D.H.WAGHELA, C.J. & B.P.RAY, J.

W.P.(C) NO. 20780 OF 2015 & MC NO. 19305 OF 2015

SHANTI BHUSHAN PANDEY ....Petitioner

.Vrs.

O.A.T, PRINCIPAL BENCH, BBSR. & ORS. ....Opp. Parties

SERVICE LAW – Advertisement for 37 vacancies of Junior Lecturer in Physics – Petitioner and O.P.No.4 applied being "Physically Handicapped" category – In the selection process petitioner obtained 66 marks and O.P.No.4 secured 197 marks – However, O.P.S.C. selected petitioner on the ground that O.P.No.4 applied against S.E.B.C. category for which there was no vacancy – O.A. filed – Tribunal quashed the appointment of the petitioner – Hence this writ petition – O.P.No.4 and the petitioner both being entitled to the benefit of horizontal reservation in "Physically Handicapped" category, the criteria to choose one from the two could only be merit indicated by the marks obtained by them in the written test and viva voce test – Mere fact that O.P.No.4 has mentioned that he belongs to S.E.B.C. or may even inadvertently or consciously trying to take the benefit of the status of belonging to the category of S.E.B.C. by itself not disqualify him from completing on merit when candidates in the special category of Physically Handicapped were to be considered – Moreover the petitioner can not steal a march over O.P.No.4 only because of mentioning of his community as S.E.B.C. – Held, there is no reason to interfere with the impugned order passed by the Tribunal.

(Paras 6, 7)

Case Laws Referred to :-

1. AIR 2007 SC 3127 : (2007 AIR SCW 5650) : Rajesh Kumar Daria -V- Rajasthan Public Service Commission & Ors.
2. (2009) 7 SCC 251 : Union of India & Ors. -V- Dalbir Singh & Anr.

For Petitioner : Mr. Rajat Rath, Senior Advocate,
M/s. Samir Ku. Das, S.K.Mishra & P.K.Behera

For Opp. Parties : Mr. M.S.Sahoo, A.G.A.

Date of Hearing : 23. 11.2015
Date of Judgment : 23. 11. 2015

JUDGMNET

D.H.WAGHELA, C.J.

1. The present petition is preferred against the order dated 04.10.2015 of the Odisha Administrative Tribunal in O.A. No. 2627 of 2013. The

petitioner herein was joined as respondent No.4 before the Tribunal and the final order of the Tribunal reads as under:-

> "11. In view of the above analysis it is clearly seen that respondent No.3 O.P.S.C. recommended the name of private respondent No.4 for appointment in pursuance to advertisement No.9 at Annexure-I in P.H.O.H. category, when in the tests the applicant has secured 197 marks and respondent No.4 has secured only 66 marks.This is wholly against the principles of recruitment, principles of equity and hence illegal. O.A. is therefore allowed. The result of selection published by O.P.S.C. at annexure-5 dated 24.08.2013 so far it relates to selection of respondent No. 4 to the post of Junior Lecturer in Physics in P.H. (O.H.) category is quashed. The applicant securing much higher marks in P.H. (O.H.) category than respondent No.4 is entitled to be considered for recommendation in P.H. (O.H.) category for the post of Lecturer pursuant to advertisement No.9. State respondents are therefore, directed to offer him appointment and extend all the service benefits with effect from the date from which other selected candidates whose names found place in Annexure-5 got such appointment along with all service and consequential benefits.
>
> Entire exercise be completed within a period of three months from the date of receipt a copy of this order.
>
> With these orders O.A. is accordingly disposed of."

2. By virtue of the above order, the selection made in favour of the present petitioner stands quashed and hence, being aggrieved, he has approached this Court.

It would be more convenient to name the contesting parties herein in order to avoid the confusion by calling them as petitioner and respondents.

3. The simple facts of this case are that Shri Bijaya Kumar Sahoo, who belonged to Physical Handicapped (P.H./O.H. category) was a candidate for the post of Lecturer in Physics and he participated in the selection process conducted by the Odisha Public Service Commission. He was aggrieved by the result of the selection as published by O.P.S.C. on 24th August, 2013, insofar as Shri Santi Bhusan Pandey was selected. There is no dispute about the facts that both Shri Bijaya Kumar Sahoo and Shri Santi Bhusan Pandey had undergone the selection process and the O.P.S.C. had published the total marks secured by the candidates in written test as well as *viva voce.*

According to that result, Shri Sahoo has secured 152 marks in written test and 45 marks in the *viva voce* with the grand total of 197 marks; whereas Shri Pandey secured 46 marks in written test and 20 marks in *viva voce* test totaling to 66 marks. Both the candidates belonged to Physically Disabled category and hence, Shri Sahoo approached the Tribunal when the O.P.S.C. failed to recommend his name for the appointment.

The Tribunal has, in the impugned order, taken the view that selection in the horizontal category, i.e. P.H./Ex-servicemen persons/Sports person etc. was a condition precedent to the placement of such selected candidates in appropriate category.

Therefore, Shri Sahoo was entitled to be selected on the basis of his performance irrespective of vertical reservation in the categories of S.C./S.T./ S.E.B.C. or U.R.

4. As against the above reasoning, learned Senior counsel, Shri R.K. Rath appearing for the petitioner, Shri Pandey, vehemently argued that while submitting his application to O.P.S.C., Shri Sahoo had specifically mentioned the letters, "S.E.B.C. in item No. 8 (a) for mentioning the community, to which the candidate belonged. He relied upon the photo copy of the application form of Shri Sahoo. To further emphasise that, as against the column for "category of vacancy against which applied for", Shri Sahoo had clearly mentioned the letters "S.E.B.C.", which left no doubt that he had applied for the post in the reserved category of S.E.B.C. He further submitted on that basis that if any vacancy were not available for the S.E.B.C. candidate in the recruitment in question, his mark could not be compared with the marks of Shri Pandey, whose candidature was admittedly considered in the Un-reserved category. Learned Senior counsel relied upon the decision of the apex Court in ***Rajesh Kumar Daria v. Rajasthan Public Service Commission & Ors.***, AIR 2007 SC 3127: (2007 AIR SCW 5650) and ***Union of India and Others v. Dalbir Singh and Another*** (2009) 7 SCC 251.

5. It was argued for the petitioner that Shri Sahoo cannot be allowed to compete in the category, in which he had not applied. The latter decision of the apex Court in Dalbir Singh (supra) was pressed to emphasise the observation that the candidate having opted to consider his case only under O.B.C. category, he cannot thereafter claim that his case was required to be considered on the general merit, only because he scored better percentage of marks than the last selected candidate in the general merit. It may be pertinent to note here that in the facts of that case the advertisement was

issued separately for general and O.B.C. categories and pursuant to such advertisement, the applicant had applied against O.B.C. category and not under general category and, therefore, his name was not considered under the general category.

6. Applying the ratio of aforesaid judgments in the facts of the present case, it has to be noted that the Advertisement No. 9 of 2011-12 for recruitment of Junior Lecturer in Physics in Odisha Education Service (Group-B) was issued with the last date for receipt of application being 15th February, 2012. The vacancy position in the advertisement was in a tabular form. As for the posts of Junior Lecturers in the discipline of Physics, total number of vacancies was 37 and reservation for S.T. & S.C. was 18 and 8 respectively. There was a column for S.E.B.C. but no vacancy was mentioned in that column, which clearly indicated that the vacancy in the reserved category where only 18 and 8 and only for S.T. & S.C. and none for S.E.B.C. The other columns indicated U.R., i.e. “Unreserved” category with the number as 11, whereas column nos.8 and 9 indicated two posts for P.H.(Physical Handicapped) and one vacancy for Ex-servicemen. Thus, undisputably, there was no reservation or vacancy in the S.E.B.C. category. Therefore, when Shri Sahoo mentioned in his application-form the category of vacancy, against which he had applied, the words, “S.E.B.C." it did not and could not amount to claiming a post in the non-extant reserved category and the only other category, in which, his candidature could have been considered, was in the general or "Unreserved” category. Shri Sahoo and Shri Pandey both being entitled to the benefit of horizontal reservation in "Physically Handicapped" category, the criteria to choose one from the two could only be merit indicated by the marks obtained by them in the written test and *viva voce* test. Mere fact of Shri Sahoo mentioning his belonging to S.E.B.C. or may be even inadvertently or consciously trying to take the benefit of the status of belonging to the category of S.E.B.C. by itself did not disqualify him from completing on merit when candidates in the special category of Physically Handicapped were to be considered, nor can Shri Pandey steal a march over Shri Sahoo only because of the mentioning of this community as S.E.B.C. by Shri Sahoo.

7. In the above facts and circumstances, the legal propositions applied by the Tribunal in the impugned judgment are unexceptionable and no reason to interfere with the conclusions and final order are made out. Therefore, the petition is dismissed at the threshold along with the misc. case filed therein.

Writ petition dismissed.

2016 (I) ILR - CUT-5

PRADIP MOHANTY, J. & BISWAJIT MOHANTY, J.

W.P.(C) NO.S. 10431 OF 2012 (WITH BATCH)

KALIA HATI & ORS. ……..Petitioners

.Vrs.

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

(A) LAND ACQUISITION ACT, 1894 – Ss. 3(f), 4, 6

Acquisition of land for public purpose – Meaning of – If land acquired for a Corporation owned or controlled by State and compensation money comes from public fund then it can be inferred that the acquisition is for a public purpose – In this case there is no evidence that payment of compensation has been made directly by M/s. Sahara India Power Corporation Ltd. (O.P.No.5) to the land oustees, rather IDCO has deposited the said money with O.P.No.4 for payment and has leased a major portion of the land to O.P.No.5 to establish the mega power plant – Due to the above plant power would be made available to the State at a cheaper rate and it would generate employment opportunities for the local people – Held, in this case acquisition has been rightly made under part-II of the Act.

(Paras 21, 22)

(B) LAND ACQUISITION ACT, 1894 – S.4

Writ petition to declare notification U/s. 4(1) of the Act as illegal – Delay of more than two years – Writ petitions involving illiterate village folk from a backward district of Odisha – Writ petition need not be dismissed on the ground of delay. (Para 16)

(C) CIVIL PROCEDURE CODE, 1908 – S.11

Land acquisition proceeding – Writ petitions filed earlier challenging such proceeding were dismissed – Objection raised to dismiss the present writ petitions being barred by resjudicata – It is seen that the parties and prayers made in the earlier writ petitions as well as present writ petitions are different – Moreover earlier writ petitions were not adjudicated on merit – Held, present writ petitions are not barred by the principles of resjudicata.

(Para 17)

(D) LAND ACQUISITION ACT, 1894 – Ss. 4, 5-A, 6

Land acquisition proceeding – Challenge made on the ground of non-publication of notice for which petitioners failed to file objection –

It is seen that various modes of public notification have been issued, pursuant to which 92 persons of the four villages have submitted their objection – Petitioners who have not filed objections to section 4(1) notification can not be permitted to contend that section 5-A enquiry is vitiated nor can they be permitted to seek for quashing the declaration U/s. 6 of the Act – However they can only challenge on the ground that the purpose for which land acquired was not for a public purpose – There is also no allegation that despite existence of Govt. land in the locality, the Govt. went for acquisition of private land – In this case, since notifications under sections 4 & 6 were duly published acquisition of land has been done with the principles of natural justice – Held, it is wrong to say that there was no adequate notification U/s. 4 of the Act. (Paras 18, 19, 24)

Case Laws Referred to :-

1. (2000) 7 SCC 296 : (Delhi Administration v. Gurdip Singh Uban & Ors)
2. AIR 2003 SC 3141 : (Maruti Suzuki India Ltd. v. Rajiv Kumar Loomba & Anr etc.)
3. AIR 2009 SC 2086 : (Urmila Roy and others v. M/s. Bengal Peerless Housing Development Company and others)
4. AIR 2004 SC 561 : (Guruvayur Devaswaom Managing Committee & Anr. v. C.K.Rajan & Ors)
5. (2008) 9 SCC 552: (Sooraram Pratap Reddy and others v. Dist. Collector, Ranga Reddy Dist. & Ors)
6. 2014 (II) ILR Cuttack 64 : Sachalabala Sethy & Ors v. the Chief Secretary and Chief Development Commission, Odisha & Ors).
7. (2008) 4 SCC 695 : (Swaika Properties (P) Ltd. and another v. State of Rajasthan & Ors.)
8. AIR 2000 SC 3737 : (Delhi Administration v. Gurdip Singh Uban & Ors).
9. (2010) 9 SCC 46) : Rajinder Kishan Gupta and another v. Union of India & Ors.
10. 2003) 10 SCC, 626: (Prativa Nema & Ors. v. State of M.P. & Ors)
11. (2008) 9 SCC 552 : (Sooraram Pratap Reddy & Ors v. Dist. Collector, Ranga Reddy Dist. & Ors)
12. (2010) 10 SCC 282 : (Nand Kishore Gupta and others v. State of U.P. & Ors).
13. (2006) 4 SCC 683 : (Smt. Somavanti and others v. The State of Punjab & Ors)

14. (2010) 9 SCC 46 : (State of Karnataka and another v. All India Manufacturers Organization & Ors.)
15. 2014 (II) ILR Cuttack 64 : (Rajinder Kishan Gupta and another v. Union of India & Ors.)
16. W.P. (C) No.16815 of 2012 :(Sachalabala Sethy and others v. the Chief Secretary and Chief Development Commission, Odisha & Ors.)

For Petitioners : M/s. M.K.Pati, R.K.Mohapatra, B.P.Satpathy & S.K.Mishra
For Opp. Parties: Mr. J.P.Pattnaik, A.G.A.
Mr. Gautam Mukherjee, A.C.Panda, Subhalaxmi & S.Priyadarsini
Mr. Jayant Das, Senior Advocate
Mr. S.S.Das, Senior Advocate
M/s. A.N.Das, Miss K.Behera, S.Modi, P.K.Ghosh & S.S.Pradhan

Date of Judgment: 13.07.2015

JUDGMENT

BISWAJIT MOHANTY, J.

The above writ petitions have been filed by the villagers of Mahada, Sargunamunda, Pudapadar and Ghantbahal falling under Titilagarh Tahasil in the district of Bolangir mainly with the following prayers:

> To admit the writ applications, issue Rule Nisi calling upon the opp. parties to show cause as to why the Lands acquisition proceeding and notifications U/s.4 (1) and declaration U/s.6 (1) and notice under Section 12 (2) of the L.A. Act and all consequential decisions shall not be declared illegal and inoperative and shall not be quashed;If the opp. parties failed to show cause or show insufficient cause, the said Rule be made absolute and consequently the Land acquisition proceeding for construction of Sahara India Power Corporation at Ghantabahal, Mahada, Sargunamunda, Luthurbandh, Pudapadar, Jamjore & Serko etc. be declared as illegal, arbitrary and inoperative in the eyes of law and the notification U/s. 4 (a), U/s.6 (1) and notice under Sec.12 (2) of the L.A. Act and all consequential decisions be quashed;

It may be noted here that W.P. (C) No.10431 of 2012, W.P. (C) No.10432 of 2012, W.P. (C) No.10433 of 2012 and W.P.(C) No.10436 of 2012 were filed by villagers of Sargunamunda, Mahada, Pudapadar and Ghantabahali respectively. W.P. (C) No.7163 of 2012 was filed by villagers belonging to the above four villages only.

2. At the outset, it is made clear that learned counsel for the parties agreed and submitted that since the issues involved in all these writ petitions are one and same, W.P. (C) No.10432 of 2012 should be taken as lead case along with other writ applications. Learned counsel for the petitioners filed memos on 26.03.2015 to the effect that written note of submission filed on behalf of the petitioners on 19.02.2015 in W.P. (C) No.10432 of 2012 be treated as final and the same be adopted for rest four writ applications. Though initially all the writ petitions were filed as public interest litigations, however, later on, vide order dated 19.06.2012 passed in W.P. (C) No.10431 of 2012, it was made clear that interim orders passed earlier have to be confined to the petitioners of these five cases only. Thus, for all purposes the present writ petitions have become private interest litigations between petitioners and the opp. parties. It is important to note here that vide orders dated 12.11.2014, the names of petitioner Nos.11 and 13 have been deleted from W.P. (C) No.10432 of 2012, name of petitioner No.7 has been deleted from W.P. (C) No.7163 of 2012, names of petitioner Nos.8 and 19 have been deleted from W.P. (C) No.10436 of 2012, names of petitioner Nos.5,10,12,18,19 and 20 have been deleted from W.P. (C) No.10433 of 2012 and names of petitioner Nos. 14 and 15 have been deleted from W.P. (C) No.10431 of 2012.

3. Now to a survey of facts. On 16.10.2008, there was a meeting of the State Level Single Window Clearance Authority (for short "the SLSWCA") which was chaired by the Chief Secretary, Odisha. In the said meeting, amongst other proposals, proposal of opp. party No.5, i.e., M/s. Sahara India Power Corporation Ltd. for setting up a 1320 MW Coal based Mega Power Plant at village Turla and Ratanakhandi under Tusra Tahasil of Bolangir district with an investment of Rs.5604.00 crores was considered. The SLSWCA recommended the proposal of opp. party No.5 to High Level Clearance Authority (for short the "HLCA") subject to a number of conditions. Some time thereafter, on 7.2.2009, a Memorandum of Understanding (Annexure-A/1 series filed in W.P. (C) No.10432 of 2012) was signed between opp.party No.5 and Governor of Odisha represented by

the Commissioner-cum-Secretary, Energy Department. In the said MOU, it was indicated inter alia that:

(i) infirm power would be made available to the State at variable cost.

(ii) a nominated agency(s) authorized by Government would have the right to purchase 14% of power sent out from the Thermal Power Plant(s) at variable cost if Coal Blocks are allocated to the IPP within the State, otherwise, it would provide 12% power at variable cost. Tariff for such power would be determined by the Odisha Electricity Regulatory Commissions.

(iii) Opp. party No.5 would have the right to sell the balance power from the Thermal Power Plant(s) to any party outside or inside the State of Odisha subject to applicable laws and regulations, for which opp. party No.5 might enter into contractual arrangement(s) with such buyer(s), the terms of which would be mutually agreed between opp. party No.5 and such buyer (s).

(iv) In case the Government or its nominated agency was unable to honour the terms of the Power Purchase Agreement (PPA), opp. party No.5 would have the right to sell such power to any other party in or outside the State of Odisha.

(v) The Government agreed to acquire the required land and handover the required land free from all encumbrances to opp.party No.5 through Odisha Industrial Infrastructure Development Corporation (IDCO) for the Project and allied facilities.

(vi) Opp. party No.5 agreed to pay the cost of the land to IDCO in case the land was acquired for the purpose and to the revenue authorities in case the land was Government land along with the rehabilitation costs and other related charges. In case the Project was abandoned for some reason or other, all required rehabilitation cost would be borne by the opp. party No.5 in the same manner as if the project had been implemented. All incidental charges paid by the opp. party No.5 for such land acquisition paid to various authorities would stand forfeited.

(vii) As the opp. party No.5 was a responsible corporate house with a high involvement in employee's welfare and social development, the Government, therefore, understood that opp. party No.5 would bring this philosophy to the Power Plant being set up in Bolangir District to

ensure the well being of this District in particular and the people of Odisha in general. In the matter of employment, preference would be given to the people of Odisha as well as local persons subject to the need of the project and their possessing the necessary qualifications and opp. party No.5 agreed to comply with policies of the State Government in this regard.

Employment to local people would be provided by the opp. party No.5 in the following ratios for the project affected people and people of Odisha;

Un-skilled and Semiskilled	A minimum 90% of the total requirement from the local people
Skilled level	Minimum 60% from among the local people
Supervisory managerial	A minimum 30% from among the local people
Senior Executives	Open Market based on merit

4. On 4.8.2009 (Annexure F/6 filed in W.P. (C) No.10432 of 2012), the Government of Odisha in Industries Department in exercise of power conferred by Section 2(h), 2 (i) and 14 of the Odisha Industrial Infrastructure Development Corporation Act, 1980, for short "1980 Act" and in pursuance of Revenue Department Notification No.44308/R dated 20.8.1981 declared some industrial zones as industrial estates/industrial areas for purposes of development/establishment of industries by Odisha Industrial Infrastructure Development Corporation (IDCO) in the State with immediate effect. The said notification covers Titilagarh Industrial Estate, falling within Titilagarh Tahasil under Bolangir district. On 16.12.2009 (Annexure-C/2 series filed in W.P.(C) No.10432 of 2012), the Chairman-cum-Managing Director of Industrial Promotion and Investment Corporation of Odisha Ltd., a Government of Odisha undertaking wrote to opp. party No.2 that 950 acres of land be acquired near village Ghantabahal, Mahada, Bhalegaon in Titilagarh Tahasil in the district of Bolangir in favour of opp.party No.5 for setting up 1320 M.W. Power Plant. It was also made clear that the usual terms and conditions of IDCO in addition to the terms and conditions stipulated in MOU be mentioned while executing the land lease agreement. On 14.1.2010, the Odisha Electricity Regulatory Commission made the following observations:-

> " xxx xxx xxx xxx
>
> The gap between availability and the State's Energy requirement has narrowed down from 2003-2004 to 2007-2008 and in the middle of 2007-2008, the availability was equal to the demand. However in the end part of 2008-2009, the availability has fallen below the State's requirement. The situation has worsened further because of the returning of power to the States which had helped Orissa to tide over the power crisis during last summer. The only options left with the existing power distribution authorities are to restrict drawl of distribution licenses or buy power through the route of trade which not only implies enhanced financial burden on the State exchequer but is also limited in supply. Distribution authorities have therefore, in utter compulsion, no other recourse that go for load shedding which implies long duration power cuts in various parts of the State affecting function of everyday life.
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> xxx xxx xxx"

5. On 27.1.2010 vide Annexure-A/2 series filed in W.P.(C) No.10432 of 2012, the HLCA approved the proposal of opp. party No.5 to change the location of the proposed 1320 MW Coal based Power Plant to village Ghantabaheli, Mahada and Bhalegaon under Titilagarh Tahasil in the district of Bolangir, subject to fulfillment of certain conditions as stipulated therein. Accordingly, on 4.3.2010 (Annexure-E/2 series filed in W.P. (C) No.10432 of 2012), IDCO requested opp. party No.3 that a patch of private land measuring Ac.197.87 decimals in village Mahada under Titilagarh Tahasil in the district of Bolangir has been identified as suitable for Industrial Development and the said parcel of land be acquired for industrial purpose. The land schedule along with detail particulars were enclosed in the said letter dated 4.3.2010 for reference. Similar such letters were issued by the IDCO requesting opp. party No.3 for acquisition of land for industrial purposes in village Ghantabaheli, Luthurbandh, Serka, Jamjor, Podapadar and Sargunamunda. It is important to note here that present five writ petitons are concerned with only four villages, namely, Sargunamunda, Mahada, Pudapadar and Ghantabaheli. On 9.4.2010 (Annexure-1 series filed in W.P. (C) No.10432 of 2012) Supplemental deed of Memorandum of Understanding was signed between the Governor of Odisha represented by the Commissioner-cum-Secretary, Energy Department and opp.party No.5. It was made clear therein that whereas the aforesaid parties had entered into a

deed of Memorandum of Understanding on 7.2.2009 to set up a Thermal Power Plant of 1320 MW at Turla, Bolangir in the State of Odisha, whereas the proposal of opp. party No.5 to change the location of the proposed 1320 MW Coal based plant to some villages of Titilargh Tahasil has been approved by HLCA on 27.1.2010 and whereas Water Resources Department have given clearance for proposed Thermal Power Plant in the new location; now, therefore, it was agreed that in the principal MOU dated 7.2.2009 for the words "Turla, Bolangir" wherever they occurred, the words "Ghantabaheli, Mahada and Bhalegaon under Titilagarh Tahasil in Bolangir district" should be deemed to have been substituted. On 11.5.2010 vide Annexure-D/2 of W.P. (C) No.10432 of 2012, Government granted administrative approval for acquisition of land measuring Acs. 808.450 decimals in Titilagarh Tahasil with certain conditions. Out of the four villages with which we are concerned, these villages covered an area of Acs. 581.230 decimals.

6. Accordingly, notification dated 7.6.2010 under Section 4 (1) of the Land Acquisition Act, 1894, for short "1894 Act" was published in the Orissa Gazette Extraordinary on 11.6.2010 with regard to village Mahada. On 16.06.2010 public notice of substance of notification was made. All these have been indicated in the affidavit dated 18.4.2015 filed on behalf of opp. parties 3 and 4. This notification with regard to village Mahada was published in Oriya newspapers - "Sambad Kalika" and "Agni Sikha" on 21.06.2010. Pursuant to such notifications while 22 persons filed their objections, no objection was submitted by the petitioners. On 25.11.2010, declaration under Section 6 (1) dated 20.11.2010 was published in official gazettee. The said declaration was also published in Oriya newspapers - "Sambad" and "Dharitri" on 20.01.2011. Public notice of substance of such declaration was made on 30.11.2010. All these have been indicated in the affidavit dated 18.4.2015 filed on behalf of opp. parties 3 and 4. Similarly, with regard to villages-Sargunamunda, Pudapadar and Ghantabaheli, the required notifications under Section 4 (1) of the "1894 Act" were also published in the Orissa Gazettee, in Oriya newspapers and public notices of substance of notification were also made. All these have been indicated in the affidavits dated 18.4.2015 filed in W.P. (C) No.10431 of 2012, W.P. (C) No.10433 of 2012 and W.P. (C) No.10436 of 2012. Pursuant to such notifications with regard to villages-Sargunamunda, Pudapadar and Ghantabaheli, 25 objections, 30 objections and 45 objections were received respectively. The petitioners of W.P. (C) No.10431 of 2012 belonging to

village, Sargunamunda; petitioners of W.P. (C) No.10433 of 2012 belonging to village, Pudapadar and petitioners of W.P. (C) No.10436 of 2012 belonging to village Ghantabaheli and petitioners of W.P. (C) No.7163 of 2012 belonging to villages-Sargunamunda, Mahada, Pudapadar and Ghantabaheli never filed any objections. Similarly, with regard to villages-Sargunamunda, Pudapadar and Ghantabaheli, declarations under Section 6 (1) of "1894 Act" were published in Orissa Gazettee, also published in Oriya newspapers and public notices of substance of declaration were made. All these have been indicated in the affidavits dated 18.4.2015 filed in W.P. (C) No.10431 of 2012, W.P. (C) No.10433 of 2012 and W.P. (C) No.10436 of 2012. On 22.11.2010, the opp. party No.5 deposited Rs.6,38,16,922/- with IDCO. On 4.12.2010 vide Annexure-H/2 filed in W.P. (C) No.10432 of 2012, IDCO deposited Rs.3,60,14,363/- with opp. party No.4 towards cost of acquisition of land in five numbers of villages, namely, Luthurbandha, Jamjor, Saragunamunda, Pudapadar and Serko under Titilagarh Tahasil in the district of Bolangir. On 29.4.2011, the petitioner Nos.9 and 17 of W.P. (C) No.10432 of 2012 along with others belonging to villages-Sargunamunda, Pudapada and Ghantabaheli filed W.P. (C) No.11768 of 2011 making a number of prayers. Awards were made on 01.06.2011, 16.06.2011, 16.06.2011 and on 29.6.2011 in respect of villages-Pudapadar, Mahada, Ghantabaheli and Sargunamunda respectively. In respect of above villages, possession of the lands in question were taken by the Government between July, 2011 to March, 2012. On 13.7.2011, W.P. (C) No.11768 of 2011 was disposed of by granting liberty to the petitioners therein to approach the opp. parties 1, 2 and 4 of that writ application by filing representations and it was made clear therein that if such representations were submitted, the said representations should be considered and disposed of within six weeks from the date of its submission. Vide order dated 17.9.2011 (Annexure-4 filed in W.P. (C) No.10432 of 2012), State Pollution Control Board, Odisha intimated Harekrushna Chattar petitioner No.1 in the aforesaid writ petition indicating disposal of his representation with certain comments. On 26.9.2011 (Annexure-H/2 filed in W.P. (C) No.10432 of 2012), IDCO deposited Rs.2,60,89,162/- with opp. party No.4 towards the cost of acquisition of land in respect of the villages, i.e., Ghantabahali and Mahada. On 17.04.2012, W.P. (C) No.7163 of 2012 was filed and on 16.05.2012, this Court directed maintenance of status quo with regard to possession of petitioners therein. On 02.06.2012 (Annexure-3 filed in W.P. (C) No.10432 of 2012) notice under Section 12 (2) of "1894 Act" was published in Odiya daily "the Sambad". It was indicated therein that those who would not receive

the compensation amount that amount would be deposited in the District Treasury and the land would be handed over to IDCO authorities. In such background, on 6.6.2012, W.P. (C) Nos.10431 of 2012, 10432 of 2012 and 10433 of 2012 were filed. On 07.06.2012, W.P. (C) No.10436 of 2012 was filed. On 8.6.2012, the opp. Party Nos.4 and 7 of W.P. (C) No.10432 of 2012 intimated opp. Party No.2 to take over possession of acquired land to the tune of Ac.608.61 decimals covering villages-Pudapadar, Mahada, Ghantabaheli, Sargunamunda, Luthurbandh and Jamjore, which were already in their possession. So far as villages, Sargunamunda, Mahada, Pudapadar and Ghantabaheli are concerned, the acquired land came to the tune of Ac.482.24 decimals. The letter dated 8.6.2012 filed along with affidavit dated 18.4.2015 by opop. party Nos.3 and 4 clearly indicated that land of petitioners of W.P. (C) No.7163 of 2012 have been excluded. On 11.6.2012 status quo orders with regard to possession were passed in W.P. (C) No.10431 of 2012, W.P. (C) No.10432 of 2012, W.P. (C) No.10433 of 2012 and W.P. (C) No.10436 of 2012. Later on vide order dated 19.6.2012 passed in W.P.(C) No.10431 of 2012, it was made clear that the interim orders passed earlier were confined to petitioners only in all five writ petitions. As indicated earlier, this modified order is reflected in the order sheet of W.P.(C) No.10431 of 2012. On 2.7.2012, opp. Party Nos. 4 and 7 of W.P. (C) No.10432 of 2012 handed over possession of Ac.392.20 decimals of land of six villages including villages-Sargunamunda, Mahada, Pudapadar and Ghantabaheli to IDCO. On 31.7.2012 by way of registered agreements between the State and IDCO, Government transferred Ac.392.20 decimals of land to IDCO with certain terms and conditions. On 28.8.2012, IDCO executed lease deed in favour of opp. party No.5 and handed over possession of land to the tune of Ac.392.20 decimals for 90 years with a number of conditions. Accordingly, on 4.9.2012, possession was handed over to opp. party No.5. All these things are contained in documents filed along with an affidavit on 18.4.2015 on behalf of opp. Party Nos.4 and 5. It is an affidavit covering W.P. (C) Nos.10431,10432,10433,10436 of 2012.

7. Heard Mr. S.K. Mishra, learned counsel for the petitioners, Mr. Mukherjee, learned counsel for opp. party No.2, Mr. Jayanta Das and Mr. S.S.Das, learned Senior Counsel on behalf of opp. parties 5 and 6 and Mr. J.P. Pattanaik, learned Addl. Government Advocate.

8. Perused the written submission dated 19.02.2015 filed by Mr. Mishra, learned counsel for the petitioners, written submissions dated 13.02.2015 filed by Mr. Mukherjee, learned counsel for the opp. party No.2 and written

submissions dated 13.8.2014 and 16.02.2015 filed by Mr.Jayanta Das and Mr. S.S.Das, learned Senior Counsel for opp. parties 5 and 6. It may be noted that as per five memos filed by the learned counsel for the petitioners on 26.03.2015, it was made clear that the written note of submission filed on behalf of the petitioners on 19.02.2015 in W.P. (C) No.10432 of 2012 be treated as final and the same was being adopted for the rest four writ petitions. After the judgment was reserved on 11.2.2015, the matter was listed under the heading "To be mentioned" and on 5.5.2015, the following question was referred to Full Bench:

> "Whether in the background of the entire Scheme of OIIDCO Act, 1980 would it be proper to say that as per the said Act, IDCO can cause acquisition of land only for the purpose of establishing industrial estate/industrial area and for no other purpose ?"

Judgment by the Full Bench was pronounced on 30.06.2015 holding that sub-section (i) of Section 14 of the "1980 Act" was independent and was couched in broad terms. The same cannot be in any manner whittled down by the language of sub-section (ii) of Section 14 of "1980 Act". It also made it clear that function and general powers of the Corporation as enumerated in Sections 14 and 15 of "1980 Act" could not be cabined, cribbed and confined by language used in Section 14 (ii).

9. Now to submissions made by learned counsel for the parties. Mr. Mishra, learned counsel for the petitioners submitted that on account of non-publication of Section 4 (1) notification in two newspapers having wide circulation in locality, the petitioners could not file their objections in terms of Section 5-A of the "1894 Act" and thereby the petitioners had been deprived of their legitimate right to object to the acquisition proceeding. He also submitted that the declaration under Section 6 (1) of "1894 Act" had not also been published in two newspapers having wide circulation in locality. Accordingly, the proceeding has been vitiated.

Secondly**,** he contended that the sequence of events indicated that the entire process was geared up to acquire land for opp. party No.5. In such background the authorities ought to have taken steps under Part-VII of the "1894 Act" read with Land Acquisition (Companies) Rules, 1963. Since the authorities had not adhered to the procedure prescribed under Part-VII of the "1894 Act" dealing with acquisition of land for Companies and the procedure prescribed by Land Acquisition (Companies) Rules, 1963, the entire proceeding was vitiated and the prayer of the petitioners should be allowed.

Mr. Mishra reiterated that the acquisition process was initiated by the State Government to acquire the land for opp. party No.5 and subsequently IDCO was brought into the picture in an attempt to regularize the acquisition. The acquisition of land by the State Government for opp. party No.5-Company to set up its power plant was not tenable as the same had been done in violation of the mandates of Part-VII of the "1894 Act". He further argued that the acquisition could not be said to be on the basis of the proposal made by the IDCO, as much prior to the alleged proposal, the State Government had already entered into an agreement to acquire the land for opp. party No.5. With regard to notification dated 4.8.2009, (Annexure-F/6), Mr. Mishra submitted that the same had no relevance as the area can be notified as industrial area only after acquisition is made and not before acquisition and by the time the notification was published, the area in question had not been acquired by the Government. The opp. parties have made an attempt to bring the acquisition within the purview of Part-II of the "1894 Act" though the prerequisites for such acquisition under "1980 Act" was lacking in the instant case.

Thirdly**,** he submitted that the claim that the acquisition was made for public purpose was not tenable, as the acquisition was made for a private company. Referring to definition of "Public Purpose" occurring at Section 3 (f) of "1894 Act", Mr. Mishra emphatically submitted that the said definition specifically excluded acquisition of land for companies. Since in the instant case the land had been acquired for company like opp. party No.5, who has paid for the land, it could not be said that the same had been acquired for public purpose.

10. On the other hand, Mr. Pattnaik, learned Addl. Government Advocate submitted that the writ petition was highly belated and on that count the writ petition deserved to be dismissed. With regard to four villages in question, he submitted that awards were made in June, 2011 and the present writ petitions were filed on 17.04.2012, 6.6.2012 and 7.6.2012. Further except the petitioners, who were now pursuing their cases, rest of the villagers of four villages to which the petitioners belong have taken their compensation amounts.

Secondly, Mr. Pattnaik submitted that there were no documents to show that petitioners of the five writ petitions were the recorded owners of the lands in question covered by notification under Section 4 (1) of the "1894 Act" relating to four villages. Accordingly, the petitioners have no locus standi to challenge the notifications.

Thirdly, he submitted that though from villages-Pudapadar, Sargunamunda,Ghantabaheli and Mahada 30,25,45 and 22 numbers of objections were received respectively under Section 5-A of the "1894 Act", the petitioners never filed any objection to that effect. Non-filing of objections by above noted petitioners clearly revealed that they were not in any way affected by the land acquisition process rather they had acquiesced to the acquisition process. On this count, he further submitted that the contention of petitioners that since Section 4 (1) notification was not published in two regional newspapers and thus, the petitioners could not file their objections, had no legs to stand. He submitted that with regard to village Mahada, besides the Gazettee Notification, the notification dated 7.6.2010 under Section 4 (1) of "1894 Act" was published on 21.6.2010 in Oriya newspapers "Sambad Kalika" and "Agni Sikha" circulating in the locality. Further, he submitted that the substance of the notification was publicly notified at convenient place of village Mahada on 16.06.2010. Similarly, with regard to village Sargunamunda besides the Gazettee Notification, the notification dated 7.7.2010 under Section 4 (1) of "1894 Act" was published on 31.07.2010 in Oriya newspapers "Odisha Bhaskar" and "Kalinga Bharati" circulating in the locality. Further, the substance of notification was publicly notified at convenient place of village-Sargunamunda on 16.07.2010. With regard to village-Pudapadar, Mr. Pattnaik, learned Addl. Government Advocate submitted that besides Gazettee notification, the notification dated 7.7.2010 under Section 4 (1) of "1894 Act" was published on 31.07.2010 in Oriya Newspapers-"The Sambad Kalika" and "The Janamukha" circulating in the locality. Further, the substance of notification was publicly notified in the locality on 21.07.2010. With regard to village Ghantabahali, besides Gazettee notification, Mr. Pattnaik, learned Addl. Government Advocate submitted that the notification dated 7.6.2010 under Section 4 (1) of "1894 Act" was published on 21.06.2010 in Oriya newspapers "The Bharat Darshan" and "The Pragatantra", circulating in the locality. Further, the substance of notification was published in the locality on 16.06.2010. Accordingly, Mr. Pattnaik reiterated that the very fact that 22 villagers belonging to village Mahada, 25 villagers belonging to village Sargunamunda, 30 villagers belonging to village-Pudapadar and 45 villagers belonging to village Ghantabaheli submitted their objections to Section 4 (1) would show that there was wide publication of Section 4 (1) notification. Since despite public notice the above noted petitioners did not object to the said notifications, now, therefore, they should be estopped from challenging notification under Section 4 (1) of "1894 Act" with regard to villages-

Mahada, Sargunamunda, Pudapadar and Ghantabaheli. In this context, he submitted that law was well settled that no writ was maintainable at the behest of the persons who never cared to submit their objections pursuant to notification under Section 4 (1) of "1894 Act". He relied on a decision reported in (2000) 7 SCC 296 (***Delhi Administration v. Gurdip Singh Uban and others)***

Fourthly, he submitted that in the present case, the notification under Section 4 (1) of "1894 Act" would clearly show that the land was acquired at the instance of opp.party No.2 for public purposes, i.e., for industrialization through IDCO. Section 4 (1) notification also made it clear that land was being acquired at the cost of public money. In such background, he submitted that acquisition was clearly under Part-II of the "1894 Act" and therefore, Part-VII of "1894 Act" and the Land Acquisition (Company) Rules, 1963 had no application to the present case. He further submitted that the documents under Annexure-H/2 would show that it was IDCO not opp. party No.5 which had deposited the compensation amount with the opp. party Nos.4 and 7 to be distributed to the land oustees.

Fifthly, he submitted that M.O.U. under Annexure-1 series clearly reserved the right of the Government to purchase 14% of power at variable cost if coal blocks were allocated within the State, otherwise, government would have right to purchase 12% of the power at variable cost and tariff as would be determined by Odisha Electricity Regulatory Commission. Thus, apart from industrialization for a backward area like Titilagarh, government was going to get power from opp. party No.5. Further, the M.O.U. made it clear that local people would get employment under opp. party No.5 in different categories of jobs, like unskilled, semi skilled, skilled and supervisory/managerial.

Sixthly**,** he submitted that the lands in question were non-irrigated lands and in any case the petitioners of the five writ petitions were going to get benefits under Odisha Rehabilitation and Re-Settlement Policy 2006.

Lastly**,** he submitted that though the petitioner Nos. 9 and 17 of W.P. (C) No.10432 of 2012 along with others moved this Court in W.P. (C) No. 11768 of 2011, however, pursuant to liberty granted by this Court on 13.07.2011 while disposing of said writ petition, these petitioners never made any grievance before opp. party No.1 by submitting any representation. Mr. Pattnaik also submitted that as per order dated 19.6.2012 passed by this Court in W.P.(C) No.10431 of 2012, which also covered the rest four writ petitions,

all these writ petitions have become private interest litigations and are confined to petitioners of five writ petitions only. In case they would succeed in the writ petitions, it would not lead to quashing of entire land acquisition process vis-à-vis four villages of Mahada, Sargunamunda, Pudapadar and Ghantabaheli. These petitioners would only get back their land from the process of acquisition. However, he made it clear that this was without prejudice to his earlier submission that there was no infirmity in the land acquisition process and accordingly submitted that the writ petitions were without any merit and the same should be dismissed.

11. Mr. Mukherjee, learned counsel for the opp. party No.2 submitted that State of Odisha was suffering from power deficit and to resolve the issue, the Industrial Policy Resolution, 2007 (in short "IPR 2007") has been adopted under which establishment of captive power plant in the State by private parties has been made permissible. He relied heavily on the order dated 14.01.2010 passed by the Odisha Electricity Reforms Commission.

Secondly, he submitted that IDCO was a nodal agency which was created by statute for securing orderly establishment of industry in the industrial area/industrial estate in the State of Odisha. According to Mr. Mukherjee, a reading of the entire IDCO Act along with its Sections 14 and 15 would show that the IDCO has very wide powers and functions for developing industrial infrastructure in the State and at the request of IDCO, State could acquire land for many purposes covered by Sections 14 and 15 of "IDCO Act". According to them, under Section 32 of the "IDCO Act", the Government can transfer acquired land to IDCO and under Section 33 of "IDCO Act", IDCO can lease out such acquired land with certain terms and conditions. In the instant case, IDCO had only leased out a certain quantity of land in favour of opp. party No.5 for industrial purpose for a period of 90 years.

Thirdly, he submitted that IDCO had also deposited the land cost under Annexure H/2. According to him, there were several power companies waiting for industrial land and for the said purpose different MOUs have been signed with them. If project of opp. party No.5 became unviable, the IDCO would get back the land for allotment to other industrialists, who were waiting in queue for allotment of the industrial land. With regard to public purpose, Mr. Mukherjee submitted that the M.O.U provided for supply of electricity at a concessional rate to the State Government and guaranteed employment to a vast section of public in one of the most remote and underdeveloped areas of the State.

Fourthly, he submitted that almost 80% of the displaced persons have happily accepted the land cost. Thus, according to him the writ petition was without any merit and the same should be dismissed.

12. In his written submission, Shri Mukherjee has relied on the decisions reported in AIR 2003 SC 3141 (***Maruti Suzuki India Ltd. v. Rajiv Kumar Loomba and another etc.)***, AIR 2009 SC 2086 (***Urmila Roy and others v. M/s***. ***Bengal Peerless Housing Development Company and others***) AIR 2004 SC 561 ***(Guruvayur Devaswaom Managing Committee and another v. C.K.Rajan and others)***, (2008) 9 SCC 552 (***Sooraram Pratap Reddy and others v. Dist. Collector, Ranga Reddy Dist. and others***) and 2014 (II) ILR Cuttack 64 (***Sachalabala Sethy and others v. the Chief Secretary and Chief Development Commission, Odisha and others)*** .

13. Mr. Jayanta Das, learned Senior Advocate supported by Mr. Sourya Sundar Das, learned Senior Advocate representing opp. parties 5 and 6 submitted that in case of four villages, the award under Part-II of the "1894 Act" was passed during June 2011 and possession had been taken by the State of Odisha and the writ petitions were filed in April and June, 2012, almost after a period of one year from the date of award. On this count, Mr. Das learned Senior Counsel relying on the decisions reported in (2008) 4 SCC 695 (***Swaika Properties (P) Ltd. and another v. State of Rajasthan and others***) submitted that the writ petitions were not maintainable and should be dismissed on the ground of delay.

Secondly, he submitted that none of the petitioners had raised any objection to the notification issued under Section 4 (1) of "1894 Act" and having not raised such objection, the petitioners were estopped in law to raise any challenge to notification under Sections 4 and 6 of "1894 Act" at a belated stage. In this context, Mr. Das relied on the decision reported in AIR 2000 SC 3737 (***Delhi Administration v. Gurdip Singh Uban and others)***.

Thirdly, Mr. Das, submitted that the petitioners have not been given the details of land particulars nor all copies of R.O.R. have been filed to substantiate the land particulars of the petitioners in all the writ applications. Most of the R.O.Rs submitted were not legible. According to him this itself created disputed questions of fact, which ought not to be adjudicated in writ petitions. In this context, he relied on (2010) 9 SCC 46), ***Rajinder Kishan Gupta and another v. Union of India and others***.

Fourthly, he submitted that Section 4 (1) notifications would clearly show that land was purported to be acquired for a public purpose, i.e., for industrialization through IDCO at public cost. After the State Government acquired the land, the same had been transferred to IDCO and IDCO had leased a sizable quantum of land, not the entire acquired land to opp.party No.5 which was a public limited company. Since the land was acquired by the State Government for public purpose at public cost, according to Mr. Das, the acquisition was clearly under Part-II of "1894 Act" and in such back ground Part-VII of "1894 Act" and Land Acquisition (Company) Rules, 1963 had no application to the present case. He reiterated that opp. party No.5 was only a lessee to a part of entire acquired land and power plant being an infrastructure and public utility industry, no illegality had been committed by the State in its action.

Fifthly, he submitted that the instant case was clearly covered under section 3 (f) (iv) of the "1894 Act", which made it clear that making provision of land for a corporation owned and controlled by the State was for public purpose. Having regard to the language of notification under Section 4 (1) where it had been made clear that land had been acquired for industrialization through IDCO at public cost, therefore, in the instant case, the land had been acquired for public purpose. In such background, Part-II of the "1894 Act" was clearly attracted. He further submitted that in this case acquisition had resulted in vesting of acquired land with the Government. Thus, till date government continues to be the owner of the land. Government has only transferred the land in question to IDCO on long term basis along with possession of the part of the acquired land. IDCO in turn had leased the land to opp. party No.5 for the purpose of setting up a Thermal Plant for a fixed tenure on payment of rent and premium. All these would show that land had been acquired for public purpose and the same had been acquired correctly by applying Part-II of "1894 Act".

Sixthly, he submitted that a reading of MOU under Annexure-1 series would make it clear that power would be made available to the State at cheaper rate, i.e., only at variable cost. Further, the MOU stipulated that employment preference to be given to the local people. He also submitted that the power project would generate numerous employment opportunities directly or indirectly for the local people. In view of the above, he contended that setting up a power plant was for a public purpose. According to him, establishment of such industries by a public company like opp. party No.5 could be said to be imbued with public purpose. He also submitted that

merely because initiation of steps for acquisition of land was made after signing of MOU, the same would not mean that such acquisition was for private purpose. In this context he relied on different decisions by the Hon'ble Supreme Court as reported in (2003) 10 SCC, 626 (***Prativa Nema and others v. State of M.P. and others)***, (2008) 9 SCC 552 (***Sooraram Pratap Reddy and others v. Dist. Collector, Ranga Reddy Dist. And others)*** and (2010) 10 SCC 282 (***Nand Kishore Gupta and others v. State of U.P. and others)***.

Seventhly, he submitted that no payment had been made by opp. party No.5 to opp. party No.7. All payments had been made by opp. party No.5 to IDCO and it was the IDCO which had deposited the compensation amount with opp. party No.7 for payment. Once the amounts were paid by opp. party No.5 to IDCO, the said amount/money got merged into funds of the IDCO. Thus, it could not be argued that payment of cost of land by the opp. party No.5-company to IDCO made the present acquisition, an acquisition under Part-VII of "1894 Act".

Eighthly, he submitted that basic idea of acquisition under Part-VII of the "1894 Act" was total transfer of ownership. In the present case, admittedly there was no total transfer of ownership in favour of companies. Therefore, Part-VII of "1894 Act" was not at all attracted to the present case. Accordingly, Land Acquisition (Company) Rules, 1963 had no applicability to the present case.

