

2016 (I) ILR - CUT- 438

SUPREME COURT OF INDIA

H. L. DATTU, CJ. & ARUN MISHRA, J.

CIVIL APPEAL NO. 8971 OF 2015
(Arising out of S.L.P. (C) No. 20942 of 2014)

DHANURDHAR SAHOO & ORS.Appellants

.Vrs.

DIVISIONAL MANAGER & ORS.Respondents

MOTOR VEHICLES ACT, 1988 – S.168

Award of compensation – Tribunal awarded Rs. 2,68,000/- with interest @ 6.5 % P.A. – Appeal before High Court for enhancement – Appeal dismissed – Hence the present appeal – Hon'ble Apex Court enhanced the compensation awarded by the Tribunal by another sum of Rs. 2,00,000/- with 6 % interest P.A. on the enhanced amount from the date of the order passed by the High Court with a direction to respondent No.1 to pay the same expeditiously, without any deductions whatsoever. (Paras 6,7,8)

For Appellants : Mr. Binay Kumar Das
For Respondents : Ms. Manjeet Chawla

Date of Order : 27.10.15

ORDER

1. Leave granted.
2. This appeal is directed against the judgment and order passed by the High Court of Orissa at Cuttack in M.A.C.A.No.988 of 2009, dated 29.04.2014, whereby and whereunder the High Court has dismissed the appeal filed by the appellants/claimants.
3. The appellants/claimants are the family members of the deceased, who met with an accident and succumbed to his injuries. On the claim made by the appellants/claimants, the Motor Accident Claims Tribunal, Cuttack (for short 'the Tribunal') had awarded a compensation of Rs.2,68,000/- with interest @ 6.5% p.a. from the date of the petition till realization.
4. Being aggrieved by the compensation so awarded by the Tribunal, the appellants/claimants preferred an appeal before the High Court. The High Court, by its impugned judgment and order has dismissed the same.

Aggrieved by the judgment and order passed by the High Court, the appellants/claimants are before us in this appeal.

5. We have heard learned counsel for the parties to the lis.

6. After going through the records and judgments and orders passed by the Tribunal as well as the High Court and keeping in view the peculiar facts and circumstances of the case, we are of the opinion that the compensation awarded by the Tribunal be further enhanced by another sum of Rs.2,00,000/- with interest at the rate of 6 per cent on the enhanced amount from the date of the order passed by the High Court.

7. Accordingly, while allowing this appeal, we modify the judgments and orders passed by the High Court as well as the Tribunal. The appellants/claimants are now entitled for another sum of Rs.2,00,000/- over and above the compensation so awarded by the Tribunal with interest at the rate of 6 per cent on the enhanced amount from the date of the order passed by the High Court. In all other respects, the judgment and order passed by the High Court is sustained.

8. We clarify that the compensation shall be paid by the respondent No.1 as expeditiously as possible at any rate within a period of six weeks from today, without any deductions whatsoever. Ordered accordingly.

Appeal disposed of.

2016 (I) ILR - CUT- 439

D. H. WAGHELA, CJ. & S. C. PARIJA, J.

W.P.(C) NO. 20821 OF 2015

GOPAL CHANDRA SAHU

.....Petitioner

.Vrs.

STATE OF ORISSA & ORS.

.....Opp. Parties

Tender – Administrative decision of the state – Scope of judicial review when Courts have no expertise to correct such decision – Interference by Courts is not warranted unless the action of the tendering authority is found to be malicious and there is misuse of its statutory powers.

In this case petitioner having failed to show as to how the authorities have acted in an arbitrary, unreasonable and malafide manner in dealing with his bid and there being no impropriety or illegality in the selection of O.P. No. 6, this Court finds no scope for interference in exercise of its extra ordinary writ jurisdiction.

(Paras 25,26)

Case Laws Referred to :-

1. (1999) 1 SCC 492 : Raunaq International Ltd. v. I.V.R.Construction Ltd. & Ors
2. (2003) 5 SCC 437 : Union of India & Anr. v. International Trading Co & Anr.
3. (2007) 14 SCC 517: Jagdish Mandal v. State of Orissa and others
4. (2009) 6 SCC 171 : Meerut Development Authority v. Assn. of Management Studies
5. (2012) 8 SCC 216 : M/s. Michigan Rubber (India) Ltd. v. State of Karnataka
6. (2014) 3 SCC 760 : Maa Binda Express Carrier and another v. North-East Frontier Railway & Ors.

