more res integra. In *Amrendra Pratap Singh v. Tej Bahadur Prajapati and others,* AIR 2004 SC 3782, the apex Court held that the State is the custodian and trustee of the immovable property of tribals and is enjoined to see that the tribal remains in possession of such property. No period of limitation is prescribed by para 3A. The prescription of the period of 12 years in Article 65 of the Limitation Act becomes irrelevant so far as the immovable property of a tribal is concerned. Acquisition of title in favour of a non-tribal by invoking the Doctrine of Adverse Possession over the immovable property belonging to a tribal, is prohibited by law and cannot be countenanced by the court. It was further held that a tribal may acquire title by adverse possession over the immovable property of another tribal by reference to para 7-D of the Regulations read with Article 65 and Sec.27 of the Limitation Act, 1963, but a non-tribal can neither prescribe nor acquire title by adverse possession over the property belonging to a tribal as the same is specifically prohibited by a special law promulgated by the State Legislature or the Governor in exercise of the power conferred in that regard by the Constitution of India. A general law cannot defeat the provisions of a special law to the extent to which they are in conflict; else an effort has to be made at reconciling the two provisions by homogenous reading.

6. In view of the authoritative pronouncement of the apex Court in the case of *Amrendra Pratap Singh* (supra), the irresistible conclusion is that the petitioners can neither prescribe nor acquire title by way of adverse possession over the property belonging to the opposite party nos.1 to 3-tribals.

7. There being no perversity or illegality in the order passed by the forum below, this Court is not inclined to interfere with the same. Accordingly, the petition is dismissed.

Writ petition dismissed.

2017 (I) ILR - CUT- 303

DR. A.K.RATH, J.

R.S.A. NO. 280 OF 2014

KALITIRTHA KALIPUJA COMMITTEE .....Appellant

.Vrs.

SRI BALUNKESWAR MAHESH BIJE, ATTOPUR (BADASASAN) ……Respondent

SPECIFIC RELIEF ACT, 1963 – S.38

Suit for injuction simpliciter – Maintainability – Held, a simple suit for permanent injunction is maintainable. (Para 30)

Case Laws Relied on :-

1. AIR 2008 SC 2033 : Anathula Sudhakar -V- P.Buchi Reddy (Dead) by L.Rs. & Ors.

Case Laws Referred to :-

1. AIR 1954 SC 340 : Kiran Singh and others vs. Chaman Paswan & Ors.
2. 1969 ILR (CUT) 214 : Raghunath Panigrahi vs. Udayanath Sahu & Ors.
3. 1971 ILR (CUT) 1065 : Baikuntha Das vs. Sabitri Devi & Anr.
4. AIR 1981 ORISSA 16, S.L. : Radhamohan Malia and another vs. Basudeb Khuntia & Ors.
5. AIR 1990 ORISSA 177 : Narasing Rao & Ors. vs. Gopaljee Mahaprabhu & Ors.
6. AIR 1991 ORISSA 33 : Lakhana Nayak and another vs. Basudev Swamy & Ors.
7. 1991 (II) OLR 12 : Laxmi Dibya (since dead) and after her Smt. Suvasin Mohapatra vs. Sridhar Suar & Ors.
8. AIR 1994 SC 853 : S.P. Chengalvaraya Naidu (dead) by L.Rs., vs. Jagannath (dead) by L.Rs. & Ors.
9. (2004) 1 SCC 551 : V. Rajeshwari (Smt) vs. T.C. Saravanabava
10. (2010) 2 SCC 114 : Dalip Singh vs. State of Uttar Pradesh & Ors.
11. (2010) 8 SCC 383 : Meghmala and others vs. G. Narasimha Reddy & Ors.
12. AIR 2012 SC 2858 : Smt. Badami (Deceased) By Her L.R. vs. Bhali
13. AIR 1940 PC 105 : Secretary of State vs. Mask & Co.

Appellant : Mr. Bidyadhar Mishra
Respondent : Mr. Ganewar Rath

Date of Hearing : 08.12.2016
Date of Judgment: 21.12.2016

JUDGMENT

DR. A.K. RATH, J.

This is an appeal against the judgment and decree dated 28.02.2014 and 14.03.2014 respectively passed by the learned District Judge, Keonjhar in R.F.A. No.59 of 2011 confirming the judgment and decree dated 08.11.11 and 24.11.11 respectively passed by the learned Civil Judge (Sr. Divin.), Keonjhar in C.S. No.125 of 2008.

2. The respondent as plaintiff instituted the suit for permanent injunction. The case of the plaintiff is that Sri Sri Balunkeswar Mahesh bije Atopur (Badasasan) is a public deity governed under the Orissa Hindu Religious Endowments Act, 1951. The Executive Officer is looking after the management and affairs of the deity. The suit schedule land belongs to the deity. The defendant has no semblance of right, title and interest over the property of the deity. It proposed to place tents on different parts of the suit land, use the suit land as kalyan mandap and allow different persons to utilize the suit land on different occasions for different purposes and let out the suit land to different business concerns to organize mina bazar by conducting opera show from 28.10.08 on the pretext of observing Kalipuja. The defendant has assessed a huge sum of money for its personal gain.

3. Pursuant to issuance of summons, the defendant entered appearance and filed written statement contending, inter alia, that the suit is not maintainable, bad for non-joinder of necessary parties and non-compliance of mandatory provision of Order 1 Rule 8 C.P.C. The plaintiff has no right, title and interest over the suit land. The ROR issued in favour of the plaintiff is the outcome fraud and mis-representation of facts. The plaintiff was never a public deity. The deity was installed by the Brahmins of Badasasan, Keonjhar and as such it is their private deity. Although on 5.5.1970 it was declared as public deity and taken up by the Commissioner of Endowments, after the intermediary estate vested in the Government on 3.1.1970, no list of property of the deity was furnished or declared. Mere payment of rent or order passed in settlement case no.40/86 cannot bestow any right, title and interest in favour of the deity in respect of the suit property. The Executive Officer is not the representative of the deity. The deity is represented by the Executive Officer, Keonjhar debottar-cum-Sub-Collector, Keonjhar. The present Executive Officer has no locus standi to file the suit. The ROR was published in the year 1981. The suit land was recorded in favour of the State as Patita. Area Ac.0.04 dec. of land appertaining to plot no.370, khata no.137 is recorded as Debighar and the rest part of the suit land in possession of the defendant, which is known as Kalipadia. The Kalitirtha Kalipuja committee

was started by the Ex-Ruler of Keonjhar in 1941. Since then the suit land remains under the possession and management of the defendant. The defendant was duly permitted to carry on mina bazar and opera show on 28.10.2008. The defendant has used the suit land for various public purposes, i.e., for the benefit of the general public and state. The further case of the defendant is that the suit land, i.e., Hatiatangar Mouza was given as "Chakada dan" by Ex-Ruler of Keonjhar Estate in the year 1953 at the time of establishment of 'Badasasan'. The status of the land was accepted as 'Brahmotor'. The brahmins of Badasasan established Lord Siva and constructed temple of Balunkeswar Mahesh. For seva puja and nitikranti of Lord Balunkeswar Mahesh, the brahmins of Badasasan donated an area Ac.10.50 dec. of land. In 1915 settlement, the total land of Hatiatangar mouza, i.e., area Ac.105.55 dec. was recorded as Debottar Niskar in the name of Balunkeswar Marfat 'State'. Though the land of Hatiatangar mouza was in sub-judice before the Collector, the plaintiff managed to settle an area Ac.48.61 dec. of land fraudulently under Sec.7-A of the Orissa Estate Abolition Act, 1951 (hereinafter referred as "O.E.A. Act") in case no.62/85 in Board of Revenue. In the application for settlement, the plot number, area, kisam and actual status of the land were not furnished. Subsequently relying on the ROR, another ROR was wrongly issued in the year 1983 in favour of the plaintiff which is an outcome of fraud. The same do not confer any title for the plaintiff. In such circumstances, the simple suit for permanent injunction is not maintainable.

4. Stemming on the pleadings of the parties, learned trial court struck five issues. The same are:

"(1) Whether the suit is maintainable ?

(2) Whether the plaintiff has cause of action to file the suit ?

(3) Whether the plaintiff has right, title, interest and possession over the suit property ?

(4) Whether the defendant is in possession of the suit land having an interest therein ?

(5) Whether the plaintiff is entitled to get the relief as claimed in the suit ?"

5. To substantiate the case, the plaintiff had examined five witnesses and on its behalf fourteen documents had been exhibited. The defendant had examined three witnesses and on its behalf eighteen documents had been exhibited.

6. Learned trial court came to hold that the plaintiff has right, title, interest and possession over the suit land except suit plot no.370 and 371. The defendant has no right, title, interest or possession over the suit land save and except its right to perform Kalipuja over the suit plot no.370 and 371 and accordingly answered issue nos.3 and 4. It is further held that suit is maintainable. Held so, the learned trial court decreed the suit in part. The defendant has unsuccessfully challenged the judgment and decree of learned trial court before the learned District Judge, Keonjhar in R.F.A. No.59 of 2011, which was eventually dismissed.

7. The second appeal was admitted on 28.10.2015 on the substantial question of law enumerated in ground no.A of the appeal memo. The same is quoted hereunder.

> "(A) Whether the plaintiff-respondent has acquired any right, title and interest over the suit land in view of the fact that the land in question has been settled u/s.7(A) of the O.E.A. Act and while settling the land in favour of the plaintiff-respondent, the Member, Board of Revenue has not followed the mandatory requirement of law required to be followed while settling land under section 7(A) of the O.E.A. Act ?"

8. Heard Mr. Bidyadhar Mishra, learned Senior Advocate for the appellant and Mr. Ganeswar Rath, learned Senior Advocate for the respondent.

9. Mr. Mishra, learned Senior Advocate for the appellant argued with vehemence that the suit has been filed by a person in representative capacity as Executive Officer of the plaintiff. The defendant is a registered society consisting of members of general public. In view of the same, the plaintiff is bound to comply the mandatory provision of Order 1 Rule 8 C.P.C. The same has not been done. The Executive Officer has no locus standi to represent the plaintiff. He further submitted that the simple suit for permanent injunction without a prayer for declaration of title is not maintainable. The finding of the learned trial court that any defect in title of the plaintiff of the suit land has been rectified by the settlement under Sec.7(A) of the O.E.A. Act which cannot be challenged in the civil court is perverse. Referring to first proviso to sub-sec.(1) of Sec.8 of the O.E.A. Act, he submitted that the Member, Board of Revenue has not followed the mandatory provisions enumerated in O.E.A. Act in settling the land in favour of the plaintiff on 3.10.1985 in Case No.62 of 1985 vide Ext.3. Public notice was not issued for which the general

public including the defendant could not be able to stake its claim. He further submitted that the application was made on 17.9.1985. The Collector recommended the case on 19.9.1985 and the order of settlement was passed at 3.10.1985 without giving public notice. The order is without jurisdiction and is nullity. It's invalidity could be set up even in collateral proceedings. He further submitted that pursuant to the order of the Member, Board of Revenue, the Tahasildar settled the land in favour of the plaintiff on 10.7.1987. In O.E.A. Lease Revision No.2/80, the plaintiff's claim was rejected vide Ext.J. Thereafter, the plaintiff filed O.J.C. No.3374/88. The same was dismissed. Thus the whole transaction obtaining settlement is tainted with fraud. He further submitted that the plaintiff was not in possession of any portion of the suit land. On the other hand, the defendant was all along in possession over the same performing Kali Puja. The possession of the defendant has been admitted by the plaintiff in W.P.(C) No.671 of 2008 vide Ext.M-1. He further submitted that where there is a competition between two persons, one claiming occupancy right and the other claiming khas possession as an intermediary on the date of vesting, the rival claims would be determined by the Estate Abolition Collector. In the event the claims are decided after following the mandatory formalities, then the decision is final and conclusive and cannot be questioned in a civil court. But then the civil court has jurisdiction to examine whether the public notice prescribed under the first proviso to Sec.8-A of sub-sec.(1) of O.E.A. Act inviting objection from persons interested was complied with. He further submitted that the Trust Board of the plaintiff filed application during pendency of the O.E.A. Revision. The said fact was not disclosed. The plaintiff is guilty of suppressio veri and suggestio falsi. He further submitted that the plea of res judicata cannot be raised for the first time in the second appeal. Since the plaintiff was not in possession of the suit land, the settlement of land in favour of the plaintiff by the Member, Board of Revenue is bad in law. The plaintiff simultaneously prosecuted two parallel proceedings for the same relief before two different forum for settlement of the land. The same is an abuse of process of the court. He relied on the decisions in the case of *Kiran Singh and others vs. Chaman Paswan and others,* AIR 1954 SC 340, *Raghunath Panigrahi vs. Udayanath Sahu and others,* 1969 ILR (CUT) 214, *Baikuntha Das vs. Sabitri Devi and another,* 1971 ILR (CUT) 1065, *Radhamohan Malia and another vs. Basudeb Khuntia and others,* AIR 1981 ORISSA 16, *S.L. Narasing Rao and others vs. Gopaljee Mahaprabhu and others,* AIR 1990 ORISSA 177, *Lakhana Nayak and another vs. Basudev Swamy and others,* AIR 1991 ORISSA 33, *Laxmi*

Dibya (since dead) and after her Smt. Suvasin Mohapatra vs. Sridhar Suar and others, 1991 (II) OLR 12, *S.P. Chengalvaraya Naidu (dead) by L.Rs., vs. Jagannath (dead) by L.Rs. and others,* AIR 1994 SC 853, *V. Rajeshwari (Smt) vs. T.C. Saravanabava,* (2004) 1 SCC 551, *Dalip Singh vs. State of Uttar Pradesh and others,* (2010) 2 SCC 114, *Meghmala and others vs. G. Narasimha Reddy and others,* (2010) 8 SCC 383 and *Smt. Badami (Deceased) By Her L.R. vs. Bhali,* AIR 2012 SC 2858.

10. Per contra, Mr. Rath, learned Senior Advocate for the respondent submitted that the land was settled by the Member, Board of Revenue in favour of the plaintiff-deity. Due procedure has been followed by the Member, Board of Revenue while passing the order of settlement. The said order has not been challenged by the defendant and as such attained finality. He submitted that C.S. No.135 of 2006 was filed by one Rankanidhi Pati and another against the plaintiff-deity and others for a declaration that Kali Tirtha Committee and general public of Keonjhar have customary and easementary right over the suit land and permanent injunction. The learned trial court came to hold that the plaintiff has right, title and interest over the suit land. Further the present plaintiff-respondent has filed C.S. No.107/2007 impleading the Collector and Sub-Collector, Keonjhar as well as the present appellant as defendants for recovery of Rs.60,000/- from defendant no.3 and to injunct the defendant nos.1 and 2 from issuing any permission in favour of defendant no.3 to perform opera, mina bazaar, etc. in the court of the learned Civil Judge (Sr. Divn.), Keonjhar. Learned trial court came to hold that the suit land belongs to the deity. Defendant no.3, present appellant, does not have any interest over the same. Both the judgments had attained finality. In view of the same, the defendant cannot question the title of the plaintiff. He further submitted that DW-3, who happens to be the Secretary of Kali Puja Committee, defendant, in his cross-examination has stated that the committee was registered in the year 1981-82. Thus by no stretch of imagination it can be said that the committee was in possession of the land before vesting in the State Government. He further submitted that the defendant is a stranger. The defendant has no right to interfere with the possession of the plaintiff. Allegation of fraud has not been specifically pleaded. The said issue has been dealt with by the learned appellate court and negatived.