Ninthly, he submitted that even in absence of notification for establishment of an industrial area/industrial estate, IDCO could request the State Government for acquisition of land. In order to fortify his argument, Mr. Das learned Senior Counsel for opp. parties 5 and 6 relied on the decisions reported in AIR 1963 SC 151 (***Smt. Somavanti and others v. The State of Punjab and others***), (2006) 4 SCC 683 (***State of Karnataka and another v. All India Manufacturers Organization and others***), (2010) 9 SCC 46 (***Rajinder Kishan Gupta and another v. Union of India and others***) and the decisions of this Court rendered in 2014 (II) ILR Cuttack 64 (***Sachalabala Sethy and others v. the Chief Secretary and Chief Development Commission, Odisha and others)*** and W.P. (C) No.16815 of 2012 and also relied on decision of the Full Bench rendered in this case on 30.06.2015.

Lastly, he submitted that the present writ petition was not maintainable as it was hit by principle of res judicata. In the said context, he

relied on the decision reported in (2006) 4 SCC 683 (***State of Karnataka and another v. All India Manufacturers Organization and others***).

14. In reply to various contentions raised by the opp. parties, Mr. Mishra, learned counsel for the petitioners submitted that the decisions cited by the opp. parties were factually distinguishable and had no application to the present case and he reiterated his earlier submissions that this was a case involving acquisition of land out and out for a company, which could not be said to be for a public purpose and having not followed Part-VII of "1894 Act", which dealt with acquisition of land for the company, the entire proceeding had been vitiated. He reiterated that pre-requisites for applying "1980 Act" were absent in the present case. In support of his contention that acquisition of the land for company could only be made in accordance with Part-VII of the Land Acquisition Act and not in terms with Part-II of the land Acquisition Act, he relied on the decision reported in 2011 (Supp-I) OLR 130 (***Rajiv Pujari v. State of Orissa***). With regard to maintainability of the writ petitions on the ground of delay he submitted that the same were maintainable relying on the decisions reported in (2013) 9 SCC 338 (***V.K.M.Kattha Industries Pvt. Ltd. v. State of Haryana and others***), (2009) 10 SCC 115 (***Baburam and another v. State of Haryana and another***). Further, he relied on the decisions reported in AIR 2008 SC 261 (***Devinder Singh and others v. State of Punjab and others)*** in favour of his argument that when entire compensation has been paid by opp. party No.5 and there was no decision by the Government to pay part of the compensation from the inception, therefore, the acquisition could not turn to one under Part-II of "1894 Act". Lastly, he relied on the decisions reported in 2012 (1) OLR SC 436 (***Raghubir Singh Sehrawat v. State of Haryana and others***) to highlight that before acquiring private land, the State or its instrumentalities should as far as possible use the land belonging to the State for the specific public purpose. If the acquisition of private land was absolutely necessary, then the concerned authority must comply with the statutory provisions or rules of natural justice before undertaking acquisition of land.

15. Considering the submissions made by the parties, the following issues arise for our consideration.

(1) Whether the writ petitions are to be dismissed on the ground of belated filing ?

(2) Whether the present writ petitions are barred by principle of res judicata ?

(3) Whether the entire proceeding is vitiated on account of non-publication of notification under Section 4 (1) in two newspapers and on account of lack of publicity in the locality ?

(4) Whether non-filing of objection under Section 5-A would non-suit the petitioners ?

(5) Whether the writ petitions involve adjudication of disputed questions of facts when there exist dispute as to land particulars of the petitioners ?

(6) Whether in the present case acquisition has been made for any public purpose?

(7) Whether in the facts and circumstances of the case Part-VII of "1894 Act" would apply and whether initiation of the process for acquisition of land after entering into MOU would make such acquisition, an acquisition for a company and thus would attract Part-VII of "1894 Act"?

(8) Whether IDCO was brought in later to regularize acquisition process, which was already vitiated?

Findings

16. **Issue No.1.** From the documents filed along with affidavits dated 18.04.2015 pertaining to W.P. (C) No.10431 of 2012, W.P. (C) No.10432 of 2012, W.P. (C) No.10433 of 2012 and W.P. (C) No.10436 of 2012, the following informations are forthcoming relating to Section 4 (1) notification and Section 6 (1) declaration of four villages which are given in a tabular form below:

SL. No.	Name of Mouza	Date of Sec.4 (1) notification	Date of publication in Gazettee	Date of publication In Oriya newspaper	Date of public notice in locality	Date of 6 (1) declaration	Date of publication in Gazttee	Date of publication In oriya newspaper	Date of public notice in locality
1	Mahada	7.6.2010	11.6.2010	21.6.2010	16.6.2010	20.11.2010	25.11.2010	20.1.2011	30.11.2010
2.	Sargun munda	7.7.2010	31.7.2010	31.7.2010	16.7.2010	15.11.2010	16.12.2010	16.12.2010	23.11.2010
3.	Pudapadar	7.7.2010	31.8.2010	31.7.2010	21.7.2010	15.11.2010	16.12.2010	16.12.2010	23.11.2010
4.	Ghantab ahali	7.6.2010	21.6.2010	21.6.2010	16.6.2010	3.12.2010	14.12.2010	13.1.2011	6.12.2010

Awards with regard to above four villages were made during June, 2011. W.P. (C) No.7163 of 2012 was filed in April, 2012. Other four writ petitions were filed in June, 2012. According to opp. parties, under such circumstances, the writ petitions are grossly belated. However, according to learned counsel for the petitioners, the writ petitions have been filed within reasonable time and thus there has not been any delay in filing of the writ petitions. In this context, the petitioners rely on the decisions reported in (2013) 9 SCC 338/AIR 2013 SC 3557 (***M/s. V.K.M.Kattha Industries Pvt. Ltd. v. State of Hariyana and others***) and (2009) 10 SCC 115 (***Baburam and another v. State of Haryana and another)***, whereas the opp. parties 5 and 6 have relied on the decisions reported in (2008) 4 SCC 695 (***Swaika Properties (P) Ltd. and another v. State of Rajasthan and others)*** and a decision of the Division Bench of this Court dated 23.04.2014 passed in W.P. (C) No.16815 of 2012. In the decision reported in **Swaika Properties (P) Ltd. (supra),** notification under Section 52 (2) (which is pari materia with Section 4 of "1894 Act") of the Rajasthan Urban Improvement Act, 1959 was issued on 25.06.1975. On 23.08.1975 another notice was issued by the State under the above noted Section 52 (2) for acquisition of land. The appellant therein filed objection on 8.9.1975. On 8.2.1984, government issued declaration under Section 52 (1) of the aforesaid Act (which is equivalent to Section 6 of the "1894 Act"). After these notices were issued the appellant filed writ petition before Calcutta High Court. Ultimately, the Hon'ble Supreme Court held that Calcutta high Court had no territorial jurisdiction over the matter. On 17.02.1987, possession of land in question was alleged to have taken over by the authorities. In 1987 the appellant therein filed writ petition before High Court of Rajasthan and in 1989 they withdrew the said writ petition and government approved the award also in 1989. Again in 1989, another writ petition was filed challenging the notifications dated 8.2.1984 and 17.2.1987 by which possession was alleged to have been taken. Relying on earlier Supreme Court decision, the Hon'ble Supreme Court took a view that writ petition having been filed after taking over possession, the case deserved to be dismissed on the ground of delay and laches. So far as the case of Gyanendra Kumar Nayak in W.P. (C) No.16815 of 2012 is concerned, in that case, this Court has come to hold that the said writ suffered from gross delay and laches as because though there the 4 (1) notification was issued on 10.03.2010, 6 (1) declaration was made on 29.2.2012 and writ was filed on 7.9.2012. In such background, this Court came to a finding that writ filed by Gyanendra Kumar Nayak was grossly delayed. Now coming to the decision cited by Mr. Mishra, learned counsel for the petitioners, we may

first refer to the decision in the case of **M/s. V.K.M.Kattha Industries Pvt. Ltd. (supra)**. In the said case, Hon'ble Supreme Court distinguished **Swaika Properteis (P) Ltd. case (supra)** as that was a case where writ was filed two years after taking over the possession. In V.K.M.Kattha case, writ was filed within five weeks of passing of the award. In the present case, first writ petition, i.e., W.P. (C) No.7163 of 2012 was filed within one year of the award and less than one year of taking over the possession. If parameters given in **M/s. V.K.M. Kattha Industreis Pvt. Ltd. (supra)** are taken into account, we are of the view that these writ petitions cannot be dismissed on the ground of delay as the same have been filed within 10 to 13 months from the date of award. In the case of **Swaika Properteis (P) Ltd. (supra),** there was delay of more than two years in filing the writ petition after possession was taken over. Here in this case, the delay is not that much. In Gyanendra Kumar Nayak's case, this Court has not taken into account the delay in filing of the writ petition from the date of award or from the date of taking over the possession. Thus, the said case is factually distinguishable. In the decision reported in **Baburam and another (supra),** Section 4 (1) notification was issued on 23.11.2005, on 2.1.2006 declaration under Section 6 was made and on 23.5.2006 award was pronounced. Prior to that on 15.2.2006, suit has been filed. Another suit was also filed on 12.4.2006. Also in 2006 the writ petition was filed. In such background, it was held that there was no delay. No doubt in the present case, the facts indicate that there has been some delay in filing the writ, but taking a liberal view of the matter, we hold that the writ petitions involving illiterate village folk from a backward district of Odisha cannot be dismissed on the ground of delay. Further, it may be noted here that petitioner Nos.9 and 17 of W.P. (C) No.10432 of 2012 had approached this Court on 29.4.2011 along with others by filing W.P. (C) No.11768 of 2011, i.e., much prior to passing of award in June 2011 and by filing W.P. (C) No.10432 of 2012 along with others they are pursuing their remedies. This is an additional reason for not dismissing the present writ petitions on the ground of delay.

17. Issue No.2

Though opp. party Nos.5 and 6 relying on the case of ***State of Karnataka and another (supra)*** pleaded that present writ petitions were not maintainable on the ground of res judicata vis-à-vis the earlier writ petition bearing W.P. (C) No.11768 of 2011. It may be noted here that the earlier writ petition was filed by the petitioner Nos.9 and 17 along with others of W.P. (C) No.10432 of 2012. In the earlier case and present case, i.e., W.P. (C) No.10432 of 2012, prayers are different and there was no adjudication on

merits in the earlier case. Further, in other four writs, which are being dealt with here petitioner Nos.9 and 17 are not parties. In such background, we refuse to accept the plea of learned counsel for opp. party Nos.5 and 6 that the present writ petitions are barred by principle of res judicata.

18. Issue Nos.3 and 4

It is one of the major contentions of learned counsel for the petitioners that the petitioners had no knowledge about notifications under Section 4 (1), as the same were not published in two newspapers and there was no public notice of substance of such notification given in the locality. Therefore, they were not in a position to file objection and accordingly Mr. Mishra, learned counsel for the petitioners submitted that the process of land acquisition proceeding had been vitiated. In this context, he relied on the decision in **M/s. V.K.M.Kattha Industries Pvt. Ltd. (supra)**. The learned Addl. Government Advocate and Mr. Jayanta Das, learned Senior Counsel have refuted such contentions of the petitioners by stating that the provisions relating to notification as contained in Section 4 (1) and declaration under Section 6 of "1894 Act" with regard to various modes of public notification have been strictly complied with. In this context, both Mr. Das and Mr.Pattnaik, the learned Addl. Government Advocate pointed out that pursuant to publication of notifications under Section 4 (1) of "1894 Act", 30 objections were received from the villagers of village-Pudapadar, 25 objections from the villagers of village-Sargunamunda, 45 objections from the villagers of village-Ghantabaheli and 22 objections from the villagers of village-Mahada. Thus, it is wrong to say that there was no adequate notifications under Section 4 of "1894 Act".

19. Considering such submissions and relying on the table indicated under Issue No.1, this Court comes to a conclusion that Section 4 (1) notifications have been published in different modes in accordance with law. Pursuant to such publication, objections were received from four villages to which the petitioners belong. Thus, it is not believable that the writ petitioners had no adequate notice of the acquisition proceedings. Rather, it shows that they have been negligent by not filing their objections. Similarly, facts given in the above noted table clearly bear out that declarations under Section 6 were also published in different modes as required under law. In the case of **M/s. V.K.M.Kattha Industries Pvt. Ltd. (supra),** facts are clearly different as there was no whisper about publication of substance of notification in the locality as provided under Section 4 (1) of "1894 Act"

which is not the case here. As per the decision reported in (2000) 7 SCC 296 (***Delhi Administration v. Gurudip Singh Uban and others)***, it is well settled that the claimants/petitioners who have not filed objection to Section 4 (1) notification cannot be permitted to contend that Section 5-A enquiry is vitiated nor can they be permitted to seek for quashing the declaration under Section 6 of "1894 Act" on that ground but they can only challenge on the ground that the purpose for which the land was acquired was not for a public purpose. Therefore, on these issues, our finding is that though the petitioners cannot contend that statutory requirements of Sections 4 and 6 have not been followed on account of non-publication of the notifications and proclamations in newspapers and proclamation at the locality, therefore they cannot take a plea of breach of violation of natural justice; however, they can still take a plea that originally notifications were not for public purpose.

20. Issue No.5

Though initially the writ petitions had flavour of PILs, however, after modification of interim order on 19.6.2012 confining the same to the petitioners only, it is clear that these cases are now private interest litigations. In such background, it was the duty of the petitioners to point out/produce the land records in their favour. Initially no such land records were filed along with writ petitions. However, while filing the rejoinders, the petitioners have filed land records. Most of these land records filed along with rejoinder are not legible. However, by way of additional affidavits and by filing charts dated 9.2.2015 showing details of land sought to be acquired from the petitioners, the petitioners tried to impress us that in reality their lands were sought to be acquired. Mr. Mishra, learned counsel appearing for the petitioners made a fervent plea that since most of the petitioners are village folks and have collected the records with much difficulty, the same may be accepted. In such background taking a lenient view of the matter, in our view, though there are some disputes, it cannot be said that vis-à-vis the land particulars of the petitioners there exists serious dispute of facts. In such background, the decision relied on by opp. parties 5 and 6 in case of **Rajinder Kishan Gupta (supra)** with their emphasis at para-23 will be of no help to them. Accordingly, we are not going to dismiss these writ petitions on that account.

21. Issue Nos. 6 and 7

Now, coming to the core issue of the case, we have to refer to Section 3 (f) of "1894 Act". The said Section defines expression "public purpose". It

is an inclusive definition that includes the provision of land for a corporation owned or controlled by the State. In other words, it means that when a land is acquired for a Corporation owned or controlled by the State it can be described as being acquired for public purpose. Section 3 (f) of "1894 Act" also makes it clear that when land is being acquired for a company, the same cannot be described as for public purpose. The expression 'company' has been defined at Section 3 (e) of "1894 Act". Now let us scan various decisions cited by the parties. In the case of **Prativa Nema (supra),** land was acquired by the State Government for the purpose of a diamond park after signing of MOU with the diamond merchant/companies dealing with diamond, the Hon'ble Supreme Court has held that initiation of step for acquisition of land after entering into MOU would not mean that it was only for private purpose. In this case, the Hon'ble Supreme Court made it clear that funds from which compensation was paid played a vital role in deciding whether it was an acquisition under Part-II of "1894 Act" for public purpose or for a company. It was the source of funds that decided whether Part-II of "1894 Act" or Part-VII of "1894 Act" would apply. Referring to Explanation-2 to Section 6 (1) of "1894 Act" it also made clear that even a minimal contribution made by the Government concern could also make the acquisition one for public purpose. In other words, if compensation money comes from a public fund then it is an indicator that acquisition proceeding is for a public purpose and in that case Part-VII of "1894 Act" will have no application. The Supreme Court in that decision also pointed out that an industry in private sector ultimately benefits the people and satisfaction of the Government to exercise its judgment in determining public purpose should not be lightly faulted and this must remain uppermost in the minds of the Court. The Court should keep in mind that even when private parties/companies had given advance payments to government owned corporation, the said money merges with the fund of Nigam and became public money. Thus, if money came from such a fund, clearly Part-II of "1894 Act" would apply. In the instant case, as has been seen under Annexure-H/2, IDCO has deposited the compensation money with the opp. party No.4 for payment. The notification under Section 4 (1) clearly shows that the acquisition was being made at public/governmental cost/money. Further, as per the case in **Sooraram Pratap Reddy (supra)**, it has been made clear by Hon'ble Supreme Court that the main distinction between Part-II and Part-VII of "1894 Act" depends on from which source the cost of acquisition is coming. When payment is wholly/partly out of public revenue/when the payment of land oustees is one out of public revenue, then

the acquisition is covered under Part-II, but where total payment is made from the funds of the company to the land oustees, then same would be covered by Part-VII of "1894 Act". Here in the instant case, compensation money has gone from the fund of IDCO, there exists no evidence to show that payment of compensation has been made directly by opp. party No.5 to the land oustees. Further, a perusal of records show that while opp. party No.5 paid Rs.6,38,16,922/- to IDCO vide letter dated 22.11.2010; IDCO has paid much more to the tune of Rs.6,80,60,576/- (Annexure-H/2 of W.P. (C) No.10432 of 2012) to the concerned Tahasildar-cum-LAO, Titilagarh, Bolangir. In such background, the present case is clearly covered by Part-II not by Part-VII of "1894 Act". In the above noted decision, Hon'ble Supreme Court has made it clear that in order to assess public purpose holistic approach is to be made and parts cannot be split into compartments. Court can only interfere when there is no public purpose at all or there is mala fide and colourable exercise of power and this decision has reiterated that the implication of public purpose is wide and it is for the State to decide existence of public purpose. All things can be said to be for public purpose if the public derives any advantage out of the same. The decision rendered in the case of **Nand Kishore Gupta (supra)** lays down that purpose complimentary to public purpose is also a public purpose. Like earlier decision it makes clear that money coming to the coffers of a government authority becomes public money. At the same time this decision lays down another test. To determine whether the case is covered under Part-II or Part-VII of "1894 Act", this test is whether there has been total transfer of ownership to the company. In case of such total transfer of ownership to the company, provisions of Part-VII are attracted. In the instant case, the facts situation does not show total transfer of land to the opp. party No.5. As it appears, after the land got vested with the Government, part of the same has been transferred to IDCO on long term basis and on 28.8.2012 IDCO has leased a major portion of the land to opp. party No.5 for a particular period in order to enable it to establish the power plant, with a number of conditions including eventualities providing for termination of lease and right of re-entry and re-possession. In such factual background, it cannot be said that ownership of the land in question has been or is being totally transferred to opp. party No.5. Thus, as per this test also Part-VII has no application to the present acquisition proceeding. In such background it is clear that as per the above twin tests, the instant case does not attract Part-VII of "1894 Act", rather Part-II of the "1894 Act" is attracted. Therefore, it can safely be concluded that no illegality has been committed in the instant land acquisition

proceeding. All the above noted decisions make it clear that the expression "public purpose" has a very wide meaning and the same cannot be ignored only because the land acquired by the State is ultimately going to be leased to a public limited company like opp.party No.5, which is going to establish a power plant. Even as per MOU under Annexure-1 series the State Government is going to get 15% or 12% of the power depending on the facts indicated therein from opp. party No.5 at a tariff to be determined by Odisha Electricity Regulatory Commission. Further, the said MOU contained provision relating to employment of local people under unskilled/semi-skilled/skilled and Supervisory categories. Lastly, the fact that the notifications under Section 4 (1) of "1894 Act" clearly show that land is being acquired for public purpose for industrialization through IDCO at public cost. These clearly show that land was being acquired for IDCO, which is a Government of Odisha undertaking. This fact situation is further fortified from the fact that after acquisition, government has transferred the land measuring Ac.392.20 decimals to IDCO on 31.7.2012. The argument that since the land acquisition proceeding was ab initio vitiated and therefore, IDCO was brought in to regularize the proceeding is not correct as the role to be played by IDCO was clearly indicated at the very beginning in MOU dated 7.2.2009. Thus, in this case public purpose is well established.

Now, coming to the decisions cited by the petitioners, it may be stated that the facts of the case reported in AIR 2008 (SC) 261 (***Devinder Singh and others v. State of Punjab and others***) are factually distinguishable and have no application to the present case. In the said case, the notification under Section-4 indicated that the government of Punjab wanted to acquire the land for a public purpose namely for setting up the Ganesha Project, M/s. International Tractors Ltd. at Village Chak Gujran, Tehsil & Distt. Hoshiarpur. Thus the notification unlike the present case indicated acquisition, both for public purpose and for a company and while taking exception to same, the Hon'ble Supreme Court has made it clear that a declaration has to be made either for a public purpose or for a company but not for both. Further in the present case, compensation has been paid out of funds of IDCO. Thus, the present case is clearly covered under Explanation-2 to second proviso of sub-section (1) of Section 6 of 1894 Act.

22. The next decisions relied on by Mr. Mishra, learned counsel for the petitioners are 2011 (Supp.1) OLR 130 (***Rajiv Pujari v. State of Orissa***) and 2012 (Supp-II) OLR 349 (***Rajkumar Gunawant and another v. State of Orissa and others***) in favour of his submission that whenever there is an

acquisition in favour of a company whether private or public the same can be made in accordance with the provision of Chapter-VII of Land Acquisition Act, but not in terms of Chapter-II of Land Acquisition Act. With regard to the decision in ***Rajiv Pujari (supra),*** a perusal of Para-42 of the said judgment shows that facts of that case are different. Here, in the Section 4 (1) notification, there exists no reference to opp. party No.5. Therefore, the said decision has no application to the present case. So far as the case of **Rajkumar Gunawant (supra)** is concerned, here also the facts are totally different. In that case notice was issued under Section 4 (1) read with Section 17 (4) of Land Acquisition Act and in Section 4 (1) notification, the name of M/s. Ariyan Iron Steel Company Ltd. was clearly indicated unlike the present case. In the instant case, no doubt the sequence of events would show that process was initiated with the proposal of opp. party Nos.5 and 6, but by that itself will not make it an acquisition for company/for private purpose and not for public purpose as discussed earlier. For this purpose, we have to see several things. Section 4 (1) notifications issued under "1894 Act" clearly speak about acquisition of land for public purpose, i.e., for industrialization through IDCO (opp. party No.2) at public cost. Here, IDCO is in the picture from very beginning, i.e., at the stage of signing of MOU on 7.2.2009. The MOU speaks about supply of some percentage of power to State by opp. party No.5. Further, opp. party No.5 undertook to provide employment to local people. Here, opp. party Nos.5 and 6 have not made any direct payment of compensation to land oustees. The compensation amount was undisputedly made available by opp. party No.2 to the Tahasildar-cum-Land Acquisition Officer, Titilagarh, Bolangir. No doubt, the opp. parties 5 and 6 have paid cost of land to opp. party No.2. However, as per settled principle of law, such contribution merged with the funds of IDCO and since the compensation amount has been deposited by IDCO, it is no more open to dispute that the land has been acquired at public cost. It is equally well settled that money going from coffer of Government Corporation like IDCO is public money. Thus, it makes the acquisition in the instant case, an acquisition for public purpose. Hence, the acquisition has been rightly made under Part-II of "1894 Act". Besides the above doctrine of merger as enunciated by the Hon'ble Supreme Court, it is further to be noted that in the present case there is no total transfer of ownership of land to opp. party No.5. Here, undisputedly, the land has been acquired by State Government and out of the same, the Government has transferred Ac.392.22 decimals to the IDCO. The IDCO on its part had leased Ac.392.22 decimals to opp. party No.5. In such background, relying on the decision in ***Nand Kishore Gupta (supra)***, it can

safely be said that since there is no total transfer of ownership of land to opp. party No.5, Part-VII of "1894 Act" has no application to the present case. For all these reasons, we are of the view that Part-II of "1894 Act" has been correctly applied to the present case.

23. Issue No.8

Now, the contention of learned counsel for the petitioners vis-à-vis "1980 Act" requires to be discussed. With regard to role of IDCO, it was contended by learned counsel for the petitioners that acquisition process was initiated by the State Government to acquire the land for opp. party No.5-company and subsequently IDCO was brought into picture in order to regularize the acquisition. Mr. Mishra further submitted that notification dated 4.8.2009 (Annexure-F/6 filed in W.P. (C) No.10432 of 2012) had no relevance as the area could be notified as industrial area only after acquisition was made and not before acquisition and by the time said notification was published, the area in question had not been acquired. According to him by such publication the opp. parties have made an attempt to bring the acquisition within the purview of "1980 Act". Mr. Das, learned Senior Advocate had submitted that MOU dated 7.2.2009 clearly referred to IDCO and even in absence of notification for establishment of industrial area/industrial estate, IDCO could request for acquisition of land within the parameters of "1980 Act". A reading of "1980 Act" shows that it nowhere restricts function of IDCO only for managing notified industrial estates and developing notified industrial areas. A reading of Sections 14 and 15 of "IDCO Act" would show that it has a number of functions to discharge. The functions of IDCO are very broad under Section 4 (i) of "1980 Act". Its functions cannot be confined to what has been delineated under Sections 14 (ii) (a) and 14 (ii (b) only. This has been made clear by the Full Bench judgment dated 30.6.2015 referred to earlier. Similarly, under Section 15 (a) of "1980 Act", it has got the power to acquire lease, exchange or otherwise transfer of any property held by it on such conditions as may be deemed proper by the Corporation. As per Section 15 (b), IDCO has the power to take on lease and to execute works as may be necessary for the purpose of carrying out its duties and functions. Thus, IDCO has got both power to take land on lease and to lease out the same for carrying out its duties and function. Section 14 (ii) (c) makes it clear that it has got the power to undertake schemes, works either jointly with corporate body or with the government or local. Thus, even without notification dated 4.8.2009 under Annexure-F/6, under Section 31 of "1980 Act", it has got power to request

the government for acquiring the land on its behalf, which can be put to various use as indicated in Sections 14 and 15 of "1980 Act". As explained earlier such land can be leased out by IDCO. Here after the case of opp. party No.5 was recommended by SLSWCA meeting held on 16.10.2008; the MOU was signed on 7.2.2009. In the said MOU, it was clearly indicated that Government would acquire the required land and hand over the required land to opp. party No.5 through IDCO and opp. party No.5 agreed to pay cost of land and other charges to IDCO. Thus from very beginning IDCO was there in the picture. Further, vide Annexure-E/2 series filed in W.P. (C) No.10432 of 2012, the IDCO has made such a request for acquisition of land to the governmental authorities for industrial development. Once such request is made, the same should be deemed as is being made for public purpose under Section 31 of the "1980 Act". It is important to note here that the requisition under Annexure E/2 series nowhere contains any reference to opp. party No.5. In tune with the same, Section 4 (1) notifications were issued by the government with regard to all four villages. All these things would again make it clear that IDCO was in the picture from the very beginning and the land has been acquired as per the requisition of IDCO in tune with Section 31 of "1980 Act" and IDCO has done no illegality in leasing the land in question to opp. party No.5 for establishing a coal based power plant.

24. Now to the other two decisions cited by Mr. Mishra, learned counsel for the petitioners. So far as reliance of Mr. Mishra on interim order reported in 2012 (1) ILR Cuttack 19 (***Nishakar Khatua and five others v. State of Orissa and four others***) is concerned, it may be noted here that the relevant writ application, i.e., W.P. (C) No.14884 of 2011 was dismissed on 26.8.2013 with all interim orders vacated. Thus, the interim order can be of no help to the petitioners, which ceased to exist after 26.08.2013. Relying on the decision reported in 2012 (1) OLR 436 (***Raghbir Singh Sehrawat v. State of Hariyana and others***), Mr. Mishra submitted that before acquiring private land, the State and/or the agency or instrumentalities should as far as possible use the land belonging to the State for specified purpose. If the acquisition of private land becomes absolutely necessary, then the concern authorities must strictly comply the relevant statutory rules and the rules of natural justice. In the instant case, the petitioners have nowhere pointed out in details that despite existence of Government land in the locality, the Government went for acquisition of private land. Further, as indicated earlier, here the acquisition has been done in tune with principles of natural justice as notifications under Sections 4 and 6 of "1894 Act" were duly published.

25. For all these reasons, we answer the issue Nos.1,2,4 and 5 in the negative, thus in favour of the petitioners; issue No.3 in negative, thus in favour of opp. parties, issue No.6 in positive in favour of opp. parties. Issues Nos.7 and 8 in negative, thus in favour of opp. parties.Thus, in the net result, the writ petitions are dismissed and accordingly all interim orders stand vacated. No cost.

Writ petitions dismissed.

2016 (I) ILR - CUT-35

VINOD PRASAD, J. & S.K. SAHOO, J.

W.P. (C) No.19941 OF 2015

PARAMANANDA NAYAK ………Petitioner

.Vrs.

THE CHIEF MANAGER, UCO BANK,
COLLEGE SQUARE, CUTTACK & ANR. ……….Opp. Parties

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 –S.13 (2),(4)

Remedies against action for recovery of secured debt – Writ petition filed by the petitioner-borrower against such action – Maintainabllity of – Held, the writ petition is not maintainable because of existence of stautory efficacious alternative remedy.

(Para 6)

For petitioner : M/s. Manoj Kumar Mohanty, M.R. Pradhan, T.Ppradhan, S.Mishra.
For opp. parties : None

Date of hearing : 23.11.2015
Date of judgment : 22.12.2015

JUDGMENT

VINOD PRASAD, J.

Paramananda Nayak, the writ petitioner, has invoked our extraordinary jurisdiction under Article 226 of The Constitution Of India, seeking relief "*to issue a writ order or direction in the nature of mandamus or any other appropriate writ or direction to the opposite parties to consider the representation of the petitioner for one time settlement for repayment of loan amount in respect of account no.15710602300002, Uco Bank, Abdalpur branch, district Jajpur.*"

2. Before entering into merits of this petition a concise accurate recapitulation of background facts, as can be fathomed out from the averments made in this petition, would reveal that the petitioner Paramananda Nayak is the owner of plot no. 562, Khata No. 144, Mauja Jajati Nagar, Unit-8, district Jajpur having an area of Ac.O.24 Decimals. Petitioner hankered to construct a residential house over the said plot for which he was in financial crunch and hence the petitioner approached respondent UCO Bank for granting him loan of Rs. 20,00,000/-(Rupees Twenty Lacs only) and succeeded in getting that much of amount of loan sanctioned on 11.8.2006 by entering into an agreement for that purpose. By way of secured asset, the borrower petitioner had mortgaged aforementioned plot to the secure creditor, UCO bank. Loan account of the petitioner is No.*15710602300002.* The loan was to be liquidated by paying agreed amount as EMIs as per schedule of payment. It is own averments by the petitioner borrower in para 4 of the writ petition, that he could re-pay only Rs. 7,00,000/- (Rupees Seven Lacs only) to the Bank/secured creditor and thereafter he was unable to pay balance of EMIs. Information from the UCO Bank, annexed as Annexure-1 would go to show that till 31.3.2015, the petitioner was required to pay Rs.54,08,754/-only(Rupees Fifty four lacs Eight thousand Seven hundred and Fifty four only) to discharge his entire loan liability. Admittedly, non-payment of EMIs inevitably resulted in classifying petitioner's aforesaid account as non performing asset (NPA) by the secured creditor Bank. Wielding statutory rights conferred under The Securitisation and Recovery of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act"), the financial institution/ Bank issued notice under section 13(2) of the Act on 12. 6.2015, which was received by the petitioner, calling upon the borrower petitioner to discharge his full liability within sixty days (60 days) from the date of notice and also informing the petitioner that failing to discharge his said liability, the "*Bank will exercise all or any of the rights detailed under Sub-Section (4) 0f Section 13 and under applicable*

provisions of the said Act." This notice, under section 13(2) of the Act, which is annexure no.2 to the writ petition, in fact records the liability amount as on 31.3.2015 as Rs.54,08,754/- only(Rs. Fifty four lacs Eight thousand Seven hundred and Fifty four only). The borrower petitioner filed an objection under section 13(3-A) of the Act on 28.10.2015 addressed to respondent/Opposite party no.2, a copy of which is annexed as annexure no. 3 and wherein it was requested "*to make one time settlement by deducting the interest amount which enables me to clear up the rest balance amount as for instalments basis."* It is averred in para-7 of the writ petition that the Branch Manager has informed the petitioner that his proposal for one time settlement (OTS) shall not be considered and the Bank is going to publish notice u/s 13(4) of the Act. Hence this writ petition assailing action by the Bank on the grounds (i) that the refusal by the Bank to consider OTS proposal by the borrower petitioner is illegal, arbitrary, and contrary to Law (ii) the secured asset, mortgaged land, is very valuable and will fetch more than crores of rupees as the same is located in central place of market of Jajpur town (iii) no action has been taken by the Bank on the representation made by the petitioner nor the opposite parties have passed an order for taking action u/s 13(4) of the Act and hence their action is illegal, arbitrary and contrary to Law (iv) the petitioner sincerely wants to repay the loan but the Bank has not acceded to his request for one time settlement.

3. In the light of above slated facts we have heard learned counsel for the petitioner in support of the writ petition in extenso.

4. Petitioner contends with vehemence that the Bank could not have rejected petitioner's OTS proposal and without deciding his objection u/s 13(3-A) could not proceed u/s 13(4) of the Act. Writ petition because of said reason is maintainable and mandamus should be issued as prayed.

5. Tenure and texture of present writ petition leaves no room for doubt that it relates to an action taken by the secured creditor, UCO Bank under the Act and consequently the primary question with emerges for determination is as to whether the writ petition is maintainable or not when the petitioner has got alternative efficacious and speedy remedy to approach Debt Recovery Tribunal, in short "DRT". Petitioner reiterates the same submissions inked in his petition but we find his contentions untenable, sans the law laid down by the Apex Court having a binding effect under Article 141 of the Constitution. We remind ourselves that question of entertaining writ petitions under Articles 226/227 of the Constitution of India, in disputes covered under the

Act, no longer remains res integra and has been subjectmatter of many a decision by the Hon'ble Apex Court and now it is trite law that no writ petition is maintainable in disputes relating to the Act and the parties must be relegated to seek remedy under the Act before the DRT. Without being bibliographical, we consider it apt to refer to some of those binding precedents. In **United Bank of India v. Satyawati Tondon and Ors.:AIR 2010 SC 3413** it has been held by the apex court as under:-

> *"17.There is another reason why the impugned order should be set aside. If respondent No.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."*

In **Kanaiyalal Chand Sachdeva And Others versus State of Maharastra and Others : (2011) 2SCC 782** it has been held as under:-

*" **21.** In Indian Overseas Bank v. Ashok Saw Mill the main question which fell for determination was whether the DRT would have jurisdiction to consider and adjudicate post Section 13(4) events or whether its scope in terms of Section 17 of the Act will be confined to the stage contemplated under Section 13(4) of the Act? On an examination of the provisions contained in Chapter III of the Act, in particular Sections 13 and 17, this Court held as under:*

"35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

* * *

39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT."

***22.** We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the*

Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT.

23. *In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person."*

6. In view of such unambiguous propounded law by the Hon'ble Apex Court, there remains little or no doubt that present writ petition is not maintainable because of existence of statutory efficacious alternative speedy remedy to the borrower petitioner.

7. Now, adverting to the submissions of petitioner's counsel that proposal of OTS submitted by the petitioner could not have been rejected by the Bank, we find the contention to be ludicrous and untenable. It is for the Bank to consider said aspect. It is a matter between two parties who are bound by the terms of agreement in between them. No third party intervention is required unless it is shown that the action by the secured creditor is beyond the purview of the Act itself and for that also the appropriate remedy is Debt Recovery Tribunal (DRT) as has been held above. In this regard, section 13(1) of the Act may be benefittingly taken note of which provides "*Notwithstanding anything contained in section 69 or section 69 A of the Transfer of Property Act, 1882(4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or tribunal, by such creditor in accordance with the provisions of this Act."* Bank as a secured creditor therefore has every right to enforce discharge of loan by the borrower in accordance with the provisions of the Act and no fetters on its power can be clamped by the Court or the tribunal as section 13 starts with a non-obstant clause. In the present petition, we further find that castigating the Bank for not accepting OTS proposal by the petitioner is an oxymoron contention as pleadings in that respect projects altogether a different picture. On his own the petitioner has pleaded that because of economic hardships and financial losses, he could not adhere to the schedule of payments by paying regular EMIs. This he could not do when his liabilities were much less than what he is required to pay now. Once the petitioner could not pay lesser amount, how can he pay a much more amount by entering into OTS is a very queer submission to

comprehend. To us it seems that the petitioner wants to use OTS proposal as a ploy to delay the payment further so that Bank could be restrained from proceeding u/s 13(4) of the Act for some more period. Otherwise also claim of the petitioner that the Bank is *"going to take over possession of the land under section 13(4) of the said Act"* is based on no concrete material and is purely conjectural and hypothetical. No notice has been issued under said section nor any intimation has been forwarded to the petitioner in that respect. For the above reasons, we don't find any substance in petitioner's submissions and consequently repel the same.

8. Second limb of petitioner's contention is that without deciding the objection filed by the petitioner u/s 13(3-A) of the Act, the Bank could not proceed u/s 13 (4) of the Act. Firstly, as has already been observed there is no basis to accept that the Bank is taking any action u/s 13(4) of the Act and secondly what is apparent from the record is that petitioner was served with a notice u/s 13(2) on 12.6.2015 calling upon him to repay the entire dues, which on that date existed as Rs.54,08,754/-only (Rupees Fifty four lacs Eight thousand Seven hundred and Fifty four only) within sixty days from the date of issuance of notice i.e. 12.6.2015. The petitioner instead of filing his objection u/s 13(3-A) within 60 days, the time period or cut off period, allowed by the statute for the Bank to proceed u/s 13(4) of the Act thereafter, admittedly, let the period of sixty days expire and filed his objection only on 28.10.2015 i.e. after a gap of more than 134 days, on 28.10.2015. The question which emerges for determination is whether the Bank is obliged to consider objection if the same is filed beyond the period of 60 days.

9. SARFAESI Act is a special enactment for specific purpose to "regulate *securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto."* In transactions/ contracts of such a nature each day counts as it either decreases right of the bank to recover a fixed amount or increases liability of the borrower to repay the liability. In our opinion, time is the essence of contract and hence time schedule fixed statutorily has to be adhered to strictly. Time of sixty days fixed by the statute is for the purposes of granting breathing time to the borrower to discharge his liability in full. In fact the borrower is under liability through a legal contract entered into on his own volition to follow repayment schedule. Further, section 13 (3-A) inserted by Act 30 of 2004, w.e.f. from 11.11.2004, does not provide any time limit for the borrower to file an objection against notice u/s 13(2) of the Act and this is for the reason that the legislature intended that the proceedings should

be expedited as quickly as possible within a reasonable time frame. The borrower, therefore, is required to file his objection as soon as possible, without any delay and to say forthwith, after receipt of notice from the secured creditor. While not fixing any period for the borrower to file objection, legislature in the same sub section 13 (3-A) of the Act has mandated the secured creditor to dispose of any such objection filed by the borrower within fifteen days (15 Days). This is also for obvious reason that the Bank should not delay in disposing of the objection within a reasonable period of time as that is in the interest of the Bank as well as the borrower. Section 13 (3-A) of the Act has to be interpreted keeping in mind the legislative intent and the purpose for which SARFAESI Act has been enacted. It has to be read in conjunction with other sub-sections and analyzing thus we are of the opinion that section 13 (3-A)of the Act albeit falls in the domain of procedure to be observed by the secured creditor, does not strictly fall in the realm of directory provision but is of a mandatory nature. Passing of each day creates a new liability on the borrower and a nascent right for the secured creditor. In this respect there lies a significant difference between Order VIII Rule 1 CPC and section 13 (3-A) of the Act. In this respect we can profitably refer to the observations made by the Apex court in **Kailash versus Nanhku : AIR 2005 SC 2441** wherein it has been held as under:-

> *"(iv)The purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court to extend the time. Though, the language of the proviso to Rule 1 of Order VIII of the CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 of the CPC is not completely taken away.*
>
> *(v)Though Order VIII, Rule 1 of the CPC is a part of Procedural Law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded the Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure there from*

> *would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the Court on its being satisfied. Extension of time may be allowed if it was needed to be given for the circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."*
>
> (Underline emphasis ours)

The observation underlined above creates a distinction between Order VIII Rule 1 CPC and section 13(3A) of the Act. At the cost of reiteration, we record that each day's delay results in a significant penal consequence upon the borrower and creates a new liability on him and at the same time a further Right on the secured creditor. Time schedule being essence of the contract, thus cannot be held to be only directory and not mandatory in nature. This opinion of ours is also supported by the proviso attached to section 13 (3-A) which ordains that no reason so communicated or the likely action of the secured creditor at the stage of communication of the reasons shall confer any right to challenge the same either before the DRT or before the District Judge under sections 17 or 17-A of the Act respectively. Curtailment of the right of the borrower to challenge in an appropriate forum the reasons communicated or steps taken in communication by the secured creditor is a significant departure from Order VIII Rule 1 CPC. Thus the right injected in the borrower to challenge the action of a secured creditor is infused with life only when action under section 13(4) is resorted to and not prior to it. This becomes apparent if section 17 (3) of the Act is read in conjunction with Section 13 (3-A) & (4) of the Act. Here we would like to add that we do not want to say that the borrower is left remediless after his objection is rejected by the secured creditor as he certainly can challenge it while challenging action under section 13(4) of the Act under section 17 (3) of the Act before the DRT. Once the statute prohibits challenge to an action by the secured creditor in the forum meant for it, then in view of various propounded law by the Hon'ble Apex Court referred to above, no writ

petition can be entertained to scuttle down the enacted provisions as it will amount to permitting something to be done indirectly or in a surreptitious way which is prohibited in law. Otherwise also if the statute provides for seeking remedy in a particular forum, no other forum should be generated to act dehors the statute.

10. In our final analysis, we find that since the petitioner had not made any objection within the period permitted under the statute i.e. sixty days (60 Days), the Bank is not under any legal compulsion to decide the same within fifteen days (15 Days) and hence petitioner cannot gain any benefit of his own wrong. Second submission by the petitioner is also without any merit and hence is discarded.

11. In view of what we have said hereinbefore and wrapping up, we don't find any merit in this writ petition which for the said reason stands dismissed. No order as to cost.

Writ petition dismissed.

2016 (I) ILR - CUT-44

VINOD PRASAD, J. & S.K. SAHOO, J.

JCRLA NO. 55 OF 2006

SANIA MUDULI ....Appellant

.Vrs.

STATE OF ORISSA ....Respondent

(A) EVIDENCE ACT, 1872 – S.32

Dying declaration – P.W.s 1, 2 & 3 categorically stated that the deceased specifically implicated the appellant to have shot arrow at him – They have no hostile attitude against the appellant to implicate him falsely – Their evidence is corroborated by medical evidence – Even doctor has stated that the injury found on the deceased is possible by arrow – Held, the arrow shot by the appellant is the cause of deceased's death. (Para 6)

(B) CRIMINAL TRIAL – Appreciation of evidence – Since the incident occurred all on a sudden, the attack made by the appellant is

not pre-meditated – No previous dispute or ill feeling between the appellant and the deceased – No evidence that the appellant was an expert in shooting arrow or he shot the arrow aiming at the right side chest of the deceased – Occurrence took place in course of sudden quarrel under the influence of liquor – Intention of the appellant for commission of murder can not be inferred though knowledge can be attributed to him regarding likelihood of death because of arrow shot injury – Held, impugned conviction and sentence U/s. 302 I.P.C. is set aside and the appellant is convicted U/s. 304 Part-II I.P.C. and directed to suffer imprisonment for eight years. (Para 8)

Case Laws Referred to :-

1. (2014) 58 OCR 645 : Om Prakash -V- State of Haryana

For Appellant : Mr. Ambika Pr. Mishra, G.Sethi
For Respondent : Mr. Sk. Zafarulla, Addl. Standing Counsel

Date of hearing : 08.01.2015
Date of Judgment : 12.01.2015

JUDGMENT

S.K.SAHOO, J.

The appellant faced trial in the court of learned Addl. Sessions Judge, Malkangiri in C.T. Case No.36 of 2002 for offence punishable under section 302 IPC for committing murder of Hadi Dora (hereafter the "deceased") at Kendu Dangara Jholla near village Podeiguda on 11.4.2002 at about 4.00 p.m. The learned trial court vide impugned judgment and order dated 18.5.2006 held the appellant guilty under section 302 IPC and accordingly convicted him of such offence and sentenced him to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in default of payment of fine to undergo R.I. for six months more.

2. The prosecution case as per the First Information Report submitted by Sukra Kirsani (P.W.1) before Officer-in-Charge, Mudulipada police Station on 13.4.2002 is that on 11.4.2002 at about 1.00 p.m. the deceased along with the appellant, P.W.2 Sukra Muduli, P.W.3 Lachhim Muduli and one Sadhu Chalan had been to Kendu Dangara Jholla to take salap (liquor prepared from date palm tree). At about 4.00 p.m. while P.W.2, P.W.3 and Sadhu Chalan were returning after taking salap, they heard quarrel between the appellant and the deceased. The deceased called out in high pitch and stated that the appellant shot at him. Hearing such shout of the deceased, P.W.2, P.W.3 and

Sadhu Chalan returned back and saw that the arrow shot by the appellant has pierced on the right side chest of the deceased and they pulled it out and then proceeded to the village and intimated the villagers about the incident. During midnight, P.W.2 along with five other co-villagers brought the deceased to his house from the Kendu Dangara Jholla. P.W.2 asked the deceased about the incident who stated that after taking salap when he asked the appellant for more salap, there was quarrel between them and the appellant shot an arrow at him. On 12.4.2002 at about 3.00 a.m., P.W.2 and others tried to shift the deceased to the hospital but he expired at the outskirts of the village. After taking back the dead body to the village, a panch was convened in the night but the appellant did not turn up for which the dead body was taken to the police station along with the arrow shot by the appellant.

On the oral report of P.W.1, the Officer-in-charge of Mudulipada police station reduced it into writing and treated it as FIR. During course of investigation on 19.4.2002, the appellant was arrested by P.W.5 Purna Chandra Nayak, Officer-in-charge Mudulipada police station and the exhibits were forwarded to R.F.S.L., Berhampur to SDJM, Malkangiri. P.W.5 handed over the charge of investigation to P.W.6 Y. Jagannath Rao who was the Circle Inspector of police, Orkel on 30.4.2002 who after completion of investigation submitted charge sheet.

3. That the defence plea is one of denial.

4. In order to prove its case, the prosecution examined six witnesses.

P.W.1 Sukra Kirsani stated to have carried the deceased in an injured condition to his house where the deceased made the dying declaration. He is the informant in this case.

P.W.2 Sukra Muduli stated to have pulled out the arrow from the chest of the deceased and further stated about the dying declaration of the deceased.

P.W.3 Lachhim Muduli also stated to have brought the deceased to his house where he made the dying declaration.

P.W.4 Dr. Sashibhusan Mohapatra conducted post mortem examination over the dead body and proved his report (Ext.1). He further replied to the query of the I.O. that injury noticed on the dead body was possible by the arrow. His report has been marked as Ext.2.

P.W.5 and P.W.6 are the Investigating Officers.

5. So far the conviction of the appellant under section 302 IPC is concerned, it is first to be seen as to how far the prosecution has established that it is a case of homicidal death.

P.W.4 who was attached to C.H.C., Khairput conducted post mortem examination on 14.4.2002 and he noticed the following injuries:-

(i) one incised wound over right side chest having size 1½ cm x ¼ cm x 2 cm on third intercostal space, which according to him was caused by sharp cutting weapon and grievous in nature. He found that the right lung was cut causing haemothorax which has lead to cardio respiratory failure resulting in death. The injury was opined to be ante mortem in nature.

The learned counsel for the appellant has not challenged the version of P.W.4 and the findings in the post mortem report (Ext.1). In view of the evidence of P.W.4 as well as the post mortem report (Ext.1), we are of the view that the prosecution has proved the death of the deceased to be homicidal in nature.

6. In this case, there is no direct evidence and the entire case is based on the oral dying declaration stated to have been made before P.W.1, P.W.2 and P.W.3. All the three witnesses have categorically stated that the deceased specifically implicated the appellant to have shot arrow at him. The version of these three witnesses regarding dying declaration is corroborated by the medical evidence and the doctor has specifically stated that the injury found on the dead body is possible by arrow (M.O.1).