For Petitioners : Shri Asok Mohanty, (Sr.Advocate), P.C.Nayak & S.K.Mishra,

For Opp. Parties : M/s. P.K. Muduli, Addl. Standing Counsel
Dr.A.K.Mohapatra, Shri A.Patnaik,
S.Samal, A.Mohapatra, S.Nath,
S.K.Barik,J.Dash & S.Mohapatra,

Date of Judgment: 02.02.2016

JUDGMENT

S.C.PARIJA, J.

This writ petition has been filed challenging the action of the authorities (opposite party nos.2 to 4) in finalizing the tender for the work “Improvement of Sundar Irrigation Project, Jadamunda, under the Dam Rehabilitation and Improvement Project (DRIP) for the year 2015-16”, in favour of opposite party no.6.

2. The brief facts of the case as detailed in the writ petition are that the Chief & Basin Manager, Tel Basin, Bhawanipatna, in the Department of Water Resources, Government of Odisha, issued E-Procurement Notice/Invitations for Bids (IFB) through National Competitive Bidding, inviting Item Rate Bids in double cover system for the work “Improvement

of Sundar Irrigation Project, Jadamunda, under the Dam Rehabilitation and Improvement Project (DRIP) for the year 2015-16". The approximate value of the work was Rs.593.28 lakhs.

3. Pursuant to such Invitation for Bids, the petitioner along with 8 other bidders, including the opposite party no.6, participated in the said tender process. On 14.10.2015 the technical bid was opened and the bid documents submitted by the bidders were scrutinised and it was found that all the 9 bidders have technically qualified. Subsequently, on 06.11.2015 the price bid was opened in presence of all the bidders and it was found that the present petitioner along with one BKD Infrastructure Pvt. Ltd. were the lowest bidders (L1) and the opposite party no.6 was the second lowest bidder (L2), as per the price bid summary uploaded in the official website. However, on 09.11.2015, the Chief & Basin Manager, Tel Basin, Bhawanipatna (opposite party no.2) intimated the Superintending Engineer, Western Irrigation Circle, Bhawanipatna (opposite party no.3), that the rate quoted by the opposite party no.6 amounting to Rs.5,04,31,685.90 being 14.995% less than the amount put to tender of Rs.5,93,27,983/-, the bid submitted by opposite party no.6 is approved, taking single digit decimal into consideration as per Clause-4 of the bid document. Accordingly, the Executive Engineer, Nuapada Irrigation Division (opposite party no.4) was instructed to execute agreement with the opposite party no.6, he being the 1st lowest bidder.

4. The case of the petitioner is that as his bid was found to be the lowest along with one BKD Infrastructure Pvt.Ltd., as per the price bid summary uploaded in the official website, the subsequent decision of the Chief & Basin Manager (opposite party no.2), to accept the bid of opposite party no.6 as the 1st lowest and approve the same is arbitrary, unreasonable and discriminatory. Accordingly, a prayer has been made to set aside the decision of opposite party no.2 in approving the award of the contract work in favour of opposite party no.6 and to award the same in favour of the petitioner.

5. Learned counsel for the State, with reference to the counter affidavit filed on behalf of opposite party nos.1 to 4, submitted that the claim of the petitioner that he was the lowest bidder (L1) and was therefore entitled to be awarded with the contract work is erroneous and misconceived. It is submitted that as per Clause-4 of the E-Procurement Notice/Invitations for Bids dated 11.9.2015, the bidder was required to write unit rate upto one decimal point only and if he writes the unit rate upto two or more decimal points, the first decimal point shall be considered without rounding off.

During evaluation of the price bid, it was found that some of the bidders, including the present petitioner, had quoted the rates upto two or more decimal points in some of the items. Therefore, the evaluation of the financial bid has been done by the authorities taking the unit rate upto one decimal point, as per the said Clause-4 of the Invitation for Bids. After evaluation, opposite party no.6 was found to be the first lowest bidder and the petitioner was the fourth lowest bidder. Accordingly, the price bid of opposite party no.6 was accepted and approved.