11. Before proceeding further, it is apt to refer the decisions cited at the Bar.

12. In *Kiran Singh and others* (supra), the apex Court held that decree passed without jurisdiction is a nullity and that its invalidity could be set up

whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree and such a defect cannot be cured even by consent of parties.

13. In *Raghunath Panigrahi* (supra), it was held that when there is a competition between two persons, one claiming occupancy right and the other claiming khas possession as an intermediary on the date of vesting, the same has to be determined by the Estate Abolition Collector. In the event the claims are decided after compliance of the mandatory formalities then the decision is final and conclusive and cannot be questioned in civil court. The civil court can only examine and see if the Estate Abolition Collector abused its power and did not act under the Act, but in violation of its provisions. The civil court can examine as to whether the public notice prescribed under the first proviso to Sec.8-A, sub-sec.(1) inviting objection from the interested was complied with. There is no quarrel over the proposition of law.

14. Seventy-five years ago, the Privy Council in the case of *Secretary of State vs. Mask & Co.,* AIR 1940 PC 105 held that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if the jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

15. In *Baikuntha Das* (supra), this Court held that the object of notice under Sec.8-A(2) of the O.E.A. Act is to give wide publicity to a claim under Sec.8-A. The provision is mandatory. It is not open to the Collector to omit any process of such publication.

16. In *Radhamohan Malia and another* (supra), this Court held that when mandatory provision of Order 1 Rule 8(2) is not complied with, decree is liable to be set aside. The same view was reiterated in *Lakhana Nayak and another* (supra).

17. In *S.L. Narasing Rao and others* (supra), a Division Bench of this Court held that under Sec.7-A power is vested in the State Govt. to settle land, tank or building in the vested trust estate which were used for certain purposes and which are needed for carrying out the purpose of the trust efficiently, with the person who immediately before such vesting was an

intermediary in respect of such land or tank or building. The power of the State Government has been delegated to the Board of Revenue by a notification and is not available to be exercised by the Addl. District Magistrate or the O.E.A. Act Collector. In the said case, the deity was not in possession of the land on the date of vesting. Thus, the O.E.A. Collector has right in holding that the claim of the managing trustee for settlement of the land under Sec.6 having failed the land must be held to have vested in the State Government free from all encumbrances under Sec.5 of the Act. But the same is not the case here. Thus, the said decision is distinguishable.

18. In *Laxmi Dibya (since dead) and after her Smt. Suvasin Mohapatra* (supra), this Court held that if the statutory procedure is not followed then the order of settlement is void and illegal.

19. In *S.P. Chengalvaraya Naidu (dead) by L.Rs.* (supra), the apex Court held that a judgment or decree obtained by playing fraud on the court in a nullity and nonest in the eyes of law. Such a judgment/decree has to be treated as a nullity by every court. It can be challenged in any court even in collateral proceedings. The same view was reiterated in *Smt. Badami (Deceased) by Her L.R.* (supra) and in *Meghmala and others* (supra).

20. In *V. Rajeshwari (Smt)* (supra), the apex Court held that the plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal.

21. In *Dalip Singh* (supra), the apex Court held that the party approaching the court by suppressing the fact is not entitled to be heard on merit.

22. Shri Shri Balunkeswar Mahesh Bije at Atopur (Badasasan), Keonjhar, plaintiff, is a public deity. It is governed under the provision of the Orissa Hindu Religious Endowments Act, 1951. The Commissioner of Endowments has appointed the Executive Officer of the deity to manage the affairs. Thus the Executive Officer is the competent person to represent the deity. $DW_{3,}$ who is the Secretary of the defendant, deposed that the defendant is a registered society. In view of the assertion of the plaintiff that the defendant having no semblance of right, title and interest over the suit property forcibly entered into the suit land, notice under Order 1 Rule 8 C.P.C. is not a sine qua non.

23. The next question does arise as to whether the simple suit for permanent injunction is maintainable ?

24. In *Anathula Sudhakar vs. P. Buchi Reddy (Dead) by L.Rs. and others,* AIR 2008 SC 2033, the apex Court in paragraph 11 held thus:

> "11. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.
>
> 11.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.
>
> 11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.
>
> 11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

25. The assertion of the plaintiff is that deity is the true owner of the land. The defendant, who has no semblance of right, title and interest over the suit schedule property, intends to let out the land to different persons to organize mina bazaar and opera show, which will like to continue on the pretext of Kali Puja and thereby collecting rent. The defendant forcibly used the land.

26. The judgment passed in C.S. No.135 of 2006 as well as C.S. No.107/2007 have been exhibited as Exts.9 and 10 respectively without objection. In C.S. No.135/2006, the plaintiff claiming to be represented to Keonjhar Town sought for declaration that Kali Puja Committee and general

public of Keonjhar have customary and easementary right over the suit land by prescription of title and permanent injunction. The plaintiff-deity was defendant no.1. Learned trial court held that defendant no.1 has right, title and interest over the suit land and it is in possession over the suit land. The said judgment attained finality. The present plaintiff-respondent instituted C.S. No.107/2007 for recovery of money and injunction impleading the Collector and Sub-Collector, Keonjhar as well as the present defendant. The present defendant was the defendant no.3 in the said suit. In issue no.4, "Whether defendant no.3 has interest in the suit land ?", learned trial court came to hold that the plaintiff is the owner of the suit land. Defendant no.3 admitting the ownership of the plaintiff prayed to Sub-Collector, Keonjhar for granting permission. The permission was granted. Thus the plaintiff is entitled to get ground rent from defendant no.3 used the suit land of the plaintiff during Kali Puja. It was further held that the suit land belongs to the deity. The defendant no.3 cannot have any interest over the suit land regarding organizing any function. The said judgment also attained finality.

27. There is no whisper with regard to the institution of the earlier suit in the written statement. The judgments have been exhibited by the plaintiff without objection. In view of the same, it is no more open on the part of the defendant to say that they are not bound by the said judgment. The said judgments operate as res judicata in the subsequent proceedings. The Member, Board of Revenue has settled the land on 3.10.1985 in favour of the plaintiff vide Ext.3. The said order has attained finality. No counter claim has been filed by the defendant. In the absence of any challenge to the same, the civil court cannot examine the correctness of the order passed by the Member, Board of Revenue in an O.E.A. proceeding.

28. Even otherwise, the submission of Mr. Mishra, learned Senior Advocate for the appellant that the order passed by the Member, Board of Revenue without following the mandatory provisions of O.E.A. Act is a nullity and fraud has been committed on the court while settling the land is difficult to fathom. The deity has filed the application, whereafter notice has been issued. Thereafter the order was passed. Any person aggrieved could have challenge the order of settlement, but the same has not been done. Merely saying that it is a void is not suffice.

29. In *State of Kerala vs. M.K. Kunhikannan Nambiar*, AIR 1996 S.C. 906, the apex Court held that even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact be effective inter parties until it is

successfully avoided or challenged in higher forum. Mere use of the word "void" is not determinative of its legal impact. The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise. The apex Court went in depth into the jurisprudential concept of 'void' and 'voidable' and held thus :

> "7. In Halsbury's Laws of England, 4th edition, (Reissue) Volume 1(1) in paragraph 26, page 31, it is stated, thus:-
>
> "If an act or decision, or an order or other instrument is invalid, it should, in principle, be null and void for all purposes; and it has been said that there are no degrees of nullity. Even though such an act is wrong and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is preserved."
>
> In the Judicial Review of Administrative Action, De Smith, Woolf and Jowell, 1995 edition, at pages 259-260 the law is stated, thus:-
>
> "The erosion of the distinction between jurisdictional errors and non-jurisdictional errors has, as we have seen, correspondingly eroded the distinction between void and voidable decisions. The courts have become increasingly impatient with the distinction, to the extent that the situation today can be summarised as follows:
>
> (1) All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent Jurisdiction."
>
> Similarly, Wade and Forsyth in Administrative Law, Seventh edition-1994, have stated the law thus at pages 341-342:-
>
> "…….every unlawful administrative act, however invalid, is merely voidable. But this is no more than the truism that in most situations the only way to resist unlawful action is by recourse to the law. In a well-known passage Lord Racliffe said:
>
> An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

> This must be equally true even where the brand of invalidity is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council without distinction between patent and latent defects."

30. In view of the authoritative pronouncement of the apex Court in the case of *Anathula Sudhakar* (supra), the inescapable conclusion is that the simple suit for permanent injunction is maintainable. The settlement of land by the Member, Board of Revenue under Sec.7-A of the O.E.A. Act in favour of the plaintiff in case no.62/85 has attained finality and binding between the parties. The plaintiff-deity has right, title and interest over the suit schedule land except plot nos.370 and 371 where 'Kali Temple' exists.

31. Resultantly, the appeal, sans merit, deserves dismissal. Accordingly, the same is dismissed. There shall be no order as to costs.

Appeal dismissed.

2017 (I) ILR - CUT- 314

BISWAJIT MOHANTY, J.

W.P.(C) NO. 15815 OF 2013

MANORAMA SAHU .....Petitioner

.Vrs.

KONA RAJESWARI REDDY & ORS. .....Opposite parties

ODISHA GRAMA PANCHAYAT ACT, 1964 – S. 11 (b)

Candidate for the post of Sarpanch – Eligibility – He/ she must have ability to read and write Odia – Ability to write means ability to write correctly – Where such writing is a laboured one with number of mistakes, conveying no meaning, such candidate cannot be said to have the ability to write Odia.

In this case many words written by the petitioner are wrong and don't convey any sense so the petitioner who is supposed to discharge multifarious duties as Sarpanch U/s 19 of the Act cannot be said to have the ability to write Odia – Held, the impugned order passed by the

learned District Judge saying that the petitioner has no ability to write Odia cannot be termed as perverse and this Court does not find any error therein for interference. (Paras 10,11,12)

Case Laws Referred to :-

1. 2006 (II) CLR, 705 : Damburu Majhi v. Tarini Charan Majhi
2. 2005 (Supp.) OLR 906 : Mrs.Suryakanti Mishra v. State of Orissa and seven ors.
3. 2011 (II) CLR 80/2011 (I) OLR 499 : Usha Sahoo v. Ambika Sahoo & anr.
4. 2009 (Supp-2) OLR 344 : Kalabati Jena v. Dhaneswar Jena & ors.
5. 2010 6 (Supp-1) OLR 7 : Labangalata Mallick v. Mandakini Mallick.
6. 2011 (I) OLR 499 : Usha Sahoo v. Ambika Sahoo
7. 2016 (1) CLR 1070 : (Smt.) Binata Samal v. (Smt.) Chanchala Samala & anr.

For Petitioners : Mr. Jagannath Patnaik, Sr.Adv., B. Mohanty,T.K.Patnaik & S.Patnaik

For Opposite Parties : M/s. Ms. Deepali Mohapatra, Sandeep Parida & P.N.Patra & Mr. L.Samantoray (ASC.)

Date of Judgment:13.01.2017

JUDGMENT

BISWAJIT MOHANTY, J.

The petitioner has filed the present writ application to set aside the impugned judgment dated 6.7.2013 passed by the learned District Judge, Ganjam-Berhampur in Election Appeal No.01 of 2012 by issuing appropriate writ/writs in the nature of writ of certiorari. She has also prayed for cost.

2. The facts of the case are as follows:

3. The petitioner and opp. party No.1 contested election for the post of Sarpanch of Indrakhi Grama panchayat which was held on 13.02.2012. In the said election, the petitioner was elected as Sarpanch. Challenging the same, opp. party No.1 filed Election Petition No.01 of 2012 before the court of learned Civil Judge (Junior Division), Berhampur on very many grounds. One of the grounds was that the petitioner was unable to read and write Odia as she is required to do under Sub-section (b) of Section 11 of the Orissa Grama Panchayat Act, 1964 (for short, „the Act"). Opp. party No.1 also took a stand that on the date, nominations were scrutinised, she filed an objection before the Returning Officer to reject the nomination of petitioner as she was unable to read and write Odia properly and correctly. The Returning Officer

dictated a sentence to the petitioner but she could not write the sentence correctly. Inspite of that, the Returning Officer accepted her nomination. In that Election Petition, the petitioner filed counter denying the allegations relating to she being not able to read and write Odia. Further she took a specific stand that she has passed Class-VII in Nilakantheswar Bidyapitha and thus she is an educated lady and she is having the knowledge of reading and writing.

4. Opp. parties 2 and 3 also filed their counter. In the said counter, opp. parties 2 and 3 took the stand that the Election Officer dictated the Odia sentence to the petitioner, and, accordingly, the petitioner wrote correct dictated sentence. Copy of the written dictated statement along with views of Election Officer dated 13.01.2012 was stated to be enclosed as Annexure-1 to their counter.

5. The learned trial court on the basis of the rival pleadings of the parties framed as many as six issues. The opp. party No.1 examined herself as P.W.1 and one G.Janakiamma Reddy was examined from her side as P.W.2. From the side of opp. party No.1, some documents were exhibited. From the side of the petitioner, she examined herself as D.W.1 and exhibited two certified copies of the judgments passed in an earlier Election Petition and Election Appeal. Opp. parties 2 and 3 despite filing their counter as indicated above, did not examine any witnesses from their side to prove their stand as well as the document dated 13.01.2012 (Annexure-1). A perusal of L.C.R. nowhere shows about filing of Annexure-1 dated 13.01.2012. During cross-examination of petitioner, the opp. party No.1 sought permission to make petitioner read and write Odia. The petitioner without any objection, read a portion (Ext.1/a) of Odia Daily, „the Samaj" dated 2.7.2012 (Ext.1). Similarly, as per dictation of counsel for opp. party No.1, the petitioner wrote Odia version of Section 2 (O) of „the Act" containing the definition of "ଅନିଷ୍ଟକର". While the Odia version of the definition has been marked as Ext.2, the writing of the petitioner has been marked as Ext.2/a.