A dying declaration is a statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death and it is admissible under section 32 of the Indian Evidence Act, 1872. Great solemnity and sanctity is attached to the words of a dying person because on the verge of death, a person is not likely to tell lies or to concoct a case so as to implicate an innocent person. When every hope of this world is gone, when every motive to speak falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. The dying declaration must be of such a nature so as to inspire full confidence of the Court regarding its correctness. Once the Court is satisfied that the declaration is true and voluntary, it can base an order of conviction. The rule

requiring corroboration is merely a rule of prudence. When the deceased is in a fit state of mind and is capable of making a statement and he has a clear opportunity to observe and identify his assailant and there is no evidence of tutoring to the deceased, the dying declaration made by such person can be acceptable. Oral dying declaration can also form the basis for conviction if it is found to be trustworthy, free from any kind of blemish and inspire confidence. Law does not require that the maker of the dying declaration has to narrate the whole incident. Even if the dying declaration is brief and it merely indicates as to who assaulted the declarant, it can be accepted and relied upon provided that the other criterias are satisfied.

In the present case the evidence of P.W.1, P.W. 2 and P.W. 3 regarding the dying declaration appears to be very natural and nothing has been brought out in the cross examination to discard such evidence. P.Ws.1, 2 and 3 have no hostile attitude against the appellant to implicate him falsely. The dying declaration is also mentioned in the FIR which was lodged by P.W.1. In view of the evidence of P.W.1, P.W.2 and P.W.3 that the deceased specifically mentioned the name of the appellant as his assailant which is corroborated by the evidence of the doctor (P.W.4), we accept the dying declaration made by the deceased to be true and voluntary. We also held that the arrow shot by the appellant which caused injury on the right side chest of the deceased is the cause of his death.

7. The learned counsel for the appellant submitted that though the incident stated to have taken place on 11.4.2002 at about 4.00 p.m. but the FIR was lodged on 13.4.2002 at 12.30 p.m. and the prosecution has not satisfactorily explained the delay caused in lodging the FIR. We are not convinced by the argument advanced by the learned counsel in as much as the material available on records clearly indicates that the deceased was shifted from the spot to his house in an injured condition at about 12'O clock midnight on 11/12.4.2002 and an attempt was also made thereafter to shift him to the hospital but on the way the deceased expired for which the dead body was brought back to the village. In the night on 12.4.2002, a Panchayat was convened in the village but the appellant did not attend the same and ultimately on 13.4.2002 the report was lodged.

It is the settled law that mere delay in lodging the first information report cannot by itself be regarded as fatal to the prosecution case. The Court has a duty to take notice of the delay and examine the same in the backdrop of the factual score, whether there has been any acceptable explanation

offered by the prosecution and whether the same deserves acceptation being satisfactory, but when delay is satisfactorily explained, no adverse inference is to be drawn (Ref:-**(2014) 58 Orissa Criminal Reports 645, Om Prakash –v- State of Haryana**).

In view of the evidence on record, we are of the view that the delay in lodging the FIR can be said to have been explained satisfactorily by the prosecution.

8. From the narration of incident, it is clear that there was no pre-meditated attack by the appellant and the incident occurred all on a sudden. The appellant, the deceased and others had been to Kendu Dangara Jholla near their village Podeiguda and after taking liquor there was quarrel between the appellant and the deceased. P.W.1, P.W.2 and P.W.3 have stated that there was no previous dispute or ill feeling between the appellant and the deceased. There is also absolutely no evidence that the appellant was an expert in shooting arrow or that he shot the arrow aiming at the right side chest of the deceased. There is also no evidence as to from what a distance the arrow was shot at the deceased. There was no previous deliberation or determination to assault the deceased. In absence of any pre-meditation and in the influence of the liquor and during course of the sudden quarrel, the arrow appears to have been shot at the deceased by the appellant. Under the circumstances, we are of the opinion that intention of commission of murder cannot be inferred. However, knowledge can be attributed to the appellant regarding likelihood of death because of arrow shot injury. It would, therefore, be proper to held the appellant guilty under section 304-II IPC and direct him to suffer imprisonment for eight years.

In the result, the appeal partly succeeds. The impugned judgment and order of conviction and sentence passed under section 302 IPC is set aside and the appellant is convicted under section 304 Part-II IPC and directed to suffer imprisonment for eight years.

It appears that the appellant was in jail custody since 20.4.2002 and he was released on bail by this Court vide order dated 21.6.2010 and thus he has already served the sentence imposed by us and therefore he is not required to be taken into custody further in connection with this case. He is set at liberty and his personal and surety bonds are discharged.

Appeal allowed in part.

2016 (I) ILR - CUT- 50

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

STREV NO. 20 OF 2015

M/S. BANSAPANI IRON LTD. ....Petitioner

.Vrs.

STATE OF ODISHA ....Opp. Party

ODISHA VAT ACT, 1947 – S.2(8) (As amended in 2007)

Amendment of the definition "Capital goods" in section 2(8) of the Act – Prior to amendment, spare parts were dealt separately other than "capital goods" – Whether the amendment is prospective or retrospective in nature ? – OVAT (Amendment) Act, 2007 did not itself declare the date from which the statute came into operation and left it to the Government to issue the appointed date through notification and notification was issued indicating 01.06.2008 as the appointed date – Held, the amendment is not clarificatory but prospective in nature.

(Para 12)

Case Laws Referred to :-

1. AIR 1990 SC 2300 : M/s. Punjab Traders & Ors. -V- State of Punjab & Ors.

For Petitioner : M/s. Prakash Kumar Jena, S.C.Sahoo, L.N.Sahoo & & A.R.Mishra

For Opp. Party : Mr. R.P.Kar, Standing Counsel (C.T.)

Date of Judgment: 02.11.2015

JUDGMENT

I. MAHANTY, J.

The present revision has come to be filed seeking to challenge an order dated 03.03.2015 passed by the Sales Tax Tribunal in S.A. No.243(V) of 2013-14, by which order, the appeal filed by the present petitioner-M/s. Bansapani Iron Ltd. on the scope, applicability and retrospectivity or otherwise of the amendment to Section 2(8) of the OVAT Act, 2004 and in particular, the definition of the terms "Capital Goods" came to be rejected holding the same to be prospective in nature and cross-appeal filed by the Revenue was disposed of accordingly.

2. Learned counsel for the petitioner while assailing the order of the Tribunal, inter alia, raised various issues and in particular, raised question as to whether the Tribunal was legally justified to hold that the amendment of Section 2(8) of the OVAT Act, 2004 was available prospectively with effect from the appointed date i.e. 01.06.2008 and not retrospectively as claimed by the petitioner.

3. Admittedly, Section 2(8) of the OVAT Act, 2004, prior to its amendment stood as follows:

> "2. Definitions.-
>
> (8) CAPITAL GOODS" means plants, machinery and equipments used directly in the process of manufacturing and shall include the components and spare parts thereof, but shall not include such plant, machinery and equipments which are used for the purposes and in the circumstances specified in Schedule 'D';"

3. After the amendment made by Gazette Notification dated 28th May, 2008 to the Orissa Value Added Tax (Amendment) Act, 2007 under (Orissa Act 3 of 2008), it has been stipulated at Sub-Section (2) of Section 1 of the Amendment Act that, the Act would come into force "on such date" as the Government may, by notification, shall appoint. The Government published in the Orissa Gazette dated 28th May, 2008 declaring to the effect that, it appointed on the 1st day of June, 2008 as the date of which, the Act shall come into force.

4. In view of the aforesaid facts situation, learned counsel for the petitioner submits that this amendment ought not to be treated as prospective in nature but ought to be accepted as clarificatory in nature and, therefore, ought to be given retrospective effect. In support of such contention, he placed reliance on the judgment of the Full Bench of this Court dated December 2, 1994 in the case of Sri Jagannath Industries and others v. State of Orissa and others, in which the insertion of a definition of the term "manufacture" in Section 2 (ddddd) of the Orissa Sales Tax Act, 1947 on the issue, as to whether the same is considered to have prospective or retrospective operation.

5. This Court in the said judgment came to conclude that on March 26, 1994, the Finance Department in exercise of the powers conferred by Section 6 of the Act amended the declaration form-1-B retrospectively w.e.f. April 1, 1986 and simultaneously also introduced the definition of the term

"manufacture" in the statute which was earlier not defined and held that such definition clause of the term "manufacture" was essentially explanatory, clarificatory or declaratory and would be read to be retrospective effect. In Para-12 of the judgment, this Court came to conclude that in view of the fact that the declaration form 1-B although, amended on 26th March, 1994, was given retrospective effect from 1st April, 1986. Consequently, this Court came to hold that introduction of the definition of the word "manufacture" would also to be given to retrospective effect.

6. Learned counsel for the petitioner also placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***M/s.Punjab Traders and others v. State of Punjab and others,*** AIR 1990 Supreme Court 2300. In the said judgment, the Hon'ble Supreme Court also came to a conclusion that the amendment Act, 1973 to the E.P.Molasses (Control) Act including "Khandsari" within the definition of sugar for the purpose of the said Act concluded that the said amendment was merely clarificatory, since it was well understood that "Khandsari" sugar was also "sugar", and that any reference to sugar in the absence of specific exclusion or qualification, was capable of equal application to sugar of all kinds including khandsari.

7. Mr. Kar, learned Standing Counsel for the Revenue submits in affirmation of the orders passed by the Sales Tax Tribunal and submits that as to whether an amendment especially in the field of tax law is prospective or retrospective, is wholly an issue where the intent of legislature has to be determined. In the present case, while the Orissa Value Added Tax (Amendment) Act, 2007 though published in the Orissa Gazette on 28th May, 2008, did not come into immediate effect and it was left to the State to notify the date on which, the said amendment would came into operation.

He further submits that in exercise of such power vested, the State on 1st June, 2008 was declared as "appointed date" and necessary Notification in the Orissa Gazette was published on 28th May, 2008.

8. On a plain reading of the amending Act as well as the further Notification fixing of the appointed date to bring the said amendment into effect, it would clear therefrom that there is no scope for entering into the issue raised by the petitioner as to whether it is retrospective or not, since legislative intent is clear, categoric and unambiguous.

9. Mr.Kar, learned Standing Counsel further submits that insofar as the judgment rendered by the Full Bench of this Court in the case of Sri Jagannath Industries and others (supra) is concerned, he places heavy reliance

on Para-10 thereof and the finding that the declaration Form 1-B was amended on 26th March, 1994 by the Finance Department but given retrospective effect from April 1, 1986. Learned counsel asserts that the Hon'ble Court derived the legislative intent from the retrospective amendment to the declaration form and accordingly, the introduction of the definition to the term "manufacture" was correctly held to be retrospective and to operate from 1st April 1986 itself i.e. the date from which Form1-B was amended retrospectively.

10. Perused the judgment of the Tribunal. The Tribunal also came to in its conclusion that the amendment of Section 2(8) of the OVAT Act dated 1.6.2008 was clearly prospective in nature and the assessment years for the period 2006-2007, the amendment would have no application for the period during which the impugned transaction took place.

11. Having heard the learned counsel for the respective parties and after perusing the order of the Tribunal as well as the judgment cited at the Bar, we are of the considered view that the fact situation that arises for consideration in the present case is distinct from the fact situation that arose for consideration by the Hon'ble Full Bench of this Court in the case of ***Sri Jagannath Industries and others*** (supra). In the said judgment the definition of the word "manufacture" was introduced in the year 1994 by way of amendment but prior thereto, no definition of the term "manufacture" existed in the statute. Further, in exercise of power under Section 6 of the Act, the Finance Department on 26th March, 1994 amended the declaration Form 1-B retrospectively from 1st April, 1996. Consequently, the introduction of the amended declaration form 1-B as well as the term "manufacture" and the definition thereof were given retrospective effect from the same date.

In the present case, the facts of the present case is distinct, inasmuch as, the Orissa Value Added Tax (Amendment) Act, 2007 did not itself declare the date from which the statute came into operation and left it to the Government to issue the appointed date through Notification.The Notification was issued thereafter indicating 1st day of June, 2008 as the appointed date.

We are of the considered view that, the same cannot be any clearer indication of legislative intent other than the Notification notifying the appointed date, from which the Act would come into operation. Apart from the above, we are also of the view that the judgment cited at the Bar by the petitioner in the case of ***M/s.Punjab Traders and others*** (supra), Hon'ble the Supreme Court clearly came to a conclusion that "the said amendment was

clarificatory, since it was always well understood in trade that khandsari sugar was also sugar". In the present case, prior to 2008 amendment to the OVAT Act, spare parts were dealt separately other than capital goods. It is only on and from the date, on which spare parts became covered under the term "capital goods" with the 2008 amendment came into force, that the situation stood otherwise and this amounted to a substantiate change insofar as taxability of a transaction is concerned.

12. We are not in agreement with the contention of the learned counsel for the petitioner that such nature of amendment is merely clarificatory in nature. It has changed the taxability or liability of tax of certain goods which is known as "spare parts" coming into the effect of the amendment. Consequently, we find no issue of law arises for the purpose of consideration in the present case any further and accordingly, the present revision stands dismissed.

13. Free copy of this order be handed over to the learned counsel for the Revenue. Urgent certified copy of this order be granted on proper application.

Revision dismissed.

2016 (I) ILR - CUT- 54

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

STREV NO. 113 OF 2009

M/S. GAYATRI BRICK INDUSTRIES ……..Petitioner

.Vrs.

STATE OF ODISHA ………Opp. Party

ODISHA SALES TAX ACT, 1947 – S.23(3)

Whether Tribunal can enhance the assessment while deciding Second Appeal without giving notice of enhancement to the dealer ? Held, when appeal is filed by the dealer and State has also filed appeal, there is already notice of enhancement of demand and there is no necessity to give further notice of enhancement to the dealer.

(Paras 5, 8)

Case Laws Referred to :-

1. (2009) 20 VST 330 (Orissa) : Sri Mayur Biscuits Co. (P) Ltd. -V- Sales Tax Officer, Mayurbhanj Circle, Baripada & Ors.

For Petitioner : M/s. Jagabandhu Sahoo, Sr. Counsel, N.K.Rout & P.Mohapatra

For Opp. Party : Addl. Standing Counsel (Revenue)

Date of hearing : 20.7.2015
Date of judgment : 24.7.2015

JUDGMENT

DR. D.P.CHOUDHURY, J.

The petitioner has filed this revision under section 24(1) of the Orissa Sales Tax Act, 1947 (hereinafter for short 'the Act') challenging the finding of the Orissa Sales Tax Tribunal (DIVISION BENCH-II), Cuttack vide order dated 20.4.2009 passed IN S.A. Nos. 416 & 654 of 2006-2007 upholding the alleged suppression of tax amounting to Rs.5,62,834.45 paise and also enhancement of tax demand in lieu of tax determined.

FACTS OF THE CASE :

2. Succinctly, facts of the case of the petitioner are stated below:-

Petitioner is a registered dealer under the Act engaged in manufacturing, selling of bricks and used to maintain the books of accounts as required under section 15 of the Act. For the year ending 2001-2002, he has maintained the books of accounts by disclosing the gross turn over and the taxable turn over at Rs.2, 93,328/- and Rs.2,61,900/- respectively after deduction towards Sales tax calculated at Rs.31,428/-. It was reported by the I.S.T.(Intelligence), Berhampur that during the year 2001-02 the petitioner has transported 340 trucks of bricks through the Girisola check gate, Ganjam, Berhampur. On being asked he reported that some manufacturers might have utilized his name while transporting their bricks. Moreover, the assessing Authority found that the dealer–petitioner has claimed to have collected Rs.3,500/- per truck load of bricks although the books of accounts is maintained reflecting Rs.1008/- per truck load of bricks. Therefore, the learned Assessing Authority demanded the tax of Rs.3,33,950/-.

3. Against the above order, the petitioner preferred First Appeal before the learned Asst. Commissioner of Sales Tax, Ganjam Range, Berhampur in F.A. Case No. AA 538/2004-05 who vide order dated 24.4.2006 rejected the plea of the petitioner to the effect that some other owner of the bricks might have utilized its name. On the other hand, learned First Appellate Authority held that the petitioner had sold 340 truck loads of bricks by using own way bills in order to evade the payment of tax of 340 nos. of truck loads of bricks. Moreover, learned First Appellate Authority reduced the enhanced turn over by Rs.6,29,200/-. Learned First Appellate Authority after deducting the tax of Rs.32,778/- already paid by the petitioner from the demand of Rs.1,17,612/-, directed to pay tax of Rs.84,834/-. The appeal was allowed in part and assessment of tax liability was reduced to Rs. Rs.84,834/-.

4. Being aggrieved by such order of the learned First Appellate Authority, the petitioner and the State filed two Second Appeals namely, S.A. Nos. 416 and 654 of 2006-07 respectively before the Tribunal. In those appeals, learned Tribunal vide order dated 20.4.2009 held the petitioner guilty of under invoicing sale price of bricks for 259 truck load of bricks. Learned Tribunal observed that the petitioner has suppressed the sale price of those truck load of bricks at the rate of Rs.3,500/- against Rs.1,008/- per truck load of bricks. Learned Tribunal further held that the petitioner is guilty of suppressing sale of 340 truck load of bricks and price in respect of entire 340 truck load of bricks was being computed at Rs.11,90,000/. Learned Tribunal found under-invoiced sale price of bricks and also sale suppression at the instance of the petitioner for which enhanced the tax from Rs.84,834/- to Rs.2,45,310/-. Resultantly learned Tribunal dismissed the Second Appeal filed by the petitioner and allowed the appeal filed by the Revenue, in part.

SUBMISSIONS :

5. Learned counsel for the petitioner submitted that due to violation of natural justice, the impugned order is liable to be set aside. According to him the petitioner has not got a notice of cross-objection or cross-appeal as the case may be before enhancement of tax. He further submitted that there is decision of our High Court in this regard in **Sri Mayur Biscuits Co. (P) Ltd. v. Sales Tax Officer, Mayurbhanj Circle, Baripada and others**, [2009] 20 VST 330 (Orissa), wherein Their Lordships have observed that the Tribunal admittedly having not issued notice to the petitioner dealer prior to the order making enhancement of tax passed by it, the order of the Tribunal is liable to be set aside. He submitted that as reasonable opportunity was not given to the petitioner to produce the books of accounts and the Tribunal grossly

erred in law by not giving opportunity of hearing while enhancing the demand of tax, the impugned order is illegal, improper and liable to be interfered with. He further submitted that the impugned order is void for the reason that the Tribunal has failed to award natural justice by not issuing notice to the petitioner of enhancement of tax demanded. Thus the petitioner prayed to set aside the entire order of the learned Tribunal and pass an order for reassessment of tax by remitting it to the assessing authority.

6. Learned Addl. Standing Counsel for the Revenue submitted that there is no merit in the appeal because the Revisional Court being not a fact finding court, cannot entertain the petition even if there is gross mistake in finding of facts of the petitioner. He further submitted that the learned Tribunal instead of allowing the appeal of the State in part, should have allowed the appeal in toto. However, the learned Standing Counsel for the Revenue supported the order of the Tribunal and prayed to dismissed the Revision filed by the petitioner.

DISCUSSIONS :

7. We have heard the respective counsel, considered the documents filed by both the parties and also perused the decision, i.e., **Sri Mayur Biscuits Co. (P) Ltd. (**supra). It has been held in the aforesaid decision in the following manner :

> "In the aforesaid view of the matter, we follow the judgment of the Division Bench of this Court in the case of Shyamsunder Sahoo v. State of Orissa reported in [1994] 92 STC 28. In that judgment also, the learned Judges were pleased to set aside the enhancement on the ground that no opportunity for showing cause against the proposed action for enhancement was given to the petitioner by the Tribunal. Following the ratio in the said judgment, we set aside the order of the Tribunal dated March 16, 2007 passed in S.A. No.256 of 2002-03. xx xx"

8. With great respect it is found that in that case, no notice of enhancement of the demand of tax was issued and also no cross-appeal was filed before the Tribunal. But in the present case, cross-appeal is filed by the State before the learned Tribunal. Both the appeals, purportedly filed by the petitioner and the State have been heard together and disposed of by common impugned order. Thus the aforesaid decision is not applicable as the facts and circumstances of the above decision differs from the facts and circumstances of the present case. Petitioner-dealer got notice of

enhancement of demand through cross appeal filed by the State before the Tribunal. When there is already notice of enhancement of demand, the question of not giving reasonable opportunity of being heard on enhancement of demand is non est. Therefore, the contention of the learned counsel for the petitioner has no force in this regard.

9. Section 24(1) of the Act enshrines in the following manner :

"**24. Revision by High Court :-**

(1) Within sixty days from the date of receipt of the copy of an order of the Tribunal under sub-section(3) of Section 23 affecting any liability of a dealer to pay tax under this Act, or within sixty days of coming into force of the Orissa Sales Tax (Amendment) Act, 2000 for the cases pending before Tribunal for reference to High Court as on the date of coming into force of the said Act, such dealer or, as the case may be, the State Government may prefer a petition to the High Court against the order on the ground that the Tribunal has either failed to decide or decided erroneously any question of law:

Provided that the High Court may admit a petition preferred after the period of sixty days aforesaid if it is satisfied that the petitioner had sufficient cause for not preferring the petition within that period."

10. The aforesaid provision clearly shows that only on question of law, the revision can be considered by the Court. Any question of dispute with regard to the fact unconnected with question of law, cannot be gone into by the Court. In the instant case, there is only allegation by the petitioner that some manufacturer of brick must have utilized its name while carrying the truck load of bricks to the Girisola Check Gate and the said plea has been rejected by the concerned authorities below including the Tribunal. Moreover, the plea of the petitioner that there is no sale suppression and under-invoicing which are the facts in issue, have not been accepted by the Tribunal. When there is already money receipt showing the collection of amount of Rs.3500/- per truck load of bricks but the books of accounts show sale at Rs.1008/- per truck load of bricks, the facts decided by the Assessing Authority, First Appellate Authority and the Tribunal have been set at rest. Such questions of fact being not question of law nor being connected with any question of fact and law, can be adjudicated in this revision. We, therefore, are not inclined to interfere with the findings of the learned Tribunal in this revision. In the result, this revision stands dismissed.

Revision dismissed.

2016 (I) ILR - CUT- 59

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

STREV NO. 60 OF 2011

M/S. KALINGA AUTO CENTRE PVT. LTD., CANTONMENT ROAD, CUTTACK ……..Petitioner

.Vrs.

STATE OF ODISHA ……..Opp. Party

CENTRAL SALES TAX ACT, 1956 – S.3(a)

Sale of Padmini Car – Customers booked the vehicle from petitioner's Cuttack office directly to its branch office at Mumbai and Mumbai Office after procuring the same, sends it to the Cuttack Office where customers take delivery of the same – Held, when the vehicle is sent from one State to another being an incident of contract, it is an inter-State sale – Impugned decision of the learned Tribunal is set aside. (Paras 17 to 23)

Case Laws Referred to :-

1. AIR 1976 SC 1016 : Balabhagas Hulschand -V- State of Orissa
2. (1992) 87 STC 506 : State of Orissa -V- Rolta Motors Ltd.
3. (1985) 60 STC 301 (SC) : Sahney Steel & Press Works Ltd. & Anr. -V- C.T.O. & Ors.
4. AIR 1977 SC 19 : English Electronic Company of India -V- Dy Commercial Tax Officer

For Petitioner : M/s. S. Kanungo, Ch. S. Mishra, R.N.Patnaik, N.R.Mohanty, N.K.Nanda & Ch. H.Satpathy

For Opp. Party: Mr. R.P.Kar, Standing Counsel (Revenue)

Date of hearing : 8 .9. 2015
Date of judgment : 22.9.2015

JUDGMENT

Dr. D.P.CHOUDHURY, J.

The captioned revision has been preferred under section 24(1) of the Odisha Sales Act, 1947 (for short 'the Act') against the order dated 28.12.2010 passed by the Odisha Sales Tax Tribunal, Cuttack (in short 'learned Tribunal') in S.A. No. 114 of 1999-2000.

FACTS :

2. The factual matrix leading to the case of the petitioner is that the petitioner carries on business in cars, motor vehicle spare parts and accessories being authorized dealer of car produced by M/s. Premier Automobiles Ltd., Mumbai. For carrying on its business, petitioner has three branches; one at Cantonment Road, Cuttack, Odisha; at Bhubaneswar, Odisha and at Mumbai, registered with STOC 150, Ghatkopar Division, New Mumbai. Petitioner, at its Cuttack Branch used to sell other automobile vehicles, namely, Hero Honda motorcycles, components, accessories and spare parts of Premier cars for which it has already paid tax to the Sales Tax Officer and for that used to pay sales tax under Odisha Sales Tax Act, 1947 (for short 'the Act'). Since the petitioner has no sale at Cuttack Branch of cars manufactured by M/s. Premier Automobiles Ltd., Mumbai, did not pay any tax under the Act. It is alleged, inter alia, that the learned Sales Tax Officer, Cuttack-I, Central Circle, Cuttack, the Assessing Officer, issued notice to produce the books of accounts. At the same time, the Assessing Officer got fraud case report against the petitioner. The report says that 176 numbers of cars have been procured from its branch office at Mumbai and sold to consumers at Odisha. According to the petitioner, no sale of such cars takes place in Cuttack because a customer desirous of purchasing Padmini car from the Mumbai under direct billing system, gives a letter of authorization in favour of the branch office situated at Mumbai to receive and to appoint a Transporter to drive down the vehicle from Mumbai to the destination mentioned in the letter of authorisation. While explaining the business, the petitioner explained that after the money is received from the customer, petitioner used to issue a money receipt in acknowledgement of the deposit made by the customer and then sends the said cheque or draft to Mumbai branch office intimating about the purchase of the car by the customer from Mumbai branch. The manufacturing company delivers the vehicle to Mumbai branch and raises the invoices in the name of Mumbai branch of the petitioner-company. Then the Mumbai branch intimates the petitioner-company over telephone or FAX with regard to the chasis number and engine number of the vehicle received in the name of the customer. Then the branch of petitioner-company in Odisha informs the customer about the consignment of the vehicle from Mumbai to Odisha and asked the petitioner to prepare insurance cover note for transporting and driving down the vehicle from Mumbai to the place of destination.

3. It is also alleged, inter alia, that the petitioner also gets temporary registration number of the vehicle at the office of Regional Transport office,

Mumbai. When the vehicle of the customer reaches at the registered office of the petitioner-company at Cuttack, petitioner-company at Cuttack undertakes necessary servicing, washing of the vehicle and then hand over the vehicle to the customer. According to the petitioner, the entire transaction is an inter-State transaction under section 3(a) of the Central Sales Tax Act, 1956 ('C.S.T. Act' in short) and the same is not a intra-State transaction. After verifying the books of accounts and hearing the matter from the petitioner, the Sales Tax Officer without any valid reason, added Rs.3,99,05,248.81 paise with the gross taxable turn over of the petitioner taking the sale of 176 numbers of cars as intra-State sale. Thereafter the petitioner preferred appeal under sub-section 1 of Section 23 of the Act raising several grounds to support its claim. The First Appellate Authority, Assistant Commissioner of Sales Tax held that the sale in question being inter-State sale is covered under section 3(a) of the Central Sales Tax Act and the same cannot be exigible under the State Sales Tax Act for which directed the deletion of the said amount of Rs.3,99,05,248.81 paise from its gross turn over and re-assess the tax payable by the petitioner-company.

4. The State preferred Second Appeal before the learned Odisha Sales Tax Tribunal, Cuttack in S.A. No. 114/1999-2000 and the Tribunal after hearing both the parties and relying upon the decisions of the Hon'ble Supreme Court in the case of **Balabhagas Hulschand v. State of Orissa**, AIR 1976 SC 1016 vide order dated 28.12.2010 held that the said transactions are not inter-State transactions and are intra-State transactions for which the above amount said to be deleted, should be added to the gross turn over and fresh assessment should be made. Against that order, petitioner preferred the present revision to set aside the order of the Tribunal and to restore the order dated 30.1.1999 passed by the Assistant Commisioner of Sales Tax, Cuttack-I Range, Cuttack in Sales Tax Appeal No. AA714 CU-I C/97-98.

<u>SUBMISSIONS</u> :

5. Learned counsel for the petitioner submitted that the order of the learned Tribunal is erroneous, illegal and arbitrary. According to him, the said order of the Tribunal is couched with conjectures and surmises. He further submitted that the Mumbai branch office is purchasing the cars from the manufacturer at Mumbai and sends the same to registered office at Cuttack for fitting of accessories, preparation of documents and then hands over the motor car to the customer. The customer's cheque is directly issued

to the Mumbai office of the petitioner where the manufacturer takes order and delivers the vehicle to its Mumbai office. The petitioner only receives the cars and makes some accessories fitted and delivers the cars to customers with the documents of the cars. So he submitted that at no point of imagination, such transaction can be said to be intra-State transaction. He relied upon the decisions reported in **State of Orissa v. Rolta Motors Ltd**., reported in **(1992) 87 STC 506**; **Sahney Steel and Press Works Ltd. and another v. Commercial Tax Officer and others**, reported in **(1985) 60 STC 301 (SC); English Electronic Company of India v. Dy. Commercial Tax Officer** reported in **AIR 1977 SC 19**. According to such decisions, in the present case no tax liability under the State Act for distribution of such cars is payable by the petitioner as it is an inter-State sale being exigible under Central Sales Act. So he submitted to set aside the order of the learned tribunal, impugned herein.

6. Learned counsel for the opposite party-State submitted that the Tribunal has discussed all the points and in the peculiar fact and circumstances of the case, rightly had held that it is not a case of inter-State sale but is a case of intra-State sale. According to him, learned Tribunal has referred to the decision of the Hon'ble Apex Court in **Balabhagas Hulschand (supra)** and come to the conclusion as stated above.

7. He further contended that the learned Tribunal has rightly held that whatever the Padmini car purchased from the M/s. Premier Automobiles Ltd., Mumbai by the petitioner, it is on behalf of the petitioner at his head office at Cuttack although it has got branch office at Mumbai who normally receives cars from the M/s. Premier Automobiles Ltd., Mumbai for which the law of agency having operated in full force, it is intra-State sale. He further stated that according to illustration at II-A given in the decision reported in **Balabhagas Hulschand (supra),** the sale by the petitioner, is outright intra-State sale inasmuch as the Mumbai branch of the petitioner purchased the goods and removed the goods to Cuttack for sale. He submitted that the decision reported in **Rolta Motors Ltd** (supra), **Sahney Steel and Press Works Ltd.** (supra) **and English Electronic Company of India** (supra), are not applicable to the facts and circumstances of the case. So he submitted that the decision of the Tribunal, impugned herein, is valid and proper and the same should be upheld.

Point for Determination :

8. After going through the contention of both the parties, there lies only point for determination whether the sale by the petitioner is inter-State coming under the C.S.T. Act or intra-State sale being exigible under the Act.

DISCUSSION :

9. We have gone through the submissions made by the learned counsel appearing for the respective parties. Perused the record. It is undisputed fact that the petitioner is a registered dealer of premier padmini cars along with other vehicles. It is undisputed fact that the premier padmini cars are manufactured by M/s. Premier Automobiles Ltd., Mumbai. It is admitted fact that the petitioner has got its registered head office at Cuttack but has branch office at Mumbai and Bhubaneswar, and the cars are purchased by the petitioner-company from M/s. Premier Automobiles Ltd., Mumbai. It is also not disputed that the customers at Cuttack placed orders to purchase the cars from the branch office of the petitioner at Mumbai and the branch office at Mumbai after purchasing the 176 nos. of such cars from M/s. Premier Automobiles Ltd., Mumbai, sent the cars to its head office at Cuttack after which the same is handed over to the customers after proper documents prepared.

10. Learned Assessing Officer observed that the petitioner has not disclosed the sale of 176 nos of cars while submitting report but showed only sale of Hero Honda motorcycles and other automobile vehicles. There is also report from the Sales Tax Officer (Intelligence) that the petitioner has suppressed the money showing sale of 176 nos. of such cars in 1995-96. Learned Assessing Officer held that the car being a movable property, cannot be sold completely unless the delivery of car is handed over to the customer. According to him, placing of order with money towards consideration of the car with the M/s. Premier Automobiles Ltd., Mumbai is not sufficient to complete the purchase of the car unless the car is delivered to the customer. The Assessing Officer did not believe the documents submitted by the petitioner stating that these documents showing placing of order for purchase and orders through the petitioner from the original manufacturer, are manufactured one for the purpose of this case. Finally he held that the dealer has manufactured documents to show as to give its transaction of cars of inter-State in nature instead of intra-State.

11. First appeal was preferred before the Assistant Commissioner of Sales Tax (ACST in short). After hearing, learned ACST observed that during 1995-96, 176 nos. of cars have not been included in the turn over by

arraying the same as sale of cars as the same was under inter-State trade. He verified the documents again and found that the Mumbai branch of the petitioner has effected purchase of cars from the manufacturer, M/s. Premier Automobiles Ltd., Mumbai and despatched the vehicle to Cuttack for delivery. It is also revealed from his order that the branch office of the petitioner at Mumbai has registered itself as a dealer under Maharashtra Sales Tax Act and has paid local tax uptodate on sale of such cars to the customers of Odisha. He followed the judgment of **Rolta Motors Ltd.** (supra) and also the judgment in **English Electronic Company of India** (supra). After verifying the xerox copies of the documents, he observed that the customers have actually placed orders before M/s. Kalinga Auto Centre (P) Ltd., erstwhile Bombay and through demand draft in favour of Bombay branch, sale invoices were raised by the Bombay branch in the name of respective customers. He further held that simply receiving orders from customers and giving delivery after pre-delivery servicing as per their agreement by the Cuttack branch cannot alter the position. Thus he found the transaction is purely inter-State in nature as per Section 3(a) of the C.S.T. Act and the order of the learned Assessing Officer by adding the sale turn over of 176 nos. of cars for Rs.3,99,05,848.61 paise into the gross and taxable turn over of the petitioner is untenable and same has to be excluded.

12. At this stage, the State of Odisha preferred Second Appeal before the learned Tribunal. Learned Tribunal in the Second Appeal after hearing the parties and quoting the decision of the Hon'ble Supreme Court passed the following order :

> "xx xx xx In the back drop of above law if the facts in the hand are considered, we are of the considered view that the branch office at Bombay was not a authorized dealer of M/s Premier Auto Mobiles Limited, Bombay. Whatever purchase he had made, it was on behalf authorized dealer which was the respondent having head office at Cuttack. Both the registered office and the branch office were offices of the same company and they did not possess separate juridical personality. The respondent-Cuttack office acted as an authorized agent of the premier padmini cars and could not have been absolved of such legal personality. The law of agency having operate in its full force, we have no hesitation to accept that this case falls under the illustration given in case no.II in the Balbhaguas Hullchand decision. For the reason stated above, such sale being held as intra-State sale the opinion recorded by Id. ACST in this regard is not sustainable in

> the eye of law. The state having no disputed other concessions, we are to only consider the effect of our fining that the transaction is intra state sale, in the impugned judgment. The Id. ACST has excluded Rs.3,99,05,848.61 from the gross turnover and the taxable turnover of the appellant towards the sale price of 176 nos. of car vide para-4 of the impugned order. The said amount is now to be included and the consequential assessment is to be done."

13. From the above observation of the learned Tribunal, we are of the view that the Tribunal has simply observed that the illustration II in the case of **Balabhagas Hulschand (supra)**can be applied and the petitioner at Cuttack branch being a authorized agent of premier padmini cars, could not have absolved its responsibility to pay tax to the State Government. Learned Tribunal found that the sale is intra-State without going deep into the matter. Learned Tribunal has not explained in the order as to how illustration II in the case of **Balabhagas Hulschand (supra)** would apply to the present case.

14. We have gone through the decision of the **Balabhagas Hulschand (supra).** In the said judgment**,** following three illustrations have been given by their Lordship.

> "Case No.I-A is a dealer in goods in State X and enters into an agreement to sell his goods to in State X. In pursuance of the agreement a sends the goods from State X to State Y by booking the goods in the name of B. In such a case it is obvious that the sale is preceded by the movement of the goods and the movement of goods being in pursuance of a contract which eventually merges into a sale the movement must be deemed to be occasioned by the sale. The present case clearly falls within this category.
>
> Case No.II-A who is a dealer in State X agrees to sell goods to B but he books the goods from State X to State Y in his own name and his agent in State Y receives the goods on behalf of A. Thereafter the goods are delivered to B in State Y and if B accepts them a sale takes place. It will be seen that in this case the movement of goods is neither in pursuance of the agreement to sell nor in the movement occasioned by the sale. The seller himself takes the goods to State Y and sells the goods there. This is therefore, purely an internal sale which takes place in State Y and falls beyond the purview of section 3(a) of the Central Sales Tax Act not being an inter-State sale.

Case No.III-B a purchaser in State Y comes to State X and purchase the goods and pays the price thereof. After having purchased the goods he then books the goods from State X to State Y in his own name. This is also a case where the sale is purely an internal sale having taken place in State X and the movement of goods is not occasioned by the sale but takes place after the property is purchased by B and becomes his property."

15. After analysing the case, their Lordships have observed that there can hardly be a case where once a sale takes place the movement is subsequent to the sale. The facts of the present case is not coming within any of the illustrations as given by their Lordships in the above judgment, because in the present case, the customers booked the vehicles to purchase the same from the petitioner's branch office at Mumbai who purchased the vehicles from the manufacturer, M/s. Premier Automobiles Ltd., Mumbai, sent the vehicles to its head office at Cuttack and the customers took delivery of the same from Cuttack. The customer has no link with the manufacturer but has placed orders to purchase the vehicle from the petitioner's Mumbai branch who after payment of the local tax at Maharashtra despatched the vehicles to its head office at Cuttack where the cars were delivered. It is not the case where sale takes place and subsequently movement to sell takes place.

16. On the otherhand, the decision in **English Electronic Company of India (supra),** Their Lordships have observed :

"(1) When the movement of the goods from one State to another is an incident of the contract it is a sale in the course of inter-State sale. It does not matter in which State the property in the goods passes. What is decisive is whether the sale is one which occasioned the movement of goods from one State to another 'the inter-State movement must be the result of a covenant, express or implied in the contract of state or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-state movement must be specified in the contract itself. It will be enough if the movement is in pursuance of 2nd incidental to the contract of sale.

(2) Branches have no independent and separate entity. Branches are different agencies. In the instant case, the contract of sale is between the appellant company and the Bombay buyer."

17. With due respect to the above decision, we find that the present fact and circumstances is covered by the facts of the aforesaid decision and we have no hesitation to hold that this is an incident of contract where the vehicle is being booked from the Cuttack office of the petitioner by the customers directly to its branch offfice at Mumbai and the Mumbai office after procuring the same, sends the vehicle to the Cuttack office where the customer takes delivery of the same. When the vehicle is sent from one State to another State, being an incident of contract, it is truely an inter-State sale.

18. In another decision in **Sahney Steel and Press Works Ltd.** (supra), Their Lordships have observed :

" 1.1 The sale transactions were inter-state sales in as much as they satisfy the terms of clause (a) of section 3 of the Central Sales Tax Act.

1.2 It cannot be said that the Movement of the goods from Hyderabad to the branch office was only for the purpose of enabling the sale by the branch office and was not in the course of fulfillment of the contract of sale. Even if the buyer places an order with the branch office and the branch office communicates the terms and specifications of the orders to the registered office and the branch office itself is concerned with the sales dispatching, billing receiving of the sale price, the conclusion must be that the order placed by the buyer is an order placed with the company, and for the purpose of fulfilling that order the manufactured goods commence their journey from the registered office within the State of Andhra Pradesh to the Branch office outside the State for delivery of the goods to the buyer. Further, both the registered office and the branch office are offices of the same Company, and what in effect does take place is that the Company from its registered office in Hyderabad takes the goods to its branch office outside the State and arranges to deliver them to the buyer. The registered office and branch office do not possess separate juridical personalities. The question really is whether the movement of the goods from the registered office at Hyderabad is occasioned by the order placed by the buyer or is an incident of the contract. The answer being in the affirmative, its movement from the very

beginning from Hyderabad all the way until delivery is received by the buyer is an inter-statement movement.

1.3 The fact that the goods were dispatched by the branch office situated outside the State of Andhra Pradesh to the buyer and not by the registered office at Hyderabad makes no difference at all. The manufacture of the goods at the Hyderabad factory and their movement thereafter from Hyderabad to the branch office outside the State was an incident of the contract entered into with the buyer, for it was intended that the same goods should be delivered by the branch office to the buyer. There was no break in the movement of the goods. The branch office merely acted as a conduit through which the goods passed on their way to the buyer. It would have been a different matter if the particular goods had been dispatched by the registered office at Hyderabad to the branch office outside the State for sale in the open market and without reference to any order placed by the buyer. In such a case if the goods are purchased from the branch office, it is not a sale under which the goods commenced their movement from Hyderabad. It is a sale where the goods moved merely from the branch office to the buyer. The movement of the goods from the registered office at Hyderabad to the branch office outside the State cannot be regarded as an incident of the sale made to the buyer.

19. With no disagreement, we are of the considered view that the facts and circumstances of the above case are very much applicable to the facts and circumstances of the present case and accordingly we are not refrained from observing that the transaction in the present case is inter-State sale.

20. It is also reported in **Rolta Motors Ltd** (supra) where their Lordships observed in the following manner :

"that the expression "sale or purchase occasions the movement of goods" means that either the contract of sale itself should provide for the movement of goods or the movement of goods must be incidental to the contract, there being no possibility of diversion of goods for any other purpose or to any other State. The Tribunal found that appropriation of the goods and delivery under the direct billing system took place at Haryana, that there were direct agreements rescind the contract if any vehicle other than that identified was delivered. The presence of the respondent as an intermediary did not

> make a difference to the nature of the transactions which were inter-State sales. The view of the Tribunal was justified."

With due respect to the above decision and applying ratio of above decision, we are of the view that in the present case no doubt there is sale of goods, which have moved from Mumbai under Maharashtra State to Cuttack under Odisha State and it is an incidental to the contract.

21. Section 3 of the C.S.T. Act is quoted herein below:

> "3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce-A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase-
>
> (a) occasions the movement of goods from one State to another; or
>
> (b) is effected by a transfer of documents of title to the goods during their movement from one State to another;
>
> Explanation 1.-Where goods are delivered to a career or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.
>
> Explanation 2.-Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State."

22. Relying upon above settled laws and provisions of C.S.T. Act in the present case undoubtedly, it is inter-State sale. Learned Tribunal has not gone through the decisions properly as noted above, although the same were placed before it. It has only given their finding without appreciating the correct analysis made by the First Appellate Authority.

CONCLUSION :

23. We are, therefore, of the considered view that the decision arrived at by the learned Tribunal being illegal and against the principle of law as decided by the Hon'ble Supreme Court and this Court on several occasions, the same is liable to be set aside. In the result the order dated 28.12.2010 passed by the learned Tribunal in S.A. No. 114 of 1999-2000, impugned

herein, is set aside and restored the order dated 30.1.1999 passed by the Assistant Commissioner of Sales Tax, Cuttack-I Range, Cuttack, First Appellate Authority in Sales Tax Appeal No. AA714 CU-I C/97-98.

Revision disposed of.

2016 (I) ILR - CUT-70

S. PANDA, J.

W.P.(C) NO. 19484 OF 2015

SRINIBASA MOHARANA ……..Petitioner

.Vrs.

COLLECTOR, JAGATSINGHPUR & ORS. ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART. 226

Application of the petitioner to issue O.B.C certificate was refused on the ground that the petitioner's caste is "Badhei" but not "Badhai" – Writ filed – Recommendation of the Mandal Commission has been duly enquired into by the Backward Class Commission appointed by the state Government – As per the report caste "Badhei" was not excluded from the list – However while the list prepared in English translation the Odiya word "Badhei" is not correctly reflected in the O.B.C. list – There are no two category of caste in the State as "Badhei" or "Badhai" and the said caste is differently spelled in Odiya vernacular and it is only one community i.e, carpenter – Impugned order is set aside – Direction issued to the Tahasildar, Balikuda to issue O.B.C. Certificate in favour of the petitioner. (Para 7)

For Petitioner : M/s. B.P.Satapathy, B.K.Nayak,
S.Sahoo & S.Roy

For Opp. Party : Additional Government Advocate

Date of Judgment : 23.12.2015

JUDGMENT

S.PANDA, J.

Petitioner in this application has challenged the order dated 1.9.2015 passed by opposite party No.3-Tahasildar, Balikuda in Misc. Certificate Case

No. e-OBC/582/2015 rejecting the application for issuance of caste certificate as well as with a prayer to direct the opposite party No.3 to issue a fresh OBC certificate in favour of the petitioner by taking his caste as "Badhai".

2. The facts leading to the present case are as follows:-

It is averred in the writ petition that petitioner is an Engineering Graduate and belongs to Other Backward Class. His caste being "Badhei" as spelt in Odia vernacular. The caste "Badhei" was recognized as a back ward class and it has been spelt as "Badhai". Basing on such recognition as a backward class, the petitioner time and again was issued with the caste certificate by opposite party No.3 on different occasions. Copy of the same annexed with the writ petition as Annexure-2 series. Basing on such certificate issued by opposite party No.3 on 6.2.2014 in Misc. Certificate Case No. e-OBC/16 of 2014 petitioner submitted his application for the post of Asst. Loco Pilot before the Railway Recruitment Board, Bhubaneswar. In the said recruitment petitioner was qualified in the written test as well as in the skill test. After qualification of the petitioner the Railway Recruitment Board issued the letter dated 4.8.2015 for verification of documents. In the said letter it was directed that the petitioner shall produce all the certificates including the OBC certificate which should have been issued before the date of verification. On receipt of the said letter petitioner applied for a fresh OBC certificate before opposite party No.3 on 1.9.2015 which was registered as Misc. Certificate Case No. e-OBC/582 of 2015. The caste of the petitioner is spelt as "Badhei" in Odia vernacular. In English it is also written as "Badhai". The caste "Badhai" has been included in the list of back ward class by the Government of India. The opposite party No.3 on different occasion had issued OBC certificate in favour of the petitioner by indicating his caste as "Badhai" but in the impugned order the opposite party No.3 rejected the application of the petitioner to issue such certificate on the ground that the petitioner's caste being "Badhei" not "Badhai". Hence "Badhei" as not been included in the OBC list he rejected the application of the petitioner for issuance of a caste certificate illegally.

3. A counter affidavit filed on behalf of the opposite parties justifying the impugned order passed by opposite party No.3. It is also stated that the SEBC list was prepared by the State of Orissa as per the recommendation of Orissa State Commission for Backward Classes (OSCBC) and copy of the State and central list of Socially and Educationally Backward Classes of Orissa filed as Annexure-A series. In view of the said list the caste certificate

issued till 2013 as “Badhai” even though their revenue record of right it was written as “Badhei”. The Government has also received letter from the State Coordinator, NCSC from which it came to the notice of the Government that people of “Badhei” caste received OBC certificate as “Badhai” and as per Section 9(1) of Chapter-III of Orissa State Commission for Backward Classes Act, 1993 earlier as per the OSCBC is empowered to recommend inclusion/exclusion of any caste in the SEBC list. Accordingly after receiving the said letter from the National Commission for Scheduled Caste, the Government of Orissa issued a letter on 18.4.2015 clarifying the position that “Badhai” caste has been included in the Central list of OBC. Thereafter the concerned authorities have not issued any caste certificate in respect of “Badhei”.

4. It is also contended by the opposite parties that before amendment brought in the OBC list at serial No.4 of the Central list objection was raised from various quarter to consider some synonymous caste of “Badhai” to be included in the Central Government list. As per the enquiry conducted by the Commission constituted under the Act recommendation was made to the Government to make necessary correction in the list. The list was amended by incorporating the caste and list was corrected accordingly. After amendment in 1992 a meeting was held by the committee constituted under the Act pursuant to direction of this Court to reconsider the grievance of some of the communities to be included in the State as well as Central list. However on 29th April, 2003 the grievance of the “Badhei” community was taken into consideration by the committee along with other several castes, however no decision taken in respect of “Badhei” caste as no body appeared before the Commissioner to put forth their grievance. A copy of such report produced by the learned Addl. Government Advocate. Copy of the said report reveals the said facts. One Nikhila Utkal Biswakarma Samiti also requested the State Government for correction of spelling in the said list with regard to list of OBC in the State.