6. As regard the plea of the petitioner that he along with BKD Infrastructure Pvt.Ltd. were the lowest bidders (L1), as per the price bid summary uploaded in the official web site, learned counsel for the State submitted that the same is a computer generated sheet, which was not accepted by the authorities, as some of the bidders had quoted their rates upto two or more decimal points in some of the items, in violation of Clause-4 of the bid document. It is specifically submitted that there was no official declaration of the petitioner being the lowest bidder (L1) and the entire bid process has been finalized in a fair and transparent manner, strictly in terms of the conditions enumerated in the bid documents.

7. In response, learned counsel for the petitioner, with reference to the rejoinder affidavit submitted that even calculating the rates offered by the petitioner as per Clause-4 of the bid document, the rate offered by the petitioner is 14.99.002% less than the estimated cost and the rate offered by opposite party no.6 is 14.995% less than the estimated cost and therefore as both the bids were 14.99% less than the estimated cost, the authorities were required to finalise the tender through transparent lottery system, as per Clause-36 of the Orissa Public Works Department Code ("OPWD Code" for short), which provides that if more than one bid is quoted at 14.99% (Decimals upto two numbers will be taken for all practical purposes) less than the estimated cost, the tender accepting authority will finalise the tender through a transparent lottery system.

8. Learned counsel for the petitioner submitted that the provisions of OPWD Code apply to the present tender in question, which would be evident from the contract data, which is a part of the tender document. It is submitted that in the said contract data, in the marginal note to the provision regarding deposit of additional performance security, it has been clearly mentioned that the successful bidder will deposit the additional performance security as per the amended Para-3.5.5 Volume-II of OPWD Code, Government of Odisha,

Works Department No.12366, dated 08.11.2013. According to learned counsel for the petitioner, this implies the application of the provisions of OPWD Code to the tender in question.

9. Learned counsel for the petitioner further submitted that the application of the provisions of the OPWD Code to the present tender in question is also evident from the Project Appraisal Document of the World Bank, which clearly stipulated for financial management (FM) and it is proposed to use the extant Government FM procedures that are contained in various documents, such as the State Public Works Department (PWD) Manual, Central Public Works Account Code and General Financial Rules of respective States and CWC. The FM arrangement for DRIP will be documented in a concise FM Manual, which will standardize the policies, procedures and reporting formats to be followed.

Learned counsel for the petitioner has also relied upon the Office Memorandum dated 24.1.2009, issued by the Government of Orissa, Works Department, prescribing the guidelines/procedure to be followed in introduction of e-Procurement in Government of Orissa, in support of his contention that the provisions of the OPWD Code is applicable to the present tender.

10. Learned counsel for the petitioner accordingly submitted that as the rates offered by the opposite party no.6 was 14.995% less than the estimated cost and the rate of the petitioner was 14.99.002% less than the estimated cost, both the bids should have been counted as 14.99% less than the estimated cost, as per Clause-36 of the OPWD Code, which provided that if more than one bid is quoted at 14.99% (Decimals upto two numbers will be taken for all practical purposes) less than the estimated cost, the tender accepting authority should have finalise the tender through a transparent lottery system. It is accordingly submitted that as the authorities have not acted in a fair and transparent manner and have proceeded to accept the bid of opposite party no.6 as the lowest bidder (L1), in contrary to the clear provisions of the OPWD Code, the impugned decision is liable to be quashed.

11. Learned counsel for the State in his rejoinder to the response of the learned counsel for the petitioner, submitted that the bids of the parties having been considered by the concerned authorities strictly in terms of the conditions enumerated in E-Procurement Notice/Invitations for Bids and after

evaluation of the bids, taking the unit rate of the items upto one decimal point, the bid of opposite party no.6 having been found to be lowest, being 14.995% less than the estimated cost, the authorities have accepted the same as the first lowest bid, which cannot be faulted. It is further submitted that as regard the plea of the petitioner with regard to the application of the provisions of the OPWD Code to the tender in question, the same is wholly erroneous and misconceived, as the conditions of the present tender, as detailed in the bid document, cannot be diluted and/or expanded by importing the provisions of the OPWD Code.