6. On conclusion of trial, the learned trial court came to a finding that the reading and writing ability of the petitioner was not cent percent correct but was manageable. The learned trial court also on analysis of materials on record/evidence, answered the other issues against opp. party No.1, and, accordingly dismissed the Election Petition. Challenging the same, opp.party No.1 filed Election Appeal No.01 of 2012 before the learned District Judge, Ganjam-Berhampur. Before the learned District Judge, the opp. party No.1 as a whole concentrated on the finding of the learned trial Court on Issue No.3

and did not press the other points as regard use of money and muscle power in the election as alleged by her and the activity alleged to be carred out in connivance with Polling Officer. There, the opp. party No.1 mainly relied on the decisions of this Court in the cases of ***Damburu Majhi v. Tarini Charan Majhi*** reported in 2006 (II) CLR, 705 and ***Mrs.Suryakanti Mishra v. State of Orissa and seven others*** reported in 2005 (Supp.) OLR 906. The petitioner defended the findings of the learned trial court and relied on a decision of this Court in the case of ***Usha Sahoo v. Ambika Sahoo and another*** reported in 2011 (II) CLR 80/2011 (I) OLR 499. On considering the submissions of both the opp. party No.1 and petitioner, the learned District Judge vide judgment dated 6.7.2013 allowed the appeal on contest and declared the election of petitioner as Sarpanch of Indrakhi Grama Panchayat as null and void and further declared the opp. party No.1 elected as Sarpanch of the said Grama Panchayat mainly on the ground that in the background of available evidence, the learned trial court went wrong in coming to a conclusion that the petitioner was able to write Odia. Challenging the same the presenet writ application has been filed with the earlier indicated prayers.

7. Heard learned counsel for the petitioner, Ms.Deepali Mohapatra, learned counsel for opp. party No.1 and Mr. L.Samantaray, learned Standing Cousnel for the State.

8. Learned counsel for the petitioner attacked the judgment dated 6.7.2013 passed in Election Appeal No.01 of 2012 on the ground that the judgment of the appellate court under Annexure-4 has been passed on a perverse reasoning, particularly when, the opp. party No.1 in her own evidence during cross-examination has admitted that when the petitioner was asked to write in Odia, she complied with the same. Therefore, the finding arrived at by the learned appellate court that the petitioner was not able to write Odia was a perverse one. Secondly, learned counsel for the petitioner submitted that the discussions made and reasoning given by the learned appellate court on the issue of ability to write Odia as prescribed under Sub-section (b) of Section 11 of „the Act‟ runs contrary to well settled principles as per the judgments pronounced by this Court in ***Kalabati Jena v. Dhaneswar Jena and others*** reported in 2009 (Supp-2) OLR 344, ***Labangalata Mallick v. Mandakini Mallick***, reported in 2010 (Supp-1) OLR 73 and ***Usha Sahoo v. Ambika Sahoo and another*** as reported in 2011 (I) OLR 499, particlarly when the Act and Rules made thereunder do not specifically prescribed any standard for writing Odia. Therefore, the appellate court went wrong in introducing the minimum standard with regard to writing Odia.

9. Per contra, Ms. Mohapatra, learned counsel for opp. party No.1 defended the impugned judgment of learned District Judge and submitted that in the cross-examination, the opp. party No.1 has also stated that writing of the petitioner, which contained a number of mistakes was underlined and was kept in the custody of Election Officer concerned. This is the reason why opp. party Nos. 2 and 3 though referred to such writing in their counter never took steps to prove their stand nor did they produce and prove the said piece of writing supported to be enclosed as Annexure-1. On account of this adverse inference ought to be drawn. She also submitted that before the learned trial court, the petitioner never took a positive stand either in the pleading or in her evidence that she knew writing Odia. She further submitted that the decisions cited by the petitioner are distinguishable and further those are Single Judge decisions have not taken into account the earlier Division Bench decision in the case of ***Damburu Majhi (supra).*** Thus, the said decisions are per incuriam judgments. She also relied on Division Bench decision in the case of **Mrs.Suryakanti Mishra** (supra) and also on a decision in the case of (***Smt.) Binata Samal v. (Smt.) Chanchala Samala and another*** reported in 2016 (1) CLR 1070. She further submitted that though the petitioner took a stand that she has passed Class-VII from Nilakantheswar Bidyapitha, however, she could not produce any documentary evidence in support of the same and the same has been admitted by the petitioner in her cross-examination. Ms. Mohapatra also submitted that the petitioner never objected to the dictation she took under Ext.2/a and her writing does not show any punctuation mark in appropriate places in the background of definition which was dictated from Ext.2 and a perusal of Ext.2/a would show that the petitioner has written words like "ଙ୍ଗିଣସି", "ବିଲପୋ", "ଅନ୍ତଭୁକ୍ତ", "ଜଗ୍ରେନିଇନ୍ଦ୍ରିୟ", "ଖ୍ୟାଣେନ୍ଦ୍ରିୟ" which do not convey any meaning in Odia. She also submitted that the learned District Judge was right in making an observation that the writing under Ext.2/a has been done with difficulty. She also argued that a Sarpanch has to perform various duties as required under Section 19 of „the Act". Such duties/functions include a duty to execute the documents relating to contracts on behalf of the Grama Sasan and to cause to be prepared all statements and reports required by or under „the Act" and in such background, the way the petitioner wrote, it cannot be said that the petitioner was able to write Odia correctly and properly as in the minimum „to write" means to write properly/correctly. Ms. Mohapatra submitted that the petitioner herself had admitted at Para-9 of her cross-examination that it is a fact that on the date of filing of nomination and scrutiny, she was not able to read and write Odia. Thus, she submitted that

the learned District Judge has correctly observed that the ability to write Odia means ability to write correctly so that writing gives out meaning. Here, since many words written by the petitioner do not convey any meaning, it cannot be said that the impugned judgment is perverse.

10. Before discussing the rival contentions of the parties, this Court would like to remind everybody about the scope of writ of certiorari in the background of the prayer made in the writ petition. It is settled that the writ of certiorari is supervisory in nature and certiorari court cannot act as an appellate forum. Therefore, ordinarily a certiorari court does not review finding of facts reached by an inferior court or tribunal. It is equally well settled that even while exercising its jurisdiction under Article 227 of the Constituiton of India, the High Court can interfere with the matter only when the finding is perverse and if no reasonable person can come to the conclusion which has been reached by the learned court below. It is also well settled that the jurisdiction under Article 227 of the Constitution of India must be sparingly exercised and may be exercised to correct errors of jurisdiction and the like but not to upset pure findings of fact unless there is no evidence to support such finding or the finding is perverse.

Secondly, we must also refer to the nature of duties of a Sarpanch, as delineated under „the Act". For this, we can profitably refer to Section 19 of „the Act". The same is quoted hereunder:

> "**19. Powers, duties and functions of Sarpanch-** (1) Save as otherwise expressly provided by or under this Act, the executive powers of the Grama Panchayat for the purpose of carrying out the provisions of this Act, shall be exercised by the Sarpanch, who shall act under the authority of the said Grama Panchayat.
>
> (2) Without prejudice to the generality of the provisions of Sub-section (1) the Sarpanch shall, save as otherwise provided in this Act, or the rules made thereunder and subject to such general or special orders as may be issued from time to time by the State Government in that behalf-
>
> (a) convene and preside over the meetings of the Grama Panchayat and conduct, regulate and be responsible for the proper maintenance of the records of the proceeding of the said meetings;
>
> (b) execute documents relating to contracts on behalf of the Grama Sasan;
>
> (c) be responsible for the proper custody of all records and documents, all valuable securities and all properties and assets belonging to or vested in or under the direction, management or control of the Grama Sasan;
>
> (d) be responsible for the proper working of Grama Panchayat as required by or under this Act;

(e) cause to be preapared all statements and reports required by or under this Act; (f) exercise supervision and control over the acts and proceedings of all officers and employees of the Grama Panchayat;

(g) be the authority to enter into correspondence on behalf of the Grama Panchayat; and

(h) 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."

The dispute in the present case mainly pertains to ability of the petitioner to write Odia as required under Sub-section (b) of Section 11 of „the Act". The same is quoted hereunder:

11. Qualification for membership in the Grama Panchayat:- Notwithstandig anything in Section 10 no member of a Grama Sasan shall be eligible to stand for election-

(a) xxx xxx xxx

(b) as a Sarpanch or Naib-Sarpanch, if he has not attained the age of tweny-one years or is unable to read and write Oriya;

(c) xxx xxx xxx"

The writing of the petitioner is there at Ext.2/a, which has been quoted by the learned District Judge at para-9 of the impugned judgment. A perusal of the same shows that atleast five words as submitted by Ms.Mohapatra which have been quoted earlier, convey no meaning at all in Odia. Thus, even the ordinary words have been wrongly written and this clearly reflects on the ability of the petitioner to write Oriya. The learned District Judge has correctly observed that the ability to write means the ability to write correctly so that the writing gives out a meaning and the same is conspicuously absent in this case. Further, a perusal of writing of the petitioner under Ext.2/a also makes it clear that such writing has been done with difficulty.

It is interesting to note here that in the counter filed before the learned trial court that though the petitioner denied the allegations relating to inability to write Odia, however, she never took a positive stand that she knew to write Odia. Only in her counter she has stated that she has the knowledge/ability of reading and writing. In her deposition also, she stated that "I am having the knowledge of reading and writing" but not that she knew reading and writing Odia. In such background, it cannot be said that the learned District Judge has committed any wrong or has returned a perverse finding while coming to a conclusion that the petitioner is not able to write Odia. Such a finding appears

to be reasonable in the background of duties and functions which a Sarpanch is supposed to discharge under Section 19 of „the Act".

11. Now, coming to submissions of learned counsel for the petitioner that when opp. party No.1 in her cross-examination has herself admitted that when the petitioner was asked to write in Odia and the petitioner complied with the same, therefore, the finding of the learned District Judge is perverse. Such a plea cannot be accepted because in her cross-examination, the opp. party No.1 at para-12 has also made it clear that in the writing of petitioner in Odia, which has been kept in the custody of the Election Officer, the mistakes committed by her (petitioner) were underlined by the Election Officer concerned. Therefore, merely because the petitioner wrote in Odia in whatever manner, it would not *ipso facto* show her ability to write Odia as required under Sub-section (b) of Section 11 of „the Act". Further, this piece of writing not having been produced/proved, one can reasonably infer that the officials of opp.party who had custody of such piece of writing suppressed the best piece of evidence, which would have enabled the court to apply its mind to the same. In any case the writing of the petitioner was before the appellate court by way of Ext.2/a and as indicated earlier since many words have been wrongly written and do not convey any sense and further since these writings appear to be a laboured one, the judgment of the learned District Judge cannot be termed as perverse.

With regard to three jugements cited by learned counsel for the petitioner, it remains a fact that these are all Single Bench cases and none of these cases refers to Damburu Majhi case (supra), a Division Bench case. There the petitioner had written down a paragraph in Court with difficulty committing several mistakes. The writing also carried no meaning. Accordingly, both the trial court and appellate court had held that the petitioner was not able to write Odia. This was upheld by this Court in Damburu Majhi case (supra).This decision has not been referred in the decisions of ***Kalabati Jena (supra)***, ***Labangalata Mallick (supra)*** and ***Usha Sahoo (supra)*** which were all decided by a learned Single Judge of this Court. These judgments also do not refer to the nature of duties of a Sarpanch is required to be performed under Section 19 of „the Act".

To elaborate it, in Kalabati Jena case (supra), there has been no reference to two earlier Division Bench decisions of the Court as rendered in Mrs. Suryakanti Mishra case (supra) and Damburu Majhi case (supra). Kalabati Jena case (supra) lays down that only interpretation of the phrase "read and write Odia" can be that a candidate should not b e illiterate and

should at least know how to read and how to write Odia to a standard as would be required for a person to function as a Sarpanch. However, such an interpretation has been given without reference to the Division Bench decision of this Court in Mrs. Suryakanti Mishra case (supra) wherein the phrase "read and write Odia" has been interpreted to mean that the person/candidate must have the capacity to read and write Odia alphabets as well as "Yuktakhyaras", i.e., the alphabets made on combination of vowels and consonants and without reference to Section 19 of „the Act". This being the position, this Court feels itself pursuaded to follow the dictum of the decision rendered by the Division Bench in Mrs. Suryakanti Mishra case (supra) and holds that in the background of requirement of Section 19 of „the Act", "read and write Odia" must mean something more in tune with the dictum of Mrs. Suryakanti Mishra (supra) so as to enable a Sarpanch to discharge his/her duties properly under Section 19 of „the Act". In such background, where the petitioner wrote without any objection and where such writing is a laboured one with a number of mistakes, conveying no meaning, the learned appellate court has committed no wrong in passing the impugned judgment. After all, very purpose of writing is to communicate certain things. If the writing fails to communicate the intention of the writer, it is rendered useless.

So far as Labangalata case (supra) is concerned, which is a Single Judge case, it neither refers to the Dambaru Majhi case (supra) or to Section 19 of „the Act". Though it refers to Mrs. Suryakanti Mishra case (supra), but while distinguishing the same, it has forgotten the dictum of Mr.Suryakanti Mishra case (supra) that a person/candidate must have the capacity to read and write Odia alphabets as well as "Yuktakhyaras". Further though Labangalata case (supra), quotes extensively from Kalabati Jena case (supra), however, there exists no discussion on Section 19 of „the Act". This being the position, this Court feels pursuaded to follow the dictum of decisions as rendered by two Division Benchs of this Court in Mrs. Suryakanti Mishra case (supra) and Damburu Majhi case (supra) in the background of requirement of Section 19 of „the Act" in preference to Single Bench decision as rendered in Labangalata Case (supra). With regard to Usha Sahoo case (supra), it would be suffice to say that the said case is factually distinguishable as this Court at Para-8 of the judgment has indicated that the petitioner therein had written correct sentence in Odia that too in a good handwriting. But here that is not the case. Further in the said case, there is also no discussion on Section 19 of „the Act".

12. So, the three decisions cited by the learned counsel for the petitioner are of no help in the present case. Rather, the latest decision of this Court reported in ***(Smt.) Binata Samal*** (supra) also goes against the stand of the petitioner wherein it has been laid down that to be able to read and write a language, a person must have elementary ordinary knowledge of letters, orthography, syntax and punctuation. In that case, the learned Single Judge has also pointed out that we come across many people who are able to read, but they are not able to write. Writing is difficult because the same involves reproduction of letters, words which make a sense/demonstrate the sense. In that case, on facts, this Court came to a conclusion that neither the words nor the sentences written by the petitioner made any sense. In such background, the prayer of the petitioner was dismissed. Here, as indicated earlier, many words written by the petitioner at Ext.2/a do not make any sense and a Sarpanch who is supposed to discharge multifarious duties under Section 19 of „the Act", in the background of such writing cannot be said to have the ability to write Odia. **13.** In such background, this Court does not find any error apparent on the face of the impugned judgment, and, accordingly, the writ application is without any merit and the same stands dismissed. No cost.

Writ application dismissed.

2017 (I) ILR - CUT- 323

DR.B.R.SARANGI, J.

O.J.C. NO. 5243 OF 1995

SUBRAT KUMAR BEHERA ……..Petitioner

.Vrs.