5. Additional affidavit filed by the petitioner producing the central list of OBC with regards to the State of Orissa which reveals that the “Badhai” caste was included. He has also produced a copy of the recommendation of the Mandal Commission in respect of State of Orissa i.e. O.M. No. 36012/22/93-Esst (SCT) dated 8th September, 1993 which reveals that at entry No.8 the Commission has recommended to include Badhai, Badhei, Bindhania, Sutradhar, Badhira, Badhia.

6. The learned Addl. Government Advocate also produced the record of the Government of Orissa Tribal Welfare Department dated 10th September, 1993 wherein the Backward Commission set up on 3rd February, 1991 to identify Socially and Educationally Backward Classes in the State of Orissa for the purpose of extending benefits with reference to the Mandal Commission's report recommended to accept the list submitted by the Mandal Commission for reservation of Socially and Educationally Backward Classes in service in respect of State of Orissa. The Commission has given the finding that people of some communities who are different added to the list being synonymous with the existing castes in the Mandal list their serial numbers and entries relating to one community to be clubbed together as they are synonymous and rectification of the list prepared by the Mandal Commission by excluding castes and communities who really belong to Scheduled Castes and Scheduled Tribes as they have no ethnic origin in Orissa. In the details of the aforesaid report at Point No. 23 the Commissioner has specifically written that on careful consideration the Commission has found that there are many castes/communities included in the list of Mandal Commission as O.B.C. who really belong to S.T. or S.C. Some castes are to be found in the list whose ethnical origin in Orissa could not be traced. Moreover, in the list some surnames of different castes have been described as particular castes and also there are people of some communities who are to be included in the list. At point No. 24.1 the castes included in the S.Ts. which was described as OBC are deleted. At Point No. 24.2 S.C. communities are deleted from the OBC list. At Point No. 24.4 the Commissioner has specifically stated the castes which are desirable not to be included in the list of O.B.C. In the said report the caste "Badhei" which is the Mandal list was not deleted.

7. The discussion made hereinabove it reveals that all recommendation of the Mandal Commission has been duly enquired into by the Backward Class Commission appointed by the State Government in the year 1993. As per the said Commission report the list prepared by the Mandal Commission was ratified and the Backward Commission has given the finding as well as the recommendation which castes are to be excluded and included in the OBC list in respect of State of Orissa is concerned. The report dated 10th September, 1993 of the Commission as discussed in the above paragraph crystal clear that the caste "Badhei" was not excluded from the list. The list prepared by the Mandal Commission in its Oriya vernacular included the "Badhei" and same was not recommended to be deleted from the list. Hence

while the list prepared in the English translation the Odiya word "Badhei" is not correctly reflected in the OBC list. However the OM dated 8th September, 1993 (supra) clearly reflected the said word which is included in the OBC list for State of Orissa. It is also admitted position that there are no two category of caste in the State as "Badhai" or "Badhei" and the said caste is only differently spelled in Oriya vernacular. It is only one community i.e. "Carpenter".

In view of the discussion made hereinabove this Court sets aside the impugned order dated 1.9.2015 as the same is not maintainable and directs the opposite party No.3 to issue the OBC caste certificate in favour of the petitioner within a period of two weeks from today on production of the certified copy of the order. Accordingly the writ petition is allowed.

Writ petition allowed.

2016 (I) ILR - CUT-74

B. K. NAYAK, J.

O.J.C. NOS. 5678 & 5679 OF 2002

UDAYA MAJHI & ORS. ……..Petitioners

.Vrs.

HADIA MAJHI & ORS. ………Opp.Parties

ADVERSE POSSESSION – One who claims acquisition of title by adverse possession must plead and prove that his possession is as of right with hostile animus, i.e., in denial of right and title of the true owner and further that such possession was open, peaceful and continues for more than the statutory period – In the absence of such pleading and proof, the claim of acquisition of title by adverse possession would not succeed – Hostile animus can be shown if the possession is as of right without any attempt at concealment – But where the initial possession is permissive, in order to show that the possession became adverse to the knowledge of true owner, the claimant has to clearly plead and prove that at a subsequent point of

time he exercised such overt acts in relation to his possession which would clearly amount to denial of title of the real owner.

In the present case the revisional court has not reversed the finding of the appellate court that the possession of O.P.s 1 to 3 over the land in question was initially permissive – The initial possession of the O.P.s over the land being permissive in nature, it was incumbent upon them to clearly plead and lead evidence indicating the particular point of time and the exact nature of overt act in relation to their possession which is indicative of denial of the title of the real owners, i.e., the petitioners – The revisional Court having not considered these aspects, the impugned revisional order is held to be illegal and is set aside. (Paras 10 to 13)

Case Laws Referred to :-

1. AIR 1995 SC 73 : Thakur Kishan Sing -V- Arvind Kumar

For Petitioners : Mr. P.C. Acharya
For Opp.Parties : M/s. R.C.Rath & S.K.Panda

Date of hearing : 16.04.2015
Date of judgment: 18.06.2015

JUDGMENT

B.K.NAYAK, J.

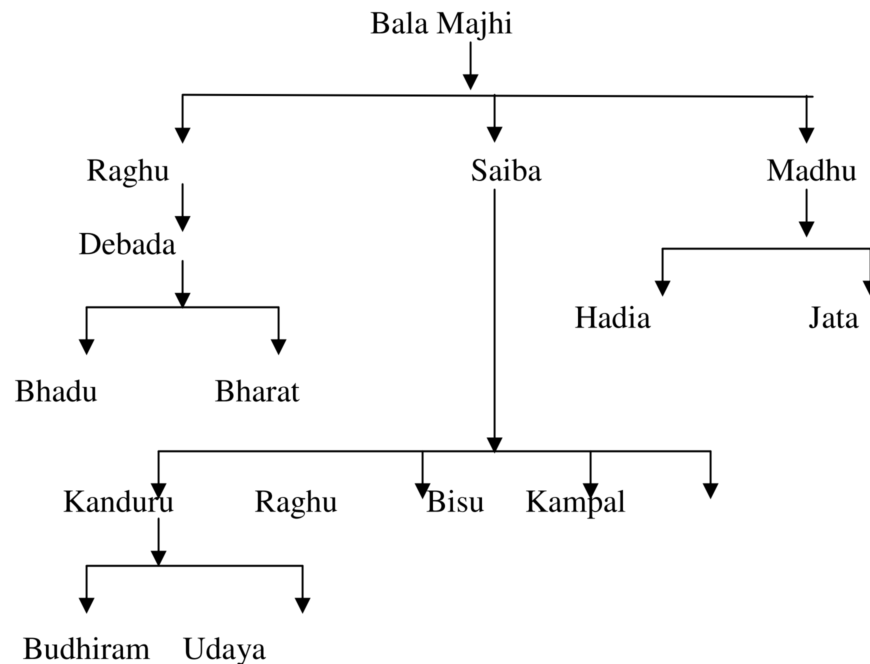
In these writ petitions the petitioners challenge the common order dated 09.05.2002 (Annexure-3) passed by the Joint Commissioner, Settlement and Consolidation, Bhubaneswar in Consolidation Revision Case Nos.709 & 710 of 2001. Since both the writ petitions involve common questions of law and fact, they were heard analogously and are being disposed of by this common judgment.

2. Disputed property appertains to L.R. Plot No.342, Ac.0.10, Plot No.344 Ac.0.19 and Plot No.344/670 Ac.0.07 under L.R. Holding No.68 corresponding to M.S. Holding No.32 and L.R. Plot No.340 Ac.0.38, Plot No.341 Ac.0.46, Plot No.343 Ac.0.05, Plot No.366 Ac.0.06 and Plot No.369 Ac.0.35 under L.R. Khata No.132 corresponding to M.S. Khata No.113 of village-Rangamatia. The total extent of land involved under both the Khatas are Ac.0.1.30 dec.

3. Present opposite party nos.1 to 3, were the petitioners in the Consolidation Revisions before the Joint Commissioner, Settlement and Consolidation and the present petitioners were the opposite parties therein.

4. Admittedly, the disputed land along with other lands totally measuring Ac.5.18 stood recorded in the name of Saiba Majhi, the father of the present petitioners in the 1921-22 and 1943-44 Settlement Records of Rights. The genealogy given below gives the interse relationship between the parties.

GENEALOGY



5. In the Major Settlement record of rights published in 1979, the disputed land was recorded in the names of opposite party nos.1 and 2. Challenging the same to be erroneous and claiming declaration of title thereover, the present petitioners filed Title Suit No.5 of 1980 in the court of the learned Munsif-Baripada. The suit having been dismissed, the petitioners filed Title Appeal No.18 of 1986-1987 before the District Judge, Baripada, which was also dismissed. The petitioners then filed Second Appeal No.178 of 1991 before this Court. During the pendency of the Second Appeal, consolidation operation was started in the suit village and, therefore, the second appeal was disposed of on 16.08.1999 setting aside the judgments of the trial court as well as the first appellate court and directing abatement of the suit itself.

Thereafter, the petitioners filed Objection Case Nos.963 & 964 of 1999 before the Consolidation Officer, Baisinga claiming their right, title and interest over the disputed land. In the objection, the petitioners claimed that the parties originally belonged to village-Ramnagar in the district of Balasore. However, Saiba Majhi, the petitioners' father migrated to village-Rangamatia (the suit village) and there he acquired disputed properties along with other properties which were recorded in his name in the 1921-22 and 1943-44 Settlement Records of Rights. After the death of Saiba Majhi, the petitioners are the owners in possession. It was further stated that the opposite parties came to village Rangamatia to stay there and seeing their pitiable condition, the petitioners allowed them to possess the suit land. Opposite party nos.1 to 3 having no right, title and interest and behind the back of the petitioners got the suit properties recorded in their names in 1978-79 Major Settlement record or rights. Challenging such recording and claiming their title over the land, the petitioners filed the suit which, as aforesaid, got abated by the High Court in the second appeal.

Opposite party nos.1 to 3 filed a written statement before the Consolidation Officer claiming that the suit property along with other property having a total extent of Ac.5.18 in village-Rangamatia are the Joint ancestral properties of the parties in which the opposite parties have 1/3rd share and it was not the self acquired property of Saiba Majhi alone. It was alleged that during jointness of the family, Raghu Majhi having died, the elder brother Saiba Majhi became the Karta of joint family and, therefore, got the suit land exclusively recorded in his name in the previous settlements. It was alternatively pleaded by them that in case it was found that the property was the self acquired property of Saiba Majhi, the opposite parties being in possession thereof for more than the statutory period have acquired title by adverse possession over the same.

6. The Consolidation Officer on considering the evidence on record came to hold that there was no adequate evidence to prove that the parties originally belonged to village-Ramnagar. It was further held that the disputed properties along with other properties standing in the name of Saiba Majhi were not the joint family properties of the parties, which continued to be recorded in the name of Saiba Majhi alone from the year 1921-22 and, therefore, the opposite parties claim of 1/3rd share in the total properties is baseless. The Consolidation Officer, however came to find that the opposite parties are possessing the suit land at least since 1952, if not earlier, with the knowledge of the petitioners and their possession is not permissive and,

therefore, they have perfected their title by adverse possession. The petitioners filed two appeals bearing Appeal Nos.47 of 2000(B) and 48 of 2000(B) before the Deputy Director, Consolidation of Holdings, Baripada Range, Baripada, challenging the said order of the Consolidation Officer. By judgment dated 18.09.2001 under Annexure-2, the Deputy Director, Consolidation held that the successive records of rights of 1921-22 and 1943-44 indicate that the suit land was the self acquired properties of deceased Saiba Majhi, ancestor of appellants and, therefore, the M.S. record of rights prepared in the name of opposite parties was palpably erroneous and that the appellant-petitioners having come to know about such erroneous recording filed title suit and that the ingredients of adverse possession of respondent-opposite party nos.1 to 3 is clearly missing. It was also held by the Deputy Director that the possession of the respondent-opposite party nos.1 to 3 over the disputed land is permissible. Accordingly, Deputy Director allowed the appeals and set aside the order of the Consolidation Officer.

7. Aggrieved by the appellate order under Annexure-2, opposite party nos.1 to 3 filed Consolidation Revision Nos.709 and 710 of 2001, which was heard and allowed by the impugned common order. The revisional authority took into consideration the extract of documents from Khanapuri Yaddast No.116 dated 29.06.1967 and mistake no.401/82 dated 05.12.1969 and came to the conclusion that those documents indicated that the present opposite parties are possessing the disputed land since 1951-52 and that the Major Settlement Record of Rights was prepared in presence of Kanduri Majhi (one of the son's of Saiba), who signed on those documents. Accordingly, without giving any specific finding on the question of adverse possession of the opposite party nos.1 to 3, the Joint Commissioner, Settlement and Consolidation set aside the appellate order and upheld the order passed by the Consolidation Officer.

8. Learned counsel for the petitioners submits that the impugned revisional order suffers from following infirmities;

(i) the appellate court having found that the opposite parties were in permissive possession of the disputed land, the revisional authority without considering the nature of possession of the opposite parties and without giving any reason as to how the possession of the opposite parties was adverse, should not have altered the decision of the appellate authority and upheld the order of the Consolidation Officer, which is illegal and unsustainable;

(ii) Khanapuri Yaddast No.116 dated 29.06.1967 and Mistake No.401 of 1982 dated 05.12.1969, which have been taken into consideration by the revisional authority were not led in evidence by any of the parties and, therefore, the revisional authority could not have relied upon the same behind the back of the petitioners;

(iii) Jointness of the parties and the ancestral character of the disputed land having been disbelieved by all the authorities including the Joint Commissioner of Consolidation and that the Joint Commissioner having not given any finding as to how and when the possession of opposite party nos.1 to 3 over the disputed land became adverse and that the pleadings and evidence with regard to adverse possession having not at all been considered, the impugned order is liable to be set aside.

9. Learned counsel for opposite party nos.1 to 3 submits that the Major Settlement Record of Rights in respect of the property was prepared in the name of the opposite party nos.1 to 3 with the consent of Kanduru, one of the sons of Saiba Majhi and, therefore, it cannot be said that opposite party nos.1 to 3 have no right title over the land. His further submission is that the revisional authority having found the possession of the opposite party nos.1 to 3 over the land from 1951-52, its finding with regard to adverse possession is quite justified.

10. It is found that the appellate authority gave a specific finding that the possession of opposite party nos.1 to 3 over the disputed land is permissive. The revisional authority has not reversed such finding. One who claims acquisition of title by adverse possession must plead and prove that his possession is as of right with hostile animus, i.e., in denial of right and title of the true owner and further that such possession was open, peaceful and continues for more than the statutory period. In absence of such pleading and proof, the claim of acquisition of title by adverse possession would not succeed. Hostile animus can be shown if the possession is as of right without any attempt at concealment. But where the initial possession is permissive, in order to show that the possession became adverse to the knowledge of true owner, the claimant has to clearly plead and prove that at a subsequent point of time he exercised such overt acts in relation to his possession which would clearly amount to denial of title of the real owner.

11. In the case of ***Thakur Kishan Sing v. Arvind Kumar***, reported in ***AIR 1995 SC 73***, the Hon'ble apex Court held as follows :

> "….. 5 As regards adverse possession, it was not disputed even by the trial Court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licencee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for however length of time does not result in converting the permissive possession into adverse possession."

12. The revisional court has not reversed the finding of the appellate court that the possession of opposite party nos.1 to 3 over the land in question was initially permissive. It has however simply jumped to the conclusion, relying on some remarks in the Yaddast and Mistake prepared during the course of the Major Settlement that the possession of the opposite parties is adverse, though those documents are said to have been utilized behind the back of the petitioners. The revisional order also does not indicate that the possession of the opposite party nos.1 to 3 was noted in the Yaddast as adverse. The revisional court should have tried to find out the exact pleadings of the opposite party nos.1 to 3 with regard to adverse possession and the proof of ingredients of such plea. The initial possession of the opposite parties over the land being permissive in nature, it was incumbent upon them to clearly plead and lead evidence indicating the particular point of time and the exact nature of overt act in relation to their possession, which is indicative of denial of the title of the real owners, viz., the petitioners. The revisional court has not considered these aspects. In the circumstances, the impugned revisional order is illegal and unsustainable and the matter needs re-consideration by the revisional authority.

13. Accordingly, the impugned revisional order (Annexure-3) is set aside and the matter is remanded back to the Joint Commissioner, Settlement and Consolidation, Bhubaneswar for fresh disposal of the Consolidation Revision Case Nos.709 & 710 of 2001 only on the question of acquisition of title by opposite party nos.1 to 3 by adverse possession on the basis of pleadings and evidence already available on record. The revisions should be disposed of within a period of four months from the date of appearance of the parties before the revisional court. To cut short the delay, the petitioners and

opposite party nos.1 to 3 are directed to appear before the revisional court on 13th July,2015. Both the writ petitions are accordingly disposed of.

Writ petitions disposed of.

2016 (I) ILR - CUT- 81

B. K. NAYAK, J.

W. P. (C) NO. 15781 OF 2014

DR. PRASANTA KU. SAMAL ……..Petitioner

.Vrs.

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

P.C. & P.N.D.T. (PROHIBITION OF SEX SELECTION) ACT, 1994 – S.20 (3)

Suspension of registration of Petitioner's Ultrasound Clinic – Action challenged as no notice or opportunity of hearing given to him as required U/s. 20 (1) & (2) of the Act – However Appropriate Authority can take such action without notice and opportunity of hearing in public interest after recording reasons in writing U/s. 20 (3) of the Act – But in the present case the note sheet does not indicate any reason as to how the suspension was in public interest and it was so emergent to avoid notice – Held, impugned action is quashed – The authority may proceed against Petitioner's Clinic in accordance with the provisions of sub sections (1) and (2) of Section 20 of the Act.

(Paras 16, 17, 18)

For Petitioner : M/s. S.K.Padhi, P.K.Mishra, S.K.Dash & S.K.Tripathy

For Opp. Parties Additional Govt. Advocate

Date of hearing : 17.08.2015
Date of judgment: 28.08.2015

JUDGMENT

B.K.NAYAK, J.

In this writ petition, the petitioner prays for quashing the seizure as per seizure list (Annexure-7) of the ultrasound machine and other materials

from the petitioner's ultrasound Clinic at Dhenkanal and also the order of suspension of registration of the petitioner's ultrasound unit dated 18.06.2014 as per Annexure-9-A passed by the Collector-cum-District Appropriate Authority, P.C. & P.N.D.T., Dhenkanal.

2. Petitioner's Clinic, namely, Amrit Ultrasound Clinic was registered under the PC & PNDT Act as per certificate of registration dated 15.06.2003 vide Annexure-2 which has been renewed as per Renewal Certificate dated 04.01.2013 vide Annexure-3 for a period of five years i.e. 31.01.2013 to 31.05.2018. It is stated that in 2011 the Ultra sound machine installed in the Clinic went out of order and became obsolete for which the petitioner vide his letter under Annexure-4 dated 01.08.2011 intimated the C.D.M.O., Dhenkanal (opposite party No.4) as required under Rule-13 that he was going to install a new Ultrasound machine. The new machine having been installed in January, 2012, the petitioner vide his letter dated 31.01.2012 (Annexure-5) intimated the factum of such installation to the C.D.M.O., where upon the A.D.M.O., Dhenkanal visited the clinic premises of the petitioner on 06.09.2012, inspected/verified the new machine and certified the same to be in order by noting down the machine no. and model name in his report dated 06.09.2012 (Annexure-6).

It is further alleged that while the petitioner's clinic was running smoothly, all on a sudden on 30.05.2014, the Tahasildar, Dhenkanal along with some staff of the office of the Director of Family Welfare demanded the papers and seized and sealed the ultra sound machine on the allegation that it was not registered and supplied copy of the seizure list (Annexure-7) to the petitioner.

In the aforesaid circumstances, the petitioner filed the present writ petition praying, at the first instance, for quashing the seizure.

3. A counter having been filed by the C.D.M.O., Dhenkanal (opposite party no.4) in which it was contended that the petitioner's registration of the ultrasound clinic has been suspended by the Collector and District Magistrate-cum-Appropriate Authority, PC & PNDT, Dhenkanal-opposite party no.3 in exercise of power under section 20(3) of the PC & PNDT (Prohibition of Sex Selection) Act, 1994 vide order dated 18.06.2014 (Annexure-G/4 to the counter affidavit), whereupon the petitioner amended the writ petition challenging the said suspension order, annexed as Annexure-9/A to the writ petition, since the suspension order has never been served on him.

4. In the meantime a criminal prosecution having been initiated against the petitioner in the criminal court in pursuance of the seizure of the machine and the criminal court having already passed order for release of the seized machine in favour of the petitioner, the prayer for quashing the seizure has not been pressed at the time of hearing. The petitioner therefore, confines his challenge to the order of suspension of registration vide Annexure-9/A.

5. The grounds of challenge to the order of suspension of registration of the petitioner's Ultra sound clinic is that the petitioner has never violated any provisions of PC & PNDT Act and Rules framed thereunder and that the installation of the new Ultra Sound machine was intimated to the C.D.M.O. before and immediately after such installation, pursuant to which the A.D.M.O., Dhenkanal visited the petitioner's clinic and inspected the new machine on 06.09.2012 and found everything in order. It is, therefore, submitted that without issuing any notice under section 20(1) of the Act prior to the proposed suspension, opposite party No.3 should not have resorted to the extreme step of passing order of suspension without notice, in exercise of power under section 20(3) of the Act. It is submitted that in case notice of proposed suspension had been issued, the petitioner would have satisfied the authority that the proposed suspension was uncalled for. It is also submitted that sub-Section (3) of Section 20 of the Act requires recording of reasons by the Collector and District Magistrate-cum-Appropriate authority in writing in passing the order of suspension dispensing notice and that the suspension order under Annexure-9/A having not recorded any reason in writing, it is a colourable exercise of power, which is legally unsustainable and liable to be quashed.

6. The C.D.M.O.-opposite party no.4 filed a counter affidavit and an additional affidavit in reply to the writ petition. It is stated in the counter affidavit that there was allegation of sex determination test being conducted in the clinic of the petitioner and accordingly an inspection of the petitioner's clinic was conducted on 30.05.2014, in course of which it was found that the petitioner has installed a new Ultra Sound machine -PHILIPS-HD 6 having sl.no.C170 110 618 which was installed on 27.10.2011, but the factum of such installation was not intimated to the District Appropriate Authority as required under Rule-13 of P.C. & PNDT Rules, 1996 seeking re-issuance of certificate of registration from the Authority and therefore, the petitioner violated the mandate of law. It is also stated that the petitioner is a Government Doctor and ex-specialist in O & G, CHC, Anlaberni, District: Dhenkanal and was proceeded against under Rule-15 of OCS (CC & A)

Rules, 1962. It is also stated that the C.D.M.O., ADMO (Family Welfare) and other officials inspected the clinic of the petitioner on 06.09.2012 and found one ultra sound machine of WIPRO GE make in the clinic as per the check list prepared on that day. But it has been overwritten in a different handwriting as PHILIPS HD 6. It is also stated that the petitioner being a Government Doctor, he is running the clinic without previous sanction of the Government which is a violation of the conduct Rule. In view of such irregularities, the petitioner's ultra sound machine was seized as per the seizure list.

It is stated in the additional affidavit of opposite party no.4 that the ultrasound unit of the petitioner was sealed on 30.05.2014 for violation of provisions of the P.C. & PNDT Act. The Collector & District Magistrate-cum-Appropriate Authority passed order on 18.06.2014 to suspend the registration of the ultrasound unit in pursuance of Section 20(3) of the Act and to file prosecution report in Court. Accordingly on 20.08.2014, 2 (CC) Case No.44 of 2014 has been initiated in the court of the S.D.J.M., Dhenkanal. It is stated that the petitioner has not obtained permission from the District Appropriate Authority as required Rule-13 of the PC & PNDT Rules with regard to change of ultrasound machine.

7. The Collector-cum-District Appropriate Authority (opposite party no.3) has not filed any counter affidavit. The CDMO, Dhenkanal (opposite party no.4) in his counter affidavit and additional affidavit does not state that he has been authorized by the District Magistrate-cum-Appropriate Authority (opposite party no.3) to file counter affidavit on his behalf. Therefore, even though the CDMO has tried to justify the action of opposite party no.3 of suspending petitioner's registration, the entire gamut of the contention in the counter affidavit go to show that the CDMO and other officials effected search and seizure of the petitioner's unit on behalf of opposite party no.3.

8. In his rejoinder affidavit, the petitioner has reiterated that the documents under Annexures-3, 4 and 5 clearly go to show that information with regard to change and installation of the new ultrasound machine was supplied to the District Appropriate Authority through the CDMO, who looks into all these matters. With regard to the previous disciplinary proceeding against the petitioner as stated in the counter affidavit, it is stated that the said proceeding was started against the petitioner on the ground of his remaining on unauthorized leave and that the petitioner has already left the Government job in 2006 and has so indicated in his show cause and since then the

petitioner has been doing private practice and is not in receipt of salary from the Government. It is also stated that there is no prohibition for a Government doctor to open ultrasound clinic. It is further stated that the publication of news against the unit of the petitioner in "the Pragatibadi" had no basis and on petitioner's protest the newspaper concerned regretted the publication of such news.

9. Undisputedly the order of suspension of registration of the petitioner's ultrasound unit has not at all been intimated to the petitioner. The factum of such suspension became known to the petitioner only from the averments made in the counter affidavit of opposite party no.4 filed in the present writ petition and from the suspension order annexed thereto as Annexure-G/4. Apparently the suspension order has been passed in terms of sub-section (3) of Section 20 of the Act and it does not indicate the reasons for which the registration was suspended. The suspension order also does not indicate the duration of suspension, which otherwise means that it would continue for an indefinite period. No reply has been furnished in the counter affidavit to the petitioner's contention as to why recourse was taken to sub-section (3) of Section 20, instead of following the procedure of sub-section (1) of the said Section providing for issuing notice to the clinic owner of the proposed suspension or cancellation of registration.

10. Before going to examine the contentions raised on behalf of the petitioner it is apposite to see the relevant provisions germane to the case in hand. Section 18(1) of the Act mandates registration of genetic clinics having ultrasound or imaging machine after the commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act,2002. The Appropriate Authority has been vested with power to grant certificate of registration of the clinic under Section 19 of the Act after holding an enquiry and being satisfied that the applicant has complied with all the requirements of the Act and the Rules made thereunder.

11. Section 20 of the Act which makes provision for cancellation and suspension of the Registration runs as under :

> "**20. Cancellation and suspension of registration :-** (1) The Appropriate Authority may *suo motu,* or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.

(2) If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.

(3) Notwithstanding anything contained in sub-sections (1) and (2), if the Appropriate Authority is of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing suspend the registration of any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1)."

12. Rule-13 of the PC & PNDT (Prohibition of Sex Selection) Rules, 1996 runs as under :

"**13. Intimation of changes in employees, place or equipment :-** Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall intimate every change of employee, place, address and equipment installed, to the Appropriate Authority within a period of thirty days of such change."

13. Sub-sections (1) and (2) of Section 20 of the Act read together make it abundantly clear that before suspending or cancelling the registration of a clinic, the Appropriate Authority shall issue a notice to the clinic concerned calling upon to show cause against the proposed suspension or cancellation of the registration and after giving a reasonable opportunity of hearing to the clinic concerned and having regard to the advice of the Advisory Committee if the Appropriate Authority is satisfied that there has been a breach of the provisions of the Act or the Rules, it may, suspend or cancel the registration. Sub-section (3) of Section 20 however empowers the Appropriate Authority to suspend the registration of a clinic without issuing notice as referred to in sub-section (1) if two conditions are satisfied; firstly where the Authority forms opinion that it is necessary or expedient to suspend the registration in public interest and, secondly, he must record reasons in writing for the suspension.

Sub-sections (1) and (2) of Section 20 engraft the salutary principle of natural justice, which the Appropriate Authority has to follow before deciding to suspend or cancel the registration of the clinic, while, on the other hand, sub-section (3) dispenses with notice. The language of sub-section (3) suggests that only in cases of grave emergency where issuance of notice and giving opportunity of hearing to the clinic in terms of sub-sections (1) and (2), which evidently takes time, would frustrate the very object of taking the action of suspension of the registration, then only the Appropriate Authority can dispense with notice and pass the order. The two conditions stipulated in sub-section (3) of Section 20 are the parameters to assess the gravity of the situation and the emergent nature of the case. Therefore, the order under sub-section (3) of Section 20 must manifest how and what public interest would suffer and how the proposed action of suspension would be defeated if notice and opportunity of hearing is given to the clinic concerned.

14. Rule-13 of the Rules mandates that the clinic shall intimate every change of employee, place, address and equipment installed, to the Appropriate Authority within a period of thirty days of such change.

It is admitted by the learned State Counsel that prior to 27.07.2007 the CDMO was the District Appropriate Authority under the Act and in pursuance of the Health Department. Office Memorandum No.19077 dated 27.07.2007 the Collector and District Magistrate has been notified to be the District Appropriate Authority in place of the CDMO for the purpose of the Act. It is also not disputed that for the purpose of inspection and verification of the clinic the District Appropriate Authority takes the assistance of the CDMO.

15. The undisputed position is that the petitioner's clinic was registered under the Act on 15.06.2003 and since then has been renewed from time to time, the last renewal of registration being for five years, from 31.01.2013 to 31.05.2018. The petitioner before and after installation of the new machine intimated the same to opposite party no.4 purportedly under Rule-13 of the Rules respectively on 01.08.2011 and 30.1.2012 by his letters under Annexures-4 and 5, and that after receipt of Annexure-5, the A.D.M.O. visited the petitioner's clinic on 06.09.2012 and verified the new machine as per his report/check list under Annexure-6. The fact of such verification has not been denied, but the CDMO in his counter affidavit states that the name of the new machine has been interpolated in the check list at Annexure-6. It is not known how Annexure-6, which was prepared by the ADMO and formed part of official document of the CDMO's office or the Appropriate

Authority's office, was manipulated and copy thereof was furnished to the petitioner. Be that as it may, the petitioner's registration was renewed for five years, i.e., from 31.01.2013 to 31.05.2018. The provisions in the Act prescribe procedure of inspection and verification of the clinic concerned before grant of new registration or renewal of registration of a clinic. Does it mean that the petitioner's registration was renewed without any verification of the clinic ?

16. The impugned order of suspension (Annexure-9/A) dated 18.06.2014 passed under Section 20(3) of the Act does not contain any reason for suspension. The Appropriate Authority himself has not filed any counter affidavit. The Court, therefore, called upon the State Counsel on 23.07.2015 to produce the file of the Collector-cum-District Appropriate Authority dealing with the suspension order. File No.543 of 2014 which was produced by the learned Additional Government Advocate appears to be one maintained in the office of the CDMO, Dhenkanal. The file does not show as to why and under what circumstances the petitioner's clinic was inspected on 30.05.2014. However it contains order No.405 dated 30.05.2014 of the District Appropriate Authority authorizing Shri Satrughna Kar, OAS-I(JB), Tahasildar, Dhenkanal to inspect various ultrasound clinics in Dhenkanal on 30th and 31st May,2014 and to take appropriate legal action under the Act and the Rules and to file prosecution on behalf of the Appropriate Authority. Accordingly inspection of the petitioner's clinic was made on 30.05.2014. Since a prosecution report has been filed against the petitioner's clinic before the criminal court, i.e., S.D.J.M., Dhenkanal, this Court refrains from indicating the contents of the said inspection report. In the counter affidavit filed by opposite party no.4, the only violation alleged against the petitioner's clinic is of the provision of Rule-13 of the Rules, i.e., the failure of the petitioner to intimate the Appropriate Authority with regard to installation of the new ultrasound machine. Note sheet no.2 dated 02.06.2014 refers to the alleged violation found during the inspection of the petitioner's clinic on 30.05.2014. Apparently, a note sheet was prepared by the Tahasildar, which was signed by three other persons and the file was endorsed to the Collector, who ordered the CDMO to discuss. Thereafter, the note sheet dated 13.06.2014 was prepared and signed by some officers, indicating that the petitioner contravened Sections 23 and 25 of the Act for which it was suggested to launch prosecution and suspend the registration of the petitioner's clinic in public interest and the file was endorsed to the District Appropriate Authority, who simply signed the same.

17. Apparently there is no allegation or report that the petitioner has undertaken sex determination test in his clinic, which is punishable under Section 22 of the Act. Opposite party no.3 has not recorded any reason in writing in the note-sheet of the file or in the impugned order of suspension. Assuming for the sake of argument that signing the note-sheet by opposite party no.3, would tantamount to his acceptance of the action proposed, note-sheet does not indicate how suspension would be in public interest and why and how the case was so grave and emergent that issuance of notice and giving of opportunity of hearing to the petitioner would defeat the very purpose of the proposed action.

18. For the aforesaid reasons, this Court is of the view that the impugned suspension order under Annexure-9/A passed by opposite party no.3 is a colourable exercise of power, which does not satisfy the requirements of Section 20(3) of the Act and, therefore, the same is quashed.

It is however open to opposite party no.3 to proceed against petitioner's clinic in accordance with the provision of sub-sections (1) and (2) of Section 20 of the Act, if so advised. The writ petition is accordingly disposed of. The file produced by the learned Additional Government Advocate be returned to him.

Writ petition disposed of.

2016 (I) ILR - CUT- 89

S. K. MISHRA, J.

CRLMC NO. 4712 OF 2015

BATA @ BATA KRUSHNA MOHARANA …….. Petitioner

.Vrs.

STATE OF ORISSA &
MANJULATA MALLICK ……..Opp. Parties

CRIMINAL PROCEDURE CODE, 1973 – S.73

Non-bailable warrant – When to issue – It is required to be issued to bring a person to court when despite issuance of summon or bailable warrant it is reasonably believed that the person will not

voluntarily appear in Court or the Police Officer is unable to find the person to serve with summon or it is considered that the person could harm some one if not taken to custody immediately – The warrant either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind and the court should properly balance both personal liberty and societal interest before issuing warrant – However unless an accused is charged with the commission of offence of a heinous crime and it is feared that he is likely to evade the process of law, issuance of non-bailable warrant should be avoided.

The petitioner in the present case charged with offences under sections 294, 323, 354, 506 I.P.C. read with section 3(1)(x)(xi) of the second ST (PA) Act and non of the offences are punishable with imprisonment exceeding seven years – Moreover the impugned order reveals that on the prayer of the I.O. learned Magistrate has issued non-bailable warrant against the petitioner – Held, the impugned orders are quashed. (Paras 2 to 6)

<u>Case Laws Referred to</u> :-

1. (2007) 12 SCC 1 : Inder Mohan Goswami and another vs. State of Uttaranchal & Ors
2. 2008 (II) OLR 148 : Sri Dipti Ranjan Parida @ Dilu vs. State of Orissa.
3. (2004) 5 SCC 568 : State of Orissa Vs. Dhaniram Luhar
4. AIR 2014 SC 2756 : Arnesh Kumar v. State of Bihar

For Petitioner : M/s. Bichitra Narayana Satapathy
For Opp. Parties : Mr. Somanath Mishra, A.G.A.

Date of Judgment : 20.11.2015

<u>JUDGMENT</u>

S.K.MISHRA, J.

This is an application under Section 482 of the Code of Criminal Procedure, 1973, hereinafter referred to as 'the Code' for brevity. The petitioner, being the accused in G.R. Case No.227 of 2010 of the court of learned JMFC (P), Kujang, arising out of Kujang P.S. Case No.88 of 2010 initiated for the alleged commission of offence under Sections 294, 323, 354, 506 of the IPC read with Section 3(1)(x)(xi) of the SC and ST (PA) Act has challenged the orders dated 18.09.2010 and 17.01.2011. The Investigating Officer prayed for issuance of non-bailable warrant against the accused-petitioner. The learned Magistrate perused the case records. He recorded that

name of the accused finds place in the case diary, statement recorded under Section 161 of the Code as well as in the FIR. He further recorded that the accused is not apprehended in spite of several attempts. Hence, issued non-bailable warrant of arrest against the present petitioner.

2. The Hon'ble Supreme Court in ***Inder Mohan Goswami and another vs. State of Uttaranchal and others,*** (2007) 12 SCC 1 has held that civilized countries have recognised that liberty is the most precious of all human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, Article 21 of the Constitution proclaims that no one shall be deprived of his liberty except in accordance with procedure prescribed by law. The Hon'ble Apex Court held that the issuance of non-bailable warrant involves interference with personal liberty. Arrest and imprisonment means infringement of precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrant. The Hon'ble Apex Court further held that non-bailable warrant should be issued to bring a person to court when summon or bailable warrant would be unlikely to have the desired result. The examples are that (i) it is reasonable to believe that the person will not voluntarily appear in court; or (ii) the police officer is unable to find the person to serve with summon; or (iii) it is considered that the person could harm someone if not taken to custody immediately.

The Hon'ble Supreme Court in the aforesaid case further held that as far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrant should be preferred. The warrant either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to extremely serious consequences and ramifications which ensue on issuance of warrant. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive. It further held that the power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrant. There cannot be any straitjacket formula for issuance of warrant but as a general rule, unless an accused is charged with the commission of offence of a heinous crime and it is feared that he is likely to tamper or destroy the

evidence or is likely to evade the process of law, issuance of non-bailable warrant should be avoided.

3. However, in this case, such a procedure is not adopted. In the case of ***Sri Dipti Ranjan Parida @ Dilu vs. State of Orissa,*** 2008 (II) OLR 148 this Court has the occasion to examine the requirements of the law before issuing warrant before submission of charge-sheet. This Court took the view that Section 73 of the Code provides that the learned Magistrate with a discretion to issue warrant on certain conditions. It is appropriate to take note of the aforesaid Section. It reads as follows:

> " 73. **Warrant may be directed any person**.- (1) The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non- bailable, offence and is evading arrest.
>
> (2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge.
>
> (3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 71.

A Plain reading of the relevant provision reveals that none of the offences, viz., 294, 323, 354, 506 of the IPC and Section 3(1)(x)(xi) of the SC and ST (PA) Act are punishable with imprisonment exceeding seven years. Further, a bare perusal of the order reveals that on the prayer of the Investigating Officer, the learned JMFC, Kujang has issued non-bailable warrant against the present petitioner.

4. In the case of ***State of Orissa Vs. Dhaniram Luhar,*** (2004) 5 SCC 568, the Hon'ble Apex Court has held that reasons introduce clarity in an order. It further held that reason is the heartbeat of every conclusion and without the same it becomes lifeless. It further held that reasons substitute subjectivity by objectivity. The Hon'ble Apex Court held that right to reason is an indispensable part of sound judicial system and reasons at least sufficient to indicate an application of mind to the matter before court. The Hon'ble Apex Court further held that giving reasons is that the affected party can know why decision has gone against him. One of the salutary

requirements of natural justice is spelling out reasons for the order made; in other words, speaking out.

5. Applying the aforesaid observations made by the Hon'ble Supreme Court, this Court in the case of Dipti Ranjan Parida @ Dilu vs. State of Orissa (Supra) held that an order issuing non-bailable warrant against a party is illegal and the said order was quashed. The entire episode can also be looked from another aspect. This Court takes note of the fact that Section 41 of the Code has been amended by virtue of Code of Criminal Procedure (Amendment) Act, 2008 (5) of 2009, which took effect from 01.11.2010. In the amended provision, Sub-clause (ii), Clause (b), Sub-section (1) of Section 41 of the Code provides that the police officer is satisfied that if certain conditions are satisfied, then he, in a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to 7 years with or without fine, arrest a person, if the police officer has reason to believe on the basis of such complaint, information or suspicion that such person has committed the offence. Secondly, it is further required that the police officer must be satisfied before such arrest is made and that it is necessary to arrest him (a) to prevent such person from committing any further offence; or (b) for proper investigation of the offence; or (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured. Before making arrest, the police officer shall record while making arrest his reasons in writing. Now, interpreting this provision, the Hon'ble Supreme Court in the case of ***Arnesh Kumar v. State of Bihar,*** AIR 2014 SC 2756 has directed that the Investigating Officer before making arrest to a person, must record his opinion. He is also required to give the reasons for which he arrived at such conclusion for arresting the accused. On production of the accused before Magistrate, the learned Magistrate is also required to examine whether the reasons given by the Investigating Officer is justified on the material placed before him by the I.O. Moreover, simple opinion is not sufficient. It must be supported by materials on record giving rise to such opinion. To that extent, the learned Magistrate is required to make a judicial enquiry. Then, the learned Magistrate can only authorize detention of the accused arrested.

6. Thus, keeping in view the aforesaid consideration, this Court is of the opinion that the orders passed by the learned JMFC (P), Kujang on 18.09.2010 & 17.01.2011 issuing non-bailable warrant against the present petitioner are incorrect and required to be quashed. Moreover, it is seen that on 17.01.2011, charge-sheet has been filed and cognizance has been taken. On a careful examination of the entire record, this Court is of the opinion that for the reasons recorded in the preceding paragraph, the orders dated 18.09.2010 and 17.01.2011, so far as it relates to issuance of non-bailable warrant against the petitioner are illegal and required to be quashed. Accordingly, the orders are quashed. Ultimately, it is seen that the case is lingering for quite a long time for appearance of the petitioner. However, since the petitioner has not yet surrendered before the learned court below and has approached this Court for invoking its power under Section 482 of the Cr.P.C., he is directed to surrender before the learned JMFC (P), Kujang within a period of 21 working days from today. On such surrender, he may move for bail, if so advised. If any such application is filed, if there is no impediment for granting bail as per the provisions and citations referred to above, the petitioner shall be released on bail on such terms and conditions as deemed just and proper by the learned JMFC (P), Kujang. The CRLMC is accordingly disposed of.

Aplication disposed of.

2016 (I) ILR - CUT- 94

S. K. MISHRA, J.

CRLMC NO. 3401 OF 2015

DHARMENDRA KU. BEURIA & ORS. ....Petitioners

.Vrs.

STATE OF ORISSA ....Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.482

Inherent power – Scope – Quashing of order taking congnizance – No material on record making out offences under sections 326 and 366 I.P.C. – However while examining the case this Court finds

ingredients of section 370 I.P.C are made out and observed the act of the Police Officer in not charging the petitioners U/s. 370 I.P.C – Held, order taking congnizance of offences under sections 326 and 366 I.P.C is quashed – However, in order to prevent abuse of process of law direction issued to the Magistrate to re-examine the records and if he finds that a prima facie case U/s. 370 I.P.C is made out he should pass appropriate orders there on. (Paras 8, 9)

Case Laws Referred to :-

1. AIR 1960 SC 866 : R.P.Kapur -V- The State of Punjab

For Petitioner : M/s. G.N.Mishra, D.N.Pattanayak
For Opp. Party : Addl. Standing Counsel

Date of Judgment : 20.11.2015

JUDGMENT

S.K.MISHRA, J.

The petitioners are charge-sheeted for the offence under Sections 324, 326, 366/34 of the Indian penal Code, 1860, hereinafter referred to as the 'IPC' for brevity, read with Sections 16, 17 and 18 of the Bonded Labour System (Abolition) Act and Sections 23 and 26 of the Juvenile Justice (Care and Protection of Children) Act, 2000. After submission of charge-sheet, the learned SDJM, Bhubaneswar has taken cognizance of the offences mentioned above on 14.10.2014 in C.T. Case No.459 of 2014, arising out of Chandrasekharpur P.S. Case No.36/2014.

02. The learned counsel for the petitioners confined his argument only to the cognizance of offence under Sections 326 and 366 of the IPC. He concedes that as far as other offences are concerned, he is not advancing any argument for quashing of those offences. It is stated by the learned counsel for the petitioners that the ingredients of offence under Section 326 of the IPC are not fulfilled. Hence, cognizance of offence under Section 326 of the IPC should be quashed. It is also contended that the ingredients of offence under Section 366 of the IPC are singularly lacking in this case. So, order taking cognizance of the offence in that Section is also bad and is to be quashed.

03. This case was initiated on the FIR lodged by the Child Welfare Committee (CWC), Bhubaneswar, Dist:Khurda on 08.02.2014. It is alleged in the FIR that the victim girl, aged about 12 years was rescued by the police and was produced before the CWC on 06.02.2014.

It is alleged that in her statement, the victim girl stated that she is 4th child of Ananta Lohara and Kanakalata Lohara of Vill:Mugapala, P.S.:Kuakhia, District:Jajpur. Her father is a daily labourer and he was having difficulty to look after his eight children. The sister of her father, namely, Tara Lehar brought the victim to her home and she was studying Class-III in Kamarda Cromite Prathamik Vidyalay, At:Kumarda, P.O.:Kansa, P.S.Tamka, Dist:Jajpur. It is further alleged in the FIR that as Tara Lehar required money for her daughter's marriage, she sold Saraswati-victim girl to the present petitioners, namely, D.K. Behuria and his wife Sagarika Sahoo, who are residing At:13/9, BDA Colony, Chandasekharpur, Bhubaneswar for Rs.15,000/-. It is alleged that this was done without the knowledge of her father.

The Child Welfare Committee alleged in the FIR that the victim girl has been working as a bonded labour with the aforesaid couple for the last two months. She was used to clean their home, wash their clothes, clean the toilet and did all other household chores as well as she looked after their baby. It is further alleged that she has been physically tortured by both the petitioners. As a result of such assault, she has got several marks and grievous injury over her body. In these two years, she was not allowed to meet her father. She has not even spoken to them. It is further alleged that when she cries with pain in her body, her employer threatened her that if she tells about the torture they will put her parents and herself in prison. Therefore, it is alleged that she was living with a traumatic state of mind with fear and pain.

On 06.02.2014, it was alleged that she was thrown out from the employer's house. As a result, she got an opportunity to escape from the bonded slavery and the story of her suffering and cruelty by her employer came to light. The Committee took the view that it is a gross violation of child right. In the aforesaid facts, this Court is at loss to understand why the aunt (Pisi) of the victim girl, whose name is Tara Lehar has not been arrayed as an accused in this case as there is specific allegation that she sold her to the present petitioners. The investigation of the case has not directed in that line also and even if materials on record the learned SDJM, Bhubaneswar mechanically took cognizance of the offence and did not thought proper to issue process against the said Tara Lehar.

04. In course of hearing, the Court carefully examined the statement of the victim girl. It is apparent from her statement that when she was very

young her mother died of lighting. Thereafter, Tara Bati Das, who happens to be her aunt, took her to Lambay. She was plucking flowers in the morning and it was going to the house of relations of the petitioners. On 07.05.2012, she came to the house of the present petitioners. The petitioners engaged her in all kinds of domestic work like washing of latrine, cleaning of house, looking after the baby girl of the petitioners. In the meantime, the said Tara Lehar took Rs.15,000/- towards the service rendered by the victim to the petitioners. In her statement she has narrated the torture meted out to her and how she was assaulted by the petitioners and ultimately she was driven out on 07.01.2014 after inflicting injuries on her body. Then, she came out of their house and asked some people present in the street about way to Jajpur. When the public saw that she has sustained injuries, she was taken to child line. The child line approached C.W.C. and C.W.C. lodged an FIR as narrated above.

05. Now, the question remains to be seen whether offence under Section 326 of the IPC is made out or not. Section 326 of the IPC provides for punishment causing grievous heart by dangerous weapons or means. In this case, a careful examination of the injury report reveals that the victim girl sustained several injuries including cut injuries. None of those injuries is grievous. So, the essential ingredients to attract offence under Section 326 of the IPC are singularly lacking. Hence, the order taking cognizance of offence under Section 326 of the IPC is bad in law. Section 366 of the IPC provides for kidnapping, abduction or inducing woman to compel her marriage. It is appropriate to quote the exact provision. It reads as follows:-

> " **366. Kidnapping, abducting or inducing woman to compel her marriage etc. –** whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be , forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid."