12. It is further submitted that in any case, the petitioner having accepted the terms and conditions of the tender and having participated in the same, he is not permitted to question the said terms and conditions and seek expansion of its scope by application of the provisions of the OPWD Code. It is further submitted that the project being funded by the World Bank, the terms and conditions of the tender are to be strictly adhered to and no dilution is permissible. In this regard, learned counsel for the State has referred to the Procedures and Guidelines for Procurement of Goods/Equipment, Works and Consulting Services under Dam Rehabilitation & Improvement Project funded by the World Bank, prescribed by the Central Water Commission, Government of India, Clause-2.1(iv) of which provides that except with the prior concurrence of the Bank, there shall be no negotiation of price with the bidder, not even with the lowest evaluated bidder.

It is further submitted that even otherwise, the amended Para 3.5.5 Volume-I of the OPWD Code itself states that the same may not be applicable to the works funded by the World Bank and other agencies, in which case their guidelines shall be followed.

13. As regard the marginal note in the contract data with regard to the furnishing of additional performance security as per the provisions of the OPWD Code, learned counsel for the State submits that such marginal note cannot be a legitimate aid to construction of the terms and conditions of the tender and the same cannot over-ride the clear and specific terms of the tender.

14. Learned counsel appearing for the opposite party no.6, while reiterating the stand taken by the State, submitted that as the evaluation of the bids of the parties has been made by the authorities in terms of Clause-4 of the Invitation for Bids, taking into account the unit rate of items upto one decimal, no impropriety or illegality can be committed by the authorities so as to warrant any interference in the present writ petition.

15. The ambit and scope of judicial review of administrative action in contractual matters has been settled by a long line of decisions of the apex Court. In *Tata Cellular v. Union of India*, (1994) 6 SCC 651, the apex Court emphasized the need to find a right balance between administrative discretion to decide the matters on the one hand, and the need to remedy any unfairness on the other, and observed:-

“94. (1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract....

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

16. In *Raunaq International Ltd. v. I.V.R.Construction Ltd. & Ors*, (1999) 1 SCC 492, the apex Court reiterated the principle governing the process of judicial review and held that the writ court would not be justified in interfering with commercial transactions in which the State is one of the parties, except where there is substantial public interest involved and in cases where the transaction is mala fide.

17. In *Union of India & Anr. v. International Trading Co & Anr.* (2003) 5 SCC 437, the apex Court in similar circumstances has held as under:-

“15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide

enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.”

18. In *Jagdish Mandal v. State of Orissa and others*, (2007) 14 SCC 517, the following conclusion is relevant:-

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade

courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone:

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

19. The apex Court in *Meerut Development Authority v. Assn. of Management Studies*, (2009) 6 SCC 171, has laid down the legal principle that the bidder who has participated in tender process has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from hidden agenda. The relevant paragraph is extracted hereunder:-

“The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting

tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.”

20. In *M/s. Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, the legal position on the subject was summed up after a comprehensive review and the principles of law applicable to the process for judicial review was identified by the Hon'ble Court in the following words:-

“19. From the above decisions, the following principles emerge:

- (a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
- (b) Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
- (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
- (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
- (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:-

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”, and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.”

21. In *Maa Binda Express Carrier and another v. North-East Frontier Railway and others*, (2014) 3 SCC 760, the apex Court while dealing with the scope of power of judicial review in contract matters, has held as under:-

“The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made or benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.”

22. In the present case, Clause-4 of the E-Procurement Notice/Invitations for Bids (IFB) provides as under:-

“The Bill of Quantities shall mention Quantities of each item thereto. The Contractor has to mention his “ITEM UNIT RATES” in figures in the prescribed format appended to the Bid document.

The bidder has to only enter the amount in figures and the system translates this into words and the total amount.

The Bidder/Contractor will write UNIT RATE up to one decimal point only. If he writes the UNIT RATE up to two or more decimal point, the first decimal point shall only be considered without rounding off.”