INDIAN OIL CORPORATION LTD. &ORS. ……...Opp. Parties

SERVICE LAW – Select list – Tenure of the list expired – Petitioner cannot claim appointment basing on the selection made earlier – Further, existence of vacancy does not give a legal right to the petitioner for appointment – Held, petitioner cannot have a right to be appointed. (Paras 13,14,15)

For petitioner : Mr. J.K. Khuntia
For opp. Parties : M/s. N.C. Sahoo & S.P. Panda

Decided on : 20.01.2017

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner has filed this application seeking for direction to the opposite parties no.1 to 3 to give him appointment in the post of Steno-cum-Typist in Indane Bottling Plant at Balasore pursuant to the select list dated

14.07.1993 (Annexure-4) and to quash the requisition dated 19.07.1995 (Annexure-6) made by the Deputy General Manager-opposite party no.2, for and on behalf of Indian Oil Corporation, to the Employment Officer, District Employment Exchange, Balasore calling for the names of suitable qualified candidates to fill up the posts of Steno-Typist at Balasore Bottling Plant.

2. The factual matrix of the case is that Indian Oil Corporation is a Government of India undertaking, of which Indane Bottling Plant at Balasore is one of its units dealing with marketing division. The petitioner, being a Graduate in Arts and having completed the course of shorthand and typewriting and also experienced in electronic typewriting and word processing in personal computer, registered his name in the District Employment Exchange, Balasore to consider his case for suitable appointment in different organizations. Marketing Division of Indian Oil Corporation Ltd. issued a requisition vide Annexure-1 dated 10.03.1993 to the Employment Officer, District Employment Exchange, Balasore to send a list of 40 suitable General and Scheduled Caste candidates, having requisite qualification and experience as indicated in Annexure-1, by 25.03.1993 for appointment of Steno-Typist. On receipt of the same, on 30.04.1993, the District Employment Officer, Balasore submitted a list of 40 suitable candidates, having requisite qualification, for test and interview for the post of Steno-Typist. In the said list, the petitioner's name was also sponsored by the Employment Officer and his name was found place at serial no.11. After receipt of the said list of names, the petitioner was issued with call letter to attend the test on 07.06.1993 for test/personal interview. The petitioner along with other candidates appeared on the date fixed and on verification of records and testimonials, the typing and stenography tests were held and lastly personal interview was conducted by the selection committee on the very same day. Finally, opposite party no.1 communicated to the Employment Officer-opposite party no.4 that out of candidates sponsored by the Employment Exchange, the present petitioner was found suitable for appointment by the Corporation on the basis of his interview test and performance and he was kept reserved for future vacancy as per the communication dated 14.07.1993. Thereafter, a requisition was received by the Employment Exchange Officer on 19.07.1995 for filling up of the vacancy of Steno-Typist. As the petitioner's name was empanelled for future vacancy, it is stated that without filling up of the vacancy pursuant to the selection already made, the authority could not have issued a fresh requisition for filling up the very same vacancy.

3. Mr. J.K. Khuntia, learned counsel for the petitioner strenuously urged that pursuant to requisition made by opposite party no.1 when the name of the petitioner was sponsored and his name was indicated in the select list with a condition that in the event any vacancy would arise in future, the same would be filled up by the petitioner, the subsequent requisition made vide Annexure-6 dated 19.07.1995 cannot sustain. It is stated that having adjudged the merits of the petitioner and kept in waiting list, opposite party no.1 could not have gone for a fresh requisition.

4. Mr. N.C. Sahoo, learned counsel appearing for opposite parties no.1 to 3 strenuously urged that even though the petitioner's name appeared in the waiting list, the validity of the said list having been expired, he cannot claim as a matter of right to get the appointment after expiry of the merit list and, as such, no right has been accrued in favour of the petitioner to get appointment because his name was found place in the merit list at one point of time. Therefore, the claim so made in the writ application cannot sustain in the eye of law.

5. Having heard learned counsel for the parties and after going through the records, since pleadings between the parties have been exchange, with the consent of learned counsel for the parties, this matter is being disposed of finally at this stage.

6. The undisputed fact being that due to vacancy available for the post of Steno-Typist, opposite party nos. 1 to 3 issued requisition to the District Employment Exchange, Balasore to sponsor names of 40 candidates having requisite qualification. In response to the same, 40 names were recommended, in which the name of the petitioner was found place at serial no.11. Accordingly, the petitioner was called upon to appear at the interview and for production of original certificates and he, having been found suitable, was placed in the waiting list subject to availability of future vacancy. This fact was also communicated to the Employment Officer, Balasore by opposite parties no.1 to 3. But, the petitioner claims that even though vacancies were available at the relevant point of time, deliberately and willfully he was given appointment just to accommodate own people of the opposite parties. This is a disputed question of fact, to which this Court expresses no opinion.

7. Admittedly, recruitments of the Corporation are governed by "the Indian Oil Corporation's Recruitment Rules". The relevant part of the said Rules dealing with validity of selection panel and the notification of vacancies is extracted hereunder:

"**I. Notification of vacancies in respect of workmen category:**

Rule 10: All vacancies which are to be filled up by outside recruitment in workmen categories shall be notified to:-

10.1: Regional Employment Exchange

10.2: Special Employment Exchange for Physically Handicapped persons in respect of vacancies to which such persons are to be considered for appointment.

10.3: The Refineries and Pipelines Division of the Corporation for their surplus staff, if any;

10.4:Foreign Oil Companies for their surplus/retrenched employees;
10.5:Ex-servicemen's Organisations; and

10.6: Scheduled Castes/Scheduled Tribes Organisations.

II. Validity of Panels :

Rule-31: *The panels shall be valid for a period of two years from the date of their creation. The validity period may be extended or reduced at the discretion of the Appointing Authority for reasons to be recorded in writing."*

In view of Rule-31, as extracted above, a selection panel is valid for a period of 2 years from the date of its creation, but, however, the validity period may be extended or reduced at the discretion of the appointing authority for reasons to be recorded in writing.

8. From the materials available on record, it appears that the petitioner's name finds place in the select list dated 14.07.1993. The validity of said list was for a period of two years, which expired on 13.07.1995. The fresh requisition was issued on 19.07.1995, after expiry of the said period of two years. The same is in consonance with Rule-31 of the Corporation's Recruitment Rules. Therefore, the validity of the select list having been expired in consonance with Rule-31, the petitioner cannot claim that he should be given appointment on the basis of selection made earlier.

9. In ***State of Bihar v. The Secretariat Assistant Successful Examinees' Union***, (1994) 1 SCC 126, the apex Court held that-

"the empanelment of the candidate in the select list confers no right on the candidates to appointment on account of being so empanelled. At the best it is a condition of eligibility for the purpose of appointment and by itself does not amount to selection nor does it

create a vested right to be appointed unless the service rules provide to the contrary."

Similar view has also been taken in ***Syndicate Bank v. Shankar Paul,*** (1997) 6 SCC 584 : AIR 1997 SC 3091; ***Vinodon v. University of Calicut***, (2002) 4 SCC 726 : AIR 2002 SC 1885 and ***State of U.P. v. Om Prakash***, (2006) 6 SCC 474: AIR 2006 SC 3080.

10. As the tenure of the select list has already been expired with the expiry of time, the petitioner cannot claim that he should be appointed on the basis of the selection made pursuant to earlier requisition made by opposite party no.1.

In ***State of Bihar v. Madan Mohan Singh***, AIR 1994 SC 765 : (1994) Supp.3 SCC 308 the apex Court held:

"A select list once made does not exist forever. It gets exhausted on completion of the selection process which was held pursuant to a particular advertisement or invitation."

Similar view has also be taken by the apex Court in ***Surinder Singh v. State of Punjab***, (1997) 8 SCC 488.

11. In ***Nadia Distt. Primary School Council v. Sristidhar Biswas***, (2007) 12 SCC 779 : AIR 2007 SC 2640 the apex Court held:

"If a panel has already exhausted itself by lapse of time, no appointment from such panel is to be made."

12. In ***Deepa Keyes v. Kerala SEB***, (2007) 6 SCC 194 the apex Court held:

"Appointment from a ranked list by extending its life after it expired is not permissible."

13. In view of the law laid down by the apex Court, merely because the petitioner's name finds place in the select list, he cannot have a right to be appointed. Further the existence of vacancy does not give a legal right to the petitioner for appointment and, as such, no mandamus can be issued to give such appointment on the basis of the fact that the petitioner's name finds place in the select list.

14. In paragraph-10 of the counter affidavit opposite parties no.1 to 3 have categorically stated as follows:-

"10. It is stated that the petitioner's name although appeared in the panel, such panel as per the rule of the opposite party no.1 was valid

for two years. Since the appointment could not be made by the opposite party no.1 within a period of two years, the panel lapsed as a result of which the employment exchange had to be requisitioned for sending of fresh names for being considered for making panel for the post of steno typist. It is stated that in the requisition to be Employment Exchange it was specifically mentioned that the requisition was made for anticipated vacancy and there was no existing vacancy as such. It is submitted that the panel in which the petitioner appeared was approved on 12.6.1993 hence the said panel was expired on 11.06.1995 as per the relevant rules of the Company."

15. As it appears from the order-sheet, though this Court on 14.08.1998 passed an interim order that one post of Steno-Typist may not be filled up without leave of this Court, by that time the validity of the list had already expired. In the meantime, more than 20 years have lapsed. Therefore, by efflux of time, since no right has been accrued in favour of the petitioner, this Court is of the considered view that the claim made by the petitioner to get appointment cannot sustain in the eye of law.

16. In view of the aforesaid facts and circumstances, this Court is of the considered view that, since no right has been accrued in favour of the petitioner on the basis of his name being found place in the select list, this Court is not inclined to issue any direction for giving appointment to the petitioner in the post of Steno-Typist.

17. Accordingly, the writ application merits no consideration and the same is hereby dismissed. No order as to cost.

Writ application dismissed.

2017 (I) ILR - CUT-329

DR. B.R.SARANGI, J.

W.P.(C NO.18236 OF 2008

BRAJA SUNDAR PANDA & ORS. .....Petitioners

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – Arts 14,16

SERVICE LAW – Revised pay scales recommended by pay commission – Implementation in respect of some particular category of servants from a date later than that recommended, amounts to violation of Articles 14 and 16 of the Constitution of India.

In this case the petitioners who are employees of Bhubaneswar Municipal Corporation challenged the resolution Dt 13.10. 2006 passed by the opposite parties wherein the benefit of Revised scale of pay Rules, 1998 was extended to them w.e.f. 01.01.2006 instead of 01.01.1996 at par with their counter parts in the State Government – The said resolution was quashed by this court in earlier writ petition as the same was not backed by valid and justified reasons and the benefit was extended w.e.f. 01.01. 1996 – Held, direction issued to the opposite parties to compute the financial benefits and pay the same to the petitioners at par with the petitioners in the disposed of writ petitions.

(Paras 6,7,8)

Case Law Referred to :-

1. AIR 1973 SC 1088 : Purushotam Lal v. Union of India

For petitioners : M/s K. Ray & A.K. Baral, Advocates.
For opp. Parties : M/s. K.P. Nanda, D. Panigrahi, D. Das & A. Mohanty.
Mr. B. Bhuyan (Addl. Govt. Advocate)

Decided on : 06.01.2017

JUDGMENT

DR. B.R.SARANGI, J.

The petitioners, who are employees of Bhubaneswar Municipal Corporation, were initially appointed as N.M.R. against the vacant sanctioned posts. They had, after working as such for a quite long period, approached this Court in OJC Nos. 1036 and 5851 of 1992 claiming for regularization and in compliance of the order passed by this Court their services have been regularized and they are continuing in service till date. As

per the policy of the State Government, the Orissa Revised Scale of Pay admissible to the State Government employees is also extended to the employees of the urban local bodies. Accordingly, the benefit of revised scale of pay pursuant to Fourth Pay Commission Report was extended to the petitioners at par with their counterparts in the State Government. When Fifth Pay Commission Report came, pursuant to the same, the benefit of Orissa Revised Scale of Pay Rules, 1998 was extended to the State Government employees, but the same was not immediately extended to the petitioners. However, subsequently pursuant to resolution passed on 13.10.2006, the benefit of Revised Scale of Pay Rules, 1998 was extended to the employees of Bhubaneswar Municipal Corporation w.e.f. 01.01.1996 notionally and the actual financial benefit was extended w.e.f. 01.01.2006. The claim of the petitioners is that the benefit of Orissa Revised Scale of Pay Rules, 1998 should have been extended w.e.f. 01.01.1996. Therefore, they have approached this Court challenging the resolution dated 13.10.2006 for extension of actual financial benefit w.e.f. 01.01.1996 instead of 01.01.2006.

2. Mr. K. Ray, learned counsel for the petitioner states that there is no valid and justified reasons to extend the actual financial benefits w.e.f. 01.01.2006 instead of 01.01.1996 as per the Orissa Revised Scale of Pay Rules, 1998. It is further contended that the resolution dated 13.10.2006 was under challenge before this Court in W.P.(C) Nos. 15359, 15360 and 15361 of 2008 and this Court vide order dated 06.04.2012 quashed the said resolution dated 13.10.2006 and directed the opposite parties to compute the financial benefits and pay the same to the petitioners therein within three months. The petitioners herein having stood at par with the petitioners in the disposed of writ petitions, the benefit should be extended to them in compliance of the order passed by this Court on 06.04.2012.

3. Mr. K.P. Nanda, learned counsel appearing for opposite parties no.3 and 5 contended that in view of the counter affidavit filed on 26.10.2009, the benefit as claimed in the writ petition to quash the resolution dated 13.10.2006 is not admissible. It is further contended that the reliance placed on the order dated 06.04.2012 passed in W.P.(C) Nos. 15359, 15360 and 15361 of 2008 has come after filing of the counter affidavit by the opposite parties. Therefore, since this Court has already quashed the resolution dated 13.10.2006 vide order dated 06.04.2012, the case of the petitioners would be examined by the authority in the light of the said order.

4. Mr. B. Bhuyan, learned Addl. Govt. Advocate states that the State Government has extended the benefit of Orissa Revised Scale of Pay Rules,

1998 giving effect from 01.01.1996 and, as such, the same is applicable to the employees of State Government as well as other authorities including local bodies in the State. The benefit having been extended pursuant to resolution dated 13.10.2006 to the employees of the Bhubaneswar Municipal Corporation, and subsequently the said resolution having been quashed vide order dated 06.04.2012, the case of the petitioners shall be considered in the light of the said order.

5. Having heard learned counsel for the parties and after going through the records, with the consent of learned counsel for the parties, this matter is being disposed of finally at the stage of admission.

6. The undisputed facts being that the petitioners are the employees of Bhubaneswar Municipal Corporation and they have been extended with the benefits of Revised Scale of Pay w.e.f. 01.01.2006 instead of 01.01.1996 pursuant to resolution dated 13.10.2006 vide Annexure-2. Now they have claimed that the benefit of Orissa Revised Scale of Pay Rules, 1998 should be extended w.e.f. 01.01.1996 at par with the counterparts of the State Government employees, and more particularly fixation of pay notionally w.e.f. 01.01.1996 and actually extended such benefit w.e.f. 01.01.2006 has no valid and justified reasons for the same. Nothing has been indicated in the resolution dated 13.10.2006 that as to why such benefit has been extended w.e.f. 01.01.2006 instead of 01.01.1996. In absence of any reason thereof, extension of such benefit cannot have any basis, and more so, such resolution having been quashed by this Court in W.P.(C) Nos. 15359, 15360 and 15361 of 2008 vide order dated 06.04.2012, nothing more remains to be adjudicated at this stage, save and except the benefit has to be extended to the petitioners w.e.f. 01.01.1996 at par with their counterparts in the State Government and also similarly situated corporation employees, who are the petitioners in the aforementioned disposed of writ petitions.