The essential ingredients of this Section is that kidnapping must have with intent that she can be compelled or knowing it to be likely that she will be compelled to marry a person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse. So, the essential requirement of Section 366 of the IPC as distinguished from the fact of the case is that the girl or woman shall be put to sexually illicit intercourse or to take compel her marriage against her marriage. This is not the allegation of the prosecution in the present case. In this connection, the Court takes note of the reported case of ***R.P. Kapur vs. The State of Punjab,*** AIR 1960 SC 866. In the aforesaid case, the Hon'ble Supreme Court held that it is well-established that the inherent jurisdiction of High Court can be exercised to quash a proceeding in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. The Supreme Court further held that ordinarily the criminal proceeding instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, the Apex Court indicated certain type of cases where proceeding can be quashed by in exercise of inherent jurisdiction of the court. It is appropriate to take note of the exact words used by the Hon'ble Supreme Court. It reads as follows:

> " xxx…we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no

> question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under s.561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained…xxx."
> (Emphasis Supplied.)

06. As far as the present case is concerned, it comes into the 2nd category annunciated by the Hon'ble Supreme Court. It is apparent from the materials available on records, i.e. FIR, statements of the victim girl and other witnesses that the offence under Sections 326 and 366 of the IPC are not made out. So, the order passed by the learned SDJM, Bhubaneswar so far as it relates to taking cognizance offences along with other offences is bad. So, the order of taking cognizance so far as it relates to offence under Sections 326 and 366 of the IPC is bad and the same requires to be quashed. However, in course of examining the case, this Court also took the pains to examine Section 370 of the IPC as to whether it is attracted or not. It is necessary for properly appreciating the provision to quote the same in its entirety.

> " **370. Trafficking of person.-(1) whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—**

1. using threats, or
2. using force, or any other form of coercion, or
3. by abduction, or
4. by practising fraud, or deception, or
5. by abuse of power, or
6. by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received,

commits the offence of trafficking.

Explanation 1. The expression “exploitation” shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2. The consent of the victim is immaterial in determination of the offence of trafficking.

2. Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

3. Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

4. Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

4. Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

5. If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine.

> 6. When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine." (Emphasis Added)

07. It is apparent from the above provision that any person for the purpose of exploitation, recruits, transports, harbours, transfers, or receives any person by using threat, force, or by abduction or by practising fraud or deception or by abuse of power or by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation-1 provides that exploitation in this case includes any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs. Explanation-2 provides that consent of the girl is immaterial in determination of the offence of trafficking.

As far as Sub-section (4) provides for where the offence involves the trafficking of a minor, it shall be publishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine. The offence is cognizable, non-bailable and triable by Court of Session.

08. After careful examination of Section 370 of the IPC, this Court finds it appropriate to find out whether the ingredients are prima facie available in this case or not. There is no dispute that there is severe allegation, which is supported by independent materials that the victim girl was exploited and harboured as a person similar to slave. Secondly, it is also apparent from the records that the petitioners by giving money (payments) obtained consent of the person having control over the victim. So, there is prima facie material before the Court indicating that the victim girl was, for the purpose of exploitation, recruited and harboured in the house of the petitioners by inducing, i.e. payment of money and the exploitation is akin to slavery or practices similar to slavery or servitude. This Court is of the opinion that the ingredients of Section 370 of the IPC are made out. Hence, this Court finds that the act of the police officer in not charging the petitioners under Section 370 of the IPC and instead of charging them under Sections 326 and 366 of the IPC is illegal.

09. On the basis of the aforesaid discussion, facts of law and citations, this Court is of the opinion that taking of cognizance of offences under Sections 326 and 366 of the IPC by the learned SDJM, Bhubaneswar is illegal and requires to be quashed. However, to prevent abuse of process of law, necessary directions be given to the learned Magistrate to examine the records in the light of the observations made in this judgment and if he finds that a prima facie case under Section 370 of the IPC is made out, he should pass appropriate orders thereon.

Accordingly, the CRLMC is disposed of quashing the cognizance of offence under Sections 326 and 366 of the IPC with a direction to learned SDJM to re-examine the records so far as it relates to a commission of offence under Sections 363 and 370 of the IPC and pass appropriate orders.

Aplication disposed of.

2016 (I) ILR - CUT-102

DR. A.K. RATH, J.

W.P.(C) NO. 8671 OF 2004

NAKULA SAHU ………Petitioner

.Vrs.

SURESH CH. BEHERDOLAI & ORS. ……...Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-26, R-9

Appointment of Survey Knowing Commissioner by appellate court – Order challenged – Boundary dispute between the parties – Controversy is as to identification, location or measurement of the land or premises – Held, appellate court has the same power like the courts of original jurisdiction in respect of the suits to appoint the Survey Knowing Commissioner for demarcation of the land – Impugned order needs no interference by this Court. (Para 10)

__Case Laws Referred to__ :-

1. 1994 (I) OLR-205 : Bishnu Charan Sahu Vrs. Paramananda Sahu & Ors.

2. AIR 1988 ORISSA 248 : Mahendranath Parida Vrs. Purnananda Parida & Ors.

For Petitioner : Mr. S.S.Rao
For Opp. Parties: M/s. A.K.Tripathy, U.Ch.Barik, P.K.Nayak & P.Kar

Date of Hearing : 01.10.2015
Date of Judgment: 01.10.2015

JUDGMENT

DR. A.K.RATH, J.

Aggrieved by and dissatisfied with the order dated 27.7.2004 passed by the learned Additional District Judge, Paralakhemundi in Title Appeal No.8 of 2001, the instant petition is filed under Article 227 of the Constitution of India. By the said order, the learned trial court allowed the application of the opposite party no.1 filed under Order 41 Rule 27 read with Order 26 Rules 9 and 10 C.P.C. and appointed the Survey Knowing Commissioner.

2. Opposite party no.1 as plaintiff filed a suit for declaration of right, title, interest, possession over the suit land, eviction of defendant no.1 and permanent injunction restraining the defendant no.1 from interfering with the peaceful possession, in the court of the learned Civil Judge (Sr.Division), Paralakhemundi, which is registered as T.S.No.54 of 1999. The petitioner was defendant no.1 in the suit. The suit was decreed. Challenging the judgment and decree dated 30.4.2001 and 18.6.2001 respectively passed by the trial court, the petitioner filed Title Appeal No.8 of 2001 in the court of the learned Additional District Judge, Parlakhemundi. During pendency of the appeal, an application under Order 41 Rule 27 C.P.C. read with Order 26 Rules 9 and 10 C.P.C. was filed by the appellant for appointment of Survey Knowing Commissioner. By order dated 27.7.2004, the learned lower appellate court allowed the application.

3. Heard Mr.Rao, learned counsel for the petitioner and Mr.A.K.Tripathy, learned counsel for the opposite party no.1.

4. The learned counsel for the petitioner submits that if the evidence on record is insufficient to arrive at a conclusion, then only power under Order 26 Rule 9 can be invoked. In the present case, finding of the learned trial court is that there is no encroachment. The present move is only to nullify the judgment of the learned trial court by collecting further evidence. Thus, the

impugned order of the learned trial court is liable to be quashed. The petitioner has filed the petition to patch up the lacuna.

5. Per contra, learned counsel for the opposite party no.1 supports the impugned order.

6. Section 107 of C.P.C. deals with powers of the appellate court. The same is quoted hereunder:-

> **"107. Powers of Appellate Court** –(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-
>
> (a) to determine a case finally;
> (b) to remand a case;
> (c) to frame issues and refer them for trial;
> (d) to take additional evidence or to require such evidence to be taken.
>
> (2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

7. Sub-Section 2 of Section 107 provides that the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein. The words "as nearby as may be" occurring in the said sub-rule imply that the appellate Court shall be vested with the powers which are vested on the Courts of original side so far as may be necessary for the interest of justice. (*Judhistir Subudhi Vrs. Balaji Financial Fund and another,* 1987 (I) OLR 589).

8. Dealing with the powers of appellate Court to appoint Survey Knowing Commissioner, a Division Bench of this Court in the case of Bishnu Charan Sahu Vrs. Paramananda Sahu and others, 1994 (I) OLR-205, in paragraph-6 of the report held as follows:-

> "6. A survey-knowing commissioner is deputed for local investigation for the purpose of elucidating the question as to whether the disputed land appertains to a particular survey plot or plots. His report is evidence in the case and forms part of the record. Such

> evidence is usually collected during trial of a suit. In a given case if such evidence was essential but has not been led during trial of the suit, and it is sought to be led in appeal, it would be by way of additional evidence. As to when either party to an appeal is entitled to produce additional evidence, the relevant provision is Order 41, Rule 27 of the Code. Under Clause 1(b) of the said rule the appellate Court has power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for any other 'substantial cause'. An appellate Court may be able to pronounce judgment on the materials already on record but may still consider additional evidence necessary in the interest of justice to pronounce a satisfactory judgment. In such a case paramount consideration being ends of justice, admission of additional evidence is for meeting a 'substantial cause'. Further more if additional evidence sought to be introduced in appeal has a direct bearing on the main issue involved in the case, a party should normally be permitted to adduce additional evidence unless he is guilty of laches. If an appellate Court felt that the evidence of survey-knowing commissioner after local investigation, or opinion of a handwriting expert after comparison, is required in the interest of justice, there can be no legal impediment for appellate Court to permit admission of additional evidence and ultimately utilise the same for final disposal of the appeal. But in such a case the appellate Court has in compliance of Rule 28, to retain the appeal and either to take such evidence itself or direct the trial Court or even any other subordinate Court to take such evidence and send it to the appellate Court who can utilise the same while finally disposing of the appeal."

9. In Mahendranath Parida Vrs. Purnananda Parida and others, AIR 1988 ORISSA 248, this Court held that when the controversy is as to identification, location or measurement of the land or premise or object, local investigation should be done at an early stage so that the parties can be aware of the report of the Commissioner and can go to trial prepared.

10. The instant case may be examined on the anvil of the decisions cited supra. The plaintiff claims to be the owner of the land appertaining to plot no.706 under khata no.276 of mouza-Mohana, out of which, defendant no.1 is said to have encroached upon a portion measuring 15 x 15 cubits. In the written statement, defendant no.1 denied to have encroached upon any

portion of the land out of plot no.706. His stand is that he is the owner of the land bearing plot no.707 over which he has constructed a residential house without encroaching upon the land of the plaintiff. The suit was dismissed by the learned trial court mainly on the ground that the plaintiff failed to establish any encroachment of the suit land. The learned lower appellate court is right in coming to the conclusion that there appears to be a boundary dispute between the two parties. Thus, the dispute cannot be finally resolved without conducting measurement of the suit plot and adjoining plots by a Survey Knowing person. It was observed that whether two plots are adjacent or not, can be ascertained from the report of the Commissioner. The appellate court has undoubtedly the power to appoint a Survey Knowing Commissioner when the controversy is as to identification, location or measurement of the land or premises or object to give quietus to the issue. For final and effective adjudication of dispute, it is necessary to appoint the Survey Knowing Commissioner for demarcation of the land.

11. The petition, sans merit, is dismissed. There shall be no order as to costs.

Writ petition dismissed.

2016 (I) ILR - CUT- 106

DR. A.K. RATH, J.

W.P.(C). NO. 14117 OF 2008

STATE OF ORISSA & ANR. ……..Petitioners

.Vrs.

SMT. SITANJALI JENA ……..Opp. Party

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

Whether defendants can be relegated to the earlier position prior to the date of hearing of the suit, when the exparte decree is set aside ? Held, when an exparte decree is set aside and the suit is restored to file, the defendants can not be relegated back to the position prior to the date of hearing of the suit – They would be debarred from filing any written statement in the suit but they can participate in the hearing of

the suit, cross-examine the witnesses of the plaintiff, adduce evidence and address argument. (Paras 7, 8)

Case Laws Relied on :-

1. AIR 1969 Orissa 261 : Surendra Mohapatra -V- Annapurna Mohapatra
2. 1987 (II) OLR 106 : V.Kameswar Rao -V- B.Nageswar Rao
3. 88 (1999) CLT 420 : Harish Chandra Panda & Ors. -V- Satyanarayan Panda & Ors.

Case Laws Referred to :-

1. AIR 1955 SC 425 : Sangram Singh -V- Election Tribunal Kotah & Anr.
2. AIR 1964 SC 993 : Arjun Singh -V- Mohindra Kumar & Ors.

For Petitioners : Addl. Government Advocate
For Opp.Party : Mr. R.C. Sarangi

Date of hearing : 02.11.2015
Date of judgment: 06.11.2015

JUDGMENT

DR. A.K.RATH, J.

The instant petition under Article 227 of the Constitution of India is to lacinate the order dated 29.03.2008 passed by the learned 1st Addl. Civil Judge (Senior Division), Bhubaneswar in M.S. No.107/39 of 2007/1998 whereby and whereunder the learned trial court struck off the written statement filed by the defendants-petitioners.

2. Opposite party no.1 as plaintiff instituted a suit for realisation of Rs.83,104/- impleading the present petitioners as defendants in the court of the learned 1st Addl. Civil Judge (Senior Division), Bhubaneswar, which is registered as M.S. No.107/39 of 2007/1998. The defendants were set ex parte. The ex parte decree was passed on 1.2.2002. An application under Order 9 Rule 13 CPC was filed to set aside the ex parte decree. Learned trial court by order dated 29.3.2008 allowed the application, set aside the ex parte decree and restored the suit to file. After the suit was restored to file, defendants filed the written statement. The plaintiff filed a petition to strike off the written statement. By order dated 29.3.2008, the learned trial court struck off the written statement.

3. Heard learned Addl. Government Advocate for the petitioner and Mr. R.C. Sarangi, learned counsel for the opposite parties.

4. The seminal point that hinges for consideration is as to whether when the ex parte decree is set aside, defendants can be relegated to the earlier position prior to the date of hearing of the suit?

5. In Sangram Singh v. Election Tribunal Kotah and another, AIR 1955 SC 425, the apex court in para-33 of the report held as follows:

> "….. if the defendant does not appear at the first hearing, the Court can proceed ' ex parte', which means that it can proceed without a written statement; and O.9, R.7 makes it clear that unless good cause is shown the defendant cannot be relegated to the position that he would have occupied if he had appeared. That means that he cannot put in a written statement unless he is allowed to do so, and if the case is one in which the Court considers a written statement should have been put in, the consequences entailed by O.8, R.10 must be suffered."

6. The same view was echoed in Arjun Singh v. Mohindra Kumar and others, AIR 1964 SC 993.

7. In Surendra Mohapatra v. Annapurna Mohapatra, AIR 1969 Orissa 261, the question arose as to whether the trial court was justified in rejecting the prayer to set aside the ex parte decree when the defendant failed to make out sufficient cause for setting aside the previous order setting him ex parte, but established sufficient cause for his absence on the date when the ex parte hearing of the suit was taken up. Taking a cue from Arjun Singh (supra), this Court held that even if the defendant failed to make out sufficient cause for setting aside the previous order setting him ex parte, but established sufficient cause for his absence on the date when the ex parte hearing of the suit was taken up, the ex parte decree could be set aside. The only difference from the normal course in such a situation would be that he would be debarred from filing any written statement in the suit, but cannot be prevented to proceed in the hearing of the suit, cross-examine the witness examined on behalf of the plaintiff and examine the witness from his side. The same view was reiterated in V. Kameswar Rao v. B. Nageswar Rao, 1987 (II) OLR 106 and Harish Chandra Panda and others v. Satyanarayan Panda and others, 88 (1999) CLT 420.

8. Thus the logical sequitur of the analysis made in the preceding paragraph is that when an ex parte decree is set aside and the suit is restored to file, the defendants cannot be relegated back to the position prior to the

date of hearing of the suit. He would be debarred from filing any written statement in the suit, but then he can participate in the hearing of the suit inasmuch cross-examine the witness of the plaintiff, adduce evidence and address argument.

9. In the result, the petition fails. Accordingly, the same is dismissed. No costs.

Writ petition dismissed.

2016 (I) ILR - CUT-109

DR. A.K. RATH, J.

W.P.(C) NO. 2114 OF 2006

KRUSHNA CH. PATI (DEAD) THROUGH LRs. 1(a) to 1(h) ……..Petitioner

.Vrs.

SMT. BASANTA PANIGRAHI & ORS. …….. Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-22, R-5

Determination of legal representatives – Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or deceased defendant, such question shall be determined by the court forthwith – It is not permissible to defer the said question to be decided in the suit by framing an issue.

(Para 9)

Case Laws Referred to :-

1. AIR 1977 Orissa 65 : Sitaram Beura -V- Birakishore Beura
2. 1984 (I) OLR 305 : Sukanta Ch. Sahoo -V- J.K.Routray & Ors.
3. 1991 (II) OLR 323 : Netrananda Dehuri -V- Bhagirathi Dehuri & Anr.

For Petitioner : Mr. D.P. Mohanty
For Opp. Parties : Mr. M. Mohanty

Date of Hearing : 12. 11.2015
Date of Judgment: 20.11.2015

JUDGMENT

DR.A.K.RATH, J.

The instant petition under Article 227 of the Constitution of India is to quash the order dated 25.1.2006 passed by the learned Civil Judge (Sr.Division), Bhadrak in T.S.No.253 of 1991, whereby and whereunder, the learned trial court rejected the application of the petitioner dated 4.1.2006 to recall the order dated 6.12.2005. By order dated 6.12.2005, the learned trial court directed to hold an inquiry under Order 22 Rule 5 C.P.C. to determine the right of opposite party no.1.

2. The petitioner as plaintiff instituted a suit for partition impleading his brothers as defendants 1 and 2 and the purchasers of the suit property as defendants 3 to 50 in the court of the learned Civil Judge (Sr.Division), Bhadrak, which is registered as T.S.No.253 of 1991. All the defendants, except defendant no.41-opposite party no.1 herein, have been set ex parte. During pendency of the suit, defendant no.1 died on 23.7.1997. Defendant no.41 claiming to be the adopted daughter of defendant no.1 filed an application for substitution in place of defendant no.1 on 28.1.1998. By order dated 6.12.2005, the learned trial court directed to hold an inquiry under Order 22 Rule 5 C.P.C to determine the right of defendant no.41 for being substituted in place of deceased-defendant no.1. Since the plaintiff disputed the claim of adoption, an application was filed to recall the order dated 6.12.2005 stating therein that an inquiry on the question of adoption will be lengthy and time consuming process. Thus, it is appropriate to take on record the plea taken by the defendant no.41, objection filed by the plaintiff, frame an issue and decide the suit. The same was rejected by the learned trial court on 25.1.2006, which is impugned in this petition.

3. Heard Mr.D.P.Mohanty, learned counsel for the petitioner and Mr.M.Mohanty, learned counsel for the opposite party no.1.

4. Mr.D.P.Mohanty, learned counsel for the petitioner submitted that determination of the question as to the legal representative of the defendant no.1 is a lengthy and time consuming process. The same involves adduction of evidence, both oral and documentary. In view of the same, the said question may be framed as an issue, whereafter the trial court shall decide the said issue along with other issues. Per contra, Mr.M.Mohnaty, learned counsel for the opposite party no.1 supported the impugned order.

5. The only question that arises for consideration in this case is when the defendant no.1 died during pendency of the suit and an application for

substitution of the legal heirs of deceased-defendant no.1 has been filed, whether the Court shall determine the said question under Order 22 Rule 5 C.P.C. or defer the same, frame an issue and proceed with the trial of the suit ?

6. Order 22 Rule 5 C.P.C. deals with determination of question as to legal representative. The said rule provides that where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court. The word 'determine' cannot be equated with the word 'decide'. An inquiry in the matter of determination of legal representative under this rule is summary in nature.

7. In Sitraram Beura Vrs. Birakishore Beura, AIR 1977 Orissa 65, it has been held that if a dispute is raised as to whether any person is or is not the legal representative of the deceased party, it should be judicially determined by the court under Order 22, Rule 5 of the Code of Civil Procedure. In the said case, on the death of a party, substitution order was made under Order 22 Rule 3 without noticing all the parties by suppressing some material facts. When a petition was filed by the rival claimant claiming to be the legal heir, dispute was raised as to who was the legal representative of the deceased. This Court held that it was incumbent upon the court to have an enquiry as contemplated under Order 22 Rule 5 of the Code of Civil Procedure. The same view was reiterated in Sukanta Chandra Sahoo Vrs. J.K.Routray and others, 1984 (I) OLR-305.

8. In *Netrananda Dehuri Vrs. Bhagirathi Dehuri and another,* 1991 (II) OLR-323, after survey of the various decisions of different High Courts, this Court held that the rule requires the court to decide such a question forthwith, if it arises as to whether a particular person is legal representative of a deceased party. It is not permissible to be left open to be decided when the suit is heard. The order for substitution made after enquiry only entitles a person substituted to carry on the suit, but cannot be said to confer any right of heirship on property. The decision on such issue does not operate as *res judicata*. The ratio in the case of *Netrananda (supra)* applies with full force to the facts of this case.

9. Thus, the inescapable conclusion is that where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the court forthwith. It is not permissible to defer the said question to be decided in the suit by framing an issue.

10. There being no patent error and gross injustice in the view taken by the learned trial court, this Court is not inclined to interfere with the impugned order in exercise of its power for judicial superintendence under Article 227 of the Constitution of India.

11. The petition, being devoid of any merit, is dismissed.

Writ petition dismissed.

2016 (I) ILR - CUT-112

DR. A.K. RATH, J.

W.P.(C) NO. 15845 OF 2006

KHETRAMOHAN TRIPATHY & ANR. ……..Petitioners

.Vrs.

BASUDEV ACHARYA ……..Opp. Party

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

Counter claim – Maintainability – When can be entertained – Counter claim, whether by way of amendment or by way of subsequent pleading, can not be brought on record as of right but shall be governed by the discretion vested in the court either under Order 6, Rule 17 C.P.C or under Order 8, Rule 9 C.P.C. – Purpose of the provision is to avoid multiplicity of judicial proceedings, to save court's time, to exclude inconvenience to the parties and in the process all disputes between the same parties can be decided in course of the same proceeding – If permitting counter claim either way could prolong the trial, complicate smooth flow of the proceeding or cause delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in exercising its discretion not in favour of permitting a belated counter-claim – In the instant case the defendant filed written statement on 20.06.2002 and there after issues were settled – Counter claim was filed on 07.08.2006 where it is evident that the cause of action for the same arose on 13.07.2006, i.e, four years after filling of the written statement – Held, since the cause of action had accrued to the defendant after he delivered his defence, learned trail court fell into patent error in

allowing the application for amendment of written statement and accepting the counter claim – Impugned order allowing counter claim is quashed. (Paras 13, 14, 15)

Case Laws Referred to :-

1. AIR 1987 SC 1395 : Mahendra Kumar and another v. State of Madhya Pradesh & Ors.
2. AIR 2003 SC 2508 : Ramesh Chand Ardawatiya v. Anil Panjwani
3. AIR 2007 SC 10 : Rohit Singh and others v. State of Bihar
4 AIR 1989 ORISSA 50 : Mangulu Pirai v. Prafulla Kumar Singh & Ors.
5. AIR 2002 SC 1334 : Padmasundara Rao (Dead) and others v. Sate of Tamil Nadu & Ors.

For Petitioner : Mr. B.Pattnaik
For Opp. Party : Mr. R.K.Mohanty, Sr. Advocate

Date of Hearing : 23. 11.2015
Date of Judgment: 04.12.2015

JUDGMENT

DR. A.K. RATH, J.

The petitioners call in question the legality and propriety of the order dated 1.11.2006 passed by the learned Civil Judge (Jr. Divn.), Jagatsinghpur in T.S. No.435 of 2001 whereby and whereunder, the learned trial court allowed the application of the defendant for amendment of written statement and accepted the counter-claim.

2. The petitioners as plaintiffs instituted a suit for permanent injunction and mandatory injunction impleading the opposite party as defendant in the court of the learned Civil Judge (Jr. Divn.), Jagatsinghpur, which is registered as T.S. No.435 of 2001. Pursuant to issuance of summons, the defendant entered appearance and filed written statement on 20.6.2002. While the matter stood thus, the defendant filed an application for amendment of written statement along with counter-claim on 7.8.2006. The plaintiffs filed objection to the same. Learned trial court came to hold that the proposed amendment is necessary for determining the real questions in controversy between the parties. It was further held that a counter-claim by the defendant can be filed provided the cause of action had accrued to him before he had delivered his defence or before the time limited for delivering his defence has expired. The counter-claim can be raised by filing amendment petition even after filing of original written statement. Having held so, the learned trial court allowed the application for amendment of the written statement and accepted the counter-claim.

3. Head Mr. B. Pattnaik, learned counsel for the petitioners and Mr. R.K. Mohanty, learned Senior Advocate for the opposite party.

4. The moot question that arises for consideration is as to whether the counter claim can be filed after filing of the written statement?

5. Order 8 Rule 6-A C.P.C. provides for counter claim by the defendant. The same reads as under.

> "**6-A. Counter-claim by defendant—**(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:
>
> Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

6. In *Mahendra Kumar and another v. State of Madhya Pradesh and others,* AIR 1987 SC 1395, the respondents 2 to 5 as plaintiffs instituted a suit being Civil Suit No.1-A of 1979 in the court of the District Judge, Bhopal for a declaration of their title to the treasure found by them. Pursuant to issuance of summons, the appellants and respondents 6 to 8, who are the defendants, filed their written statement, inter alia, denying the claim of the plaintiffs to the treasure. They claimed title to the treasure. After the filing of the written statement, the defendants filed a counter claim claiming title to the treasure. The plaintiffs filed an application praying that the counter-claim should be dismissed contending that it was barred by limitation as prescribed under Section 14 of the Treasure-Trove Act, 1878 (hereinafter referred to as 'the Act') and that it was also not maintainable under Order 8 Rule 6-A(1)

C.P.C. Learned District Judge came to the finding that the counter claim was barred by Section 14 of the Act and in that view of the matter, dismissed the counter claim. Being aggrieved by the said order of the learned District Judge, the defendants moved the High Court in revision against the same. The High Court upheld the order of the learned District Judge that the counter-claim was barred by limitation as prescribed under the Act. The High Court further held that the counter claim having been filed after the filing of the written statement, it was not maintainable under Order 8 Rule 6-A(1) C.P.C. The matter was carried to the apex Court. The apex Court in paragraph 15 of the report held as follows:-

> "**15**. The next point that remains to be considered is whether R.6A(1) of O.VIII, Civil P.C. bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for R.6A(1) does not, on the face of it, bar the filing of a counter claim by the defendant after he had filed the written statement. What is laid down under R.6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of R.6A(1) in holding that as the appellants had filed the counter claim after the filing of the written statement, the counter claim was not maintainable. The finding of the High Court does not get any support from R.6A(1), Civil P.C. As the cause of action for the counter-claim had arisen before the filing of the written statement, the counter claim was, therefore, quite maintainable. Under Art. 113, Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues, has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counter claim, which is treated as a suit under S.3(2)(b), Limitation Act, had been filed by the appellants within three years from the date of accrual to them of the right to sue. The learned District Judge and the High Court were wrong in dismissing the counter claim."

7. In *Ramesh Chand Ardawatiya v. Anil Panjwani,* AIR 2003 SC 2508, the question arose before the apex Court as to whether the counter-claim filed

belatedly can be accepted after the defendant is set exparte. In paragraph 28 of the report, the apex Court held as follows:-

> "**28**. Looking to the scheme of O.VIII as amended by Act No.104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under R.1 may itself contain a counter-claim which in the light of R.1 read with R.6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by R.6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under R.9. In the latter two cases the counter-claim though referable to R.6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under O.VI, R.17 of the C.P.C., if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under O.VIII, R.9 of the C.P.C., if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading could be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written

> statement within the meaning of R.6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter claim therein. Equally there would be no question of a counter-claim being raised by way of 'subsequent pleading' as there is no 'previous pleading' on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the Trial Court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim."

8. In *Rohit Singh and others v. State of Bihar,* AIR 2007 SC 10, after the evidence was closed and arguments were heard, the defendant filed the counter-claim. The apex Court held that a counter-claim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counter-claim can be raised after the issues are framed and the evidence is closed. Therefore, entertaining the so called counter-claim of defendants by the trial court, after the framing of issues for trial, was clearly illegal and without jurisdiction.

9. In *Mangulu Pirai v. Prafulla Kumar Singh and others,* AIR 1989 ORISSA 50, the question arose before this Court as to whether a counter-claim can be filed after the filing of the written statement or after the time fixed for the said purpose had expired. Interpreting the words "either before or after filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired" appearing in O.8, R.6A(1) the Division Bench came to hold that the same mean to limit the right of the defendant to set up by way of counter-claim in respect of a cause of action which arose after he delivered his defence or after the expiry of the date for filing his defence only. But any cause of action which may arise after the filing of the written statement by the defendant or after the expiry of the date for filing the defence will not come within the scope of R.6A(1). The restriction regarding the limit of the accrual of the period of the cause of action is based upon sound public policy, as otherwise the defendant may go on filing one counter-claim after another against the plaintiff in the same suit until it was disposed of and thus the suit may be indefinitely delayed.

10. In *Ramesh Chand Ardawatiya* (supra) the defendant has filed the counter-claim after he was set exparte and allowed to cross-examine of the plaintiff's witnesses. The apex Court held that generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial and more so when the trial has already commenced. The said observation cannot be read in isolation dehorse the context in which it was made.

11. Similarly, the observations of the apex Court in *Rohit Singh* supra that a counter-claim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counter-claim can be raised after issues are framed and the evidence is closed was made in the facts and circumstances of the said case since the counter-claim was filed after the evidence from both the sides was closed and arguments were heard. Thus, the said case is distinguishable.

12. The Constitution Bench of the Supreme Court in the case of *Islamic Academy of Education and another v. State of Karnataka and others,* AIR 2003 SC 3724 has restated the well settled principle of precedent. The apex Court held that a judgment, it is trite, is not be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal. It is further held that a decision is an authority for what it decides and not what can be logically deducted therefrom. In *Padmasundara Rao (Dead) and others v. Sate of Tamil Nadu and others,* AIR 2002 SC 1334, in paragraph 8 of the said report, the apex Court held that there is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

13. Thus, when a counter-claim is preferred by way of amendment incorporated subject to leave of the Court in a written statement or a counter-claim is filed by way of subsequent pleading, the same cannot be brought on record as of right, but shall be governed by the discretion vesting in the Court either under Order 6 Rule 17 C.P.C., if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under

Order 8 Rule 9 C.P.C., if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading could be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim.

14. The instant case may be considered on the anvil of the decisions cited supra. The defendant filed a written statement on 20.6.2002. Thereafter issues were settled. On 7.8.2006, the application for amendment of the written statement along with counter-claim was filed. On a cursory perusal of the application for proposed amendment to introduce the counter-claim vide Annexure-1, it is evident that the cause of action arose on 13.7.2006, i.e., four years after the filing of the counter-claim. Since the cause of action had accrued to the defendant after he delivered his defence, learned trial court fell into patent error in allowing the application for amendment of the written statement and accepting the counter-claim.

15. In the result, the order dated 1.11.2006 passed by the learned Civil Judge (Jr. Divn.), Jagatsinghpur in T.S. No.435 of 2001 is quashed. The petition is allowed.

Writ petition allowed.

2016 (I) ILR - CUT- 119

DR. B.R.SARANGI, J

MATA NOs. 57 & 58 OF 2009

MANASI SARITA DASH ……..Appellant

.Vrs.

MAHENDERA KUMAR NATH ……...Respondent

HINDU MARRIAGE ACT, 1955 – S. 13 (1) (i-a)

Divorce – Cruelty – Refusal of wife to cohabit with husband inorder to compel him to leave his parents and take her to his service place – Wife alleged extraneous relationship of the husband with his own sister – Wife has no slightest concern for the public image of her husband – She has no respect for the marital bond – Constant and consistent ill treatment of wife towards her husband – Husband suffered mental agony and harassment which amounts to cruelty – Marriage has broken irretrievably – Held, learned Court below has rightly passed a decree of divorce in favour of the husband.

(Paras 9 to 12)

Case Laws Rreffered to :-

1. AIR 20008 AP 20 : B. Srinivasulu -V- Mrs. Veena Kumari
2. AIR 2005 Bombay 180 : Smt. Pranati Chatterjee -V- Shri Goutam Chatterji

For Appellant - M/s. S.P.Mishra , S.Nanda, S.K.Sahu, B.S.Panigrahi & S.K.Mohan

For Respondent- M/s. S.K.Dash , A.K.Otta & S.K.Mishra

Date of hearing : 21.01.2015
Date of Judgment : 19.02.2015

JUDGMENT

DR. B.R.SARANGI, J.

The wife, being the appellant, has filed MATA No. 57 of 2009 challenging the judgment and decree dated 07.09.2009 and 17.09.2009 respectively passed by the Learned Civil Judge (Sr. Division), Dhenkanal in Mat Case no. 191 of 2007 wherein the learned Court below dissolved the marriage and passed a decree of divorce in favour of the husband-respondent under Section 13(1)(i-a) of Hindu Marriage Act, 1955, in short "the Act, 1955".

The husband, being the appellant in MATA No. 58 of 2009 has challenged the very same judgment and decree granting benefit of monthly maintenance of Rs.3,000/- to the wife and Rs.2,000/- the minor son till he gets majority starting from the month of September, 2009 until any circumstances arises warranting a modification or variance of the decree regarding maintenance under Sections 25 and 26 of the Hindu Marriage Act.

Both the appeals having arisen out of one judgment and decree passed in Mat Case No.191 of 2007, they being heard together, are disposed of by this common judgment.

2. The factual matrix of the case in hand is that the marriage between the parties was held on 30.06.2006 and after the marriage they stayed in her matrimonial home at Karigar Sahi of Dhenkanal town and led a conjugal life. After 8 to 10 days of marriage the wife persuaded the husband to stay with him at his service place at Tikarpada. The wife questioned that whether Sonu, the son of the deceased sister of the husband will remain with them or not and she expressed her dissatisfaction with the family members of the husband and persuaded him to leave his family members and to lead an independent life with better amenities and also did not like to take the burden and responsibility of other family members of the husband. It is further stated that the mother of the wife misbehaved the married sisters of the husband and gave unpleasant remarks about his brother-in-law. The husband assured the wife to bring a cordial atmosphere but the wife did not agree to stay in the matrimonial house with other family members and made some remarks against all the family members and refused to cohabit with the husband in order to compel the husband to leave his parents and take her to his service place. After 20 to 25 days of the marriage, the mother of the wife came to the house of her husband and abused all his family members in filthy language and threatened that she will not spare anybody who stands on the way of her daughters comfort. On 11.11.2006 the wife left her matrimonial house with her brother to her parental house without informing her husband and refused to join him. The wife alleged the incestuous relationship of the husband with his own sister and informed that she is pregnant and threatened to terminate the pregnancy if the husband will not act according to her will and also threatened to institute criminal case against the husband and other family members. Thereafter, the husband went to the in-law's house with hope for conciliation and during his stay at night, he found that his wife was ill. So, he proposed her for medical check-up, which was refused. Therefore, the husband finding no other alternative returned back after giving her a sum of Rs.10,000/- with advice to take care of herself during pregnancy. On 23.6.2007 the wife gave birth a male child. But this fact was not informed neither to the husband nor to his parents and this was made known to the husband and other family members by outsiders. The husband went along with his brother to the hospital, but the mother of the wife did not allow them to see the child and abused them in filthy language. On 25.7.2007 the mother of the wife came to the house of the husband and scolded his parents in filthy language alleging illicit relationship between the husband and his sister. The matter was reported to the Town Police Station, Dhenkanal on 30.7.2007. The husband wrote a letter to the wife asking her to change herself to lead a

happy family life or else there is no other option than to seek a divorce in the Court of law. But all his efforts were in vain. Due to such behaviour of the wife, the husband suffered mental agony and harassment which amounts to cruelty. Therefore, finding no other way out, the husband preferred the Mat case before the learned Civil Judge (Senior Divisiion), Dhenkanal bearing Mat Case No. 191 of 2007 under Section 13(1) (i-a) of the Act, 1955 seeking for a decree of divorce in dissolving the marriage between them.

3. After getting notice in Mat Case No. 191 of 2007, the wife filed written statement. The wife while admitting the fact of marriage and consummation of their marital life with the husband, stated, inter alia that out of their wed-lock, she had been blessed with a son, but alleges that the family members of the husband demanded dowry of a car and colour T.V. and teased her by giving mental stress. The wife also denied the allegation that she refused cohabitation with her husband nor put pressure on him to leave his parents and to take her to his place of service. The wife made allegation with regard to the illicit relationship of her husband with his own unmarried sister, which is not only heinous but also shocking and gave her a mental jolt. It is further stated that the wife was being brutally assaulted by her husband at the instigation of his mother and unmarried sister for further demand of dowry. It is denied by the wife that after 22-25 days of marriage, her mother went to the house of her husband and misbehaved other family members by using filthy language. On the other hand, the husband used filthy language against her mother and her sister. When the wife protested, she was assaulted inside the room, which caused swelling injury on her head. The mother and sister of the husband took away all the gold ornaments from the wife and when she was tortured by the family members of her husband, it became unbearable. Finding no other alternative, she left the matrimonial house and went to her parent's house in order to save herself and the child in her womb. While the wife was in her parent's house, she suffered from profuse bleeding and informed the same to her husband, who advised her to terminate the pregnancy and adopt the son (nephew of the husband) as their child, which was denied by the wife. On 23.6.2007 and 24.6.2007 the father of the husband was intimated and thereafter the wife intimated through the DFO about the birth of the child. Neither the husband nor his family members visited the child and on the other hand, the husband threatened to divorce the wife and thereby she was also subjected to cruelty. It is further stated that the wife time and again expressed her intention to stay with her husband and to lead a happy conjugal life and to have her own family with their son, but the

husband for no justifiable reason has filed the aforesaid Mat case, which the wife seeks for dismissal.

4. On the basis of the above pleadings, learned Court below framed as many as five issues. The husband examined three witnesses including himself as P.W.1, sister-Smitarani Nath as P.W.2 and his father-Duryodhan Nath as P.W.3 and relied upon several documents marked as Exts.1 to 7. Per contra, the wife examined herself as D.W.1 and her mother Sanjukta Dash as D.W.2 and exhibited three documents as Exts.A, A/1 and B.

5. Considering the materials available on record and on analyzing the evidence adduced by the parties and going through the documents, learned Civil Judge (Senior Division), Dhenkanal allowed Mat Case No.191 of 2007 by passing a decree of divorce and by directing the husband to pay Rs.3,000/- to the wife as her maintenance and Rs.2,000/- to the child towards maintenance till he gets majority per month vide judgment and decree dated 7.9.2009 and 17.9.2009 respectively.

6. Ms.D.Priyanka, learned counsel for the appellant in MATA No. 57 of 2009 strenuously urged that the learned Court below has committed gross error by passing an order for dissolution of marriage by a decree of divorce without properly considering the provisions contained in Section 13(1)(i-a) of the Act, 1955 and the learned Court below has accepted the evidence of P.Ws.1 to 3 without examining the veracity of the statements and also shifted the onus on the wife to prove the allegations of extraneous relationship of her husband with his uterine sister and disbelieved the same in absence of any corroborative statement and also stated that the learned Court below has committed gross error of law in disbelieving the statement of D.W.1-wife as her statement is corroborated by Ext.2 and the learned Court below should not have ignored the same and passed the impugned judgment against her.

7. Mr.S.K.Dash, learned counsel appearing for the husband in MATA NO.58 of 2009 though accepted part of the judgment and decree with regard to dissolution of marriage by granting decree of divorce, but objected to the grant of maintenance of Rs.3,000/- and Rs.2,000/- per month in favour of the wife and the son. It is stated that the award of such maintenance is contrary to the provisions contained in Sections 25 and 26 of the Act, 1955 and stated that without filing any proper application, the impugned order relating to maintenance of the child in absence of such application is bad and also stated that the quantum of maintenance for the wife and child is excessive and therefore, the same should be modified and reduced or instead of awarding

periodical sum towards maintenance, permanent alimony should be decided and without doing so, the order so passed by the learned Court below is absolutely misconceived one. In order to substantiate his contention, he has placed reliance on **B.Srnivasulu v. Mrs.Veena Kumari**, AIR 2008 AP 20, **Mrs.Manisha Sandeep Gade v. Sandeep Vinayak Gade**, AIR 2005 Bombay 180, **Smt.Pranati Chatterjee v. Shri Goutam Chatterji,** AIR 2006 Cal 196**, Satish Kumar v. Suman,** 2012(I) CCC 225 (P & H), **Malarvijy v. Kanthan,** 2012(I) CCC 82(Mad), **Bhavana N.Shah v. Nitin Chimanlal Shah**, AIR 2012 Bombay 148, **Vijay Kumar Ramchandra Bhate v. Neela Vijay Kumar Bhate**, AIR 2003 SC 2462, **U.Sree v,. U.Srinivas,** AIR 2013 SC 415, **K.Srinivas Rao v. D.A.Deepa**, AIR 2013 SC 2176 and **Guntamukkala Naga Venkata Kanaka Durga v. Guntamukkala Eswar Sudhakar and another**, AIR 2013 AP 58.

8. Considering the above pleadings of the parties and materials available on record and going through the evidence, initially this Court made an endeavour for reconciliation, but the same having failed, opportunity was given to the parties to settle the matter amicably with lump-sum as permanent alimony, but the same having not been materialized, matters were heard at length.

9. So far as the question of dissolution of marriage by granting decree of divorce is concerned, the learned trial Court dealt with the matter in proper perspective. As it appears, the husband has established mental cruelty inflicted on him through pleadings and evidence on record, it does not require solemn's wisdom to understand the embarrassment and harassment that might have been felt by the husband on account of allegations pertaining to highly immoral conduct raised by the wife before institution of the proceeding, which has been further aggravated by narrations in the written statement and in her deposition before the Court. The level of disappointment on his part can well be visualized like a moon in cloudless sky. The evidence of the wife having been studiedly scrutinized by the learned Court below, who had additional opportunity to mark the demeanor, categorically reveal that there was not even any basis for any kind of suspicion with regard to harshest allegation about the conduct of any person. It can be stated with certitude that the cumulative effect of the evidence brought on record clearly establishes a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband a miserable hell. The husband has been treated as an un-person as has been rightly analyzed by the learned Court below that with the mental pain, agony and sufferings, the

husband cannot be asked to put up with the conduct of the wife and continue to live with her. On the basis of the facts available that both the spouses fought the matter with utmost bellicosity and hardly there is any chance of reunion.

10. In **U.Sree (supra)** , the apex Court has held as follows:

> 23. In the case at hand, the husband has clearly deposed about the constant and consistent ill-treatment meted out to him by the wife inasmuch as she had shown her immense dislike to his "sadhna" in music and had exhibited total indifference and, in a way, contempt to the tradition of teacher and disciple. It has graphically been demonstrated that she had not shown the slightest concern for the public image of her husband on many an occasion by putting him in a situation of embarrassment leading to humiliation. She has made wild allegations about the conspiracy in the family of her husband to get him re-married for the greed of dowry and there is no iota of evidence on record to substantiate the same.This, in fact, is an aspersion not only on the character of the husband but also a maladroit effort to malign the reputation of the family. The learned Family Judge as well as the High Court has clearly analysed the evidence and recorded a finding that the wife had treated the husband with mental cruelty. True it is, there is some reference in that regard to the photostat copy of the letter which we have not accepted as admissible in evidence but the other evidence brought on record clearly support the findings recorded by the learned Family Judge and the High Court and the said finding remains in the realm of fact."

11. In **K.Srinivas Rao(supra)**, the apex Court in paragraphs 14,22 & 23 held as follows :

> 14. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.
>
> 22. We need to now see the effect of the above events. In our opinion, the first instance of mental cruelty is seen in the scurrilous,

vulgar and defamatory statement made by the respondent-wife in her complaint dated 4/10/1999 addressed to the Superintendent of Police, Women Protection Cell. The statement that the mother of the appellant-husband asked her to sleep with his father is bound to anger him. It is his case that this humiliation of his parents caused great anguish to him. He and his family were traumatized by the false and indecent statement made in the complaint. His grievance appears to us to be justified. This complaint is a part of the record. It is a part of the pleadings. That this statement is false is evident from the evidence of the mother of the respondent-wife, which we have already quoted. This statement cannot be explained away by stating that it was made because the respondent-wife was anxious to go back to the appellant-husband. This is not the way to win the husband back. It is well settled that such statements cause mental cruelty. By sending this complaint the respondent-wife has caused mental cruelty to the appellant-husband.

23. Pursuant to this complaint, the police registered a case under Section 498-A of the IPC. The appellant-husband and his parents had to apply for anticipatory bail, which was granted to them. Later, the respondent-wife withdrew the complaint. Pursuant to the withdrawal, the police filed a closure report. Thereafter, the respondent-wife filed a protest petition. The trial court took cognizance of the case against the appellant-husband and his parents (CC No. 62/2002). What is pertinent to note is that the respondent-wife filed criminal appeal in the High Court challenging the acquittal of the appellant-husband and his parents of the offences under the Dowry Prohibition Act and also the acquittal of his parents of the offence punishable under Section 498-A of the IPC. She filed criminal revision seeking enhancement of the punishment awarded to the appellant-husband for the offence under Section 498-A of the IPC in the High Court which is still pending. When the criminal appeal filed by the appellant-husband challenging his conviction for the offence under Section 498-A of the IPC was allowed and he was acquitted, the respondent-wife filed criminal appeal in the High Court challenging the said acquittal. During this period respondent-wife and members of her family have also filed complaints in the High Court complaining about the appellant-husband so that he would be removed from the job. The conduct of the respondent-wife in filing a complaint making

> unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of the sentence awarded to the appellant-husband, in filing appeal questioning the acquittal of the appellant-husband and acquittal of his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is removed from his job. We have no manner of doubt that this conduct has caused mental cruelty to the appellant-husband."

12. Similar view has also been taken by the apex Court in the judgments cited by Mr.S.K.Dash, learned counsel appearing for the husband mentioned supra. Therefore, with regard to the finding of the learned Court below that the marriage has broken irretrievably and the chapter should therefore be closed, this Court is of the considered opinion that the learned Court below has not committed any irregularity or illegality in coming to such conclusion and therefore, concurs with such finding.

13. In **Vijay Kumar Ramchandra Bhate** (supra), the apex Court has considered the word "**mental cruelty**" as mentioned in Section 13(1)(i-a) of the Act, 1955. In paragraph 11 of the said judgment, the apex Court has held as follows:

> "11. That apart, in our view, even the fact that the application for amendment seeking for deletion of the accusations made in the written statement was ordered and amendments carried out subsequently does not absolve the husband in this case, from being held liable for having treated the wife with cruelty by making earlier such injurious reproaches and statements, due to their impact when made and continued to remain on record. To satisfy the requirement of clause (i-a) of sub-section (1) of Section 13 of the Act, it is not as though the cruel treatment for any particular duration or period has been statutorily stipulated to be necessary. As to what constitute the required mental cruelty for purposes of the said provision. In our view, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct, but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the Courts perhaps need consider the further question as to whether their continuance or persistence over a period time render, what normally

would, otherwise, not be a so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer. A conscious and deliberate statement levelled with pungency and that too placed on record, through the written statement, cannot so lightly be ignored or brushed aside, to be of no consequence merely because it came to be removed from the record only. The allegations levelled and the incidents enumerated in the case on hand, apart from they being per se cruel in nature, on their own also constitute an admission of the fact that for quite some time past the husband had been persistently indulging in them, unrelented and unmindful of its impact. That the husband in this case has treated the wife with intense cruelty is a fact, which became a fait accompli the day they were made in the written statement. They continued on record at any rate till 5-10-1988 and the indelible impact and scar it initially should have created, cannot be said to have got ipso facto dissolved, with the amendments ordered. Therefore, no exception could be taken to the courts below placing reliance on the said conduct of the appellant, in this regard, to record a finding against him."