Clause-12.1.1 of the Instructions to Bidders (ITB) provides as follows:-

“8. Bill of Quantities (BoQ): The schedule of quantities shall mention Quantities of each item. The Bidder/Contractor has to mention UNIT RATE (in figures) in the prescribed format appended to the tender document. The amount shall be worked out thereof against each item & gross total worked out at the end by the system itself.”

Clause 5 of the Invitations for Bids provides that bidding will be conducted through the National Competitive Bidding procedures specified in the World Bank’s Guidelines.

23. It is not disputed before us that the authorities have evaluated the price bids of the bidders in accordance with the terms and conditions of the tender. It is also not the case of the petitioner that his price bid has been improperly evaluated or worked out. The only plea of the petitioner is that as the rates offered by him was 14.99.02% less than the estimated cost and the rates quoted by the present opposite party no.6 was found to be 14.995% less than the estimated cost, both the bids should have been counted as 14.99% less than the estimated cost and the tender accepting authority should have finalized the tender through a transparent lottery system in terms of Clause-36 of the OPWD Code, the provisions of which are applicable to the present tender.

24. The terms and conditions of the tender cannot be expanded or diluted by application of the provisions of the OPWD Code, on the basis of a marginal note to the provisions for deposit of additional performance security

in the contract data. Such marginal notes cannot be considered as a legitimate aid to construction of the provisions of the tender document. The side notes are not to be considered as part of the tender document and therefore such marginal notes cannot be referred to for the purpose of construction of the provisions of the tender document. (See-*Guntaiah and others v. Hamamma and others* (2005) 6 SCC 228).

25. It is trite law that the terms and conditions of an invitation to tender is not open to judicial scrutiny, as the same is in the realm of contract. It is reiterated at the risk of repetition that in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities and unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted.

26. The petitioner having failed to show as to how the authorities have acted in an arbitrary, unreasonable and mala fide manner in dealing with his bid and there being no impropriety or illegality in the selection of opposite party no.6, we do not find any scope for interference in exercise of extra ordinary writ jurisdiction. The writ petition being devoid of merits, the same is accordingly dismissed. No costs.

Writ petition dismissed.

2016 (I) ILR - CUT- 451

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

JCRLA NO. 94 OF 2009

BISHNU DAKUA

.....Appellant

.Vrs.

STATE OF ORISSA

.....Respondent

EVIDENCE ACT, 1872 – S.27

Statement of an accused to a Police Officer while in custody – Section 27 is an exception to sections 25 & 26 of the Evidence Act – Confessional part of the statement of the accused recorded U/s. 27 of the Act is not admissible – However any information given by an accused pursuant to which any fact is discovered is admissible U/s. 27 of the Act.
(Para 10)

Case Laws Referred to :-

1. AIR 1995 SC 1437 : Madhusudan Singh -V- State of Bihar
2. 1995 SCC (Criminal) 445 : Prem Kumar & Anr. -V- State of Bihar
3. 1993 SCC (Criminal) 1096 : Surinder Pal Jain -V- Delhi Administration
4. (1988) 1 OCR 400 : Bhaga Gauda -V- State
5. AIR 1976 SC 483 : Mohmed Inayatullah -V- State of Maharashtra
6. AIR 1979 SC 1042 : Baboo & Ors. -V- State of Madhya Pradesh
7. 1999 SCC (Criminal) 539 : State of Himanchal Pradesh -V- Jeet Singh
8. (1985) CLT 180 (Vol.59) : Manju @Mohan Das -V- State
9. 1985 Cuttack Law Reports 256 : Lakshmi Jani -V- State

For Appellant : Mr. Arunendra Mohanty
For Respondent : Mr. Sk. Zafarulla, A.S.C.

Date of hearing : 01.09.2014

Date of Judgment : 05.09.2014

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

The appellant Bishnu Dakua faced trial in the court of Adhoc Additional Sessions Judge, Fast Track Court No.4, Bhubaneswar being charged under section 302 Indian Penal Code in Criminal Trial No.7/55 of 2008 for committing murder of Bhagaban Goud (hereinafter "the deceased") on or about 6.7.2007 night at Salia Sahi, Sriram Nagar. The learned trial court vide impugned judgment and order dated 29.8.2009 found the appellant guilty under section 302 I.P.C. and sentenced him to undergo imprisonment for life and to pay a fine of Rs.5,000/-, and in default to suffer R.I. for a further period of six months.