7. In ***Purushotam Lal v. Union of India***, AIR 1973 SC 1088, the apex Court held that revised pay scales recommend by Pay Commission, implementation in respect of some particular category of servants from a date later than that recommended amounts to violation of Articles 14 and 16.

8. In view of the law laid down by the apex Court, applying the same to the present context, as this Court has already quashed the resolution dated 13.10.2006 in W.P.(C) Nos. 15359, 15360 and 15361 of 2008, this Court directs the opposite parties to compute the financial benefits and pay the same to the petitioners within a period of three months from the date of

passing of the order at par with petitioners in aforementioned disposed of writ petitions.

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

Writ petition allowed.

2017 (I) ILR - CUT- 332

D. DASH, J.

W.P.(C) NO. 54 OF 2007

BASANT KUMARI MOHANTY .....Petitioner

.Vrs.

PARBATI MOHANTY & ORS. .....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-9, R-13

Suit decreed exparte – Original defendant filed petition under O-9, R-13 C.P.C. to set aside such decree – Objection to the petition filed and evidence was led – Original defendant expired during the pendency of such proceeding and his LRs substituted – Trial Court, although held that the original defendant was negligent in the case, set aside the exparte decree by taking a liberal view that for the negligence of the original defendant his LRs should not suffer – Hence the writ petition – In a proceeding under O-9, R-13 C.P.C. the defendant must satisfy the Court that either the summon was not duly served upon him or he was prevented by sufficient cause for appearing in the suit when it was called on for hearing – In the present case evidence shows that summon in the suit was duly served on the original defendant – As the LRs claim their right through the original defendant and the original defendant is not found to be prevented by sufficient cause or was negligent or his absence was deliberate, the LRs have to share the same blame and should not succeed in getting the exparte decree set aside – Held, since the trial Court found that the original defendant was not prevented by sufficient cause from appearing in the suit on the date of hearing and was negligent in the case, the impugned order passed is beyond his jurisdiction being contrary to law – The impugned order is quashed. (Paras 5, 6)

Petitioner : M/s. M.Mishra, S.Mishra & C.Mallik
Opp. Parties : Mr. B.K.Mishra
M/s. S.Satpathy & S.K.Sahoo

Date of hearing : 13.09. 2016
Date of judgment : 02.11.2016

JUDGMENT

D.DASH

In this application under Article 227 of the Constitution of India, the petitioner seeks quashment of an order dated 27.10.2006 passed by the learned Civil Judge (Sr.Divn.), 1st Court, Cuttack in Misc. Case No. 107 of 2001 arising out of T.S. No. 409 of 1997 filed by the present petitioner as the plaintiff against the predecessor-in-interest of the opp. parties namely, Suryamani Mohanty arraigning him as the defendant in the matter of a petition under Order 9 Rule 13 of the Code of Civil Procedure.

2. Facts essential for the purpose are stated hereunder:-

A. The petitioner as the plaintiff had filed the suit against the said Suryamani Mohanty arraigning him as the defendant who is the predecessor-in-interest of the opp. parties claiming the following reliefs:-

(i) that the inclusion of the name of defendant no. 1 in the lease deed No. 4636 dated 5.8.81 inclusion of the name of defendant no. 1 in the Cuttack Municipal register jointly with defendant no. 1, inclusion of the name of defendant no. 1 as a cotenant with plaintiff in joint patadar Khata No. 1714 of Cantonment and Cuttack Town Khasmahal Patta now in Khewat No. 1 in the name of Govt. were fraudulent and result of deceptively false representations by defendant no. 1;

(ii) that plaintiff's interest has not been affected by those documents and she is the sole owner of the suit house and suit land and the defendant no. 1 has no right, title, interest nor possession of the said suit land and house;

(iii) for permanent injunction restraining defendant no. 1 his friends relatives and agents to come upon the suit land and house;

(iv) for costs of the suit to be paid by the defendant to the plaintiff; and

(v) for any other relief or reliefs which by law, equity and justice the plaintiff may be found entitled to.

B. In the said suit despite service of notice the defendant did not appear and thus he was set ex parte on 3.9.98. The suit then stood posted to 21.9.98, 19.12.98, 31.3.99, 1.5.99, 27.8.99, 13.10.99 and 18.12.99. The ex parte hearing being then taken up by examination of witnesses, finally the judgment was delivered on 14.3.2000. The defendant remained absent all through the period beginning from 3.8.98 to 14.3.2000.

C. Thereafter it is said that coming to know about the said ex parte decree, a petition was filed by the original defendant under Order 9 Rule 13 of the Code for setting aside the ex parte decree in the year 2001.

It is stated in the petition that when the original defendant had been to the office of the Tahasildar, Cuttack (S) to pay the annual rent, he could know about the ex parte decree and then making necessary inspection of the record, it was ascertained that the service of summon in the suit upon him had been manipulated and therefore he had no knowledge about the institution of the suit and for that reason, he could not take necessary steps and the decree has been passed ex parte behind his back.

D. This petitioner objected to the said petition stating the grounds to be false, frivolous and denying the allegation with regard to manipulation in the matter of service of summon upon the original defendant. It is further stated that the original defendant had willfully and intentionally avoided to defend the suit. So it was stated that there was no sufficient cause for remaining absent as on the date of hearing.

E. The trial court having recorded the evidence has gone to discuss the same. It has found the allegation with regard to manipulation in the matter of service of summon in the suit upon original defendant to have not been established, with further positive finding that it was so served upon the original defendant on 8.4.98. So it has taken the view that the original defendant having received the summon in the suit did not prefer to appear and contest.

F. It may be stated here that the original defendant who had filed the petition under Order 9 Rule 13 of the Code having expired during the pendency of the proceeding i.e. Misc. Case No. 107 of 2001, these petitioners as his the L.Rs. have come to be substituted in his place later. The trial court although has held the original defendant to be negligent in the matter and that according to him has resulted the ex parte judgment and decree, yet, taking a view that for his negligent act, the petitioners who are his legal representatives should not suffer and as the ex parte decree has taken away a valuable right, has gone to set aside ex parte decree.

3. Heard the learned counsel for the petitioner.

None appears on behalf of the opp. parties.

I have carefully read the entire order in question.

4. It is the settled law that in the proceeding under Order 9 Rule 13 of the Code, the defendant must satisfy the court that either the summon was not duly served upon him or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing.

In the present case, the trial court upon discussion of evidence has arrived at a factual finding that the summon in the suit was duly served upon the original defendant. So now the matter of examination remains confined to the existence of sufficient cause as on the date of hearing of the suit. It is true that the word "was prevented by any sufficient cause for appearing" must receive liberal construction in order to do complete justice between the parties. But at the same time, the rider remains that when no such negligence or inaction is attributed to the applicant. The word 'sufficient cause' is no doubt an elastic expression and no hard and fast guidelines could be given when the court have also the wide discretion in deciding the sufficient cause for the purpose of allowing or rejecting the application under Order 9 Rule 13 of the Code and the decision on the question must be the cumulative effect of various factors depending upon the circumstances of each case. The court in such proceeding is not to enter into the question whether the defendant has a strong case on merit or not. It's to remain confined in its examination whether the facts and circumstances as stated in the petition with the evidence let in for the purpose would constitute 'sufficient cause' for non-appearance to its satisfaction.

5. Its no more *res integra* that when the defendant dies after ex parte decree is made against him, his legal representatives can apply under Order 9 Rule 13 of the Code to set aside the same. The reason is that the legal representatives enjoy the same right and liability as the original defendant. Even where the defendant having applied under Order 9 Rule 13 of the Code when dies his legal representatives can come forward to pursue the petition as in this case in hand. However, even in that proceeding the question remains confined that whether the original defendant against whom the ex parte decree has been passed was prevented by sufficient reason from appearing on the date of hearing of the suit. But after holding the original defendant to have willfully avoided to take part in hearing and was negligent in the matter, it is not permissible to turn around and say that for the said negligent act of the original defendant, his legal representatives coming to prosecute the

proceeding under Order 9 Rule 13 of the Code would not be allowed to suffer. This again violates the very fundamental principle that when a decree either passed ex parte or on contest binds the parties and the same if is sought to be set at naught it can only be so done in accordance with law but not on any such compassionate ground or examining the matter from a humanitarian angle. The sufficient cause to have prevented the defendant on the date of hearing has to be there to the satisfaction of the Court. It has to be shown that the defendant was neither negligent nor was in any way deliberate in said inaction. If these findings do not run in favour of original defendant, the legal representatives cannot get the relief of setting aside the ex parte decree passed against their predecessor in interest on the ground that for his negligent act, they should not made to suffer and their valuable right should not be taken away. This aspect however may weigh in mind when the court considers the next question as regards the delay in filing the petition under Order 9 Rule 13 of the Code by those legal representatives having later derived the knowledge regarding the ex parte decree.

6. In the instant case, it has to be kept in mind that they claimed the right only through the original defendant and not any right independently. So if the predecessor-in-interest was prevented by sufficient cause and its stands to the satisfaction of the court, the legal representatives have to be favoured with an order of setting aside the ex parte decree giving them opportunity to contest the suit, subject of course upon condonation of delay if any as per law. On the other hand, if the original defendant is found to have not been prevented by sufficient cause or was negligent or such absence was a deliberate attempt on his part, the legal representatives have to share the same blame and cannot succeed in getting the ex parte decree set aside. Liberal view in the matter is no doubt to be taken but it has to be within the four corners of law and not contrary to the provision of law. Therefore, when the trial court has found that the original defendant was not prevented by sufficient cause from appearing on the date of hearing and to be negligent right from the initial stage of the case and to have not taken care to appear despite the opportunity with clear finding that the case projected in the petition as regards manipulation in the matter of service of summon has not been established in my considered view clearly a case is made out that the trial court in passing the order in question has acted contrary to the law and beyond the bounds of its authorities. In that view of the matter, it calls for interference in exercise of the power under Article 227 of the Constitution. The order dated 27.10.2006 passed by the learned Civil Judge (Sr. Divn.), 1st Court, Cuttack

in Misc. Case No. 107 of 2001 arising out of T.S. No. 409 of 1997 is thus liable to be quashed which is hereby done.

7. The writ application is accordingly disposed of. No order as to cost.

Writ application disposed of.

2017 (I) ILR - CUT- 337

S. PUJAHARI, J.

CRLREV NO. 1070 OF 2013

NARAHARI BARIK .....Petitioner

.Vrs.

SAMAPTI PATTANAYAK & ANR. .....Opp. Parties

NEGOTIABLE INSTRUMENTS ACT, 1881 – S.138 (Proviso-C)
r/w Section 27 of the General Clauses Act, 1897

Dishonor of cheque – O.P.No.1-complainant received intimation from the Bank on 06.10.2005 – O.P.No.1 issued demand notice to the petitioner-accused on 18.10,2005 which was returned unserved with postal remark that addressee was absent from 21.10.2005 to 26.10.2005 – O.P.No.1 received back the undelivered notice on 30.10.2005 and filed complaint on 09.11.2005 – Petitioner challenged his confirming orders of conviction and sentence on the ground that complaint was filed before expiry of 15 days from the date of receipt of notice under clause (c) of the proviso to section 138 N.I.Act – Now question is, which is the date to be treated as the date of receipt of the statutory notice by the petitioner ? – Section 27 of the General Clauses Act, 1897 provides a presumption that where the payee dispatched the notice by registered post with correct address, it is deemed to have been served on the drawer of the cheque until the contrary is proved by the addressee.

In this case in ordinary course of business the notice would have been delivered to the petitioner-accused on 21.10.2005 had he remained present in the address on that date and there being nothing contrary from the side of the petitioner-accused, the date "20.10.2005" can be taken as the date of deemed service of statutory notice – The complaint was filed after expiry of the stipulated period in terms of clause (c) of the Proviso to section 138 N.I.Act – The revision petition, challenging the confirming judgment of conviction and sentence, being devoid of merit is dismissed.

(Paras 9, 10)

Case Laws Referred to :-

1. AIR 2015 SC 157 : Yogendra Pratap Singh vrs. Savitri Pandey.
2. 2007 (II) OLR (SC) 384: C.C. Alavi Haji vrs. Palapetty Muhammed & anr.
3. 2000 (I) OLR (SC) 1 : K. Bhaskaran vrs. Sankaran Vaidhyan Balan & anr.

For Petitioner : M/s. D.P.Dhal & Associates.
For Opp. Parties : M/s. N.K. Dash, Aurovinda Mohanty & Associates

Date of Order : 20.06.2016

ORDER

S. PUJAHARI, J.

The judgment dated 06.12.2013 passed by the learned Addl. Sessions Judge-cum-Special Judge (Vigilance), Balasore in Criminal Appeal No.82/23 of 2011/2012 confirming the trial court's judgment convicting and sentencing the petitioner under Section 138 of the Negotiable Instruments Act, 1881 (for short "the N.I. Act") is sought to be set-aside on the ground of the same being legally not sustainable.

2. The case of the complainant (opposite party no.1 herein) is that on 10.04.2005, on the request of the petitioner-accused, she advanced a friendly loan of Rs.3,50,000/- to him under a written agreement on 20.09.2005, and towards discharge of the said liability, the petitioner issued a cheque for the aforesaid amount which the opposite party no.1 presented to her Bank for encashment. The cheque, however, was dishonoured on the ground of "insufficiency of funds" and intimation in that regard was received by the opposite party no.1 vide the return memo dated 06.10.2005. The opposite party no.1 thereafter issued a demand notice through her Advocate to the petitioner on 18.10.2005 in terms of Clause (b) of the proviso to Section 138 of the N.I. Act. The same was returned un-served with postal remark dated 27.10.2005 that the addressee (petitioner) was found absent from 21.10.2005 to 26.10.2005. The opposite party no.1 received back the said undelivered notice on 30.10.2005 and as the petitioner did not make payment, the opposite party no.1 filed the complaint on 09.11.2005 before the S.D.J.M., Balasore who took cognizance of the offence under Section 138 of the N.I. Act and subsequently the case was made over to the Special Judicial Magistrate, Balasore for trial. As the petitioner pleaded not guilty, trial was held, in course of which both the sides adduced evidence and the learned trial magistrate on appreciation of the evidence found the petitioner guilty under Section 138 of the N.I. Act and sentenced him to undergo S.I. for a period of six months and pay a sum of Rs.3,75,000/- as compensation to the opposite

party no.1-complainant. Upon appeal, the verdict of the trial court having been upheld by the learned Addl. Sessions Judge-cum-Special Judge (Vigilance), Balasore, the petitioner has approached this Court by filing the present revision petition.