14. Coming to the question of grant of permanent alimony as it appears from the pleadings available on record, the wife has neither pleaded in her written statement the exact amount she wants nor adduced any evidence to that extent. Considering the fact that the wife was awarded a sum of Rs.2,000/- for herself and Rs.500/- for the minor child under Section 24 of the Act, 1955 and that the husband is drawing a sum of Rs.13,535/- in 2008, learned Court below went on to assess the salary of the husband, which would not be less than Rs.20,000/- after implementation of 6th pay Commission and therefore separately awarded a sum Rs.3,000/- and Rs.2,000/- per month in favour of the wife and minor child respectively. But by virtue of the interim order passed by this Court on 22.8.2013 in Misc. Case Nos.75 of 2009 and 141 of 2009, the monthly maintenance has been increased to Rs.6,000/- from the month of September, 2013 by taking into account that the husband is drawing Rs.23,145/- per month. The husband had produced the materials to reveal his liability being the eldest son of his father to bear the expenditure towards the treatment of chronic ailments of his parents, maintain his younger brother, his nephew (son of his deceased daughter) and produced further materials to show that though the house at

Karigar Sahi belongs to his father, he has to bear the liability for repayment of loan taken for construction of the said house. Therefore, stated that the award of maintenance against the husband becomes too heavy in these circumstances. It is further urged that instead of monthly maintenance @ Rs.3,000/- and Rs.2,000/- awarded in favour of the wife and minor child respectively by the Court below, it would be just and proper if the award of maintenance can be computed on lump-sum basis. Opportunity has been given to the wife to suggest the quantum with regard to permanent alimony, which she can take for finalizing the dispute vide order dated 25.2.2014. Pursuant to the same, though suggestion has come for payment of Rs.30 lakhs as permanent alimony and a sum of Rs.15,000/- per month towards education of the minor child, the same was not accepted by the husband.

15. Mr.S.K.Dash, learned counsel for the husband relied upon the judgment of Andhra Pradesh High Court in **Guntamukkala Naga Venkata Kanaka Durga (supra),** wherein in paragraph 32, it is held as follows:

> "In the context of the observations made above, awarding maintenance to a wife because of whose fault the marriage between her and her husband has been broken is against the concept of marriage. How can one of the spouses who got no respect for the marital bond be granted maintenance. The wife or husband will have the obligation of maintaining the other spouse when the other spouse is neglected by him or her without lawful excuse having got sufficient means while the other spouse got no means to maintain herself or himself having entered into the wedlock."

16. It is urged that since the wife has no respect for the marital bond and the marriage between her and her husband was broken due to her fault, she is not entitled to maintenance. While giving such finding, the High Court of Andhra Pradesh has not taken note of Section 25 of the Act, 1955 in its proper perspective. In order to consider the aspect for grant of permanent alimony, reference was made to Section 25 of the Act, 1955 which reads as follows :

> "Section 25. Permanent alimony and maintenance:- (1) Any Court exercising jurisdiction under this Act, may at the time of passing any decree or at time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the appellant for her or his maintenance and support such gross sum or such monthly or

periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant (the conduct of the parties and other circumstances of the case), it may seem to the Court to be just and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent. (2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just. (3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just."

17. Taking into consideration the above proposition of law laid down by the apex Court, similar view has also been taken by this Court in **Miss Moumita Roychoudhury v. Abhijit Chattarjee**, MATA No. 41 of 2012 disposed of on 27.8.2013.

18. In the present case, since the offer made by the wife pursuant to the order dated 25.2.2014 basing upon which affidavit was filed on 23.4.2014 was not accepted by the husband, the wife filed another affidavit on 22.8.2014 in paragraph 6, it states as follows :

"Learned counsel appearing for the respondent-husband stated that on perusing the application filed under Section 12 of the Act by the appellant-wife, it would be seen that neither there is any pleading nor any prayer for claiming permanent alimony. On the other hand, appellant-wife has claimed compensation of Rs. 10 lakhs, on consideration of which the learned Judge, Family Court has granted Rs.5 lakhs as permanent alimony, which is beyond the pleading. Therefore, he vehemently urged that the appellant is not entitled to get any permanent alimony, save and except the compensation claimed in her application under Section 12 of the Act. He further urged that by granting such permanent alimony learned Judge, Family Court has exceeded his jurisdiction and therefore the impugned judgment to that effect cannot be sustained. "

19. On perusal of the above contention, it appears that the wife has suggested for payment of Rs.20 lakhs towards permanent alimony and a sum of Rs.8,000/- per month to meet the educational expenses and the child keeping in view his welfare which is the paramount consideration.

20. In view of the above fact and law discussed above, this Court has the power under Section 25 of the Act, 1955 to award permanent alimony just like original Court. The husband, who is a Govt. employee, taking into consideration his social status and the income on the basis of the salary certificate as Annexure-A to the affidavit filed by him on 13.8.2013, it would be just and proper to award a lump-sum of Rs.17 lakhs (seventeen lakhs) towards permanent alimony in favour of the wife though she had claimed otherwise as mentioned above. Accordingly, this Court directs the husband to pay a lump-sum of Rs.17 lakhs towards permanent alimony to the wife and the minor child within a period of three months.

21. Accordingly, MATA No. 57 of 2009 filed by the wife is hereby dismissed and MATA No. 58 of 2009 filed by the husband is partly allowed.

Appeals disposed of.

2016 (I) ILR - CUT-131

DR. B. R. SARANGI, J.

W.P.(C) NOS. 23946 OF 2014 (WITH BATCH)

LALITA BAL …….Petitioner

.Vrs.

CONTROLLER OF EXAMINATIONS,
I.G.N.O.U. & ORS. ……..Opp. Parties

Examination – Malpractice – Petitioners are correspondence course students in B.Sc. Nursing – Allegation is they have copied down the exact answer from the study materials supplied by the University – Cancellation of result – Action challenged – Neither the study materials recovered during the examination nor any invigilator has reported regarding such malpractice – No positive evidence – Moreover total similarity in answers with that of the study materials can not per se indicative of adoption of "unfair means" – Impugned order

cancelling the result as well as debarring the petitioners from appearing in the further examinations upto next four term-end is quashed – Direction issued to opposite parties to publish the result of the petitioners. (Paras 14 to 17)

Case Laws Referred to :-

1. AIR 2001 Orissa 131 : B.S.E., Orissa, Cuttack -V- Gayatri Hota & Ors.
2. 2010 (I) OLR 335 : Governing Body, Evening College, Angul -V- State of Orissa & Ors.
3. AIR 1998 SC 5 : Rajesh Kumar & Anr. -V- Institute of Engineers (India)
4. AIR 1972 SC 229 : Automotive Manufacturers Pvt. Ltd. -V- Govt. of Andhra Pradesh
5. Air 2003 SC 1628 (1631) : (2003) 3 SCC 454 : CST -V- Subhas & Co.
6. (1969) 2 SCC 694 : 1970 SC 1654 (1656) : Parasramka Commercial Co. -V- Union of India

For Petitioner : M/s. K.K.Swain & P.N.Mohanty
M/s. K.Patnaik, R.Samal, S.Pattanaik & K.K.Mohanta
M/s. M.Mishra, R.B.Sinha & S.R.Kar
M/s. N.Lenka, R.Lenka, S.Sahu, H.K.Mahanta, L.Sahu & N.Behera

For Opp. Parties: M/s. R.K.Bose, J.Nayak, S.K.Nayak

Date of hearing : 31.08.2015
Date of judgment : 29.09.2015

JUDGMENT

DR. B.R.SARANGI, J.

All the writ petitions mentioned above having common cause of action, they have been heard together and disposed of by this common judgment.

2. The petitioners, who are the Correspondence Course students in B.Sc. Nursing (Post Basic) under Indira Gandhi National Open University (in short hereinafter referred to as IGNOU), New Delhi, have filed these petitions challenging the order of punishment dated 23.05.2014 & 07.07.2014 under Annexure-3 series issued by the opposite parties cancelling their entire examination imposing punishment debarring them to appear in the further examinations of the University up to next four term-end on the ground that they have copied from the study materials supplied by the University without following due procedure of law and complying with the principles of natural justice. They further seek to quash such punishment and publish their result.

3. The factual matrix of the case in hand is that the petitioners having passed the Diploma Course in Nursing (GNM) took admission in B.Sc. Nursing (Post Basic) as Correspondence Course candidates under IGNOU, New Delhi. The duration of course is three years and after completion of the said course, the petitioners appeared in the final examination. Though they have fared well in all the papers, before publication of result, they were intimated by the University authority that since they have copied from study materials, they have to appear before the Examination Disciplinary Committee in person to put their defence or in the alternative to send written statement in their own handwriting explaining the position to the Section Officer (Examination-III), Student Evaluation Division, IGNOU, New Delhi through registered letters. On receipt of the letters on different dates, the petitioners submitted their explanations by registered post denying the charges leveled against them. In spite of submission of such explanations, neither the petitioners have been intimated anything nor have they been given any opportunity of hearing before the Examination Disciplinary Committee which is in gross violation of provision under Section 26(g) of the NEHU Act, 1973 and Regulation framed therein. Therefore, the punishment has been imposed unilaterally on the petitioners cancelling the examination and debarring them to appear in the further examinations of the University up to next four term-end examination which has been communicated to the petitioners by the Section Officer, Students Evaluation Division, IGNOU, New Delhi. Hence, these applications.

4. Mr. K.K. Swain, learned counsel for the petitioner in W.P.(C) No.23964/2014 urged that Clause-3 of "Ordinance on Discipline Among Students in Relation to University Examination" of IGNOU, New Delhi which has been framed under Statute 20(2) of the IGNOU Act states "use of unfair means". Clause-4(n) of the said Ordinance reflects Copying, attempting to copy, taking assistance or help from any book, notes paper or any other material or device or from any other candidate, to do any of these things or facilitating of rendering any assistance to any other candidate to do any of these things amount to use of unfair means. In the notice of show-cause the only allegation that has been made against the petitioner is that she has copied from study materials supplied by the University in respect of three papers i.e. Course Code Nos.109, 110 and 111. It is urged that during examination neither any incriminating materials, namely, such study materials have been recovered nor the Centre Superintendent or any invigilator has reported against such allegation regarding her indulgence in

copying. Therefore, the conclusion arrived at by the Examination Discipline Committee that the petitioner had copied from study materials and adopted unfair means is contrary to the provisions of the Ordinance inasmuch as while imposing punishment, the authorities having not complied with the principles of natural justice cancelling the result cannot be sustained in the eye of law. In order to substantiate his case, learned counsel for the petitioner has relied upon ***Board of Secondary Education, Orissa, Cuttack v. Gayatri Hota and others***, AIR 2001 Orissa 131, ***Governing Body of Evening College, Angul v. State of Orissa and two others***, 2010 (I) OLR 335 and ***Rajesh Kumar and anr. v. Institute of Engineers (India),*** AIR 1998 SC 5.

5. Mr. K. Pattnaik, learned counsel appearing for the petitioners in W.P.(C) Nos.4918/2015, 4919/2015, 4920/2015 and 4921/2015 supported the contentions raised by Mr. K.K. Swain, learned counsel appearing for the petitioner in W.P.(C) No.23964/2014. In addition to it, he urged that in course of examination neither any incriminating materials have been seized from the petitioners nor anything has been communicated with regard to factum of indulgence of the petitioners in any unfair means. He has relied upon Section-26 of IGNOU Act, 1985 and stated that "Ordinance on Discipline Among the Students in Relation to University examinations" has been framed under the Statute 20(2) of the IGNOU Act with reference to 26 of the Act. Since imposition of punishment having not been done in conformity with the provisions of law, he seeks for quashing of the same.

6. Mr. Manoranjan Mishra, learned counsel appearing for the petitioners in W.P.(C) Nos.3309/2015, 3310/2015 and 3424/2015 supported the contentions raised by Mr. K.K. Swain and Mr. K. Pattnaik, learned counsels for the other petitioners of the writ petitions mentioned above.

7. Mr. N. Lenka, learned counsel appearing for the petitioner in W.P.(C) NO.1733/2015 supported the contentions raised by Mr. K.K. Swain and Mr. K. Pattnaik, learned counsels for the other petitioners in the writ petitions mentioned above. In addition to the same, he urged that the petitioner's case stands on a better footing than that of the other petitioners mentioned above meaning thereby that after the petitioner appeared in the examination, her result was published by the authority as and she has been awarded less marks in two papers, she has deposited requisite fees for re-addition of marks and also sought for supply of xerox copies of the answer sheets. Said application has been entertained by the opposite parties and she was supplied xerox copies of the answer sheets accordingly and as such her mark in Paper

No.BNS 110 has been enhanced. When she took steps for admission in Hospital Health and Management Course under the IGNOU, she was issued with an order/memorandum dated 11.12.2014 wherein she was informed that there is allegation of unfair means against her in term end examination of Course Code No.BNS-109. In response to the same, the petitioner filed her written statement explaining the position in writing. It is stated that neither any incriminating materials has been seized from her in the examination hall nor is there any allegations made against her with regard to adoption of unfair means during examination. So, the allegation so made against her is not correct Therefore, the communication made by the authority cancelling the examination of the petitioner in respect of Course Code BNS-109 during June 2014 without complying with the provisions of law and principles of natural justice cannot sustain.

8. Mr. R.K. Bose, learned counsel appearing for the IGNOU has filed similar counter affidavits in all the cases wherein it is stated that IGNOU has been created by an act of Parliament is unlike any other conventional University. It imparts higher education for large segments of the population and in particular the disadvantaged groups such as who lives in remote and rural areas including working people, housewives and other adults who wish to upgrade or acquire knowledge through studies in various field and as such there is no campus based instruction. Therefore, the University disseminates knowledge through diverse means including the contemporary communication media i.e. printed material, home experiment kits, television and radio broadcasting and audio-visual aids. There is no direct link of students and teachers as is found in a classroom in a general/conventional University.

9. Opposite parties have admitted that the petitioners appeared in B.Sc. Nursing Examination. The IGNOU has made an Ordinance known as "Ordinance on Discipline Among Students in relation to University Examination" which is under Statute 20(2) of the IGNOU Act, 1995. Clause 10.57 of Chapter-10 of the Ordinance states "Reporting of Unfairmeans cases by Evaluators" which states that in case any unfair means used by the students in the examination is noticed, the same will be reported separately in the manner prescribed therein. It is urged that the Evaluator on the basis of answer sheets can also express his views. During the course of evaluation, it was noticed by the evaluator that the petitioners have answered as per the study materials supplied to them. In that view of the matter, the action taken

by the opposite parties against the petitioners is wholly and fully justified. Therefore, this Court should not interfere with the same.

10. On the basis of the facts pleaded, it is the admitted fact that the petitioners have been admitted in three years B.Sc. Nursing Course under the IGNOU. After completion of the said course they filled up the forms and appeared in the examination conducted by the University. The result of the petitioners have not been published except the petitioner in W.P.(C) No.1733/2015 on the plea that they were involved in unfair means as the answers given by the petitioners are replica of the study materials supplied to them. Clause-3 of the Ordinance states "Use of unfair means"- a candidate shall not use unfair means in connection with any examination. Clause-4 deals with what shall be "Unfair means". Clause-4 (n) states about "Copying, attempting to copy, taking assistance or help from any book, notes paper or any other material or device or from any other candidate, to do any of these things or facilitating of rendering any assistance to any other candidate to do any of these things". Under Clause-6 (a) it is stated that the Superintendent of the Examination Centre shall report to the Director (SRE)/Registrar (SR & E) without any delay and on the day of occurrence, if possible, each case where use of unfair means in the examination is suspected or discovered with full details of the evidence in support thereof and the statement of the candidate concerned, if any, on the forms supplied by the Director (SRE)/Registrar (SR & E) for the purpose and (b) a candidate shall not be forced to give a statement but the fact of his having refused to make a statement shall be recorded by the Superintendent and shall be got attested by two other members of the supervisory staff on duty at the time of occurrence of the incident. As per Clause-7 all the cases of alleged use of unfair means shall be referred to a Committee called the Examination Discipline Committee to be appointed by the Vice-Chancellor who shall examine the same and pass appropriate order in conformity with the provisions of law and against the order of the Examination Committee a candidate may appeal to the Vice Chancellor in writing for a review of the case. As per Clause-8 the Examination Discipline Committee may recommend as per the terms and conditions mentioned therein. Chapter-10 deals with pre-examination activities, conduct of examinations and evaluation process at students registration and evaluation division at Headquarters as per Annexure-B/2 annexed to the counter affidavit.

11. In ***Automotive Manufacturers Pvt. Ltd. v. Government of Andhra Pradesh***, AIR 1972 SC 299 : 1972) 1 SC 125, the apex Court dealt with the

word 'use'. The meaning of word 'use' in the Oxford Dictionary is To make use of as a means or instrument; To employ for a profitable end. In the Black's Law Dictionary, 7th Edn. at page 1540 it has been stated that (1) the application or employment of something especially a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional (2) A habitual or common practice. Therefore, applying the meaning of "use" to the present context the petitioners have not made use as a means of instrument of unfair means so as to undergo the procedure involved in Clause 10.57 of said Ordinance.

12. Mr. R.K. Bose, learned counsel appearing for the opposite parties referring to Clause-10.57 strenuously urged that power is vested with the Evaluators to notice unfair means used by the students in the examination and if any unfair means is noticed, the same will be reported separately in the manner prescribed therein. It is stated that the petitioners have indulged themselves in unfair means by writing from the study materials provided to them which the Evaluator has noticed. Therefore, on the basis of the report of the Evaluator, the action against the petitioners has been taken. In ***CST v. Subhas & Co.,*** AIR 2003 SC 1628 (1631): (2003) 3 SCC 454, it is held that the term "notice" is originated from the Latin word "notifia which means "a being known" or a knowing is wide enough in legal circle to include a plaint filed in a suit.

13. In ***Parasramka Commercial Co. v. Union of India***, (1969) 2 SCC 694: 1970 SC 1654 (1656) the apex Court has also dealt with the word 'notice' which reads as follows:

> " 'Notice' denotes merely an intimation to the party concerned of a particular fact. Notice may take several forms. It must, to be sufficient, be in writing and must intimate quite clearly that the award has been made and signed".

14. Therefore, applying the meaning of word "notice" as mentioned (supra) if the Evaluator has given a report in case of any unfair means used by the students in the examination, the same has to be reported in the manner prescribed under Clause-10.57 of the Conduct of Examinations and Evaluation Process at Students Registration and Evaluation Division. It is strenuously urged that at different stages no communication has been made with regard to indulgence of the petitioners in any unfair means either by the Evaluator or by the Centre Superintendent as per Clause-10.57 of Chapter-

10. Therefore, inference has to be drawn that the petitioners' indulgence in unfair means by the authority is absolutely misconceived one inasmuch as while drawing such conclusion the opposite parties had to follow the procedure as envisaged therein. Admittedly there is no seizure of any incriminating materials from the petitioners nor any report has been submitted by the invigilator or Centre Superintendent against the petitioners alleging adoption of the unfair means by the candidates. Only reason that has been indicated for cancellation of result is that the petitioners have reproduced the study materials in their answer books. Therefore, the students have adopted unfair means cannot be a ground for cancellation of their result. It is the admitted fact by all the parties that the students those who have taken admission in the Course have been provided with the study materials prepared by the University in absence of any prescribed books for the purpose. Once the study materials have been provided, the normal presumption is that the students have to prepare themselves on the basis of the materials provided to them. Therefore, in the event the answer is same and reproduction of the study materials, it cannot be construed that the petitioners have indulged themselves in unfair means as alleged. It is the admitted fact that no incriminating materials have been seized from the petitioners in course of the examination nor any report has been given by the Centre Superintendent alleging adoption of unfair means. The ratio decided in para-4 of the Board of Secondary Education (supra) is quoted below:

> "4. The candidates (respondents) took a positive stand that they had not resorted to any malpractice or any unfairness in course of examination, inasmuch as no allegation of malpractice was reported by the invigilator, Centre Superintendent or Flying squad. No incriminating material whatsoever was seized or recovered from any of the respondents. In absence of such reports and materials, only on the allegation that the answers of some of the questions appeared to be identical, results could not have been cancelled and the decision is based on surmise and conjectures. It was also averred in the writ application that in the notice to show cause, there was no mention about the serial number of the questions or roll number of the examinees with whom the answers are found to be identical. Thus, the respondents were prevented from giving specific reply and were constrained to deny the allegations. No opportunity of adducing evidence or hearing was also accorded. Thus, there was gross violation of principles of Natural Justice".

15. Similar view has also been taken by this Court in ***Governing Body of Evening College, Angul*** (supra) in paragraphs-7, 8 and 9 which read as follows:

> "7.Mr. Routray, learned counsel relying upon the decision of the Supreme Court in the case of ***U.O.I. and others v. Jai Prakash Singh and another***, AIR 2007 S.C. 1363 and the decisions of this Court in the case of ***Board of Secondary Education, Orissa, Cuttack v. Gayatri Hota and others***, 2001(I) OLR 398 and ***Kumari Babita Jena and others v. Council of Higher Secondary Education, Orissa and others***, 2007(I) OLR 161 submitted that law has been fairly settled in the aforesaid decisions that only because some of the answer scripts are tallying and/or similar and/or identical with some other answers, that too, in respect of the students, who were appearing in the examination in different halls, a conclusive interference cannot be drawn to the effect that they were involved in mass mal-practice. Law is also settled that before arriving at the conclusion that the examinees were involved in commission of mass mal-practice during the examination, the requirements of natural justice have to be followed. The above principles have been approved by the apex Court in the case of ***Suresh Koshy George v. University of Kerala and others***, AIR 1969 SC 198.
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> 8. This Court in the case of ***Prashanta Kumar Chakara v. Council of Higher Secondary Education, Orissa***, 1988(II) OLR 451 observed that the authorities cannot utilize materials which had not been put to the petitioner and that the principle of natural justice have to be sacrosanctly followed in the case of cancellation of result on the ground of mass mal-practice. In the case of ***Kumari Babita Jena and others*** (supra), a Division Bench of this Court, being posed with similar facts, held that the stand taken by the Council that the result was cancelled due to infringement of the examination rules or because of mass mal-practice, since the answer scripts indicated identical answers, cannot be accepted. Identical answers may be found for very many reasons, but for the inference that it was the result of mass mal-practice, something more has to be proved.
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> 9.Learned counsel for the C.H.S.E. relied upon the judgment dated 11.08.1992 of this Court passed in O.J.C. No. 4316 of

1991(***Radhaballav Baral and others v. Council of Higher Secondary Education and another***) and the judgment dated 02.08.2002 passed in O.J.C. No.6438 of 2000(***Smt. Pravamayee Nayak and others v. Council of Higher Secondary Education, represented through its Chairman, Pragnyapitha, Bhubaneswar and others***), wherein this Court upheld the stand taken by the Council. The facts of the said cases, however, are distinguishable from the facts of the present case, as the facts of the case in ***Radhaballav Baral and others*** (supra) disclose that the answers to essays were identical and the grammatical mistakes were similar. In the case of ***Smt. Pravamayee Nayak and others*** (supra), the report was submitted while evaluating the answer scripts, immediately, which was place before the Examination Committee and the said Examination Committee, observed that it is a clear case of mass mal-practice. The Court, on finding that it is not only the identically of the answers of the petitioners therein, but also the incorrect answers being identical, upheld the decision of the Council. However, it was observed that what could be considered mass copying cannot be laid down with mathematical precision and it has to be decided on the facts and circumstances of each case as to whether there has been mass copying at a particular examination centre".

16. In ***Rajesh Kumar*** (supra), the apex Court in paragraph-7 states as follows:

> "xxxxxxx All literate men have been students at a given point of time but all have not been crammers. Those who cram do not achieve their goal by a single reading. it is a ceaseless effort for days and days till the desired result is achieved. Crammers inter se do not have any nexus with each other. The text of a book as the common source for cramming establishes no connection. That per se cannot be evidence of any conspiracy between the crammers to adopt unfair means in the examination unless there be material to show that there was copying of the answer books, descended from the answer book of one of the candidates, or directly from the book leading to the copying by others xxxxx".

17. Considering the ratio decided in the aforementioned judgments (supra) and applying the same to the present context, due to non-availability

of any materials against the petitioners and due to non-compliance of the principles of natural justice, the order impugned cancelling the result on the allegation of indulging in unfair means cannot sustain. Accordingly, the impugned orders dated 23.05.2014 & 07.07.2014 under Annexure-3 series issued by the opposite parties cancelling their entire examination imposing punishment debarring them to appear in the further examinations of the University up to next four term-end on the ground that they have copied from the study materials supplied by the University without following due procedure of law and without complying with the principles of natural justice are hereby quashed and the opposite parties are directed to publish the results of the candidates in respect of their examination on the respective subjects within a period of six weeks from the date of passing of the judgment.

18. With the above observation and direction, these writ petitions stand disposed of. No order to cost.

Writ petitions disposed of.

2016 (I) ILR - CUT-141

DR. B.R.SARANGI, J.

O.J.C. NO. 16314 OF 1998

JAYANARAYAN MISHRA & ORS. ....Petitioners

.Vrs.

STATE BANK OF INDIA & ORS. ....Opp. Parties

SERVICE LAW – Promotion – Seniority-cum-merit – Meaning of – Minimum merit necessary for the post may be assessed either by subjecting candidates to a written examination or an interview or by assessment of their work performance during previous years or by combination of either of all the three of the aforesaid methods – However there is no hard and fast rule as to how minimum merit is to be ascertained – So long as ultimate promotions as based on seniority, any process for ascertaining minimum necessary merit, will not militate against the principle of seniority-cum-merit – So the senior, even though less meritorious, shall have priority.

In this case the petitioners working in Clerical Grade of the State Bank of India sought for promotion to the cadre of Junior Management Grade-I as per promotion policy of the Bank but the selection made amongst the employees who have secured highest number of marks amongst the eligible officers pursuant to the written and interview test by the authorities and consequently merit has been given primacy over seniority – Held, the promotion has been made contrary to the principles laid down in the circular – However, since promotion of the employees is a discretionary power of the employer, this Court instead of setting aside the promotion of O.P.Nos. 3 to 12, directed O.P.Nos. 1 & 2 to reconsider the case of the petitioners as well as O.P.Nos. 3 to 12 afresh as per the circular. (Paras 12, 13, 14)

Case Laws Relied on :-

1. 1998 AIR SCW 2577 : B.V.Sivaiah & Ors. Etc. -V- K.Addanki Babu & Ors. Etc.
2. (2002) 10 SCC 359 : Ved Prakash -V- State of Haryana

Case Laws Referred to :-

1. (1974) 4 SCC 308 : State of Mysore -V- C.R.Sheshadri
2. (1976) 2 SCC 310 : AIR 1976 SC 490 : State of Kerala -V- N.M.Thomas
3. (2010) 1 SCC 335 : AIR 2010 SC 699 : Rajendra Kumar Srivastava -V- Samyut Kshetriya Gramin Bank

For Petitioners : M/s. A.K.Mishra, B.B.Acharya, J.Sengupta, D.K.Panda, P.R.J.Dash, C.Mohanty & G.Sinha.

For Opp. Parties: M/s. P.V.Ramdas & P.V.B.Rao
M/s. A.Deo, M.P.J.Ray & A.K.Dash.

Date of hearing : 29.10.2015
Date of Judgment : 24.11.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioners, who are the clerical cadre people of State Bank of India, have filed this application claiming for promotion to Junior Manager Post Grade-I in the normal channel in consonance with promotion policy issued by the State Bank of India pursuant to Circular Special Letter No. CDO/PER & HRD/87 of 1997-98 dated 24th February, 1998 in Annexure-3 and further seeking to quash the promotion of opposite party nos. 3 to 12 as per Annexure-5 and to grant all the consequential financial benefit as admissible to them in accordance with law retrospectively.

2. The short fact of the case, in hand, is that the petitioners have been appointed as Clerk in State Bank of India on different dates. Promotion to the Officer's grade JMG Scale-I is being done by the State Bank of India under two channels i.e. merit channel and normal channel. The merit promotion is being conducted from amongst the incumbents, who have to compete with regard to the posts which are going to be filled up by way of merit and merit alone. With regard to normal channel, promotion has to be made on the basis of seniority- cum-merit. Opposite party no.2 issued a staff circular on 14.10.1992 bringing modification of the promotion policy in both the channels such as (i) normal channel and (ii) appointment of Trainee Officers channel. So far as normal channel is concerned, it was provided that the number of employees to be called would henceforth be five times the number of vacancies with a proviso that once an employee is called for the written test, he/ she would continue to be called in the subsequent years also till he/ she exhausts all the chances available to him/ her even if the later exercise would lead to calling of employees in excess of 1:5 ratio. The number of chances that would be available to an employee would stand increased to 5 and all such chances would have to be availed of in consecutive occasions with no gap between the availment of the penultimate and fifth and final chance. The guideline issued on 14th October, 1992 was subsequently amended in staff Circular No.5 of 1993 on 7th January, 1993 in which it was provided that the clerical and cash department staff, who have not crossed 50 years as on 1.8.1992 and 21 years as on 1.8.1992, are eligible to appear in the examination and the ratio of 1:5 has also been amended. Then the Management issued Circular Special Letter dated 24.2.1998 referring to earlier staff circular dated 14.10.1992 and 7.1.1993 in terms of which the policy for promotion of clerical cadre staff to Jr. Management Grade under both the channels, i.e., normal as well as Trainee Officers was partially modified. In Clause-4 it has been specifically mentioned that an employee with a minimum service of 15 years is eligible to appear for the test for promotion to Junior Management Grade under normal (seniority-cum-merit) channel. The petitioners state that while considering their promotion vis-à-vis opposite parties 3 to 12, the Circular Special Letter No. CDO/PER & HRD/87 of 1997-98 dated 24th February, 1998 in Annexure-3 has not been taken into consideration. Being aggrieved by such conduct of the opposite parties 1 and 2, they have approached this Court by filing this application seeking for the aforementioned reliefs.

3. Mr.D.K.Panda, learned counsel appearing on behalf of Mr.A.K.Mishra, learned Sr.Counsel for the petitioners urged that the promotion of the opposite parties 3 to 12 having been made contrary to the Circular Special Letter dated 24.2.1998 in Annexure-3, they seek for quashing of the same. He further states that the promotion should be effected on the basis of seniority-cum-merit. To substantiate his contention, he has relied upon the judgment of the apex Court in **B.V.Sivaiah and others etc. v. K.Addanki Babu and others etc.**, 1998 AIR SCW 2577.

4. Mr.P.V.B.Rao, learned counsel for opposite parties 1 and 2 states that as per the policy in vogue in the impugned promotion exercise, all the employees with the requisite service seniority of 15 years were called for the written test and thereafter, employees up to one and half times the number of vacancies were called for the interview in order of merit, i.e., in order of marks secured by them in the written test. The marks in the written test and interview were added together to prepare the final merit list (in order of total marks) of successful candidates for the sanctioned number of vacancies. He further submits that while conducting the promotion exercise, the provisions of Reservation Policy for S.Cs. and S.Ts. were also taken into consideration. He further submits that since no illegalities or irregularities have been committed by the opposite parties in granting promotion to the opposite parties 3 to 12, the writ application should not be entertained.

5. Learned counsel appearing for opposite parties 3 to 12 concurred with the argument made by the learned counsel for opposite parties 1 and 2 and stated that no illegalities having been committed in the matter of promotion to the opposite parties 3 to 12, this Court should not interfere with the same.

6. On the basis of the facts pleaded above, it is an admitted fact that the petitioners were working in Clerical Grade of the State Bank of India. They sought for promotion to the cadre of Junior Management Grade-I in consonance with the promotion policy formulated by the opposite parties. Staff Circular No. 46 of 1992 dated 14.10.1992 and Staff Circular No. 5 of 1993 dated 07.01.1993 in terms of which the policy for promotion from clerical cadre to Junior Management Grade under both the channels viz. normal as well as Trainee Officers was further modified by the Circular Special Letter No. CDO/PER & HRD/87 of 1997-98 dated 24th February, 1998 in Annexure-3. As per the policy for promotion under the normal channel, it provides inter alia for calling candidates for written test in the

ratio 5 for one vacancy. In view of the limited number of vacancies and the stipulated number of chances each candidate could take, the same set of candidates is being permitted to appear for the test, year after year. The employees having minimum of service of 15 years are eligible to appear for the test for promotion to Junior Management Grade under normal channel and their promotion has to be considered on the basis of seniority-cum-merit. As per the said circular policy limiting the number of candidate to 5 for 1 vacancy along with the provisions for calling the repeaters until they exhaust all their chances consecutively (5 in case of general candidates and 6 in case of SC/ST candidates)/ become overaged would be continued for the year 1997-98. In the event of the present policy not resulting the service range for being eligible for promotion to 15 years, the bank will allow all the cadre employees putting in 15 years of total service as on the 1st August 1997 and otherwise eligible for promotion to appear for the test. In order to ensure that the ratio of the number of candidates to vacancies is not less than 5 to 1 against reserved vacancies, service requirement will be lowered for SC/ST candidates to the required extent where necessary. On the basis of such promotion policy dated 24.02.1998 in Annexure-3, the basic criteria is seniority-cum-merit. The sole contention of the petitioner is that while considering their promotion the policy of seniority-cum-merit has been given a go-bye, as a result the opposite party nos. 3 to 12 have got promotion on the basis of mark secured in the written test as well as viva-voce test taken together on the basis of merits. It is stated by opposite parties that for promotion in the normal channel employees with requisite service seniority who have been called for the written test and number of employees for the interview is restricted to one and half times the number of vacancies as provided for in the promotion policy. The marks in the written test and interview are added together to prepare the final merit list (in order of total m arks) of successful candidates for the sanctioned number of vacancies. The petitioners dispute the methodology adopted by the authority for granting promotion to opposite party nos. 3 to 12 and state that the opposite parties have made out that they are to conduct a written test and thereafter the interview and the marks secured in both are added together to prepare the merit list. As such, there is no comparative merit to be determined giving a go-bye to the seniority of the petitioner under the policy of promotion. The policy clearly envisages that promotion has to be effected on the basis of seniority-cum-merit and as such, there is no merit channel promotion and therefore, seniority has got primacy over the merits of the candidates, meaning thereby that less meritorious candidates can be given promotion on

the basis of their seniority. In that view of the matter promotion has been granted to opposite party nos. 3 to 12 contrary to the circular issued on 24.02.1998. In this factual backdrop of this case, let this Court consider the meaning of "seniority-cum-merit" as has been done by the apex Court from time to time.

7. In **State of Mysore v. C.R. Sheshadri,** (1974) 4 SCC 308 in para 2, the apex Court has held that if the criterion for promotion is one of seniority-cum-merit, comparative merit has to be assessed if length of service is equal or an outstanding junior is available for promotion.

8. In **State of Kerala v. N.M. Thomas,** (1976) 2 SCC 310 : AIR 1976 SC 490, the Constitution Bench comprising of seven judges of the apex Court has held that "seniority-cum-merit" means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. Hon'ble Justice A.N. Ray, C.J. has explained the criteria of seniority-cum-merit in para 38, which states as follows:

> "With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority."

9. In **Ved Prakash v. State of Haryana** (2002) 10 SCC 359, while considering rule 9 of Punjab Forest Subordinate (Executive Section) Rules, the apex Court has held as follows.

> "The expression "seniority-cum-merit" cannot be construed to be equivalent to seniority alone. Where a promotion is based solely on the basis of the seniority, then there is no question of adjudging the merit of the relevant contesting candidate and promotion is bound to be given on the basis of the seniority in the feeder cadre. But when Rule 9 itself provides that the promotion is based on the criterion "seniority-cum-merit", it is difficult to comprehend how 'merit' will be ignored from consideration, particularly when the selecting authority brought to the notice of the Court that the senior persons were duly considered but were adjudged unsuitable to hold the promotional post because of their performance in the feeder cadre and/or because of some proceedings pending against them."

10. In **B.V. Sivaiah (supra)** while considering the provisions of Regional Rural Banks (Appointment and Promotions of Officers and Other Employees) Rules (1988) Sch. 2, Para 7(c) which has been issued under the provisions of Section 29 of the Regional Rural Banks Act (21 of 1976), the Apex Court in para-18 has held as follows:

> "The criterion of 'seniority-cum-merit' in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration the senior, even though less meritorious, shall have priority, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.

11. The apex Court in **Rajendra Kumar Srivastava v. Samyut Kshetriya Gramin Bank,** (2010) 1 SCC 335 : AIR 2010 SC 699, while making a distinction between "seniority-cum-merit" and "merit-cum-seniority", in para 11 and 12 has held as follows:

> **"11.** It is also well settled that the principle of seniority-cum-merit, for promotion, is different from the principle of "seniority" and the principle of "merit-cum-seniority". Where promotion is on the basis of seniority alone, merit will not play any part at all. But where promotion is on the principle of seniority-cum-merit, promotion is not automatic with reference to seniority alone. Merit will also play a significant role. The standard method of seniority-cum-merit is to subject all the eligible candidates in the feeder grade (possessing the prescribed educational qualification and period of service) to a process of assessment of a specified minimum necessary merit and then promote the candidates who are found to possess the minimum necessary merit strictly in the order of seniority. The minimum merit necessary for the post may be assessed either by subjecting the candidates to a written examination or an interview or by assessment of their work performance during the previous years, or by a combination of either two or all the three of the aforesaid methods.

There is no hard-and-fast rule as to how the minimum merit is to be ascertained. So long as the ultimate promotions are based on seniority, any process for ascertaining the minimum necessary merit, as a basic requirement, will not militate against the principle of seniority-cum-merit.

12. In **B.V. Sivaiah (supra)**, a three-Judge Bench of this Court held that while the principle of seniority-cum-merit laid greater emphasis on seniority, the principle of merit-cum-seniority laid greater emphasis on merit and ability, with seniority playing a less significant role. This Court held: (SCC p. 730, para 18)

"*18.* We thus arrive at the conclusion that the criterion of 'seniority-cum-merit' in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

12. With regard to the meaning of "seniority-cum-merit" for consideration for promotion, the apex Court has clarified in **Rajendra Kumar Srivastava (supra)** that minimum merit necessary for the post may be assessed either by subjecting candidates to a written examination or an interview or by assessment of their work performance during previous years or by a combination of either of all the three of the aforesaid methods. There is no hard-and-fast rule as to how minimum merit is to be ascertained. So long as ultimate promotions as based on seniority, any process for ascertaining minimum necessary merit, is a basic requirement, will not militate against the principle of seniority-cum-merit. Similar view has also been taken in **B.V. Sivaiah (surpa)** cited by the learned counsel for the petitioners.

13. As has been stated in the counter affidavit filed by the Bank, the employees with the requisite service seniority of 15 years are called for the

written test and thereafter, employees up to one and half times the number of vacancies are called for the interview in order of merit i.e. in order of marks secured by them in the written test. The marks in the written test and interview are added together to prepare the final merit list (in order of total marks) of successful candidates for the sanctioned number of vacancies and while conducting the promotion exercise, the provisions of the Reservation Policy for SCs/STs are also taken into account. But nothing has been spelt out with regard to consideration of seniority in the counter affidavit save and except it has been indicated that employees with requisite service seniority of 15 years have been called for the written test. The circular did not prescribe the minimum qualifying marks for assessment of performance and merit on the basis of which the employees would be considered for being selected and appointed on promotion. Therefore, the selection as stated in the counter affidavit clearly speaks that same was made amongst those employees who have secured highest number of marks amongst the eligible officers pursuant to the written and interview test held by the authority. Consequently, merit has been given primacy over seniority. In that view of the matter promotion of the clerical cadre employees has been considered on the basis of merit-cum-seniority and not seniority-cum-merit as required under the policy. As such, the promotion/selection has been made contrary to the principles laid down by the authority in Annexure-3.

14. Referring to the ratio decided in **C.R. Sheshadri (supra)** the promotion of the employees basically is a discretionary power of the employer. Therefore, instead of setting aside the promotion of opposite party nos. 3 to 12, it would be just and proper to issue necessary direction to opposite parties 1 and 2 to reconsider the case of the petitioners vis-a-vis opposite party nos. 3 to 12 for promotion afresh in consonance with the promotion policy in Annexure-3 on the basis of seniority-cum-merit. I direct accordingly.

15. With the aforesaid observation and direction, the writ application stands disposed. No costs.

Writ petition disposed of.

2016 (I) ILR - CUT-150

DR. B.R. SARANGI, J.

OJC. NO. 9972 OF 1999

DINABANDHU GOUDA ……..Petitioner

.Vrs.

THE CHAIRMAN, GRIDCO & ORS. ……...Opp. Parties

ELECTROCUTION DEATH – Three she-buffaloes died – FI.R. lodged in the police station – Investigation as well as post mortem report reveals that the death was due to heavy electric shock – Snapping of live electric conductor itself indicates that there was negligence on the part of the authority in maintaining the live electric wire – Due to such death petitioner deprived of his source of livelihood which affects his right to life and is violative of Article 21 of the constitution of India – Held, petitioner is entitled to compensation of Rs. 75,000/- with 6% interest from the date of death of the buffaloes till payment. (Para 6 to 12)

Case Laws Referred to :-

1. AIR 2005 SC 3971 : S.D.O.,Grid Corporation of Orissa Ltd. & Ors. v. Timudu Oram
2. AIR 1999 SC 3412. : Chairman Grid Corporation of Orissa Ltd. & Ors. v. Smt. Sukamani Das and Anr.
3. AIR 2000 SC 3629 : West Bengal Electricity Board & Ors. v. Sachin Banerjee & Ors.
4. AIR 2002 SC 551 : M.P. Eletricity Board v. Shail Kumar & Ors.
5. AIR 1990 SC 1480 : Charan Lal Sahu v. Union of India.
6. AIR 1987 SC 1690 : Gujurat State Road Transport Corporation v. Ramanbhai Prabhatbhai.
7. AIR 2001 SC 485 : Kaushnuma Begum v. New India Assurance Co. Ltd.
8. 2005 (II) OLR 389 : Nirmal Nayak and others v.Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd. & anr
9. AIR 1999J & K,137 : Executive Engineer, Electricity (M & RE) Division, Awanipura, Anantanagar v. Mohammad Ashraf Bhat.

For Petitioner : M/s. Manoj Mishra, P.K. Das, B. Mishra, P.K. Mohanty.

For Opp.Parties: Mr. S.C. Dash.

Date of hearing : 08.10.2015
Date of Judgment : 16.10.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is owner of she-buffaloes, has filed this application seeking for a direction to opposite parties to pay compensation of Rs. 1,00,000/- for the death of three she-buffaloes due to electrocution.

2. The short fact of the case, in hand, is that when the petitioner's son was taking three she-buffaloes for grazing on the village road, due to the negligence of the opposite parties, live electric wire snapped on three she-buffaloes, who died instantaneously at the spot on 18.10.1998 at about 6.30 a.m., as a result of which a case was lodged in the Aska Police Station bearing Aska P.S. Case No. 157 of 1998, which was registered under Section 258/427, I.P.C.. The police took up investigation and examined the witnesses and owner of the she-buffaloes. During investigation, the I.O. found that due to negligence of the Lineman, who was in-charge of the electric line, Babanpur, such mishap took place and charge sheet No. 179 of 1998 was submitted against the line man under Section 285/427 I.P.C. to stand his trial in the court of law. The police paper, shows that the death of the she-buffaloes was due to electrocution. In the post-mortem, which was conducted on the dead bodies of those three she-buffaloes, it was pointed out that the cause of death was due to heavy electric shock. Hence a claim of compensation of Rs. 1,00,000/- has been made for the death of the three she-buffaloes due to electrocution.

3. Mr. S. Mishra, learned counsel on behalf of Mr. M. Mishra, learned Senior Counsel for the petitioner stated that from the investigation caused by the I.O. pursuant to the FIR under Section 285/427, I.P.C. read with Post mortem report, it appears that the death of three she-buffaloes was caused due to heavy electric shock and such mishap took place due to the negligence on the part of the authority and therefore, the petitioner is entitled to get compensation as claimed. To substantiate his contention he has relied upon the judgment in **Nalini Pradhan and others v. Chief Executive Officer, CESCO and others,** 2014 (I) OLR 546.

4. Per contra, Mr. S.C. Dash, learned counsel for opposite parties, stated that the writ petition is not maintainable in law and as there was no laches or

negligence on the part of the opposite parties, they are not liable to pay the compensation. He further submitted that since disputed questions of fact are involved, this Court should not interfere with this writ application. It is stated that in stead of approaching the authority, the petitioner has directly approached this Court by filing the present writ application and therefore, the claim made by the petitioner cannot sustain in the eye of law. To substantiate his contention he has relied upon the judgment in **Jamuna Das and others v. Chief Executive Officer, CESU and others (**W.P.(C) No. 7453 of 2008 disposed of on 16.02.2009); **Haripada Huali v. Chief Executive Officer, CESU and others (**W.P.(C) No. 906 of 2009 disposed of on 20.01.2009); **Ashok Kumar Behea and another v. Chief Executive Officer (Administration), CESU and another** (W.P.(C) No. 5526 of 2008 disposed of on 04.02.2009); **Jagdish Panigrahi and another v. The Chief Executive Officer (C.E.O.), Southern Electricity Supply Company Ltd. and another** (W.P.(C) No. 8746 of 2006 disposed of on 28.01.2009); **Abhimanyu Muduli and others v. Chief Executive Officer, CESCO and others** (W.P.(C) No. 4654 of 2004 disposed of on 10.11.2006); **Kumari Rita @ Gita Sahoo v. GRID Corporation and others** (OJC No. 11105 of 2096 disposed of on 30.10.2008), wherein reference has been made in ***S.D.O., Grid Corporation of Orissa Ltd. & Ors. v. Timudu Oram,*** *AIR 2005 SC 3971,* ***Chairman Grid Corporation of Orissa Ltd. & Ors. v. Smt. Sukamani Das and Anr.,*** *AIR 1999 SC 3412 and* ***West Bengal Electricity Board & Ors. v. Sachin Banerjee & Ors.,*** *AIR 2000 SC 3629.*

5. On the basis of the facts pleaded above, the short question which falls for consideration is as to whether the petitioner is entitled to get any compensation as claimed in the writ application due to the death of three she-buffaloes on electrocution.

6. The petitioner is the owner of three she-buffaloes. His son took them for grazing and while they were grazing in the road side land, came in contact with the live electric wire and breathed their last due to electrocution, which is substantiated pursuant to the investigation caused by the Police and subsequent post mortem done by the Doctor, who opined that the death was caused due to heavy electric shock. The cause of death of the she-buffaloes due to electrocution is not in dispute. But the only question that is to be considered is whether such death was due to the negligence on the part of the authority in maintaining the live electric wire or not. From the investigation pursuant to the FIR lodged, it appears that since the death of three she-buffaloes was caused due to snapping of the conductor, that ipso facto

indicates that there is non-maintenance of the electric apparatus by the competent authority which they are obliged to do under law. That itself amounts to negligence on the part of the authority in maintaining the live electric wire, which ultimately caused the death of the three she-buffaloes. Due to death of the three she-buffaloes, which was the source of earning for the petitioner, the petitioner is deprived of maintaining his livelihood. Consequently, the petitioner is deprived of leading a decent life, which affects the right to life and is violative of Article 21 of the Constitution of India.

7. Reliance placed is on **S.D.O., Grid Corporation of Orissa Ltd.**(supra), **Chairman Grid Corporation of Orissa Ltd.**(supra), **West Bengal Electricity Board** (supra) and in **Kumari Rita @ Gita Sahoo** (supra), wherein the apex Court held that this kind of writ petition raises disputed questions of fact and therefore cannot be entertained in writ jurisdiction. As to whether the opposite party-company has committed any negligence or not, as to what is the extent of disability and whether there is contributory negligence on the part of the victim are the basic questions to be considered after assessing evidence by appropriate authority/Court. Therefore, the power of writ jurisdiction in the present case should not be exercised.