2. The prosecution case as per the First Information Report lodged by one Ganesh Gauda (P.W.7) of village Badakholi before the Inspector-in-Charge, Nayapalli Police station on 6.7.2007 at about 4.00 a.m. is that P.W.7 was working as a daily labourer and staying at Salia Sahi of Sriram Nagar since last 15 days. On 5.7.2007 in between 8.00 p.m. to 9.00 p.m. while he was going to take his dinner, the landlord of the rented house where the appellant and the deceased were staying came to him and informed him that the appellant and the deceased had a tug of war and one of them is lying on the ground. Receiving such message, P.W.7 proceeded to the spot and found that the deceased was lying injured in front of the shop room situate close to the house of the landlord. When P.W.7 asked the deceased about the injury, the deceased disclosed that there was a quarrel between him and the appellant over cooking and the appellant stabbed him. Immediately P.W.7 and another shifted the deceased to a private clinic where first aid bandage was tied on his abdomen. The doctor told them that in case the deceased was not cured, he should be shifted to

Unit-VI Hospital, Bhubaneswar. During course of treatment, some other persons arrived at the clinic and the deceased was then brought back to his rented house. Some persons suggested that the deceased should be taken to some other place as there was quarrel between him and the appellant and accordingly the deceased was taken to the school verandah. The landlord came and informed about the arrival of the appellant in the house and accordingly P.W.7 and others apprehended the appellant. The matter was intimated to the Police Station and with the help of police the deceased was shifted to Unit-VI Hospital, Bhubaneswar, where he was declared dead.

Basing on such information of P.W.7, on 6.7.2007 at 4.00 a.m. Nayapalli P.S. Case No.215 of 2007 was registered under section 302 I.P.C. against the appellant. After registration of the case, I.I.C., Nayapalli P.S. directed S.I. Rabi Narayan Padhi (P.W.4), of said Police Station to investigate the matter.

During investigation I.O. P.W.4 examined P.W.7 at the Police Station and also arrested the appellant on being produced by P.W.7 and others. On the disclosure statement of the appellant, a scissors (M.O.I) was recovered from under a stone near Loyal School vide seizure list (Ext.2). The wearing apparels of the appellant i.e. one Ganji, one light black colour pant suspected to have been stained with blood were also seized under seizure list (Ext.5) and the appellant was forwarded to court. P.W.4 conducted inquest over the dead body of the deceased at Capital Hospital, Bhubaneswar on 6.7.2007 in presence of witnesses and prepared inquest report (Ext.6). The dead body was sent for post-mortem examination and Dr. Sarbeswar Acharya (P.W.6), F.M.T. Specialist of Capital Hospital, Bhubaneswar conducted the post-mortem examination and submitted his report vide Ext.12. The Medical Officer examined the scissor and opined that the injury on the deceased was possible by that scissor. P.W.4 also seized the wearing apparels and blood sample of the deceased produced by the Constable after the post-mortem examination vide seizure list (Ext.8). The seized articles including the scissor were sent to the State Forensic Laboratory, Bhubaneswar on 3.8.2007 for chemical examination and finally charge sheet was submitted against the appellant.

3. The defence plea is one of denial. It is pleaded by the appellant that the deceased was his close friend and both of them were staying together in one room and cooking food in that room and on the date of occurrence, he was not present in his rented room and had gone to his work place and he has been falsely entangled.

4. In order to prove its case, the prosecution examined 7 witnesses.

P.W.1 Rabindra Pradhan is the landlord of the house where the appellant and deceased were staying together. He has a grocery shop near the spot and he stated about the push and pull between the appellant and the deceased on the road and found that the deceased has received bleeding injury on the lower part of the abdomen and the appellant leaving the spot telling "let him die". He further stated

about the shifting of the deceased to the hospital and apprehension of the appellant during late night of the occurrence.