3. Both the sides have been heard. The concurrent finding of guilt recorded by the Courts below is challenged mainly on the ground that the complaint was premature on account of the same having been filed before expiry of fifteen days of the statutory notice as stipulated in Clause (c) of the proviso to Section 138 of the N.I. Act, and there is also no specific finding by the Courts below that the petitioner intentionally avoided the said notice. The learned counsel for the petitioner has placed reliance on a decision of the Apex Court in the case of ***Yogendra Pratap Singh vrs. Savitri Pandey,*** AIR 2015 SC 157, to bolster his contention.

4. On the other hand, the learned counsel for the opposite party no.1-complainant while supporting the impugned judgment draws the attention of this Court to paragraphs-9 and 10 of the judgment of the appellate court, to submit that the points raised by the petitioner have already been dealt with by the learned appellate court and the view in that behalf so taken by the appellate court being in consonance with the principle settled by the Apex Court in the case of ***K. Bhaskaran vrs. Sankaran Vaidhyan Balan and another,*** 2000 (I) OLR (SC) 1 and another three Bench decision of the Apex Court in the case of ***C.C. Alavi Haji vrs. Palapetty Muhammed and another,*** 2007 (II) OLR (SC) 384, needs no interference by this Court.

5. There is no dispute on record that the statutory notice was duly sent by registered post in the correct mail address of the petitioner. The endorsement of the postal employee on the un-delivered postal article shows that during the period from 21.10.2005 to 26.10.2005 when he visited the place, the addressee was found absent from house. The opposite party no.1 in his evidence stated that he received back the undelivered notice on 30.10.2005. The complaint was filed on 09.11.2005.

6. In the case of ***Yogendra Pratap Singh (supra),*** two questions on being referred to by a two Judges Bench came up before a three Judges Bench of the Apex Court for consideration, and the question no.1 was in relation to filing of complaint before expiry of fifteen days in terms of Clause (c) of proviso to Section 138 of the N.I. Act. This question was answered in negative with a pronouncement that a complaint filed before expiry of fifteen days from the date of receipt of the notice issued under Clause (c) of the

proviso to Section 138 of the N.I. Act is not maintainable inasmuch as till expiry of the said period of time, no offence can be said to have been committed by the drawer of the cheque / accused. The factual aspect in that reported case reveals that the demand notice had been served on the addressee (accused) on 23.09.2008 and the complaint was filed on 07.10.2008, i.e., before expiry of the stipulated period of fifteen days. Now reverting to the case at hand, the question that assumes primacy is, which is the date to be treated as the date of receipt of the statutory notice by the petitioner.

7. In the case of ***K. Bhaskaran (supra),*** the Apex Court in paragraph-20 of the judgment observed as follows :-

> "20. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the Court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measures."

Referring to Section 27 of the General Clauses Act, the Apex Court further held in paragraph-24 of the judgment as follows :-

> "24. No doubt Section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuse by successfully avoiding the notice."

8. Further, a three Judge Bench of the Apex Court in the case of ***C.C. Alavi Haji (supra),*** in paragraph-14 of the judgment held as follows :-

> "14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered

post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. [Vide **Jagdish Singh v. Natthu Singh,** *AIR 1992 SC 1604;* **State of M.P. v. Hiralal and others,** *(1996) 7 SCC 523,* and **V. Raja Kumari v. P. Subbarama Naidu and another,** *(2004) 8 SCC 774.* It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."

9. Thus, as per the settled principle of law, unless and until the contrary is proved by the addressee (accused), service of notice is deemed to have been effected at the time at which the notice would have been delivered in the ordinary course of business. In the present case, to reiterate, the postal employee visited the place in address on 21.10.2005 and repeated his visit till 26.10.2005. In ordinary course of business, the notice would have been delivered to the petitioner on 21.10.2005 had he remained present in the address on that date. There being nothing contrary from the side of the petitioner, the date "21.10.2005" can be taken as the date of deemed service of the statutory notice, and if counted accordingly, the complaint can be safely held to have been filed after expiry of the stipulated period in terms of Clause (c) of the proviso to Section 138 of the N.I. Act. The contention of the petitioner questioning the maintainability of the complaint is, therefore, bereft of any merit. There being nothing further from the side of the petitioner to impeach the sustainability of the impugned judgment, the revision petition deserves to be dismissed.

10. In the result, this revision petition being devoid of any merit stands dismissed.

Revision petition dismissed.

2017 (I) ILR - CUT- 342

BISWANATH RATH, J.

O.J.C. NO. 12272 OF 2000

SUDAM NAYAK & ORS. .....Petitioners

.Vrs.

KANHEI SAHOO & ORS. .....Opp. Parties

ODISHA LAND REFORMS ACT, 1960 – Ss. 14, 15

Eviction of tenant for non-payment of arrear rent – Owner is required to file application claiming recovery within one year from the date such arrear falls due – However, the revenue officer before ordering the tenant to cease to cultivate the land shall decide after rent has been duly offered and may allow reasonable opportunity to the tenant to pay or deliver to his land lord the rent payable.

In this case O.P.No.1-owner filed OLR Case No. 1 of 1985 to evict the father of the petitioners for non-payment of rent from 1980-81 till 1984-85 which was dismissed being barred by time – However, appellate court passed order of eviction which was confirmed by the Revisional Court – Hence the writ petition – Impugned orders passed by the appellate authority as well as Revisional authority are set aside as the authorities have failed to exercise their power U/s. 15 of the Act – Held, OLR case No. 1 of 1985 was maintainable for the period 1983-84 and 1984-85 – Direction issued to the petitioners-tenants for payment of arrear rent within two months. (Paras 3, 4)

For Petitioners : M/s. S.K.Nayak-2, B.K.Rout, M.K.Jena, N.Barik, Miss P.Mishra & B.K.Sahoo

For Opp. Parties : M/s. C.R.Satpathy, B.Behera & D.K.Sahoo

Date of judgment : 28.10.2016

JUDGMENT

BISWANATH RATH,J.

By filing the writ petition, the petitioners have prayed for issuing a writ in the nature of certiorari and for quashing of the impugned orders under Annexures-2 and 3.

2. Short background involved in the case is that admittedly the father of the petitioners was a tenant in respect of Sabik Plot No.846, area Ac.1.76 decimals under Sabik Khata No.76 in village-Sandhagada corresponding to Hal Plot No.837, area Ac 1.80 decimals under Hal Khata No.299. The landlord Sri Kanhei Sahoo, opposite party no.1 on the premises of non-

payment of arrear rent initiated O.L.R. Case under Section 14 (1) (c) of the O.L.R. Act praying for eviction of the tenant, the father of the present petitioners on the premises of non-payment of arrear rent for the period 1980-81, 1981-82, 1982-83, 1983-84 and 1984-85. The original proceeding vide O.L.R. Case No.1 of 1985 was dismissed on the ground of filing of the application beyond the prescribed period of time but after observing that the tenant was utilizing the land in proper use. Appeal being filed, at the instance of the owner vide O.L.R. Appeal No.20 of 1987, the appeal was allowed vide Annexure-2 directing eviction of the tenant on the ground that the tenant was a defaulter for payment of due within the stipulated time. A revision at the instance of the present petitioners challenging the appeal order was dismissed vide Annexure-3. Assailing the impugned order under Annexure-3, Sri Nayak, learned counsel appearing for the petitioners contended that looking into the provisions contained in Section 15 (2) proviso of the O.L.R. Act in the event of arrear involving a dispute for eviction of the tenant, the mandatory requirement of the statute is before directing for eviction of the tenant, the tenant is required to be given reasonable opportunity to pay arrear rent to his landlord. It is in these premises, Sri Nayak, learned counsel for the petitioners contended that the orders passed in the appeal as well as in the revision are bad in law. Besides, looking to the limitation provided under the statute, claim of arrear for 1980-81, 1981-82 and 1983-84 could not have been entertained.

2. Sri K.K. Mishra, learned Additional Government Advocate appearing for the State-opposite parties contended that even looking to the provision assuming that there can be no direction for eviction of the tenant without being 2. Sri K.K. Mishra, learned Additional Government Advocate appearing for the State-opposite parties contended that even looking to the provision assuming that there can be no direction for eviction of the tenant without being affording an opportunity of payment of arrears, the appellate order cannot be sustained. So far the direction contained therein in respect of arrear dues involving the year 1980-81, 1981-82 and 1982-83, which were all grossly time barred being beyond the prescribed period of limitation under the O.L.R. Act, consequently, revisional authority for having not considered the above appropriately the revisional order also cannot be sustained.

3. Considering the rival contentions of the parties, this Court finds provisions at Sections 15 (1), 15 (1) (a),15-(d)(a), 15 (2), including the proviso since required to be considered, are quoted as herein below:-

> **"15. Recovery of rent and dispute between landlord and raiyat or tenant**- (1) Any claim for recovery of arrears of rent by a landlord and any dispute between a landlord and his raiyat or tenant, as the case may be, regarding –
>
> **15 (1) (a)** the quantum of the rent payable;
>
> **15(d)(a)** a claim for recovery of arrears of rent shall be filed within one year from the date on which such arrears fall due.
>
> **15 (2)** On receipt of the application under Sub-section (1), the Revenue Officer may, after making such enquiry as he deems fit direct the payment of arrears of rent, if any, found due or, determine the quantum of rent under Clause (a) or [in cases under Clauses (b) (c) and (d) thereof] order the tenant by a notice served in the prescribed manner and specifying the grounds on which order is made to cease, to cultivate the land:
>
> Provided that in cases of dispute arising out of a matter mentioned in clause (c) of sub-section (1) of section 14, the Revenue Officer before ordering the tenant to cease to cultivate the land shall decide, if rent had been duly offered and may allow reasonable opportunity to the tenant to pay or deliver to his landlord the rent payable."

Looking to the provisions contained in Section 15 of the O.L.R. Act as quoted hereinabove, this Court finds the owner is required to file an application for claiming recovery of arrear rent within one year from the date of which such arrear falls due and further this Court also finds in dealing with the matters under Section 15(1) (c) of the O.L.R. Act the mandate of the statute is, the Revenue Officer before ordering the tenant to cease to cultivate the land shall decide after rent has been duly offered and may allow reasonable opportunity to the tenant to pay or deliver to his landlord, the rent payable. Looking to the appellate order as well as the revisional order, this Court finds the appellate authority and the revisional authority have not exercised their power entrusted under Section 15 of the Act.

4. Considering the submissions of learned counsel for the petitioner and after perusing the impugned orders, this Court finds the order under Annexures-2 and 4 are not sustainable in the eye of law but taking into consideration that the claim of the opposite party no.1 being made on 23.4.1985 claiming arrear for the period 1982 to 1985, this Court finds that the application of the owner vide O.L.R. Case No.1 of 1985 was

maintainable at least for the period 1983-84 and 1984-85. Consequently interfering in the impugned orders, this Court allows the O.L.R. Case No.1 of 1985 directing the petitioners-tenants to pay arrear rent for the years 1983-84 and 1984-85 within a period of two months hence. The writ petition stands allowed but to the extent indicated hereinabove. However there is no order as to cost.

Writ petition allowed.

2017 (I) ILR - CUT- 345

S.K. SAHOO, J.

CRLREV NO. 388 OF 2016

A. PRAKASH RAO ……..Petitioner

.Vrs.

S.D.M., BERHAMPUR & ANR. ……..Opp. Parties

CRIMINAL PROCEDURE CODE, 1973 – Ss 133,138

Order for removal of nuisance – Magistrate to pass orders after considering evidence adduced by the complainant and the OPP.Party.

In this case learned Magistrate passed the impugned order after receiving an enquiry report, without supplying copy of such report to the parties and without allowing them to lead evidence, which is mandatory U/s 138 (1) Cr.P.C. – Held, the impugned order, not being in accordance with law is not sustainable, hence setaside.

(Para 4)

For Petitioner : Mr. Arun Kumar Mishra-2 & Debajyoti Chatterjee
For Opp. Party : Mr. Bijaya Kumar Behera-1 & Prabodha Kumar Dash

Date of Hearing : 09.11.2016
Date of Judgment: 09.11.2016

JUDGMENT

S. K. SAHOO, J.

This revision petition has been filed by the petitioner A.Prakash Rao with a prayer to quash the order dated 18.3.2016 passed by the learned Sub Divisional Magistrate, Berhampur in Misc. Case No. 38 of 2015 in a

proceeding under section 133 of Cr.P.C. in directing the petitioner to obey the orders of the Court dated 5.5.2015, 19.5.2015 and 2.7.2015 and to obtain all the required permission from the concerned authorities to run the Kalyan Mandap and take steps not to create any public nuisance in future.

2. Learned counsel for the petitioner contended that earlier the petitioner approached this Court in Criminal Revision No.507 of 2015 challenging the order dated 2.7.2015 passed by the learned Sub-Divisional Magistrate, Berhampur and this Court disposed of Criminal Revision vide order dated 9.9.2015 directing the Sub-Divisional Magistrate, Berhampur to make an enquiry as contemplated in Chapter-XB of the Code of Criminal Procedure and pass a final order on the same within two months from the date of receipt of the L.C.R.

It is the further contention of learned counsel for the petitioner that after receipt of the order of this Court, the learned Sub-Divisional Magistrate, Berhampur directed one P.K. Maharana, ORS, Asst. Collector cum Executive Magistrate to visit the case site to enquire and to submit a factual report and accordingly, Sri P.K. Maharana submitted his enquiry report on 8.2.2016 and basing on such report, the learned Sub-Divisional Magistrate, Berhampur passed the impugned order.

It is the further contention of learned counsel for the petitioner that in view of section 138 of the Cr.P.C., the Magistrate should have taken evidence in the matter and thereafter, the case should have been decided but merely accepting the report of Sri P.K. Maharana and without giving any opportunity to the respective parties to lead evidence, the impugned order has been passed which is not sustainable in the eye of law.

Learned counsel for the Opposite party no.2 on the other hand submitted that there is no illegality or infirmity in the impugned order and therefore, this revision petition should not be entertained.

3. Considering the submissions of learned counsel for the respective parties and on perusal of the impugned order, it is apparent that no evidence has been taken by the learned Sub-Divisional Magistrate, Berhampur and the impugned order has been passed solely basing upon the factual report which was submitted by Sri P.K. Maharana.

In view of section 139 of the Cr.P.C., the Magistrate may, for the purpose of inquiry under section 137 or 138 of the Cr.P.C. direct a local investigation to be made by such person as he thinks fit. In view of section 140 of the Cr.P.C., such report may be read as evidence in the case. The

expression 'shall take evidence in the matter' which appears in section 138(1) of Cr.P.C. means the Magistrate shall take evidence upon the matter of the complainant as well as of the opposite party as in a summons case. It is necessary in the interest of justice that the evidence of both the sides should be considered at length by the Court in coming to a decision. The evidence of the complainant at whose instance proceedings under section 133 of the Cr.P.C. are initiated is to be recorded and thereafter, the evidence of the opposite party is to be recorded. Similarly the documentary evidence adduced by the parties should be duly considered. Where no opportunity for adducing evidence has been given to the parties under section 138 of the Cr.P.C., the final order of the Magistrate would be illegal, without jurisdiction and is liable to be set aside.