8. So far as the cases in **Abhimanyu Muduli** (supra), **Jagdish Panigrahi** (supra), **Ashok Kumar Behea** (supra), **Haripada Huali** (supra), **Jamuna Das** (supra) are concerned, the petitioners in those cases, without approaching the concerned authority, for mitigating their grievance approached this Court for issuance of writ to the opposite parties for award of compensation and that apart several disputed questions of facts were involved in those cases which cannot be adjudicated in those writ petition. Therefore, this Court directed the petitioner to approach the authority for consideration of the grievance of the petitioner for grant of adequate compensation. The contentions raised by learned counsel for opposite parties referring to the judgments mentioned supra, are not in dispute. But question remains for consideration in the present case being germen to the fact that due to negligence of electricity authority whether the petitioner is entitled to get compensation, this fact is telltale on the basis of the investigation caused by the police and subsequently, on the basis of the post mortem report submitted by the competent authority, namely, the veterinary surgeon. If the death has occurred due to electrocution, by snapping of live electric conductor that itself indicates that due to the negligence on the part of the

authority in maintaining the live electric line, the conductor snapped resulting in the death of three she-buffaloes, which is established on the basis of the post mortem report submitted by the veterinary surgeon. On perusal of paragraph-5 of the counter affidavit filed by opposite party nos. 2 to 4, it appears that a cock and bull story has been made out in order just to create a confusion that the death had occurred not because of electrocution but because of fighting between two she-buffaloes and due to push and pull of the electric poll, the conductor was snapped and as such there is no negligence on the part of the authority whatsoever. Assuming for the same of argument but without admitting that due to push and pull of the she-buffaloes, the conductor snapped resulting in the death of three she-buffaloes, is sufficient to indicate that the live electric wire was not maintained properly, which attributes negligence on the part of the authorities and thus, the petitioner is entitled to get compensation.

9. In **Nalini Pradhan** (supra), this Court has already considered the various judgments of the apex Court by referring to **M.P. Eletricity Board v. Shail Kumar and others,** AIR 2002 SC 551, **Charan Lal Sahu v. Union of India,** AIR 1990 SC 1480, **Gujurat State Road Transport Corporation v. Ramanbhai Prabhatbhai,** AIR 1987 SC 1690 and **Kaushnuma Begum v. New India Assurance Co. Ltd.,** AIR 2001 SC 485. Taking into consideration those judgments, this Court in **Nirmal Nayak and others v. Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd. and another,** 2005 (II) OLR 389 held that in exercise of power under Article 226 and 227 of the Constitution of India this Court can grant compensation, if the death has occurred due to electrocution.

10. In **Executive Engineer, Electricity (M & RE) Division, Awanipura, Anantanagar v. Mohammad Ashraf Bhat,** AIR 1999 J & K, 137, wherein the High Court in a case of death due to electric shock, held that with regard to the claim for compensation and employment to the son of the deceased, the High Court has jurisdiction to entertain the petition and deal with it appropriately.

11. In **M.S. Grewal v. Deep Chand Sood,** (2001) 8 SCC 151, the apex Court held that the writ petition, for compensation is maintainable under Article 226 of the Constitution of India. The appellants contended that while the negligence aspect has been dealt with under penal laws already, the claim for compensation cannot but be left to be adjudicated by the civil laws and thus the Civil Court's jurisdiction ought to have been invoked rather than by

way of writ petition under Article 226 of the Constitution. The apex court observed that this plea of non-maintainability of the writ petition though advanced at the initial stage of the submissions but subsequently the same was not pressed and as such the apex Court need not detain themselves on that score, expecting however recording that the law courts exists for the society and they have an obligation to meet the social aspirations of citizens since law Courts must also respond to the needs of the people. Accordingly, the petitioner is entitled to get compensation due to death of the three she-buffaloes which was the source of livelihood for such type of poor people.

12. In view of the above facts and circumstances of the case, referring to the ratio of the decisions mentioned supra, this Court is of the considered view that the petitioner should be paid compensation to the tune of Rs. 75,000/- (Seventy Five Thousand) for the death of three she-buffaloes as claimed in the writ application with simple interest @ 6 % per annum from the date of death of the three she-buffaloes till the payment and this Court directs accordingly. The amount shall be paid within a period of two months from the date of passing of this order.

13. With the above observation and direction, the writ petition is allowed in part. No order as to costs.

Writ petition allowed.

2016 (I) ILR - CUT- 155

D. DASH, J.

R.S.A. NO. 112 OF 2012

BASANTI @BASANTIRANI JENA & ORS. ……...Appellants

.Vrs.

STATE OF ODISHA ………Respondent

LIMITATION ACT, 1963 – ART.58

Whether the learned Courts below have erred in law by dismissing the suit of the plaintiff on the ground of limitation that it has not been filed within a period of three years from the date of publication of the record of right under the Odisha Survey and Settlement Act or under Article 58 of the Indian Limitation Act ?

Law is fairly well settled that in a suit based on antecedent title, when the Court finds his possession to have been there over the suit land, even if he does not call in question the wrong recording of the suit land in the settlement operation within a period of three years as prescribed in Article 58 of the Limitation Act and in section 42 of the Odisha Survey and Settlement Act, 1958, he cannot be shown the door of exit and can not be non-suited on that ground when record of right neither creates title nor extinguishes title – So when the title holder continues to remain in possession of the property despite the said wrong recording, his non-filing of the suit within a period of three years from the date of publication of the erroneous R.O.R. can not extinguish his right, title and interest over the property and as such he does not become disentitled to continue in possession.

(Paras 11, 12)

For Appellants : M/s. B.H.Mohanty, D.P.Mohanty, R.K.Nayak,T.K.Mohanty, P.K.Swain & M.Pal.

For Respondent : Mr. R.P.Mohapatra, Addl. Govt. Adv.

Date of Hearing : 20.11. 2015
Date of Judgment: 03.12. 2015

JUDGMENT

D. DASH, J.

This appeal has been filed against the judgment and decree passed by the learned Civil Judge (Sr. Division), Jaleswar in R.F.A. No.23 of 2011. The predecessor-in-interest of the present appellants as the plaintiff had filed the suit for declaration of right, title and interest over the suit land with further prayer for declaration that the preparation of the record of right in the major settlement is wrong and erroneous. Ultimately, the suit having been dismissed, an appeal had been carried and that has also been dismissed. So, the present appeal has been filed under section 100 of the Code of Civil Procedure.

2. For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arraigned in the trial court.

3. Plaintiffs case is that the suit land was Anabadi land of the then Zamindar of the area, namely, Gokul Prasad Jena and others. One Gobinda Chand of village-Budhakusumi was granted lease of the suit land for the purpose of cultivation in the year 1942 and it was evidenced by one

unregistered amlanama patta. During abolition of the zamindari estate, the then Zamindar had submitted a Rafa in the name of the said Gobinda and basing on that the tenant ledger was opened and rent was realized by the State. It is also the case of the plaintiff that while Gobinda was the owner of the suit land, he and his son sold land measuring Ac.0.49.5 dec. out of Ac.1.04 dec. on the southern side recorded under C.S. plot No.332 and Ac.0.5 dec. under C.S. plot No.337 to one Rama Chandra Marandi and delivered possession of the same to him on the same day. They also sold the other portion of that C.S. Plot No.332 to one Phulray Murmu followed by delivery of possession. Both the purchasers when were in possession of the said land sold those to the plaintiff by two registered sale deeds dated 21.06.1968 having obtained necessary permission from the competent authority under the O.L.R. Act in O.L.R. Case Nos.608 and 610 of 1968 as the vendors belonged to the members of the scheduled tribe. Thus, the plaintiffs claim to be the absolute owner of the said land measuring Ac.1.09 dec., which has later on reduced by Ac.0.05 dec. It is stated that the land being reduced by Ac.0.05 dec. rest Ac.0.04 dec. has been wrongly recorded in the name of the State under Rakhit Khata No.186 with Kisam as Jungle and Gochara. However, it is pleaded that the said land actually is of kisam Sarada-III and has been in cultivable possession of the plaintiff. This wrong recording having been noted, the plaintiff after serving notice under section 80 of the Code of Civil Procedure filed the suit after having waited for the required period and as no response came from the side of the State.

4. The defendant in the written statement contested the claim of the plaintiff. The factum of grant of lease is denied, as also the opening of the tenant ledger and collection of rent. The sales as averred by the plaintiffs said have been made first in favour of Rama Chandra and Phulray and then in his favour are also challenged. It is asserted that the recording in the settlement operation is right.

The trial court on such rival pleadings framed six issues and has rightly taken up issue no.3 and then issue no.4 for decision. Issue no.3 is as to whether Gobinda was the tenant under the then Zamindar and later on under the State whereas issue no.4 concerns with the sale of the land by Govinda to Rama Chandra and Phulray and thereafter in favour of the plaintiff by those Rama Chandra and Phulray which in turn thus concerns with the right, title of the plaintiff over the land in suit.

5. Upon analysis of evidence in the backdrop of the pleadings, issue no.3 has been answered in favour of the plaintiff.

It has been held that the then Zamindar had delivered possession of the suit land to Gobinda and also that Gobinda was a tenant under the then Zamindar and as such was in possession of the said land all along and then he remained as a tenant under the State being recognized as such upon opening of the tenancy ledger and payment of rent as well as its due acceptance.

Next in respect of issue no.4, the trial court's categorical finding is that the recording of the land as made in the M.S. R.O.R. is wrong. It has been specifically found out that an error has been committed by the settlement authority in recording the suit land in the name of the State under Rakhit Khata. With these findings now going to the other technical issues as regards the maintainability of the suit, lack of cause of action and law of limitation standing on the way of the suit, the answer however, has been given against the plaintiff holding the suit to be not maintainable being hit under section 34 of the Specific Relief Act as there remains no prayer seeking consequential relief such as the relief of confirmation of possession. It has next been said that the suit having not been filed within three years from the date of publication of the record of right, the same is barred by limitation.

So with all the finding of right, title and interest having been rendered in favour of the plaintiff, he has been non-suited for the aforesaid reasons.

6. The lower appellate court being moved has again gone to affirm all those findings of the trial court on those factual issues. Going one step ahead, the lower appellate court has of course set aside the finding of the trial court that the suit is not maintainable being hit under section 34 of the Specific Relief Act but despite of the same it has refused to grant the relief to the plaintiff as because, according to him, the suit is not maintainable being not instituted in adherence to the provision of Article 58 of the Limitation Act.

7. The appeal has been admitted on the following substantial question of law:

> "Whether the courts below have erred in law by dismissing the suit of the plaintiff on the ground of limitation that it has not been filed within a period of three years from the date of publication of the record of right under the Orissa Survey and Settlement Act or within the limitation under article 58 of Indian Limitation Act?'

8. Challenging the findings of the trial court the State has not filed any cross-objection in the appeal before the lower appellate court nor any such step has been taken in the present second appeal. Therefore, the findings on

issue nos.3 and 4 as recorded by the trial court and affirmed by the lower appellate court are no more open to challenge here in this appeal. The position is fairly and rightly conceded by the learned Additional Government Advocate in course of hearing of this appeal.

9. Now, coming to the substantial question of law as framed in this appeal with which we are presently concerned, the learned counsel for the appellant submits that the suit being one, based on title and having been filed within a period of 12 years, Article-58 of the Limitation Act does not get attracted on the face of the categorical findings of the courts that the appellants are in possession of the suit land having their right, title and interest over the same. It is also his submission that when a person is in possession of the immovable property on the strength of his right, title and interest, merely because, the erroneous record of right is published and as such is allowed to stand for a period of more than three years from its publication, it is not the law that the right, title and interest of the person concerned gets extinguished thereby and he thereby looses the right to institute the suit for declaration of right, title and interest. It is his submission that when the Civil Court declares the right, title and interest of a person and finds the possession of the property with that person, the erroneous record of right is pushed to oblivion thereby. The person i.e. title holder in possession cannot thereby loose the right to institute the suit for declaration of right, title and interest if he does not file the suit within three years from said publication of record of right which is found to be erroneous in not recognizing the right, title, interest and possession of the person and article 58 of Limitation Act is not attracted in that event to non-suit the person. It is his submission that when the court declares the right, title and interest of the person and finds the possession of the property with that person, the declaration with the record of right is erroneous in recording the land in favour of someone is just consequential. In view of the above, he contends that the substantial question of law is required to be answered accordingly in favour of the plaintiff and the suit of the plaintiff is thus to be decreed.

10. Learned Additional Government Advocate, however, submits in favour of the finding rendered by the lower appellate court that in view of the provision contained in Article 58 of the Limitation Act, when the suit has not been filed within the prescribed period, it is barred by limitation.

11. Law is fairly well settled that in a suit based on antecedent title, when the Court finds the same in favour of the plaintiff and also finds his

possession to have been there over the suit land, even if he does not call in question the wrong recording of the suit land in the settlement operation within a period of three years as prescribed in Article 58 of the Limitation Act and also as prescribed in Section 42 of the O.S.S. Act, he cannot be shown the door of exit and cannot be non-suited on that ground, on the face of the settled law that the entry in the record of right does neither create title in favour of someone who in fact does not have it nor does extinguish the title of the true owner in respect of the said land. So, in that view of the matter when the title holder continues to remain in possession of the property despite of said wrong recording, his non-filing of the suit within a period of three years from the date of publication of the said erroneous R.O.R. cannot extinguish his right, title and interest over the property and as such he does not become disentitled to continue to be in possession as of that.

The aforesaid discussion and reasons provide the answer to the substantial question of law accordingly and it runs in favour of the plaintiff-appellant.

12. In the result, the appeal stands allowed and in the facts and circumstances of the case without cost. The suit filed by the plaintiff is decreed declaring right, title and interest over the suit property as also their possession with further consequential declaration that the entry in the record of right in respect of the said suit land is erroneous.

Appeal allowed.

2016 (I) ILR - CUT-160

D. DASH, J.

R.S.A. NO. 168 OF 2012

RANJAN PRADHAN & ORS. ……...Petitioners

.Vrs.

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

CIVIL PROCEDURE CODE, 1908 – S.100

Substantial question of law – Suit for declaration of right, title, interest and permanent injuction – Suit decreed – State preferred appeal – During pendency of appeal before the lower appellate court

plaintiff Nos. 6 and 7 died – No substitution of the legal representatives – Lower appellate Court, though passed specific order that the appeal stood abated against plaintiff Nos. 6 & 7 but disposed of the appeal on merit, setting aside the judgment and decree in toto – Hence this appeal – Whether the lower appellate court is justified under law to dispose of the appeal on merit without holding that the appeal had abated as a whole ? Held, the suit having been decreed declaring the plaintiff's right jointly the appeal could not have been said to have abated only qua the deceased plaintiffs but as a whole – Impugned judgment and decree passed by the lower appellate court is set aside.

(Para 7)

Case Laws Referred to :-

1. MANU/SC/0008/1966 SC 1427 : Sri Chand v. Jagdish Pershad Kishan Chand
2. (1973) 2 SCC 9 MANU/SC/0008/1972 : Ramagya Prasad Gupta v. Murli Prasad
3. (2003) 3 SCC 72) : Sardar Amarjit Singh Kalra v. Pramod Gupta

For Petitioners : Mr. A.K. Nath
For Opp. Parties : Mr. R.P.Mohapatra, Addl.Govt.Adv.

Date of hearing : 12.11.2015
Date of judgment: 18.11.2015

JUDGMENT

D. DASH, J.

The appellants in this appeal have called in question the judgment and decree passed by the learned District Judge, Nayagarh in R.F. A. No. 01 of 2007.

The present appellants with others had filed the suit for declaration for their right, title and interest over the suit land, confirmation of possession and for permanent injunction. The suit having been decreed, the State had carried an appeal. The appeal has been allowed and the judgment and decree passed in the suit decreeing the same in favour of the plaintiff have been set aside. Therefore, the unsuccessful plaintiffs have now filed this appeal under section 100 of the Code of Civil Procedure.

2. The appellant nos. 1 to 3 and 6 to 8 were the plaintiffs in the trial court and respondents in the lower appellate court. Appellant No. 4 and 5 are the legal representatives of Pathani Pradhan who was one of the plaintiffs as also a respondent. This Pathani Pradhan having died on 30.03.2012 i.e., after

the disposal of the appeal in the lower appellate court, his legal representatives have joined with others in filing the appeal. However, though during pendency of the appeal in the lower appellate court, the plaintiffs namely, Gadadhar, Gurubari, the two sons of Kanhei Pradhan, died their legal representatives had not been brought on record and the appeal had stood abated against them.

3. The appeal has been admitted on the following substantial questions of law:-

> (1) Whether in view of the specific order of the lower appellate court passed on 08.05.2009 that the appeal stood abated against plaintiff nos. 6 and 7, it was permissible in law and justified on the part of the lower appellate court to further proceed to dispose of the appeal on merit without holding that the appeal had abated as a whole?
>
> (2) Whether the lower appellate court is justified by entering into the merit of the case in setting aside the judgment and decree passed by the trial court decreeing the suit of the plaintiff declaring their rights jointly over the suit property and confirming their possession when the appeal had abated against plaintiff nos. 6 and 7 and the judgment and decree in favour of the legal representatives of the plaintiff no. 6 and 7 had attained their finality which now gives rise to two conflicting decrees in respect of the same subject matter and among the parties?

4. Heard the learned counsel for the appellants and learned Additional Government Advocate. I have carefully perused the judgments of both the courts.

5. Fact of the case is that the suit land measuring Ac. 0.32 decimals are said to be in the joint possession since time of their predecessors- in-interest of the plaintiffs. It is stated that land in question was in open, continuous and peaceful possession of their predecessors in interest all along without any interruption from any quarter and that the plaintiffs have been possessing exercising all sorts of rights as owners thereof. The trial court declared the right, title, interest and possession of the plaintiffs. The State then challenged the same by carrying appeal. In the appeal, consequent upon the death of plaintiff no. 6 and 7, their legal representatives were not substituted. So by specific order, the appeal stood abated as against them and thus the judgment and decree passed by the trial court in their favour attained finality finally

enuring to the benefit of their legal representatives. The order to that effect was passed on 08.05.2009. However the lower appellate court being aware of the same and although the question was raised before it that it be held that the appeal has abated as a whole has not touched that aspect and rather has side tracked it and instead has gone to decide the appeal on merit on 17.03.2012 by setting aside the judgment and decree passed in favour of the plaintiffs and allowing the appeal.

6. The law stands crystalised to the effect that as to whether non-substituted of L.R.s. of the Respondent-Defendants would abate the appeal in toto or only qua the deceased Respondent-Defendants, depends upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not interdependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased Respondent. However, in case, there is a possibility that the court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject-matter in the same suit. Thus, whether the judgment/decree passed in the proceedings vis-à-vis remaining parties would suffer the vice of the being a contradictory or inconsistent decree is the relevant test.

(Budh Ram and Ors. V. Bansi and Ors. MANU/SC/0565/2010: (2010) 11 SCC 476, this Court after considering series of judgments rendered by this Court in the State of Punjab v. Nathu Ram (MANU / SC/0019/1961: AIR 1962) SC 89, Sri Chand v. Jagdish Pershad Kishan Chand MANU/SC/0008/1966 SC 1427, Ramagya Prasad Gupta v. Murli Prasad MANU/SC/0008/1972 : (1973) 2 SCC 9 and Sardar Amarjit Singh Kalra v. Pramod Gupta (2003) 3 SCC 72).

7. In the anvil of aforesaid settled position of law, the matter in hand now needs the examination so as to answer the above substantial questions of law as framed.

The fact remains that by the decree of the trial court, the right, title, interest and possession of all the plaintiffs were declared. In view of abatement of the appeal against defendant no. 6 and 7, the decree in their favour stood final and attained its finality enuring to the benefit of their legal representatives i.e., judgment and decree of the trial court had attained their finality in respect of legal representatives of defendant no. 6 and 7 and thus

as those favour them, under no circumstance, they can be deprived of reaping the benefit of it without being in accordance with law and being hit below the back. In fact with such status as successful litigants armed with a valid and lawful decree, they have been in enjoyment of same for all these years. The legal representatives of all those defendant no. 6 and 7 could not have been hit below the belt in the way as done by the lower appellate court land in law they are not bound by the judgment and decree passed by the lower appellate court in dismissing the suit. The lower appellate court ought not to have sat over to decide the appeal on merit as though the judgment and decree of the trial court have been set aside, yet conflicting decree stands. The legal representatives of plaintiff no. 6 and 7 are not being arraigned in the appeal the decree in their favour declaring right, title, interest and possession over the suit land of their predecessors-in-interest can well protect their rights as per the said decree of the trial court. So, here is a case, where the appeal under no circumstances could have been said to have abated only qua the deceased plaintiffs and the lower appellate court was not within its legal competence to pass decree to the contrary to that of the trial court. In fact the lower appellate court ought to have avoided to enter into arena of the merit of the case.

For an aforesaid discussion, the substantial questions of law are answered in favour of the appellants and against the respondents. In that view of the matter, the judgment and decree as passed by the lower appellate court being unsustainable in the eye of law are hereby set aside. It is needless to say that in view of above, the judgment and decree as passed by the trial court stand restored.

7. The appeal is accordingly allowed. There shall however be no order as to costs.

Appeal allowed.

2016 (I) ILR - CUT- 165

S. PUJAHARI, J.

RPFAM NO. 19 OF 2014

DIGAMBAR SAMAL ……..Petitioner

.Vrs.

NARMADA MOHANTY & ANR. ……..Opp. Parties

CRIMINAL PROCEDURE CODE, 1973 – S.125

Grant of maintenance to wife and child – Order challenged by the petitioner-husband on the ground that once he has been convicted for the offence of rape on the allegation of the O.P.1-wife, he is not liable to maintain her as his wife as the same is hit by the principle of double jeopardy – In the other hand there is sufficient oral as well as documentary evidence establishing their relationship as husband and wife and O.P.2 was born out of their wedlock – No rebuttal proof by the petitioner to dispel such evidence – Held, there is no infirmity in the impugned order calling for interference by this Court.

(Paras 8, 9)

Case Laws Referred to :-

1. 2010 (Supp.11) OLR 376 : Narayan Mehere -V- Mukta Meher
2. 2011 (48) OCR 688 : Chandrama Biswal @Chadrama Biswal -V- Banchanidhi Biswal
3. (1999)7 SCC 657 : Dwarika Prasad Satpathy -V- Bidyut Prava Dixit & Anr.

For Petitioner : M/s. K.N.Parida & Asso.
For Opp. Parties : M/s. Dayanidhi Mohanty, Asit Ku. Jena & T.N.Choudhury.

Date of order : 11.09.2015

ORDER

S. PUJAHARI, J.

1. I have heard the learned counsel for the petitioner and he learned counsel for the opposite parties.

2. This revision is directed against the judgment and order dated 16.01.2014 passed by the learned Judge. Family Court, Kendrapara in Criminal Proceeding No. 428 of 2003 directing the petitioner to maintain the opposite parties claiming to be his wife and son and to pay monthly maintenance of Rs. 1000/- to opposite party no.1-wife and Rs.500/- to

opposite party no.2-son from the date of application, adjusting the arrear maintenance paid .

3. It appears that the present opposite parties have filed the aforesaid proceeding under Section 125 of the code of Criminal Procedure (for short "the Cr.P.C."), as according to the them, though the present petitioner had sexually assaulted the present opposite party no.1 but to keep the said sexual assault in secret and to save him from criminal prosecution, he made a promise to marry opposite party no.1 and married her in a temple and kept her as his wife, but some days thereafter when opposite party no.1 conceived and gave birth to opposite party no. 2, the petitioner refused to maintain her. The present petitioner in the aforesaid 125 Cr.P.C. proceeding denied the allegation that he had ever married to her and opposite party no.2 was born into their wedlock, rather he stated that opposite party no. 1 had raised false allegation of rape against him.

4. The learned Judge, Family Court, Kendrapara on appreciation of the evidence on appreciation of the evidence on record accepted the case of the opposite parties and repelling contention made by the petitioner, passed the impugned judgment. The same has been assailed here in this revision to be perverse as no material was there substantiating the fact that opposite party no. 1 was the legally married wife of the present petitioner and opposite party no.2 was born into their wedlock and the learned Judge, Family Court, Kendrapara did not take into consideration the that in the criminal trial initiated at the instance of opposite party no.1 against the petitioner for alleged commission of offence punishable under Section 376 of I.P.C. the petitioner was convicted, which clearly dispels a relationship between the petitioner and opposite party no.1 as husband and wife, so also the fact that the documentary evidence adduced by opposite party no.1-wife in the said trial was admitted into an evidence behind his back without giving him any reasonable opportunity of adducing evidence to dispute such documents.

5. During the course of hearing, it has been submitted by the learned counsel for petitioner that since at the instance of opposite party no.1 a false case was initiated against the petitioner for alleged commission of rape to her and the petitioner was convicted therein, thereafter the learned the learned Judge, Family Court, Kenderapara could not have held that opposite party no.1 to be the legally married wife of the present petitioner and into their wedlock opposite party no. 2 was a born and the petitioner was refused to maintain them, is liable to be maintained them. The same is bad also for the reasons that once the petitioner has been convicted on the allegation of rape

raised by opposite party no.1, he could not thereafter be fastened with the liability to maintain her as his wife and the same hit by the principal of double jeopardy. Furthermore, the same has also been assailed on the ground that the prayer made by opposite party no.1 for issuance of income certificate of the petitioner having been refused by the Tahasildar and such document filed by the petitioner in the sessions trial and copy of the depositions in the session trial disowning such relationship, the finding of the learned Judge, Family Court, Kendrapara in this regard cannot be sustained as the same suffers from perversity by ignoring the aforesaid materials while arriving into a conclusion.

6. Per contra, the learned counsel for the opposite parties submitted that the aforesaid contention of the learned counsel for the petitioner challenging the impugned order to be perverse, appears to have no force in view of the fact that when the rape was committed, there was no relationship of husband and wife between the petitioner and opposite party no.1 and thereafter the petitioner assured her not to proceed against him for such commission of offence, entered into relationship of marriage in a temple and thereafter kept relationship as a wife and out of their such relationship, opposite party no.2 was born and opposite party no.1 petitioner in this regard has adduced voluminous evidence disclosing the fact that they had relationship of husband and wife which is also fortified from the other evidence adduced as well as the documentary evidence produced disclosing that opposite party no.2 was born into their wedlock and their relationship of husband and wife. So also, this Court had refused the prayer mad by the petitioner as well as the opposite party no.2 for DNA test. Therefore, there being no perversity in the appreciation of the evidence on record and the petitioner admittedly having refused to maintain opposite party nos.1 and 2, the impugned order needs no interference.

7. It is well settled in law that the revisional jurisdiction of the High Court which is necessarily a supervisory jurisdiction can only be exercised for correcting the miscarriage of the justice, arising out of irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted, on the one hand, or on the other hand in some underserved hardship to individuals. This power of the High Court which is discretionary one, as such, must be exercised in the interest of justice with regard to the facts and circumstances of each particular case, which vary greatly from case to case. So also, though the power of the revision is as wide as the power of a Court of appeal, but the same has to be exercised only in

exceptional cases when there is a glaring defect in the procedure or there is manifest error on a point of law which has which has consequently resulted in flagrant miscarriage of justice. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Court subordinate, unless any glaring feature is bought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice.

8. The validity of the marriage for the purpose of summary proceedings under Section 125 Cr.P.C. is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence under Section 494 IPC. If the claimant in proceedings under Section 125 of Cr.P.C. succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouses, and in such a situation, the party who denies the martial status can rebut the presumption. If the Magistrate is prima-facie satisfied with regard to the performance of marriage in proceedings under Section 125 Cr.P.C. which are of a summary nature, strict proof of performance of essential rites is not required.

9. Keeping in mind the aforesaid, when the case in hand is addressed, it is seen that in case, the petitioner says that there was perversity in the appreciation of the evidence as the learned Judge, Family Court, Kendrapara is refused to take into consideration the finding of the criminal court wherein the petitioner was convicted in a charge of rape under Section 376 IPC on the report lodged by opposite party no.1 which could not have sustained if opposite party no.1 would have been the wife of the present petitioner. Therefore, the finding of learned Judge, Family Court, Kendrapara with regard to the relationship between the petitioner and opposite party no.1 being contrary to law, the same cannot be sustained. Such contention of the learned counsel. for the petitioner appears to this Court to be misconceived inasmuch as in the facts and situation, such an allegation of rape does not repel the claim of opposite party no.1 to be the wife of the present petitioner. As according to opposite party no.1 that the petitioner kept opposite party no.1 as his wife after making marriage in a temple to wriggle out from a charge of reap which he said to have committed prior to marriage with opposite party no. 1. So far as the proof of marriage is concerned, opposite party no.1 has also adduced sufficient evidence disclosing that the present

petitioner had kept her as his wife marrying in a temple and they continued their such relationship as husband and wife and into their wedlock opposite party no.2 was born which is also fortified from the documentary evidence adduced by opposite party no.1. The petitioner though made attempt to rebut the same, but except making some suggestions to prove the character of opposite party no.1. no other rebuttal evidence has been adduced to dispel such evidence adduced by opposite party no.1. In this regard, the learned Judge, Family Court Kendrapara placing reliance on the law with regard to the standard of proof as has been held by this Court in the cases of ***Narayan Mehere vers. Mukta Meher***, reported in 2010 (Supp.11) OLR 376, ***Smt. Chandrama Biswal @ Chandrama Biswal vrs. Banchanidhi Biswal,*** reported in 2011 (48) OCR 688 and also by the Hon'ble Apex Court in the case of ***Dwarika Prasad Satapathy Vrs. Bidyut Prava Dixt and Anr***., reported in (1999) 7 SCC 657 and ***Badri Prasad vrs.Dy. Director of Consolidqtion & Ors.,*** reported in (1978 3 SCC 527, held that the relationship was proved by opposite party no.1. In such premises, the finding recorded by the learned Judge, Family Court, Kenderapara cannot be said to be suffering from any perversity warranting an interference of this Court on the existence of the relationship. So far as the contention that the petitioner once having fastened with the liability of conviction could not have simultaneously fastened with the liability under Section 125 Cr.P.C. as the same hit by double jeopardy, the same appears to this Court to be misconceived and the same has no application at all to the facts and circumstances of this case.

10. Hence, on re-appraisal of the materials on record vis-à-vis the law in this regard, I see no illegality, infirmity or impropriety in the impugned judgment and order passed by the learned Judge, Family Court , Kenndrapara in a petition under Section 125 Cr.P.C. As such , this RPFAM filed challenging the same being devoid of merit stands dismissed. L.C.R. received be sent back forthwith along with a copy of this order.

Revision dismissed.

2016 (I) ILR - CUT-170

BISWANATH RATH, J.

W.P.(C) NO. 7428 OF 2010

KISHAN KUMAR GOYEL ……..Petitioner

.Vrs.

SMT. BHAGWATI CHAND & ORS. …......Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-41, R-25

Remand of matter by Lower Appellate Court for trial court's finding on the question of adverse possession – Sufficient materials with the appellate court to take a decision – No occasion for remand – First the appellate court is required to make an endeavour to answer the disputed issues but where inspite of such endeavour he is not in a position to come to a conclusion either way, then it may decide to remand the matter – However there can not be an arbitrary order of remand without satisfying the conditions under Rule 23, 23A or 25 of Order 41 of the code of Civil Procedure – Held, impugned order is set aside – Direction issued to lower appellate court to decide the question of adverse possession basing on the materials available on record.

(Paras 6 to 8)

Case Laws Referred to :-

1. 1986(I) OLR-198 : Rushi @ Rusi Behera & Anr. v. Madan Behera & Anr.
2. 1998(II) OLR-598 : Balaram Das and others v. Ganesh Karan & Anr.
3. 2005(II) OLR-618 : Chennuru Gouri Varaprasad Babaji v. State of Orissa & Ors,
4. 2003 AIR SCW 3680 : Sayeda Akhtar v. Abdul Ahad.

For Petitioner : M/s. N.C.Pati, A.K.Das, M.R.Dash & N.Singh
For Opp. Parties: Mr. A.P.Bose

Date of Hearing : 9.11. 2015
Date of order :16.11.2015

JUDGMENT

BISWANATH RATH, J.

This matter arises out of a judgment dated 30.3.2010 passed by the learned Additional District Judge, Sonepur in R.F.A. No.22 of 2004 thereby remitting the matter to the trial court to frame a specific issue on the point of

adverse possession and, thereafter, shall answer issue Nos.2, 4, 5 and 6 in exercise of power under Order 41, Rule 25 of the Code of Civil Procedure and to send the L.C.R. back with its findings together with the evidence along with reasons for its findings on or before 31.10.2010.

2. Challenging the impugned order of remand, Sri N.C.Pati, learned Senior Counsel submitted that the impugned order is excessive and illegal for the reasons that there was sufficient material available with the lower appellate court to take a decision on the question of adverse possession and, therefore, there was no necessity of remitting the matter for trial court's finding on the question of adverse possession.

3. From perusal of the trial court judgment, it is found that the plaintiff - appellant has a clear pleading in his plaint to the effect that taking advantage of recording of certain portion of the disputed land in the name of the son of the original owner i.e. defendant no.3 in bata Plot No.110/1646 extending to Ac.0.035 decimals, the defendant nos.1 and 2 along with their follower with a view to grab the suit property wanted to oust the plaintiff from the suit land and with such motive the defendant nos. 1 and 2 with the collusion of defendant no.3 created registered sale deed in favour of the defendant no.1 and with the help of such sham document initiated a Criminal Misc. Case bearing No.56 of 2002 before the Executive Magistrate, Biramaharajpur. Suppressing the material facts of existence of different structures of the plaintiff over the suit land obtained an ex parte order under Section 144 of the Code of Criminal Procedure and utilizing the said order criminally trespassed over the suit land on 5.9.2002 with the help of their followers and damaged the pucca fence of the plaintiff, the latrine, bath room, latrine tanki and such other establishment of the plaintiff over the suit property. The plaintiff further asserted that he has perfected title over the suit land by adverse possession by remaining over the same in open, continuous and peaceful possession by making different establishment of permanent nature over the suit land to the knowledge of the original owner without any objection.

4. In response to such claim of the plaintiff on right, title and interest by way of adverse possession, the defendant no.1 filed a written statement denying the allegations and asserting that one Mangal Purohit purchased an area of Ac.0.,025 decimals from Dasarath Meher, the original owner and claimed that Mangal Purohit transferred Ac.0.025 decimals of land to the plaintiff and the allegation of transfer of the suit plot in favour of the plaintiff is a myth. The defendant further claimed that Dasarath Meher, the original

owner was in possession of the suit land and after him his son Ramachandra was in possession of the suit land till the date, it was transferred in favour of the defendant no.1, who is in possession of the same till date. The defendant denied the possession of the plaintiff over the suit land and also denied his claim with regard to right, title and interest over the same. The defendant further pleaded that the settlement authorities recorded the suit land in favour of the defendant no.3 and therefore, the allegation that the settlement authority found the possession of the plaintiff in respect of the suit land is also a myth. The defendant no.1 also denied the allegation of demolition of structure of the plaintiff. Defendant specifically pleaded that since the plaintiff has never possessed the suit land, the question of adverse possession does not arise and submitted that the construction, if any, on the suit land was not to the knowledge of the original owner and without objection.

5. On the basis of the aforesaid pleading, the trial court framed the following vital issue as issue no.3 "Has the plaintiff got right, title and interest over the suit land". This Court finds both the sides attacking much importance on the question of adverse possession led much evidence. To answer the said issue, the trial court while deciding the question of right, title and interest over the suit land arrived on the issue, mostly taking into consideration the materials available on record through pleadings as well as evidence very specifically and vividly discussing the claim of adverse possession by the plaintiff and its counter by the opposition. The discussion on issue no.3 is quite a lengthy one and on a thorough scrutiny of discussion therein as well as observations and the findings of the trial court, it clearly reveals that even though no specific issue was framed with regard to the claim and objection of the parties on the question of adverse possession, but most of the discussion made seriously and genuinely taking the question of adverse possession only. It is also observed that the trial court has determined the issue no.3 holding that the plaintiff has got right, title and interest by virtue of adverse possession only.

Now coming back to the decision passed by the lower appellate court, this Court finds that the lower appellate court even though arrived on the point to decide the question of adverse possession, but has failed in appreciating the fact of availability of sufficient material to take up the issue of adverse possession thereby arrived at a wrong conclusion by remitting the matter to the trial court for framing a specific issue on the point of adverse possession and taking a decision thereon.

6. From the narrations hereinabove and on a thorough scrutiny of the plaint and written statement as well as the discussions made in relation to issue no.3 by the trial court, this Court is of the firm view that there exists sufficient materials to decide the question of adverse possession. In view of the availability of sufficient material facilitating decision on the particular issue raised by the lower appellate court in exercise of power under Order 41, Rule 24 or Order 41, Rule 25 of the Code of Civil Procedure and decide the matter on its own merit. Thus, there was no occasion for the lower appellate court to remand the matter for framing the particular issue and remitting back the L.C.R. after arriving at a finding on the said issue for the decision by the Lower Appellate Court.

7. Law has been fairly well settled in the matter of remand of a case on specific issues. Here are certain decisions already rendered by this Court as well as the Hon'ble Apex Court on the subject. In the case of ***Rushi @ Rusi Behera and another v. Madan Behera and another***, *1986(I) OLR-198*, this Court in similar situation came to hold that the appellate court is required first to make enderavour to answer the disputed issues and where in spite of such findings it would not be in a position to come to a conclusion either way, then the Court is required to go to decide by remanding the matter.

Similarly, in another decision in the case ***of Balaram Das and others v. Ganesh Karan and another,*** *1998(II) OLR-598*, this Court in deciding a similar nature of issue came to hold that the lower appellate court is required to arrive at a finding that the issue already framed is sufficient to cover the new issue framed and before remanding a matter further it must also come to a conclusion that the evidence on record would not be sufficient to cover the new issue sought to be decided.

Similar is the view of this Court in the case of ***Chennuru Gouri Varaprasad Babaji v. State of Orissa and others***, *2005(II) OLR-618.* Further, in a case in between ***Hata Swain (dead) his legal heir Ramesh Ch.Swain and others v. State of Orissa***, *2012 (Supp.-II) OLR-411*, this Court again considering the similar situation has come to a conclusion that the order of remand cannot be made for the purpose of enabling party to fill up lacuna. In the case of ***Sayeda Akhtar v. Abdul Ahad***, *2003 AIR SCW 3680*, the Hon'ble Apex Court in paragraph-13 came to hold that there cannot an arbitrary order of remand without satisfying the conditions under Rule 23, 23-A or 25 of Order 41 of the Code of Civil Procedure. The Hon'ble Apex Court in such contingency held the order of remand is bad.

8. Under the circumstances and taking into consideration the consistent view of this Court as well as the Hon'ble Apex Court, quoted hereinabove, this Court while interfering in the impugned order sets aside the direction part of the lower appellate court passed in R.F.A.No. 22 of 2004 in remitting back the matter to the trial court for the purpose mentioned therein and further directs the lower appellate court to take up the issue itself and decide the question of adverse possession on the basis of materials already available on record and affording opportunity of hearing to the counsel appearing for the parties. The writ petition stands allowed with the direction made hereinabove but with no order as to cost.

Writ petition allowed.

2016 (I) ILR - CUT- 174

B. RATH, J.

C.M.P.NO.1264 OF 2014

SURENDRANATH BARAL ....Petitioner

.Vrs.

BISHNUPRIYA PANDA & ORS. ....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-22, R- 4
r/w Sec. 141 & O-9,R-13 CPC.

Whether the provision under order 22, Rule 4 C.P.C. is applicable for substitution in a proceeding under order 9, Rule-13 C.P.C. ? Held, No – Order 22 C.PC. is applicable in respect of a suit or in case of an appeal arising out of the suit and cannot be extended to any other proceeding (Para-7)

Case Laws Referred to :-

1. A.I.R.1980 Madhya Pradesh -12 : Smt.S.Begum & Anr. -vrs- A.Hossain & Ors.
2. A.I.R.2001,SC – 2497 : M.K.Prasad -vrs- P.Arumugam.
3. A.I.R.1979,Patna-319 : Syed Balal Ahsan -vrs- Wastana Rubi & Ors.
4. A.I.R.1949,Lahore-186 : Mohd. Sadaat Ali Khan vrs The Administrator, Corporation of City of Lahore

5. A.I.R.1949,Madras-435 : Manickam vrs Ramanathan.

For Petitioners : M/s.Susanta Kumar Dash,A.K.Otta,
Mrs.A.Dhalsamanta & Miss S.Das.

For Opp.Parties :M/s G.Mukherjee, P.Mukherjee,
A.C.Panda,S.D.Ray,S.Priyadarshi
S.Sahoo & M.Chatterjee

Date of Hearing :19.11. 2015
Date of Judgment : 26.11.2015

JUDGMENT

BISWANATH RATH,J.

This Civil Miscellaneous petition is filed under Article 227 of the Constitution of India assailing the order dated 11.4.2014 passed by the Additional Civil Judge (Senior Division), Puri in C.M.A.No.09 of 2012 thereby rejecting an application under Order 22,Rule 4 read with Order 6,Rule 17 of the Civil Procedure Code basically bringing the legal representatives of the deceased defendants in the pending application under Order 9,Rule 13 of the Civil Procedure Code for setting aside the exparte decree.

2. Short facts involved in the case is that on obtaining an exparte decree, the plaintiff-Opp.party No.1 filed an application to draw the Final Decree on the basis of the preliminary decree passed in the suit. During pendency of the Final Decree proceeding, the plaintiff-Opp.party No.1 had brought an application for substitution on 13.3.2013.Having come to know about the death of such parties, the present petitioner filed an application for substitution in the pending proceeding under Order 9,Rule 13 of the Civil Procedure Code for setting aside the exparte decree. It is alleged that even though the substitution application at the instance of the Opp.party No.1 was allowed in the Final Decree proceeding but the application for substitution at the instance of the present petitioner in the restoration proceeding under Order 9,Rule 13 of the Civil Procedure Code has been rejected. Being aggrieved by the said order of rejection, the petitioner preferred this Civil Miscellaneous petition. On challenging the said order, Mr.S.K. Dash, learned counsel appearing for the petitioner submitted that there has been mechanical consideration of the application for substitution by the lower Court in as much as the lower Court has failed to appreciate the provisions contained in Order 22,Rule 4(3) and Order 22,Rule 11 of the Civil Procedure Code as

well as the provisions contained in Articles 120,121 and 137 of the Limitation Act. Strongly relying on the provisions noted herein above, Mr.Dash, learned counsel for the petitioner submitted that in view of the provisions contained therein, there was no requirement of attracting the provisions of Order 22, Rule 4(3) of the Civil Procedure Code or Section 5 of the Limitation Act in as much as since the application for substitution was filed in a proceedintg under Order 9, Rule 13 of the Civil Procedure Code which is neither a suit nor an appeal. Provision of Order 22,CPC is not attracted and the Court should not have been persuaded by mere nomenclature of the petition. Referring to a decision in the case of ***Smt.S.Begum & another –vrs- A.Hossain and others*** reported in ***A.I.R.1980 Madhya Pradesh - 12*** ,Sri Dash, learned counsel for the petitioner claimed that the impugned order is contra to the provisions of the Civil Procedure Code and law. Sri Dash, learned counsel further contended that since similar application at the instance of Opp.party No.1 was allowed by the very same Court in a Final Decree proceeding, the lower Court rejecting the application at the instance of the present petitioner in the proceeding under Order 9, Rule 13 of the Civil Procedure Code, amounts to application of two standards in similar situation.

3. In opposition, Mr.Goutam Mukherjee, learned counsel for the Opp. parties submitted that in view of the specific provision as contained in Order 22,Rule 4(3) of the Civil Procedure Code since the substitution sought for beyond the period of 90 days, the application for substitution in absence of an application for setting aside abatement and condonation of delay perse was not maintainable and in absence of such application, the petition under Order 22, Rule 4 of the Civil Procedure Code was not maintainable and therefore the lower Court did no wrong in rejecting the application under Order 22,Rule 4 of the Civil Procedure Code at the instance of the present petitioner, leaving no scope for this Court to interfere in the impugned order Mr.Mukherjee, learned counsel for the Opp.parties relying on a decision in the case between ***M.K.Prasad -vrs- P.Arumugam***, reported in ***A.I.R.2001,SC – 2497*** submitted that in view of the decision of the Hon'ble Apex Court, the impugned order is justified.

4. Under the afore stated facts, submissions and circumstances, the question now emerges for consideration here is; Whether the provision of Order 22, Rule 4 of the Civil Procedure Code is applicable in respect of substitution in a proceeding under Order 9,Rule 13 of the Civil Procedure Code ?

5. Section 141 of the Civil Procedure Code reads as follows:

“141.**Miscellaneous proceedings –**

The procedure provided in this code in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any Court of civil jurisdiction.

[**Explanation –** In this section, the expression “proceedings” includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution.]”

Bare reading of the above, makes it clear that the provision in the Civil Procedure Code are not mandatory.

6. Now coming to the provision under Order 22,Rules 1 & 4 of the Civil Procedure Code which reads as follows:

“**1. No abatement by party’s death, if right to sue survives.-** The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

4. Procedure in case of death of one of several defendants or of sole defendant.- (1) Where one of the two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4)The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have

the same force and effect as if it has been pronounced before death took place.

(5) Where,—

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified there for in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved."

Similarly Order 22,Rule 11 of the Civil Procedure Code reads as follows:

"**11. Application of order to appeals.-** In the application of this order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal."

7. Bare reading of Order 22,Rule 1 of the Civil Procedure Code clearly speaks that the death of a plaintiff or defendant shall not cause the **suit** (high lighting is of this Court) to abate if the right to sue survives. Similarly reading of Order 22, Rule 4 of t he Civil Procedure Code lays down the procedure in case of death of one of several defendants or of sole defendant and coming to Sub Rule 3, it again speaks unless an application for substitution is made within time, the suit shall abate as against the deceased defendant. Above again speaks in relation to a suit. Now coming to the provisions contained under Order 22, Rule 11, CPC. The provisions of Order 22, CPC in respect of suits, are also applicable in respect of appeal arising out of suit. Under the above legal provision as discussed herein above, there is no doubt that the provision of Order 22, CPC is applicable in respect of a suit or in case of an appeal arising out of suit and can not be extended to any other proceeding. In deciding a case of similar nature, High Court of Patna in

a case between ***Syed Balal Ahsan -vrs- Wastana Rubi and others***, reported in ***A.I.R.1979,Patna-319,*** the Patna High Court has come to hold that question of abatement of a suit does not arise unless the suit itself is pending. Similarly by a number of decisions, High Court of Lahore as well as the Division Bench of High Court of Madras in the case between ***Mohd. Sadaat Ali Khan vrs The Administrator, Corporation of City of Lahore***, reported in ***A.I.R.1949,Lahore-186*** and in the case between ***Manickam vrs Ramanathan***, reported in ***A.I.R.1949,Madras-435*** came to hold that in terms of provision, Order 22,R.3,CPC applies to suits only and by virtue of Rule 11,CPC its provisions are extended to appeals.

Similarly High Court of Madhya Pradesh in an exact case of this nature in between ***Smt.Sayeeda Begam & another –vrs – Ashraf Hussain & Others***, reported in ***A.I.R.1980,Madhya Pradesh-12***, referring to Section141,C.P.C, Order 9,Rule 13,CPC,Order 22,CPC as well as Articles -137 and 120 of the Limitation Act,1963 in paragraphs-6 to 9 came to hold as follows:

> " 6. Applicability of the procedure pro-rided in the Code for suits with the aid of S, 141 to a proceeding under Order 9 ex debito justitiae, i. e., to prevent an injustice, cannot be doubted. The trouble arises when penal provisions, which in terms have not been made applicable to such a proceeding, though applicable to a suit, are sought to be invoked with the aid of Section 141. Whether that would be permissible? Section 141 of the Code itself says that the whole of the procedure in regard to suits may not be applicable to a proceeding in a Court of Civil jurisdiction. Only such procedure shall be followed "as far as it can be made applicable". The question then is whether the penal provisions of abatement contained in Order 22, in case an application for substitution is not filed within 90 days, should govern even an application for restoration filed under Order 9. The relevant Article of the Limitation Act is Article 120, which reads as under:
>
> Art. 120: Under the Civil P. C. 1908, to have the leRul representatives of a deceased plaintiff or appellant fir of a deceased defendant or respondent, made a party.
>
> Ninety days The date of death of the plaintiff appellant, defendant or respondent as the case may be.