P.W.2 Ajit Kumar Sahu and P.W.5 Krushna Chandra Swain have stated about the recovery of the scissor under a stone at the instance of the appellant near Loyal school on 6.7.2007 under seizure list (Ext.2).

P.W.3 Jayasen Palai was the Constable attached to Nayapalli Police station who had escorted the dead body for post-mortem examination and after the post-mortem was over, produced the Lungi of the deceased, blood samples and scissor given by the doctor before the Investigating Officer.

P.W.4 Rabi Narayan Padhi is the Investigating Officer.

P.W.6 Dr. Sarbeswar Acharya, F.M.T. Specialist, Capital Hospital, Bhubaneswar had conducted the post-mortem examination over the dead body of the deceased and proved his report vide Ext .12.

P.W.7 Ganesh Gauda is the informant in the case.

The appellant examined himself as a defence witness under section 315 Cr.P.C. and he stated that he has been falsely entangled in the crime.

5. Let us first see as to whether the prosecution has proved that the deceased met a homicidal death or not?

Apart from the inquest report vide Ext.6 prepared by the I.O. (P.W.4), the prosecution relies upon the evidence of P.W.6, the F.M.T. Specialist of Capital Hospital, Bhubaneswar who conducted the post-mortem examination. According to P.W.6, a lacerated wound of size ¼" X ¼" looking dark red and dry was present on right lower abdomen 5" down and out to the navel. On dissection, the wound was looking like a lacerated puncture into the abdominal cavity up to mesentery of large gut. The doctor opined the injury to be ante mortem caused by blunt pointed object and the cause of death was due to syncope as a result of the injury which according to him was sufficient in ordinary course of nature to cause death. P.W.6 examined the scissor sent by the Investigating Officer and opined that injury found on the abdomen of the deceased was possible by the said scissor.

The learned counsel for the defence does not dispute about the homicidal death of the deceased.

In view of the evidence of P.W.6 coupled with the post-mortem report (Ext.12), we are of the view that the deceased met a homicidal death.

6. At the outset, it is noticed that even though the informant (P.W.7) has mentioned in the F.I.R. about the dying declaration of the deceased at the spot immediately after the occurrence implicating the appellant, but during his evidence in court, he has not whispered anything regarding the dying declaration. The

prosecution also has not declared this witness as hostile and has not confronted him about the contents of the F.I.R.

In the case of **Madhusudan Singh v. State of Bihar reported in AIR 1995 SC 1437**, it is held as follows:-

“5.....F.I.R. by itself is not a substantive piece of evidence. It can be used to either contradict or corroborate the maker thereof in the manner provided under the Evidence Act.”

P.W.7 has not supported the version relating to dying declaration mentioned in the F.I.R. in Court and nothing has also been brought out by the prosecution on record that the deceased made any dying declaration at the spot or thereafter implicating the appellant. Thus, we cannot give any importance to the alleged oral dying declaration part as has been reflected in the F.I.R.

7. In the present case there is no eye witness to the actual assault on the deceased. Thus, the case virtually rests upon circumstantial evidence. The circumstances are as follows:-

- (i) There was push and pull between the appellant and the deceased at the spot on the date of occurrence and immediately thereafter the deceased was found lying with bleeding injury on the abdomen; and
- (ii) Recovery of scissors (M.O.I) at the instance of the appellant.

MOTIVE.

8. The prosecution case is based on circumstantial evidence. Let us see whether the prosecution has established any motive behind the commission of the crime.

Under section 8 of the Evidence Act, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. In case of **Prem Kumar and another –v- State of Bihar reported in 1995 Supreme Court Cases (Criminal) 445**, it is held as follows:-

“5.....Very often, a motive is alleged to indicate the high degree of probability that the offence was committed by the person who was prompted by the motive. In our opinion, in a case when motive alleged against the accused is fully established, it provides a foundational material to connect the chain of circumstances. We hold that if the motive is proved or established, it affords a key or pointer, to scan the evidence in the case, in that perspective and as a satisfactory circumstance of corroboration. It is a very relevant and important aspect- (a) to highlight the intention of the accused and (b) the approach to be made in appreciating the totality of the circumstances including the evidence disclosed in the case.”