4. In view of the settled principle of law, when it is apparent on the face of the impugned order that after receipt of the report from Sri P.K. Maharana, learned Sub-Divisional Magistrate has not furnished the copy of the enquiry report to either side and has not taken any evidence either from the complainant or from the opposite parties, I am of the view that the mandatory provisions under section 138 (1) of the Cr.P.C. has been flouted and therefore, I am of the view that the impugned order dated 18.3.2015 passed by the learned Sub-Divisional Magistrate, Berhampur is not sustainable in the eye of law.

Accordingly, the matter is remitted back to the learned Sub-Divisional Magistrate, Berhampur who shall furnish the copy of the enquiry report of Sri P.K. Maharana to both the parties and take evidence from the complainant as well as opposite parties and after giving due opportunity of hearing to both the sides dispose of the proceeding in accordance with law. It is made clear that this Court has not expressed any opinion on the merits of the proceeding. The entire exercise should be completed by the learned Sub-Divisional Magistrate, Berhampur within a period of one month from the date of appearance of both the sides which with the consent of the learned counsels for both the sides is fixed to 15th November 2016. Registryisdirected to send back the L.C.R. along with a copy of the judgment to the learned Sub-Divisional Magistrate, Berhampur for compliance.

Revision allowed.

2017 (I) ILR - CUT- 348

S.K. SAHOO, J.

TRPCRL NO. 20 OF 2016

RABINDRA NATH SAHU & ANR. ……..Petitioners

.Vrs.

SMT. SUSILA SAHU ……..Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S. 407
r/w section 27 of the Domestic violence Act, 2005

Power of High Court to transfer cases – O.P.-Mother filed application U/s 12 of the Act, 2005 against the petitioners (her son and daughter-in-law) in the Court of S.D.J.M., Phulbani while staying in the house of her daughter – Petitioners sought transfer on the ground that OPP. Party being a permanent resident of Berhampur, S.D.J.M., Phulbani has no jurisdiction to entertain the application – Legislature, U/s 27 of the 2005 Act has given options to an aggrieved woman to institute a case under the 2005 Act by residing at a place even if for a temporary period of time – Held, the application U/s 12 of the 2005 Act is maintainable in the court of the learned S.D.J.M., Phulbani – Consequently the transfer application stands dismissed.

For Petitioner : Mr. Ashok Das
For Opp. Party : Miss Deepali Mohapatra

Date of Argument : 14.09.2016
Date of Judgment : 14.09.2016

JUDGMENT

S. K. SAHOO, J.

Mother's love is divine. It is unselfish and unending. It flows gently but unrelentingly like the holy water of Ganges. Mother is the root which takes all the pain in growing the child plant and feeds him right from the womb. She is the truest friend who gives support to her child in every situation. She takes food only after her child eats satisfactorily; she sleeps only when her child sleeps comfortably. What a tragedy when a widow mother in the twilight of her life is compelled to leave the house by none else than her son and daughter-in-law?

The petitioners are the son and daughter-in-law of the opposite party.

The opposite party filed an application under section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereafter '2005

Act') in the Court of S.D.J.M., Phulbani against the petitioners seeking reliefs under the Act which was registered as Misc. Case No.3 of 2016.

It is the case of the opposite party that the petitioners subjected her to physical and mental cruelty and drove her out of the house for which she was constrained to take shelter in the house of her elder daughter Santoshi Kumari Sahoo at Nadikhanda Sahi, Phulbani.

This application under section 407 of Cr.P.C. has been filed by the petitioners seeking for transfer of Misc. Case No.3 of 2016 pending in the Court of S.D.J.M., Phulbani to the Court of S.D.J.M., Berhampur.

Heard Mr. Ashok Das, learned counsel for the petitioners and Miss Deepali Mohapatra, learned counsel for the opposite party.

Learned counsel for the petitioners contended that the ancestral house of the opposite party is at Berhampur and now she is also staying at Berhampur and she had earlier instituted two cases against the petitioner no.1 at Berhampur and therefore, the S.D.J.M. Court at Phulbani has no jurisdiction to entertain the application under section 12 of 2005 Act filed by the opposite party and therefore, the case should be transferred to the Court of learned S.D.J.M., Berhampur.

Learned counsel for the opposite party on the other hand contended that in the application itself, in column no.3, it is mentioned that the opposite party is now residing in the house of her elder daughter namely, Santoshi Kumari Sahu at Phulbani and that her present address is at Nadikhanda Sahi, Phulbani and therefore, the Court of S.D.J.M., Phulbani has got jurisdiction to entertain the application.

Section 27 of the 2005 Act deals with the jurisdiction of the competent Court to pass necessary orders under the Act and also to try the offences under the Act.

Section 27 of 2005 Act reads as follows:-

> "27. Jurisdiction.-(1) The Court of Judicial Magistrate of the First Class or the Metropolitan Magistrate, as the case may be, within the local limits of which:-
>
> (a) the person aggrieved permanently or temporarily resides or carries on business or is employed; or
>
> (b) the respondent resides or carries on business or is employed; or
>
> (c) the cause of action has arisen,
>
> shall be the competent Court to grant a protection order and other orders under this Act and to try offences under this Act.

(2) Any order made under this Act shall be enforceable throughout India."

Thus in view of section 27, if the 'aggrieved person' either permanently or temporarily resides at a place, the Court of Judicial Magistrate of the First Class within the local limits whose jurisdiction such place situates is competent to entertain an application under Section 12 of 2005 Act and to grant protection order and other orders under the Act or try the offences under the Act.

The legislature in its wisdom has provided that jurisdiction can be invoked by an 'aggrieved person' before the competent Court on the basis of temporary residence. The word "temporarily" means lasting, existing, serving for a time only which is not permanent. A temporary residence is a temporary dwelling place of the aggrieved person who has for the time being decided to make that place as her home. An aggrieved person who has lost her matrimonial home due to domestic violence and was not even allowed to stay at her ancestral house or at her father's place for some reason or the other and is compelled to take residence, though temporarily, either with one of her relatives or with one of her friends at a place where the domestic violence was not committed can invoke the jurisdiction of the Magistrate within whose local limits such place of temporary residence situates. The temporary residence includes a place where the aggrieved person was compelled to reside in view of commission of domestic violence. She may not have decided to reside there permanently or for a considerable length of time but for the time being. A place where the aggrieved person has gone on a casual visit, a lodge or hostel or a guest house or an inn where she stays for a short period or a residence at a place simply for the purpose of filing a case against another person cannot be a place which would satisfy the term "temporarily resides" as appears in section 27. The legislature has provided the aggrieved women who are financially, economically or physically abused wide options to institute a case which best suited their convenience, comfort and accessibility. Section 2(i) of 2005 Act indicates "Magistrate" means the Judicial Magistrate of the First Class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal Procedure, 1973 (2 of 1974) in the area were the *aggrieved person resides temporarily* or otherwise or the respondents resides or the domestic violence is alleged to have taken place. Thus even if for a temporary period of time, an aggrieved person is residing at a place, she can seek reliefs under the 2005 Act by filing an appropriate application before the competent Court within the local limits whose jurisdiction such place situates.

Since in the application under Section 12 of the 2005 Act, the opposite party who is the aggrieved person has mentioned her present address as Nadikhanda Sahi, Phulbani where she is staying in her elder daughter's house being subjected to domestic violence, the application is maintainable in the Court of S.D.J.M., Phulbani, Even though the learned counsel for the petitioners disputes the temporary abode of the opposite party at Nadikhanda Sahi, Phulbani, I am of the opinion that in this application under section 407 Cr.P.C., such disputed facts cannot be adjudicated.

Thus the contentions raised by the learned counsel for the petitioners being devoid of merits, the TRPCRL application stands dismissed.

The learned Magistrate shall make every endeavour to dispose of Misc. Case No.3 of 2016 within a period of sixty days from the date of receipt of the order of this Court. A copy of the order be sent to the learned S.D.J.M., Phulbani for compliance.

TRPCRL dismissed.

2017 (I) ILR - CUT-351

S.K. SAHOO, J.

CRLMC NO. 2777 OF 2006

KRUSHNA CHANDRA BEHERA ……..Petitioner

.Vrs.

STATE OF ORISSA …….Opposite party

G.R.C.O. (Criminal) VOL-I – Rules,363, 365

Charge U/s 409 I.P.C. framed against the petitioner by the learned J.M.F.C., Kantabanji – Prosecution examined three witnesses and exhibited certain documents – During Court inspection C.J.M., Kantabanji directed the Magistrate to frame the charge afresh and to proceed with de novo trial – Order challenged – Rules 363 and 365 of the G.R.C.O. (Criminal) Vol-I indicate that after inspection of the Courts, C.J.M. has to send a copy of the inspection report to the concerned Magistrate for his views /compliance report and if he gets the views he has to forward it with his inspection report to the District and Sessions Judge – However if the views not received within time,

the C.J.M. has to send his inspection report alone to the District and Sessions Judge, who after examination shall pass appropriate order to the C.J.M. and concerned Magistrate for taking appropriate action.

In the present case learned C.J.M. without seeking the views of the J.M.F.C. has straightway directed for framing of fresh charge and to proceed with the trial – Held, the impugned orders are set aside – When inspection report of the C.J.M., Bolangir in the year 2005 alongwith the views of the learned J.M.F.C., Kantabanji would be placed before the learned District and Sessions Judge, Bolangir, the learned Sessions Judge keeping in view the provisions under sections 212, 219 Cr.P.C. and other provisions found that there is illegality in framing of charge U/s 409 IPC, shall initiate a suo motu Criminal revision and correct the error committed by the trial Court in accordance with law after giving opportunity of hearing to the respective parties.

For Petitioner : Mr. Manoj Kumar Mohanty, M. R. Pradhan
K. C. Tripathy, T. Pradhan,
S.K. Panda & J. R. Bhuyan
For Opposite Party : Mr. Jyoti Prakash Patra (A.S.C.)

Date of Hearing : 25.10. 2016
Date of Judgment: 25.10.2016

JUDGMENT

S. K. SAHOO, J.

Heard Mr. Manoj Kumar Mohanty, learned counsel for the petitioner and Mr. Jyoti Prakash Patra, the learned Addl. Standing counsel for the State.

This is an application under section 482 of Cr.P.C. filed by the petitioner Krushna Chandra Behera challenging the orders dated 21.04.2006 and 25.05.2006 passed by the learned J.M.F.C., Kantabanji in G.R. Case No. 207 of 2002 arising out of Bangamunda P.S. Case No.61 of 2002 in directing framing of charge afresh and for de novo trial as per the direction of learned Chief Judicial Magistrate, Bolangir after inspection of the Court in the year 2005.

Learned counsel for the petitioner contended that the petitioner was working as Village Level Worker (VLW) at Bangomunda Block Office and on the First Information Report dated 20.09.2002 submitted by one Basanta Kumar Oddu, B.D.O., Bangomunda Block, Bangamunda P.S. Case No.61 of 2002 under section 409 of the Indian Penal Code was registered against the petitioner and after completion of investigation, charge sheet was submitted

under section 409 of the Indian Penal Code on 06.08.2004. On 01.10.2004 the learned J.M.F.C., Kantabanji rectified the charge on the ground that the charge was defective and thereafter, the prosecution examined as many as three witnesses to prove the case against the petitioner and exhibited certain documents. Learned C.J.M., Bolangir inspected the Court of the learned J.M.F.C., Kantabanji in the year 2005 and found irregularities in the framing of charge and accordingly, directed the learned J.M.F.C., Kantabanji to frame charge afresh and to proceed with de novo trial. In pursuance of such direction, the learned J.M.F.C., Kantabanji on 21.04.2006 decided to proceed with the trial de novo and fixed the date for framing of charge and on 25.05.2016 the learned J.M.F.C., Kantabanji considering the materials available on record was of the view that there was sufficient materials to presume the complicity of the petitioner in the commission of offence under section 409 of the Indian Penal Code. It is held that the alleged offence was committed in respect of two years i.e. 2001 and 2002 and in view of section 212 and section 220 of Cr.P.C., separate charge for each of the aforesaid years are to be framed and accordingly, two separate files i.e. G.R. Case No. 207 of 2002 and G.R. Case No. 207-A of 2002 for trial of the petitioner under section 409 of the Indian Penal Code in respect of the year 2001 and 2002 respectively were opened.

Challenging the impugned orders dated 21.04.2006 and 25.05.2006, it is contended by the learned counsel for the petitioner that in view of Rule 363, Part-VI, Chapter-I of General Rules and Circular Orders (Criminal) Vol-I, the learned Chief Judicial Magistrate lacks jurisdiction to pass such direction during inspection and therefore, the learned J.M.F.C., Kantabanjhi should not have passed the impugned orders on the direction of learned C.J.M. It is further contended that under Rule 365, the learned District and Sessions Judge is empowered to pass appropriate orders/direction in that respect.

Rule 363 of G.R.C.O. (Criminal) Vol.1 deals with inspection by Chief Judicial Magistrates which is enumerated hereunder:-

363. Inspection by Chief Judicial Magistrates:

The Chief Judicial Magistrates shall inspect the Courts of the Judicial Magistrates subordinate to them quarterly, half-yearly or annually as may be specified by the Court from time to time. These inspections should be detailed and should amongst other matters, be directed to the following:-

x x x x

(8) Framing of charges.

Rule 365 of the G.R.C.O. (Criminal) Vol-I deals with forwarding of notes of inspection by the Chief Judicial Magistrate to the District and Sessions Judge which is enumerated hereunder:-

365. Notes of inspection to be forwarded through Sessions Judge:

The Chief Judicial Magistrate, after inspection of Magisterial Courts will send a copy of the inspection report to the concerned Magistrate within one month from the date of his inspection. The concerned Magistrate will submit his views/compliance report within a period of six weeks from the date of receipt of the copy of the inspection report.

i) The Chief Judicial Magistrate will forward a copy of his inspection report along with the views/compliance report of the concerned Magistrate to the District and Sessions Judge within a period of four weeks from the date of receipt of the Magistrate's views. In case no views/compliance report are received from the concerned Magistrate within the aforesaid period of six weeks, the Chief Judicial Magistrate will send his inspection report to the District and Sessions Judge without waiting for the views/compliance from the concerned Magistrate.

ii) The District and Sessions Judge shall examine the inspection report of the Chief Judicial Magistrate along with the views/compliance reports of the concerned Magistrate and thereafter he shall pass appropriate orders/directions to the Chief Judicial Magistrate and the concerned Magistrate for taking appropriate action. However, in cases where orders/directions of the High Court are necessary, it shall be referred to the Registry of the Court.

iii) A copy of the order/direction issued by the District and Sessions Judge along with a copy of the inspection report of the Chief Judicial Magistrate shall be sent to the Registry of this Court for record.

Thus the combined reading of Rules 363 and 365 of the G.R.C.O. (Criminal) Vol-I would indicate that after inspection of the Courts of the Judicial Magistrates, the Chief Judicial Magistrate has to send a copy of the inspection report to the concerned Magistrate for his views/compliance report within stipulated period of time and if he gets the views/compliance report, he has to forward it along with his inspection report to the District and Sessions Judge. However, if the views/compliance report is not received

within such time, the Chief Judicial Magistrate has to send his inspection report alone to the District and Sessions Judge. The District and Sessions Judge after examining the inspection report of the Chief Judicial Magistrate along with the views/compliance report of the concerned Magistrate shall pass appropriate orders/directions to the Chief Judicial Magistrate and the concerned Magistrate for taking appropriate action.