In a suit when the plaintiff or the defendant dies, an application to bring on record the legal representatives has to be made within 90 days, the limitation for the application is provided inArticle 120 of the Limitation Act. The same Article governs the application for substitution when an appellant or a respondent dies in a pending appeal. This Article of the Limitation Act cannot be extended in its operation by analogy or otherwise to an application for substitution when an applicant or non-applicant dies hi a pending proceeding for restoration under Order 9. We cannot read into the Article "an applicant" for the plaintiff or "a non-applicant" for the defendant.Section 141, Civil P. C. may permit the procedure for a suit to be followed in a proceeding initiar-ted under Order 9 but the provisions of the Limitation Act could not be amended by any process of reasoning so as to read "applicant" for "plaintiff" and "non-applicant" for "defendant". And unless that could be done, the application for substitution in such a case would be governed by the residuary Article, there being no special provision.

7. Order 22 contains penal provisions which affect substantive rights of the plaintiff or the appellant, as the case may be, when an application for substitution is not filed within time. The penal provisions have to be construed strictly. Unless they expressly declare the provisions to be applicable to a proceeding other than a suit or appeal, those provisions cannot be applied by analogy to such a proceeding.

8. There are two weighty reasons given by Abdur Rahman, Ag. C. J. in the Mohd. Sadaat Ali Khan v. Administrator, Corporation of City of Lahore, AIR 1949 Lah 186 (FB) for holding that the provisions of Order 22, Rule 3. C. P. C. are not applicable to revisions. (Please see paras 9 to 13 of the Judgment). There is nothing to choose between a revision and a Miscellaneous Judicial case, which is not a suit or appeal, to make any distinction in the applicability of Article 120 of theLimitation Act. If the said Article does not apply to a revision, it does not apply to an application for restoration either. To the same effect are the Full Bench Authorities reported in Babulal v. Mannilal, AIR 1953 Raj 169 and Chandradeo Pandey v. Sukhdeo Rai, AIR 1972 All 504 (FB).

> 9. Naturally a proceeding on the death of a party cannot proceed and those to whom the right to sue survives have to be impleaded. But the limitation to make an application for substitution in a suit for which there is express provision, would not govern a proceeding which is neither a suit nor an appeal. That being so, Order 22 would not in terms apply to a proceeding initiated under Order 9 for restoration of a suit dismissed in default ."

In view of the discussions made herein above on the factual aspects of the case, all the legal provisions referred to and quoted herein above and the position as settled by different Courts, this Court is of the view that since the application for substitution was filed in a proceeding under Order 9, Rule 13 of the Civil Procedure Code, the provision of Order 22 of the code of Civil Procedure would not have any application to the petitioner's case and in view of settled position of law and the clear provision as contained in Order 22 of Civil Procedure Code, the Court should not have gone merely by the nomenclation of the application and instead would have allowed the application.

Consequently this Court finds the impugned order is bad in law, thus while interfering in the impugned order, this Court sets aside the impugned order and allow the application for substitution thereby permitting for bringing the legal representatives of the deceased defendants in the proceeding under Order 9,Rule 13,CPC and necessary amendment consequent upon the death of the particular defendants to the case proceeding. Civil Miscellaneous Petition stands allowed. However, there is no order as to cost.

Petition allowed.

2016 (I) ILR - CUT-182

S.K.SAHOO, J

JCRLA NO. 40 OF 2008

JITU LOHAR @ KHOKA & ANR ……..Appellants

.Vrs.

STATE OF ORISSA …….. Respondent

EVEDENCE ACT,1872 – S.11

Rape case – F.I.R lodged six hours after the alleged incident – Names of the accused persons not mentioned in the F.I.R. though they were known to the victim and her father earlier – Omission of important facts in the F.I.R affecting the probabilities of the case are relevant U/s. 11 of the Act in judging the veracity of the prosecution case – Prosecution has failed to establish the case against the appellants beyond all reasonable doubt – Impugned judgment of conviction and sentence is setaside. (Para 7)

For Appellants : Mr. Neelakhantha Panda, S.K.Nath & Rabindranath Nayak

For Respondents : Mr. Sk. Zafarulla, (Addl. Standing Counsel)

Date of hearing : 03.03.2015
Date o judgment : 03.03. 2015

JUDGMENT

S.K.SAHOO, J.

The appellants Jitu Lohar @ Khoka and Anup Kumbhar alogwith co-accused Budhus Laguri faced trial in the Court of learned Addl. Sessions Judge, Fast Track Court, Rourkela in Sessions Trial No.92/39 of 2007 for offences punishable under sections 376(2)(g), 342/34, 307/34, 452/34 and 363/34 Indian Penal Code. The learned trial Court vide impugned judgment and order dated 14.3.2008 though acquitted co-accused Budhus Laguri of all the charges and also the appellants of the charge under section 342/34 IPC but found the appellants guilty under section 376 (2)(g) IPC so also under sections 307/34, 363/34 and 448/34 of IPC and accordingly convicted them of such offences and sentenced each of them to undergo R.I. for ten years and to pay a fine of Rs.20,000/- each, in default, to undergo further R.I. for three months for the offence under section 376 (2)(g) IPC, R.I. for seven years and

to pay a fine of Rs.5000/- each, in default, to undergo further R.I. for two months for the offence under section 307/34 IPC, R.I. for two years and to pay a fine of Rs.2000/- each, in default, to undergo further R.I. for one month for the offence under section 363/34 IPC and R.I. for one year for the offence punishable under section 448/34 IPC. The sentences were directed to run concurrently.

2. The prosecution case as per the FIR lodged by one Surya Bahadur (P.W.7) is that he along with his wife, daughter (hereinafter the "victim") who was aged about 13 years and son Raja aged about 8 years and another daughter Anu were staying together in a place locally known as Mishra Khatal. The informant was working as a mason and on 19.4.2007 at about 8 O' clock in the morning, he had been to his work and at that time his wife and children were at home. In the evening hours in between 6 to 7 O' clock, he returned back home and after taking his dinner went to sleep at around 8.30 p.m. The informant and his wife Mina slept in one room and their son Raja and the victim slept in the nearby room after watching T.V. The door of the room was open. During midnight at about 2 O' clock, the informant woke up from his sleep and found the gate was open and the victim was not there in her bed room. The informant called his wife and informed her about the absence of the victim in the house. The wife of the informant searched for the victim in the house of her mother which was situated nearby and there also she could not found the victim and accordingly she returned back home. Then the informant and his wife thinking that the victim might have gone to attend call of nature to the nearby lands, went in search of the victim and heard some sounds from the nearby canal and by focusing torch light, the informant noticed that two boys had pressed the victim inside the canal water; one was trying to force her face inside the water and another was pressing her legs. Hearing the shout of the informant, the two boys fled away from the spot. The informant rushed to the canal water and rescued the victim. He found the hands of the victim had been tied by means of a shirt towards the back and he untied her hands. The victim was sent back home with her mother. The informant chased the two boys but could not catch hold of them. After returning back home, the informant tried to ascertain about the incident from the victim. The victim narrated that in the night while she and her brother Raja after watching T.V. had slept in the room and the door was open, all on a sudden she realised that somebody was pressing her face and when she opened her eyes, she saw three unknown persons were carrying her. Those persons took her towards the nearby canal which was situated at a little

distance from her house and thereafter removing her wearing apparels, they committed rape on her one after another. When the victim shouted, she was assaulted by those persons and thereafter they took a decision to finish the victim and accordingly took her towards the canal side and pressed her face in the canal water and at that time the informant reached there and she was rescued.

3. On the basis of such FIR lodged before the Inspector–in-charge, Mahila Police Station, Rourkela, Rourkela Mahila P.S. Case No.16 of 2007 was registered on 20.4.2007 for the offences under sections 376(g)/307 IPC against unknown persons. The IIC of Rourkela Mahila P.S. directed P.W.10 Nalita Modi, Sub-Inspector of Police to investigate the case. During course of investigation, P.W.10 examined the informant, the victim and her mother Mina and recorded their statements. She sent requisition to the Scientific Officer, DFSL, Rourkela to visit the spot for the purpose of investigation. The victim was sent for medical examination on police requisition. After arrival of the Scientific Officer, DFSL, Rourkela, P.W.10 visited the spot with the victim along with the Scientific Officer and seized one pair of Hawai Chappal, one handkerchief, one blue colour panty (Chadi) near the canal located at Mishra Khattal, Sector-20, Rourkela under seizure list Ext.12 . She also seized the wearing apparels of the victim being produced by her under seizure list Ext.7. She conducted raid at the houses of the accused persons but could not trace them out. She prepared the crime detail form vide Ext.13 and also prepared spot map Ext.14. She received the medical examination report of the victim and also seized her biological sample collected by the Medical Officer under seizure list Ext.5. On 27.4.2007 P.W.10 arrested all the accused persons and seized their wearing apparels under Exts.15, 16 and 17. She sent the accused persons for their medical examination and received the injury report of appellant No.2. On 28.4.2007, the appellants and the co-accused were forwarded to Court and a prayer was made by the I.O. before the learned S.D.J.M., Panposh for conducting the T.I. Parade and accordingly T.I. Parade was conducted on 3.5.2007 by P.W.11 inside the Special Jail, Rourkela. P.W.7 correctly identified both the appellants but failed to identify the co-accused Budhus Laguri. The I.O. also made query to the medical officer regarding the injury noticed on the person of appellant No.2 and obtained the reply. A prayer was made before the S.D.J.M., Panposh on 29.6.2007 to dispatch all the incriminating materials for chemical examination and accordingly those were forwarded to RFSL, Sambalpur.

After completion of investigation, charge sheet was submitted against the appellants as well as co-accused Budhus Laguri.

4. The defence plea of the appellants was one of denial.

5. In order to prove its case, the prosecution examined eleven witnesses. P.W.1 is the victim and she narrated the entire prosecution case.

P.W.2 Kabita Rani Nayak was the IIC Mahila P.S., Rourkela who registered the case on the report of P.W.7 and directed P.W.10 for investigation.

P.W.3 Prasant Kumar Pradhan was the Scientific Officer, DFSL, Rourkela who on police requisition visited the spot and found some articles which he handed over to the I.O. He also submitted his preliminary report vide Ext.3. He did not find any incriminating substance over the articles seized from the spot.

P.W.4 Dr. Sharmila Tripathy examined the victim on police requisition on 20.4.2007 and proved her report Ext.1/1. According to the medical examination report, the age of the victim was in between 14 to 15 years and the doctor further opined that there was recent forcible sexual intercourse to the victim.

P.W.5 Smita Mahanty was the constable who stated about the seizure of the biological sample of the victim on 26.4.2007.

P.W.6 Rehman Mahammod also stated about the seizure of biological sample of the victim and about the seizure of sealed packets of biological sample on 16.5.2007 Exts.6.

P.W. 7 Surya Bahadur is the father of the victim and he is the informant in the case. He identified the appellants in the T.I.Parade.

P.W.8 Dr. Arun Prasad Bhoina examined the appellants and the co-accused Budhus Laguri on police requisition and proved his reports Exts.8, 9, 10 and 11.

P.W.9 Mina Bahadur is the mother of the victim and she stated about the disclosure made by the victim before her about the occurrence.

P.W.10 Nalita Modi is the Investigating Officer.

P.W.11 Pravakar Ganthia was the J.M.F.C., Rourkela who conducted the Test Identification Parade at Special Jail, Rourkela on 3.5.2007 and proved her report vide Ext.23.

No witness was examined on behalf of the defence.

The prosecution has proved twenty five documents. Ext.1/1 is the Medical Examination report of the victim, Ext.2 is the FIR, Ext.3 is the Preliminary report of Scientific Officer, DFSL, Rourkela, Ext.4 is the report of the Scientific Officer, Exts.5, 6 and 7 are the seizure lists, Exts.8, 9 and 11 are the medical examination reports of the three accused persons and Ext.10 is the opinion report of the doctor relating to examination of appellant no.2, Ext.12 is seizure list, Ext.13 is the spot map (victim's house) and Ext.14 is another spot map (place of rape), Ext.15 to 17 are seizure lists, Ext.18 is the prayer for T.I. parade, Ext.19 is the query of the I.O. regarding injuries on appellant no.2, Ext.20 is the query of the I.O. Ext.21 is the prayer of the I.O. for chemical examination, Ext.22 is the forwarding memo to RFSL, Sambalpur, Ext.23 is the T.I. parade report and Ext.24 and 25 are the chemical examiners reports.

6. The learned counsel for the appellants Mr. Nilakantha Panda submitted that the statement of the victim and her parents do not inspire confidence and even though there are materials available on record that the two appellants were known to the victim and her father but the FIR has been lodged against unknown persons. He further contended that the accused persons were arrested on 27.4.2007 and they were first produced at RGH before the doctor for their medical examination on the same day and on the next day they were produced in Court and therefore there was possibility on the part of P.W.7 to see the appellants prior to the T.I.Parade.

Learned counsel for the State on the other hand supported the impugned judgment and order of conviction and contended that since the victim has identified the appellant no.1 in the Court and the informant has identified both the appellants in the T.I. Parade as well as in the Court and there is no infirmity in the T.I. parade, their testimonies can be safely accepted to convict the appellants. He further contended that the co-accused who faced trial alongwith the appellants was acquitted as he was neither identified in the T.I.Parade nor in the Court.

7. The victim who has been examined as P.W.1 was a minor at the time of occurrence in as much as according to her, she was born on 16.11.1995 and the incident took place on 19.4.2007. The victim has stated in her evidence that she knew the appellant No.1 Jitu Lohar prior to the incident as the said appellant was residing at some distance from her house and that appellant is also locally known as "Khoka". She has further stated that when

the boys entered inside the room, she was under complete sleep and they lifted her by gagging her mouth and inside the room, she could not identify the boys but after coming outside, she became conscious and could identify one boy among them. If the victim was aware about the identity of the appellant No.1 prior to the incident as she has stated in her deposition that the house of the appellant no.1 is at a little distance from her house and she was even aware the local call name of the appellant no.1 as "Khoka", it was expected that in ordinary course of nature immediately after the occurrence she would have disclosed the name of the said appellant before her parents. Though in the FIR, it is mentioned that the victim narrated about the incident before the informant and P.W.9, but it is not mentioned in the FIR that the victim has named appellant No.1 before them and as such the FIR was lodged against unknown persons. The victim has not participated in the T.I. parade which was conducted on 3.5.2007 inside the Special Jail, Rourkela. She has neither identified appellant No.2 in Court nor alleged anything against him.

The mother of the victim Mina Bahadur who has been examined as P.W.9 has not identified the appellants in Court. She has also not participated in the T.I. parade. When it is mentioned in the F.I.R. that both P.W.7 and P.W.9 were searching for the deceased in the night and at that time on the focus of torch light of P.W.7, the two boys who had pressed the victim in the canal water fled away and the victim was sent back home with P.W.9, it was the duty of the prosecution to put P.W.1 as well as and P.W.9 as identifying witnesses in the T.I. parade for identification of the suspects. The same has not been done.

So far as P.W.7, the informant is concerned, though the informant has identified both the appellants in the T.I. parade and also in the Court, but in his evidence he has stated that all the accused persons including the appellants were residing in the same Basti for which he knew them earlier. In spite of knowing the appellants before hand and alleged to have noticed them at the time of occurrence pressing the victim inside the water of the canal, he has not mentioned the names of the appellants in the FIR. Even he has not mentioned that any of the accused persons were of his Basti or that he knew them earlier. The absence of such important aspect in the FIR is relevant under section 11 of the Evidence Act which creates doubts about the veracity of the prosecution case.

In the case of **Ram Kumar Pande v. The State of Madhya Pradesh reported in AIR 1975 SC 1026**, it is held that no doubt, an F.I.R is a

previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, omissions of important facts, affecting the probabilities of the case, are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case.

F.I.R. in criminal case and particularly in a rape or murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence laid at trial. F.I.R. is not the encyclopaedia or be all and end all of the prosecution case. It is not a verbatim summary of the prosecution case. Whether non- mentioning of some material facts would be fatal or not depend on the facts and circumstances of each case.

In view of the materials available on record when the appellants were residing in the same Basti and were known to the informant P.W.7 earlier and when the victim P.W.1 even knew appellant no.1 prior to the incident and even his local call name as "Khoka", the omission of the names of the culprits in the F.I.R. is very significant in the circumstances of the case. The F.I.R. was lodged almost six hours after the alleged incident and there must have been discussion in the family before lodging of the F.I.R. In fact P.W.7 has stated that during the night of occurrence, after returning to the house, he enquired about the incident from the victim and she narrated about the commission of forcible rape. The fact that the FIR is silent about the names or identity of the appellants in spite of the fact that the appellants were known persons and belonged to same Basti and residing at some distance from the house of the victim and no explanation whatsoever has been furnished by the prosecution in that respect, it is very difficult to accept the participation of the appellants in the alleged crime.

In case of **Mallanna and Ors. -V- State of Karnataka reported in 2007 (11) SCALE 194**, the Hon'ble Supreme Court held

> "14.We now proceed to deal with the cases of the ten convicted persons individually, out of whom, Appasab [A-9], Chandappa [A-15] and Rajasekhar [A-16] were not named in the FIR, although they were also known to the informant [PW-1], for which no explanation whatsoever has been furnished by the prosecution. This being the position, on this ground alone, these three accused persons are entitled to be given benefit of doubt".

In case of **Juwarsingh –v- State of M.P. reported in AIR 1981 SC 373**, it is held as follows:-

> "6. In regard to the seven persons whose names were not mentioned in the First Information Report, P.W.1 was unable to explain why she failed to mention their names in the report……We think that these seven persons are entitled to the benefit of doubt and should be acquitted."

Even though the allegations are very serious in nature and the medical opinion indicates that there was recent forcible sexual intercourse on the victim and the victim was also a minor but it is the duty of the prosecution to prove the case against the appellants beyond all reasonable doubt. Though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any Court yet suspicion, however strong it may be, cannot take the place of legal proof. A moral conviction, however strong or genuine, cannot amount to a legal conviction supportable in law. It is well established rule of criminal justice that 'fouler the crime, higher the proof'. Court cannot allow emotional and sentimental feelings to come into play in judicial pronouncements otherwise the Judge would bound to view the evidence with a bias resulting in biased conclusions which would cause great injustice.

It seems that the learned trial Court has proceeded pedantically without making an in-depth analysis of facts and circumstances and the evidence led in the trial and the impugned verdict is based neither upon facts nor upon law but it is a sheer moral conviction. The prosecution has failed to establish the case against the appellants beyond all reasonable doubt. Therefore, the appellants are entitled to benefit of doubt.

In the result, the appeal is allowed and the impugned judgment and order of conviction and sentence of the appellants for the offences under sections 376(2)(g), 307/34, 363/34 and 448/34 of IPC as assailed in this appeal is hereby set aside.

The appellants are in jail custody since the date of their arrest. They shall be set at liberty, if they are not required in any other case. Accordingly the JCRLA is allowed.

Appeal allowed.

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S. N. PRASAD, J.

O.J.C. NO. 17347 OF 1997

SUBHENDU KUMAR DEO, PROJECT ENGINEER, ORISSA STATE HOUSING BOARD, JEYPORE ………Petitioner

.Vrs.

REGIONAL PROVIDENT FUND COMMISSIONER, ORISSA. ………Opp. Party

E.P.F. & M.P. ACT, 1952 – Ss 2 (f), 7A

"Employee" as defined U/s 2(f) of the Act – Meaning of – It includes not only persons directly engaged by the employer but also the persons employed through a contractor – Petitioner-Board constructs buildings by engaging contractors who in turn engaged workers/ labourers for execution of such work – Since the workers who are working under the petitioner-Board i.e. the principal employer through contractors for its construction work it is the duty of the petitioner-Board to deposit the statutory contribution U/s 7A of the Act for disbursement amongst the workers – This court finds no reason to interfere with the impugned order. (Para 41 to 45)

<u>**Case Laws Referred to**</u> :-

1. AIR 1987 S.C. 447 : M/s. P.M. Patel and sons vrs. Union of India
2. 1987 S.C. 447 M/s. : P.M. Patel and sons vrs. Union of India
3. AIR 2001 SC 850 : S.K.Nasiruddin Beedi Merchant Ltd. vrs. Central Provident Fund Commissioner
4. AIR 1974 SC 1832 : Mangalore Ganesh Beedi Works vrs. Union of India
5. AIR 1987 S.C. 447 : M/s. P.M. Patel and sons vrs. Union of India
6. AIR 1971 SC 33 : Hirday Narain vrs. Income-tax Officer, Bareilly
7. (2004) 13 SCC 665 : Durga Enterprises (P) Ltd. and another vrs. Principal Secretary, Government of U.P. & Ors.

For Petitioner : M/s Srikanta Ku. Nayak (1), A. K. Baral, K.Ray, S.K.Nayak

For Opp. Party : M/s Deba Ranjan Ram, Basanta Ku. Jena, Jay Prakash Rout

Date of hearing : 08.09.2015
Date of judgment : 08.09.2015

JUDGMENT

S. N. PRASAD, J.

Heard learned counsel for the petitioner and learned counsel appearing for the Regional Provident Fund Commissioner.

2. In the present writ petition, the petitioner has challenged the order passed under Section-7-A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 by the Regional Provident Fund Commissioner, Orissa on 30th June, 1997 determining a sum of Rs.14,59,785.00 upon M/s. Orissa State Housing Board, Jeypore Division, Jeypore for the period from 1987 to 1991.

3. Brief facts of the case is that the petitioner-Board was served with a notice to show cause on 08.11.1996 as to why action shall not be taken for contravening the provisions of E.P.F. and M.P. Act, 1952 (hereinafter referred to as 'the Act, 1952') while the petitioner was waiting for the show cause reply to show cause to be given on the very day issued notice under Section 7(A) of the Act directing the petitioner to attend the enquiry on 29.11.1996 to determine the dues towards payment of provident fund contribution, payment of family pension fund contribution, administrative charges, Employees Deposit linked Insurance, Administrative charges etc for the period from 1987 to 1991.

4. After receipt of notice, the authorised representative of the petitioner-Board appeared before the opposite party no.1 but without giving adequate opportunity and without applying judicious mind held that the petitioner is liable for payment of Rs. 14,59,785.00 towards provident fund, Employees Deposit Linked Insurance contribution, F.P. contribution , Administrative Charges etc. and accordingly a demand notice to that effect has been issued which is impugned in this instant writ petition.

5. Ground of challenge is that the opposite party no.1 without waiting for show cause, issued notice under Section 7(A) of the Act, 1952. Hence the entire action is without any application of mind because of the reason that when liability to make contribution under the Act is disputed the enquiry under Section 7(A) will not be maintainable, the authorities have determined the amount without scrutinising the complete records of the case.

6. The petitioner-Board is not coming under the definition of 'industry' and the Schedule-1 appended to the Act, 1952 but in spite of all these having been raised before the opposite party no.1 the same has not been considered and the impugned order has been passed.

7. It has contended that the petitioner – Board is neither a factory nor carries on any manufacturing process. Therefore, the provision of the Act, 1952 is not applicable.

On the other hand, learned counsel for the opposite parties has contested the case by filing detail counter affidavit stating therein that the writ petition is not maintainable on the ground of availability of alternative remedy as provided under Section 7-I of the Act, 1952. Section 7(A) proceeding has been initiated against the petitioner for compliance of the provisions of the Act for the period from 1987 to 1991. The petitioner has been given several opportunities to put forth his case but no documentary evidence has been produced before the authorities concerned hence the opposite parties has passed an order to determine the dues taking into consideration the labour components as 30% of the actual value to protect and determine interest of the workers.

8. Normal activities of the petitioner – Board is to perform functions under the provisions of the Orissa Development Authority Act i.e., to acquire land and develop the same for sale or to construct houses/flats for sale to public as such activities were to carried out the development work through its regular employees, contractors employees, daily wages employees.

9. The notification dated 31.10.1980 of the Government of India extending the provisions of the Act to the Building and Construction industry attracting the petitioner's establishment. The petitioner has got no scheme or rules by which Contractors employees/daily wages employees who are entitled to the benefits of contributory provident fund or old age pension, a proceeding under Section 7(A) of the Act was initiated with respect to the Contractors employees and 16 D.L.R. employees engaged by the petitioner for the period from 1987 to 1991 for whom the petitioner has not made any Scheme for old age pension.

10. It has been contended vide order dated 8.1.1994 under Section 19-A of the Act decided to apply to the employees of building and construction industries as per Section 2(f) of the Act with the observation that the Act is meant for extending the workers social security benefits.

11. Refferring to the judgment rendered by the Hon'ble Supreme Court in the case of **M/s. P.M. Patel and sons vrs. Union of India** reported in AIR 1987 S.C. 447 it has been held by clarifying the definition of 'employees' in the Act which includes not only persons directly engaged by the employer but also the persons employed through a Contractor.

12. It has been contended that in para-30 of the EPF and MP Act, 1952 it provides that the principal employer shall pay both the contributions payable by himself also on behalf of the persons employed by him directly or by him through the contractor.

13. After hearing learned counsel for the parties and perusing the documents on record it is necessary to go through the relevant provisions of the Act, 1952 which has been incorporated by way of welfare legislation to impose duty upon the establishment for compulsory deposits of contributory provident fund in the industries enacting for the purpose that the employees who have not been covered with any statutory rule for extending benefit of pension or contributory provident fund may get some amount to sustain their life after retirement and for execution for the said purpose, the Act, 1952 has been enacted upon to be applicable to every establishment which is a factory engaged in any industry specified in Schedule-1 and to any other establishment employing 20 or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specified in this behalf.

For ready reference provisions of Section 1 of the Act, 1952 is being quoted herein below:-

> **1.** ***"Short title, extent and application***.*-(1) This Act may be called the Employees provident Funds and Miscellaneous Provisions Act, 1952.*
>
> *(2) It extends to the whole of India except the State of Jammu and Kashmir, subject to the provisions contained in Section16, it applies-*
> *(a) to every establishment which is a factory engaged in any industry specified in Schedule 1 and in which twenty or more persons are employed and*
>
> *(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf".*

In pursuance to this provision of an establishment to which this Act applies shall continue to be governed by this Act.

14. The petitioner has raised an objection that the petitioner-Board is not coming under the purview of the Act, 1952 in order to examine this issue it is relevant to focus upon the provisions of Rule 1(b) of the Act, 1952 which provides applicability of the Act in any other establishment employing 20 or more persons or class of such establishments.

15. There is no dispute that the petitioner who is under the OSHB is performing duty for making construction of the house in order to provide house to the low income group or middle income group and for that purpose regular employees working in the construction work is being engaged simultaneously it is also executed through the Contractors by engaging daily wages workers. Considering the nature of work which is being performed by the petitioner-Board which is an establishment created by the State Government it cannot be said that the petitioner is not coming under the definition of 'establishment'.

16. Moreover, the issue is no more res integra in view of the judgment pronounced by the Hon'ble Supreme Court in the case of **M/s. P.M. Patel and sons vrs. Union of India** reported in AIR 1987 S.C. 447 wherein at para-12 their lordships has been pleased to hold after taking into consideration the definition of the 'employees' as provided under Section 2(f) of the Act, 1952 by which it has been held that the provision of the EPF and MP Act and the Scheme shall be applicable not only to persons employed directly by the employer but also the persons employed through a contractor.

17. After the judgment laid down by the Hon'ble Supreme Court in the case of **M/s. P.M. Patel and sons vrs. Union of India** now there is no dispute regarding the recovery of the petitioner under the definition of the establishment.

18. So far as the contention of the petitioner is that without waiting for the show cause (Annexure-2) regarding determination of coverage of the petitioner – Board a proceeding under Section 7-A has been initiated.

19. It is settled as has been held by the Hon'ble Supreme Court in the case of **S.K.Nasiruddin Beedi Merchant Ltd. vrs. Central Provident Fund Commissioner** reported in *AIR 2001 SC 850* that after placing reliance upon the judgment in the case of **Mangalore Ganesh Beedi Works vrs.**

Union of India reported in *AIR 1974 SC 1832* and in the case of **M/s. P.M. Patel and sons vrs. Union of India** reported in *AIR 1987 S.C. 447* that the applicability of the Act to any class of employees is not determined or decided by any proceeding under Section 7-A but under the provision of the Act itself. When the Act become applicable to the employees in question the liability arises.

For ready reference part of Para-6 is being quoted herein below:-

> *"**6**. The applicability of the Act to any class of employees is not determined or decided by any proceeding under Section 7-A of the Act, but under the provisions of the Act itself. When the Act become applicable to the employees in question the liability arises. What is done under Section 7-A of the Act is only determination of quantification of the same. Therefore, the contention put forth on behalf of the appeal that liability was attracted only from the date of determination of the matter under Section 7-A of the Act does not stand to reason. Indeed."*

20. Thus the submission advanced by the learned counsel for the petitioner is that without waiting for the outcome of the show cause proceeding has been initiated under Section 7-A that cannot be accepted in view of the provision as laid down in the case of **S.K.Nasiruddin Beedi Merchant Ltd.** (supra).

21. Moreover, the fact is evident from the order also because the petitioner-Board has already been covered under Code No.OR/1743 which also suggests that the petitioner-Board is coming under the parameter of the Act, 1952.

22. In this regard reference to the order dated 08.01.1994 passed under Section 19-A of the Act, 1952 as has been made by the opposite parties in the counter affidavit is worth to be considered which empowers the Government of India to make applicable the provision of the Act and accordingly the building and construction industry has been brought under the purview of the Section 2(f) of the Act which specifically provides the definition of the 'employees' according to which any person who is employed for wages in any kind of work, manual or otherwise in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer. For ready reference Section 2(f) of the EPF and MP Act, 1952 is being reproduced herein below:-

"**2(*f*)** *'employee' means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets, his wages directly or indirectly from the employer and includes any person-*

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 or under the standing orders of the establishment".

23. Now which has been raised by the learned counsel for the State is that the writ petition is not maintainable in order to assess this aspect of the matter there is no denial of the fact that there is provision of appeal provided under Section 7-I of the Act, 1952 to approach before the Tribunal. For ready reference the said provision is being reproduced herein below:-

"7-I. *Appals to Tribunal-(1) Any persons aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section(4) of section 1, or section 3, or sub-section (1) of Section 7A, or section 7B except an order rejecting an application for review referred to in sub-section (5) thereof or section 7C, or section 14B may prefer an appeal to a Tribunal against such notification or order.*

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed".

24. In this case the order having been passed on 30.06.1997, the writ petition has been filed on 10.12.1997, the same has been pending for final hearing. Interim order has been passed, affidavits exchanged between the parties.

25. There is no denial in the settled proposition of law that if there is any alternative remedy available under the statute the High Court under Article 226 should not interfere since the same will amount snatching the power of the appellate authority but however, there is no straight jacket formula rather it depends upon discretion of the Court. It is self-imposed restriction upon the High Court.

26. The writ petition was pending before this Court i.e., from 10.12.1997. Thus 18 years has been lapsed. If after lapse of 18 years this Court will not entertain the writ petition on the ground of availability of alternative remedy, after exchanging the affidavits in between the parties it would not be proper in this regard reference of the judgment of the Hon'ble Supreme Court is worth to be seen delivered in the case of **Hirday Narain vrs. Income-tax Officer, Bareilly** reported in *AIR 1971 SC 33* wherein their lordships has been pleased to hold which is being quoted herein below:-

"We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on merit."

Further in the judgment in the case of **Durga Enterprises (P) Ltd. and another vrs. Principal Secretary, Government of U.P. and others** reported in *(2004) 13 SCC 665* wherein their lordships has been pleased to pass an order that the writ petition was pending for a long period of thirteen years when summarily dismissed on the ground that there is remedy of civil suit by the High Court. Their lordships in that judgment were of the view that the High Court should not have dismissed the writ petition without deciding the writ petition on merit.

27. After considering the fact that during pendency of the writ petition, this Court has passed an interim order to maintain status quo with regard to possession of property in question.

28. Taking into consideration the facts as indicated hereinabove and the views of Hon'ble Supreme Court and if the facts of this case will be compared from the views of Hon'ble Supreme Court in the cases indicated above after lapse of 18 years when this Court has entertained this writ petition, passed an interim order to take no coercive action, affidavits has been exchanged, thereafter it would not be proper for this Court to summarily reject the writ petition on the ground of availability of alternative remedy otherwise the question of period of limitation will arise and also in order to avoid further litigation it would be appropriate to decide the case on merit.

29. In view of the above reasons in stead of sending the matter before the alternative remedy of appeal i.e., before the Tribunal, the writ petition is being decided on merit.

30. So far as merit of this case is concerned, admittedly the petitioner-board has deposited the statutory dues in respect of work charged employee upto10/96 but the petitioner-board has taken service of 16 DLR employees but no deposits have been made in respect of DLR employees on the ground that Head Office is taking care of such employees and reported under Code No.OR/1743 and when a notice was issued to the petitioner-board under Section 7-A of the Act, 1952, appearance was made and it was informed to the authority that appropriate steps were being taken with respect to 16 DLR employees by the Head Office, Bhubaneswar since code has already been opened bearing Code No.OR/1743 and accordingly when directed by the Board to give the certificate regarding details of payment made under Code No.OR/1743, no compliance has been made by the Secretary, OSHB hence the benefit has not been extended to the DLR employees by their Head Office at Bhubaneswar and assessment of dues in respect of these 16 DLR employees was pending hence in order to take conscious decision in this regard has directed the Secretary, OSHB and the representative of this establishment to submit a detail list of contractors by whom the 16 DLR workers have been engaged and accordingly name and address of 24 contractors were furnished. All the contractors have been impleaded as parties out of them only two contractors namely Sri Ramesh Ch. Biswal and Sri Mihir Kumar Jena attended the proceeding on 29.01.1997, filed detail submission whereas other contractors though file Hazira but not presented themselves while the case was taken up. Accordingly the principal employer was also directed to submit a detail statement of payments made to the contractors showing the work order number and the amount paid to the contractors for the said period as the contractors failed to appear before the authority for proper determination of the dues.

31. But the principal employer as well as the contractors failed to arrange the production of records during the pendency of the proceedings, the representative of the Orissa State Housing Board, Bhubaneswar who has appeared on 28.04.1997 was advised to issue suitable instruction to the Executive engineer, OSHB, Jeypore Project Division to represent their case properly and accordingly appropriate direction was issued to the Executive Engineer but not appeared, the case was adjourned on 23.05.1997/26.05.1997.

32. Thereafter, the Project Engineer in-charge had appeared, filed detail list of the contractors, value of agreement, date of commencement of project, date of completion of project and the actual value of work done by the

contractors, accordingly the authority since relevant record has not been produced has drawn adverse inference though imposed 30% of the actual work value has been taken as labour component to determine in respect of employees engaged by or through the contractors and accordingly the amount has been assessed.

33. From perusal of the order impugned, there is no dispute after going through the same that Code bearing No.OR/1743 has been opened by the OSHB which has been meant for DLR workers.

34. The opening of the Code itself suggests that the petitioner-Board has come under the purview of the 'establishment' and hence there is no need to conduct further enquiry regarding determination of the fact that whether the Board is coming under the definition of 'establishment' or not.

35. The authority with full substance and after full satisfaction that the petitioner-board is coming under the purview of the establishment as prescribed under the Act, 1952 has initiated proceeding under Section 7-A issued notice to the Board, in spite of several opportunities not appeared, when appeared the Divisional Officer, Orissa State Housing Board, Jeypore Division has requested the authority to implead the Executive Engineer or the petitioner-board, Jeypore Division as party to the proceeding, prayer was allowed then Project Engineer has appeared after several adjournments, disclosed the details of the contractors.

36. Hence, the Court has taken adverse inference, thereafter came to definite finding for determination of claim of the petitioner by taking 30% of the actual work value as labour component and accordingly the amount has been assessed.

37. Scope of judicial interference under the proceeding 7-A of the act, 1952 is very limited because the same depends upon the determination of the value on the basis of evidence produced before the authority.

38. The authorities have tried their level best for production of the documents by granting several adjournment but the documents have not been produced. This has been taken as adverse inference and the amount has been assessed by taking 30% of the labour component.

39. The spirit of the Act is purely beneficiary in nature, in order to sustain the employees who have got no support under any statute so that they may sustain their life at old age.

40. The petitioner-board being beneficiary of the State Government since constituted by the order passed by the State Government is supposed to follow the provisions of the Act, 1952.

41. From the record and from the reason given hereinabove, there is no dispute that main function of the Board is to construct building to provide it to the needy people of the State in subsidised rate and for that purpose contractors are being engaged who are engaging labourers for execution of the work.

42. The board being the principal employer was duty bound to give proper implementation of the Scheme, the Scheme is that the workers who are working either under the principal employer or through contractors for the purpose of construction of work of the principal employer it is the duty of the board to deposit the statutory contribution as per the Act, 1952 so that it may be disbursed to the workers/employees.

43. There is also no dispute after the pronouncement of the judgment in the case of **M/s. P.M. Patel and sons vrs. Union of India (supra)** that even in the construction work of a house the work is being taken by the contractors has to deposit the amount in the contributory fund.

44. There is also no dispute after the pronouncement of the judgment in the case of **S.K. Nasiruddin Beedi Merchant Ltd.** (supra) that the scope of Section 7-A is for determination of the amount and not to determine as to whether a particular body is coming under the definition of the establishment or not since it is to be decided under the Act itself.

45. Hence, taking into consideration all these aspects of the matter and for the foregoing reasons, I find no reason to interfere with the impugned order. Accordingly, the writ petition is dismissed.

Writ petition dismissed.

2016 (I) ILR - CUT-201

K. R. MOHAPATRA, J.

M.C. NO. 242 OF 2013
(ARISING OUT OF RFA NO. 230 OF 2009)

PRAMODINI PATTNAIK (SINCE DEAD) ……... Petitioner/ Appellant

.Vrs.

SMT. JAYASHREE TARAI & ANR. ………Opp. Parties/ Respondents

AND

RAMAKANTA MOHANTY ………Petitioner

INDIAN SUCCESSION ACT, 1925 – S.211

Executor of will – Executor can only represent and continue the litigation on behalf of the testator by getting himself transposed but he can not claim/establish his independent right over the property covered under the will/testament unless the probate or letter of administration is granted in his favour by a competent court of law – Held, the application filed by Ramakanta Mohanty under Order 22 Rules 3, 10 & 11 C.P.C. is allowed and he is permitted to be substituted in place of the sole deceased appellant. (Paras 6,7)

Case Laws Referred to :-

1. AIR 1954 Pat, 175 : Ramcharan Singh -V- Mst. Dharohar Kuer
2. AIR 1988 Ori 143 : Surendra Ch. Jena & Ors. -V- Laxminarayan Jena & Ors.
4. AIR 1980 ORISSA 27 : Kannhialal Sarda & Anr. -V- State of Orissa & Ors.

For Petitioner/ Appellant : M/s. A.R.Dash, R.N.Behera, P.K.Behera, S.N.Sahu & K.S.Sahu

For Opp. Parties/ Respondents : M/s. N.C.Pati & B.Das
Mr. Nigamananda Das

Date of Judgment: 11.12.2015

JUDGMENT

K.R. MOHAPATRA,J

This is an application under Order 22 Rules 3, 10 and 11 of CPC filed by one Ramakanta Mohanty, son of Adaita Charan Mohanty praying, inter

alia, to be substituted in place of deceased appellant, namely, Promodini Pattnaik.

2. The petitioner inter alia contended that the sole appellant, namely, Pramodini Pattnaik died on 05.05.2013. Before her death, she had executed a registered Will on 24.10.2005 in favour of the petitioner (Ramakanta) as executor of the Will. Thus, he is the legal representative of the deceased appellant and right to sue and to be sued survives with him. He is entitled to continue the appeal. Accordingly, he seeks leave of this Court to be substituted in place of sole deceased appellant and to prosecute the appeal.

3. Respondents 1 and 2 filed two separate counter affidavits objecting prayer of the petitioner.

Respondent No.1 in his counter affidavit challenged the genuineness of the Will on various grounds. He further stated that respondent No.2 is the adopted son of the sole deceased appellant and has no conflicting interest with that of the appellant. Thus, it is highly improbable to believe that the deceased appellant has executed the Will in favour of petitioner-Ramakanta Mohanty, who is none other than the brother of respondent No.2. He further submitted that the proceeding for probate of the Will being pending before the competent court of law, the prayer of the petitioner should not be entertained. Thus, he prayed for dismissal of the petition.

Respondent No.2, in his counter affidavit, denied the contentions raised in the petition. It is contented inter alia that the petition filed by Ramakanta Mohanty is not maintainable. Respondent No.2 has also filed an application to transpose as appellant to prosecute the appeal as he is the only legal heir of the deceased appellant and has no conflicting interest with that of the appellant. Though he admitted the date of death of the sole appellant, but strongly refuted the Will alleging it to be a forged one. He also submitted that no right will accrue in favour of said Ramakanta Mohanty unless the Will is probated by competent court of law. Thus, he prayed for dismissal of the petition.

4. Respondent No.2 had, in fact, filed an application as Misc. Case No.45 of 2014 to be transposed as appellant. Subsequently, when the matter was taken up on 30.11.2015, he did not press the application and accordingly Misc. Case No.45 of 2014 was dismissed as not pressed.

5. Mr.A.R.Dash, learned counsel for the appellant referring to the provisions of Section 211 of the Indian Succession Act, 1925 (for short, 'the Act') submitted that Ramakanta Mohanty being the executor of the

registered Will dated 24.10.2005 executed by the sole deceased appellant, is her legal representative for all purposes and is entitled to continue this appeal as right to sue survives with him. He further submitted that respondent No.2, who is the adopted son of the deceased appellant, does not press this application to be transposed as appellant. Thus, it is essential for the petitioner to be substituted in place of the deceased appellant to keep litigation alive and continue the appeal.

6. Mr.N.C.Pati, learned counsel for respondent No.1, on the other hand refuting the contentions raised by Mr.Dash submitted that Section 211 of the Act should not be read in isolation. A conjoint reading of Sections 211 and 213 of the Act makes it abundantly clear that no right of an executor or a legatee can be established in any court of justice unless the Court of competent jurisdiction grants a probate or a letter of administration of the Will executed by the deceased appellant. The Will in question being suspicious in nature no right can accrue to the petitioner (the executor) unless probate is granted. In fact, a probate proceeding in respect of the Will in question is pending before the competent Court of law. Thus, the appeal should stand abated till probate of the Will is granted in favour of the executor-petitioner. Thus, he prayed that the petition filed is premature and cannot be considered at this stage. He also submitted that no enquiry as required under Rule 5 of Order 22, CPC having been made the petition is not maintainable and hence the same is liable to be dismissed.

Section 211 of the Indian Succession Act, 1925 is extracted here under for better appreciation of the case:-

> "**211. Character and property of executor or administrator.—**
>
> (1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.
>
> (2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship of some other person."

Section 211 thus postulates the executor or administrator, as the case may be, of a deceased person, is his 'legal representative' fo r all purposes

with regard to property covered under the testament, i.e., the Will. However, Section 213 of the Act makes it clear that no right as executor or legatee can be established in any Court of justice unless a Court of competent jurisdiction in India grants probate of the Will under which the right is claimed by the executor or the legatee. Section 2(11) of the CPC defines 'legal representative' as follows:-

> "2(11)"Legal Representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;"

It emanates from the definition that legal representative is a person, who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. From the provisions of law as discussed above, it is to be seen as to whether the petitioner, who is undisputedly the executor of the Will dated 24.10.2005, can be treated to be the legal representative of the sole deceased appellant. It leaves no room for doubt that the legal representative is only entitled to continue the suit or appeal, as the case may be, on the basis of the claim laid by the deceased plaintiff and/or appellant. He is not entitled to plead contrary and obtain reliefs which the plaintiff himself/herself is not entitled to. He is also not entitled to claim independent title of his own in respect of the property contrary to what had been claimed in the suit. He only represents the estate of the deceased [See 51 (1981) CLT 42]. Thus, the term 'legal representative', as appears in Section 211 of the Act, cannot be given a different meaning. It is also not in conflict with the meaning as defined in Section 2(11) of CPC. All the properties of the testator covered under the testament vests with the executor, but the same does not give any right to him to establish his independent right over the property unless a probate or letter of administration, as required under Section 213 of the Act, is granted in his favour. He being an executor is only entitled to protect the estate and to continue the litigation. Mr.Dash placed reliance upon a decision of the Patna High Court in the case of ***Ramcharan Singh Vs. Mst. Dharohar Kuer***, reported in AIR 1954 Pat, 175, wherein, at paragraph 8, it has been held as under:-

> "12. It is Section 211 and not Section 213, which deals, with the vesting of the property of a deceased person, and it says, without any specification as to time, that the executor or the administrator, as the

case may be, is the legal representative of the deceased for all purposes and the property of the deceased person vests in him as such. The corresponding provisions in the former statutes, namely, the Indian Succession Act, 1865, and the Probate and Administration Act, 1881, were contained in the Chapter of those Acts dealing with the grant of probate and letters of administration. This fact was relied on in some reported decisions as an argument supporting the proposition that the vesting in the executor occurs when probate is granted. Section 211, however, occurs in Part 8 of the Act entitled "Representative Title to Property of Deceased", while Part 9 deals with Probate, Letters of Administration and Administration of Assets of the Deceased." This argument is, therefore, no longer available. On the terms of Section 211 there is no reason to limit the vesting of the property in the executor in the manner contended for. The section being in general terms which speaks of the property as vesting in the executor or the administrator "as such", the vesting would occur as soon as there is an individual answering to the description of an executor or administrator as the case may be. This happens in the case of an administrator when he is appointed by a competent authority and in the case of the executor when the testator dies. Had it been intended that the vesting of property in the executor would be dependent on the grant of probate the necessary provision would have been made in the statute as was done by Section 220 relating to letters of administration in cases of intestacy. This section is in strong contrast to Section 213 dealing as it does with rights, whereas Section 213 deals with evidence. The reason for this difference is that in the case of succession under a will Section 211 had already provided for the vesting of the property of the deceased….."

Relying upon the aforesaid decision, this Court in the case of ***Surendra Chandra Jena And Ors. vs Laxminarayan Jena and Ors.,*** reported in AIR 1988 Ori 143 in paragraph 4 has held as follows:-

"4. Apart from the above fact, Section 211 of the Act makes a special provision. According to this provision, the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. According to the scheme of the above provision of the Act, the executor is not required to wait for the grant of the probate but can ipso facto being the legal representative prosecute the lis in

view of the devolution of the interest under Order 22, Rule 10 of the Civil P.C. inasmuch as the testator's title stands vested in the executor on the his death….”

In a reported decision of this Court in the case of ***Kannhialal Sarda and another Vs. State of Orissa and others***, AIR 1980 ORISSA 27, in paragraph 9 of which it has been held as follows:-

> “9. It is contended on behalf of the petitioner in these two writ petitions that the petitioner, in his capacity as the executor of Baijnath's will, is the legal representative of Baijnath for all intents and purposes as soon as Baijnath died, and all the properties of Baijnath vested on the petitioner on the death of the former as provided under Section 211 of the Succession Act, and the petitioner's right to possess and manage the property has already accrued to him on the death of the testator and the vesting of that right is not postponed till the grant of the probate by the court, and that being so, the State should renew the mining leases in his favour without waiting for the grant of probate of the said will. The proposition of law contained in the above submission, even if true, cannot enable the petitioner to obtain the direction asked for from this Court, as a Court of Justice cannot come to his aid unless probate of the will is granted in his favour. As discussed above Section 213 of the Act lays down a peremptory rule of law, and the petitioner, cannot obtain the aid of this Court to establish his right as the executor under the alleged will so long he is not able to produce the probate of the will before this Court. Of course the want of a probate may not affect his right as the executor under the will, but if he seeks the aid of any court of law to establish any of the rights of an executor under the will, the court will not come to his aid till he does not produce the probate of the will….”

Thus, from the discussions made in the aforesaid reported decisions and the law laid down therein, it is crystal clear that an executor can only represent and continue the litigation on behalf of the testator, but he cannot claim/establish his independent right over the property covered under the Will/testament unless the probate or letter of administration is granted in his favour by a competent court of law.

7. In that view of the matter, the petition is allowed. Sri Ramakanta Mohanty is permitted to be substituted in place of the sole deceased appellant. Consolidated cause title shall be filed within a week. Issue urgent certified copy of the order on proper application.

Petition allowed.