In the present case, it seems that without seeking for the views of the learned J.M.F.C., Kantabanji on his inspection report, the learned Chief Judicial Magistrate has straightway directed for framing of fresh charge and to proceed with the trial de novo. This is impermissible in view of the provisions enumerated under Rules 363 and 365 of the G.R.C.O.(Criminal) Vol-I. If the Chief Judicial Magistrate found any irregularities in the framing of the charge during his inspection of the Court of learned J.M.F.C., Kantabanji, he should have been called for the views of the concerned Magistrate on such irregularities and then he should have been forwarded his inspection report along with the views of learned J.M.F.C., Kantabanji to the learned District and Sessions Judge, Bolangir for passing the appropriate orders/directions. The learned J.M.F.C., Kantabanji should not have done what he has done as per orders dated 21.04.2006 and 25.05.2006 on the direction of the C.J.M., Bolangir.

Accordingly, the impugned orders dated 21.04.2006 and 25.05.2006 passed by the learned J.M.F.C., Kantabanji passed in G.R. Case No. 207 of 2002 are hereby set aside.

The relevant inspection report of the C.J.M., Bolangir in the year 2005 should be sent to the learned J.M.F.C., Kantabanji within a period of four weeks by the learned C.J.M., Bolangir from the date of receipt of the judgment for submission of his views on the framing of charge and after receipt of the views, if any, the learned C.J.M., Bolangir shall submit the inspection report which was prepared in the year 2005 along with the views of the learned J.M.F.C., Kantabanji to the learned District and Sessions Judge, Bolangir.

Section 212(2) of Cr.P.C. indicates that if the accused is charged with criminal breach of trust or dishonest misappropriation of money or other moveable property then if it is not possible to specify the exact date and time and the exact amount in respect of which the offence is alleged to have been committed then it would be sufficient to specify the gross sum or the moveable property and the dates between which the offence is alleged to have been committed. However the time included between the first and the

last of such dates should not exceed one year. Therefore the charge ought not to refer the gross sum or the items which extend over a period of more than one year. When the period exceeds one year or the charge does not specify the first and last dates during which the criminal breach of trust or dishonest misappropriation of money takes place then it will cause serious prejudice to the accused and section 465 of Cr.P.C. will not cure the irregularity. In view of section 219(1) of Cr.P.C., the accused must be charged with not more than three offences of the same kind if it has been committed within a space of twelve months from the first to the last of such offences, whether in respect of the same person or not. Therefore, if an accused is alleged to have committed four distinct and separate acts of misappropriation for separate ascertained sums of money, the prosecution is permitted to try three of them at one trial, if committed within the space of one year and try the remaining charge at another trial. Though as per the order dated 25.05.2006, it appears that the petitioner has committed the offence under section 409 of the Indian Penal Code in respect of the year 2001 and 2002 respectively, it is not clear as to whether the offences are committed within a space of twelve months from the first to last of such offences.

When the inspection report of the Chief Judicial Magistrate, Bolangir in the year 2005 along with the views of the learned J.M.F.C., Kantabanji would be placed before the learned District and Sessions Judge, Bolangir, keeping in view the provisions under section 212 and 219 of the Cr.P.C. and other provisions, if it is found that there has been illegality/irregularities in the framing of the charge under section 409 of the Indian Penal Code, the learned Sessions Judge, Bolangir shall initiate a suo motu criminal revision proceeding and correct the error committed by the learned Trial Court in accordance with law. Needless to say that before correcting any error in the framing of charge, opportunity of hearing should be provided to the respective parties. With the aforesaid observation the CRLMC is disposed of.

CRLMC disposed of.

2017 (I) ILR - CUT-357

K.R. MOHAPATRA, J.

CRLMC NO. 512 OF 2013

RAMAKANTA SAHOO & ORS. ……..Petitioners

.Vrs.

STATE OF ORISSA & ANR. ……Opp. Parties

(A) CRIMINAL PROCEDURE CODE, 1973 – S. 203

Dismissal of first complaint case U/s 203 Cr. P.C. – Whether a second complaint will lie on the self same facts ? – Held, second complaint on the self same facts could be entertained only in exceptional circumstances, namely.

i) Where the previous order was passed on an incomplete record; or
ii) On a misunderstanding of the nature of complaint; or
iii) It was manifestly absurd or unjust; or
iv) Where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced.

(Para 11)

(B) CRIMINAL PROCEDURE CODE, 1973 – Ss. 256,300, 200,203

Complaint case – Absence of complainant consequential dismissal of complaint case and acquittal of the accused U/s 256 (1) Cr. P.C. – Whether, a second complaint on identical facts is maintainable ? Held, No

Considerations for dismissal of a complaint U/s 203 Cr.P.C. and U/s 256 (1) Cr.P.C. are completely different – The power U/s 256 (1) Cr.P.C. can only be exercised at the stage of trial and an acquittal under that section shall be covered under the principles of section 300(1) Cr.P.C. – So in this case the only alternative available for the complainant is to prefer an appeal U/s 378 Cr.P.C to set aside the order of acquittal and he is debarred from filing a second complaint on the self same facts so long as the order of acquittal is not setaside.

(Paras 6,10,12)

Case Laws Referred to :-

1. 2006 CRI. L.J. 601 : Om Gayatri & Co. & others –v- State of Maharashtra & anr.
2. 1988 (II) OLR 362 : Madan Mohan Tripathy –v- Rama Chandra Behera.
3. AIR 2001 SC 784 : Jatinder Singh and others –v- Ranjit Kaur.
4. (2003) 1 SCC 734 : Mahesh Chand –v- B. Janardhan Reddy and anr.

For Petitioners : M/s. Arijeet Mishra, S.K.Jena,S.Biswal,S.K. Panda, S.P. Mishra & P.C. Mishra

For Opp. Parties : Addl. Standing Counsel

Date of Order: 16.09.2016

O R D E R

K.R. MOHAPATRA, J.

The petitioners in this petition under Section 482 Cr.P.C. assail the order dated 24.12.2012 (Annexure-2) passed by the learned J.M.F.C., Jajpur Road in I.C.C. No. 209 of 2012 taking cognizance of the offence under Sections 294, 323, 341, 342, 506 and 34 I.P.C.

2. Though notice on the opposite party no.2 was made sufficient, none appears for the opposite party no. 2, when the matter was called.

3. It is submitted by Mr. Mishra, learned counsel for the petitioners that the opposite party no.2 had earlier filed I.C.C. No. 35 of 2010 before the learned J.M.F.C., Jajpur Road. After appearance of the petitioners in the aforesaid complaint case, the matter was posted for hearing. On 14.05.2012, when the matter was posted for hearing, though the petitioners appeared, neither opposite party no. 2 nor his counsel took any step. Hence, the complaint was dismissed for default for non-appearance of the complainant-opposite party no.2 and the petitioners were acquitted. Subsequently, the petitioners filed another complaint case (I.C.C. No. 209 of 2012) on the same set of allegations and stating that due to their illness, they could not appear on the date of hearing for which I.C.C. No. 35 of 2010 was dismissed for default on 14.5.2012. It is the submission of Mr. Mishra that the second complaint (I.C.C. No. 209 of 2012) for the same offence is not maintainable and hence, the proceeding is liable to be quashed.

4. When the matter came up on 8.8.2016, this Court after hearing leaned counsel for the parties passed an order directing the learned counsel for the petitioners to check up whether after dismissal of the complaint under Section 256 (1) Cr.P.C. for non-appearance of the complainant and acquittal of the accused, a second complaint for the self-same occurrence would lie or not.

5. In view of the above, the only question remains to be decided in this case is whether the second complaint on the self-same allegation is maintainable, when earlier one was dismissed under Section 256 (1) of the Cr.P.C.

In support of his case, Mr. Mishra, learned counsel for the petitioners relied upon the decision in the case of ***Om Gayatri & Co. & others –v- State of Maharashtra & another***, 2006 CRI. L.J. 601, wherein it has been held as follows:

> "11. ……In the present case, the Magistrate found that the complainant was avoiding to lead evidence, therefore, relying on the ruling of this Court reported in 1998 Mah LJ 576: (1998 Cri LJ 3754) the Magistrate proceeded to pass an order acquitting the accused. Once this order has been passed, the remedy of the complainant is to prefer an appeal under Section 378 of the Code of Criminal Procedure after obtaining leave of the Court as required by Section 378 (4) of Cr.P.C..... …… There is one more distinction which will have to be kept in mind and that is, that once an order of acquittal under Section 256(1) of the Criminal Procedure Code, 1973 is passed, then the complainant is debarred from filing a second complaint on the same facts so long as the order of acquittal is not set aside. Therefore, the only course open to the complainant was to prefer an appeal in the High Court against the said order of the learned Magistrate by special leave of the Court under section 378 (5) of the Criminal Procedure Code, 1973."

7. Mr. Pani, learned Addl. Standing Counsel for the State, however, supported the impugned order of taking cognizance and submitted that earlier complaint having not been considered on merit and the petitioners having not faced the trial, a second complaint on the same set of allegations is maintainable.

8. Having heard Mr. Mishra, learned counsel for the petitioners and the learned Addl. Standing Counsel for the State (opposite party no. 1) and on perusal of the case record, it is abundantly clear that the learned J.M.F.C. has exercised his power conferred on him under Section 256 (1) of the Cr.P.C. and dismissed the complaint for default of the complainant and acquitted the accused person as well. Section 256 of the Cr.P.C. provides the procedure to be adopted by the Magistrate for non-appearance or death of the complainant. Sub-section (1) provides that if the summons has been issued on complainant, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing of the case may be adjourned, the complainant does not appear, the Magistrate shall acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.

Three courses are open for the Magistrate in the event of non-appearance or death of the complainant on the date of hearing, such as:-

(a) shall acquit the accused; or

(b) adjourn the hearing of the case; or

c) when the complainant is represented by a pleader or officer conducting prosecution, dispense with personal appearance of the complainant.

9. In the case at hand, the Magistrate in terms of Section 256 (1) of the Cr.P.C. acquitted the accused persons (petitioners herein) for non-appearance of the complainant by his order dated 14.5 .2012. The said order having not been challenged/modified or varied at any subsequent stage has reached its finality. Again on the same set of allegations, the complainant-opposite party no. 2 filed another complaint in I.C.C. No. 209 of 2012 stating therein that on 14.5.2012, the complainant was suddenly fell ill and could not attend the court.

Thus, the question arises whether an acquittal under Section 256 (1) of the Cr.P.C. would be covered under Section 300 (1) of the Cr.P.C. which provides that a person once has been tried by a competent Court for an offence and convicted or acquitted of such offence, shall not be, while such conviction or acquittal remains in force, liable to be tried again.

10. An exception may be taken to the words 'has once been tried' appearing in Section 300(1) Cr.P.C. When an order under Section 256 (1) is passed, an obvious question may arise that the accused has not faced the trial, so the order of acquittal may not be covered under Section 300 (1) of the Cr.P.C. The said query has been answered in a decision of this Court in the case of ***Madan Mohan Tripathy –v- Rama Chandra Behera***, reported in 1988 (II) OLR 362. This Court placing reliance on several case laws including the case of State of Karnataka –v- K.H. Annegowda and another, reported in (1977) 1 SCC 417, held that 'tried' under Section 300 (1) Cr.P.C. would include all steps taken after taking of cognizance which includes the date of appearance of the accused after issuance of summons. Thus, this Court in the case of Madan Mohan Tripathy (supra) held that an acquittal under Section 256 (1) Cr.P.C. is squarely covered under the provisions of Section 300 (1) Cr.P.C.

In the case of ***Jatinder Singh and others –v- Ranjit Kaur***, reported in AIR 2001 SC 784, it has been held as under:

> "9. There is no provision in the Code or in any other statute which debar a complainant from preferring a second complaint on the same

> allegations if the first complaint did not result in a conviction or acquittal or even discharge. Section 300 of the Code, which debars a second trial, has taken care to explain that "the dismissal of a complaint or the discharge of an accused is not an acquittal for the purpose of this Section." However, when a Magistrate conducts an inquiry under Section 202 of the Code and dismisses the complaint on merits, a second complaint on the same facts cannot be made unless there are very exceptional circumstances. Even so, a second complaint is permissible depending upon how the complaint happened to be dismissed at the first instance.
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> xxx xxx xxx

12. If the dismissal of the complaint was not on merit but on default of the complainant to be present there is no bar in the complainant moving the Magistrate again with a second complaint on the same facts. But if the dismissal of the complaint under Section 203 of the Code was on merits the position could be different. There appeared a difference of opinion earlier as to whether a second complaint could have been filed when the dismissal was under Section 203. The controversy was settled by this Court in Pramatha Nath Talukdar –v- Saroj Ranjan Sarkar, AIR 1962 SC 876 : (1962)(I) Cri LJ 770). A majority of Judges of the three Judge Bench held thus (Para 48):

> "An order of dismissal under S. 203, Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into."

In the aforesaid case law, the Hon'ble Apex Court was examining the maintainability of a second complaint for the same offence after dismissal of earlier one under Section 203 Cr.P.C. and came to a conclusion that a second complaint in such a circumstance is maintainable. But, considerations for dismissal of a complaint under Section 203 Cr.P.C. and that under Section

256(1) Cr.P.C. are completely different. The power under Section 256(1) of the Code can only be exercised at the stage of the trial. Thus, an acquittal under Section 256(1) of Cr.P.C. shall be covered under the principles of Section 300(I) of Cr.P.C.

11. At this stage, it is profitable to refer para-48 of the case of Pramatha Nath Talukdar quoted herein above. This view has been reaffirmed in the case of ***Mahesh Chand –v- B. Janardhan Reddy and another***, reported in (2003) 1 SCC 734, which subscribes that a second complaint on the same facts could be entertained only in exceptional circumstances, namely;

i) Where the previous order was passed on an incomplete record; or
ii) On a misunderstanding of the nature of complaint; or
iii) It was manifestly absurd or unjust; or
iv) Where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced.

The case at hand does not fall under any of the category stated above. Hence, the ratio decided in Jatinder Singh's case (supra) is not applicable here.

12. The only alternative available before the complainant was to prefer an appeal under Section 378 Cr.P.C. following due procedure of law against an order of acquittal under Section 256 (1) Cr.P.C. The said view also gets support from the decision in the case of *Om Gayatri* (*supra*), relied upon by Mr. Mishra. In that view of the matter, the second complaint on the same allegation in I.C.C. No. 209 of 2012 pending before the learned J.M.F.C., Jajpur Road is not maintainable.

13. Accordingly, the CRLMC is allowed. The proceeding in I.C.C. No. 209 of 2012 pending before the learned J.M.F.C., Jajpur Road is quashed.

CRLMC is allowed.