In case of **Surinder Pal Jain –v- Delhi Administration reported in 1993 Supreme Court Cases (Criminal) 1096**, it is held as follows:-

“11.....In a case based on circumstantial evidence, motive assumes pertinent significance as existence of the motive is an enlightening factor in a process of presumptive reasoning in such a case. The absence of motive, however, puts the court on its guard to scrutinize the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof”.

P.W.1 has stated that the appellant and the deceased were staying together in a room in his house on rent. He further states that the appellant and the deceased had no quarrel or fighting prior to the date of occurrence. The appellant during his examination as D.W.1 has also stated that the deceased was his close friend and both of them were staying in one room and they were also cooking their food in that room. There is no other material regarding any kind of previous dispute or enmity between the appellant and the deceased. Thus, the prosecution has failed to bring forth any motive for the appellant to commit the crime.

FIRST CIRCUMSTANCE

9. P.W.1 has stated about push and pull between the appellant and the deceased at the spot on the date of the occurrence. According to him, he was running a grocery shop at Sriram Nagar Basti and on 5.7.2007 between 7.00 p.m. to 7.30 p.m., he was in his grocery shop and had seen appellant and the deceased were pushing each other and when he went there, he found blood was coming out from the lower part of belly of the deceased and the appellant left the spot saying “let him die, let him die”.

P.W.1 has stated in his cross-examination that there used to be good business in his shop during morning and evening time and at the time of alleged incident; there were one or two customers in his shop. None of the customers have been examined in this case.

P.W.1 has stated that there were other houses by the side of the road and the persons were staying in those houses. None of those person has also been examined.

P.W.1 has stated that the appellant first started the push towards the deceased and both the appellant and the deceased were giving push and pull to each other. He has not stated to have seen any scissor in the hands of the appellant during tussle.

P.W.1 has stated in his chief examination that the deceased told him that he was killed and he was killed (Maridela, Maridela) but in the cross-examination he has stated that when he saw the deceased, the deceased was crying saying “Marigali, Marigali” (i.e., I am dying, I am dying) and was not in a stable mind.

P.W.1 has stated in his chief examination that the appellant was telling at the spot "Marijau, Marijau" (let him die, let him die), but in the cross-examination he has stated that when he asked the appellant to stay there, he did not hear and ran away.

P.W.1 has stated that the chapals of both the appellant and the deceased were lying at the spot but the I.O. (P.W.4) has not seized any chapal from the spot.

In view of the self contradictory evidence of P.W.1, it would not be safe to accept his solitary testimony to come to a finding that there was push and pull between the appellant and the deceased at the spot and immediately thereafter the deceased was found with bleeding injury on his abdomen.

SECOND CIRCUMSTANCE.

10. The witnesses to the recovery of scissors (M.O.I) at the instance of the appellant are P.W.2, P.W.5 and the I.O. (P.W.4).

All these witnesses have stated that the appellant first confessed his guilt and then gave statement regarding place of concealment of scissor which was recorded under Ext.1 and then led the police and others to give recovery of scissor.

The learned trial court has relied on the confessional part of the appellant before the police made in the disclosure statement vide Ext.1.

Section 27 of the Evidence Act indicates that in consequence of any information received from an accused in the custody of a Police Officer, if any fact is discovered, then so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

This Section is an exception to Sections 25 and 26 of the Evidence Act. Section 25 of Evidence Act states that confession to Police Officer shall not to be proved as against a person accused of any offence and Section 26 of the Evidence Act states that confession by an accused while in police custody unless it being made in the immediate presence of a Magistrate, shall not be proved against him.

The object of making a provision in Section 27 of the Evidence act was to permit certain portion of the statement made by an accused to a Police Officer admissible in evidence whether or not such statement is confessional or non-confessional. That bar against admissibility would stand lifted if the statement distinctly relates to a discovery of fact. Recovery or even production of object by itself need not necessarily result in discovery of a fact. The fact discovered within the meaning of the section is not equivalent to the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it.

The pre-condition to bring Section 27 of the Evidence Act into operation is that the discovery of a fact must be proved, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved.

In case of **Bhaga Gauda v. State, reported in (1988) 1 OCR 400** it is held as follows:-

“8.....Therefore, the exact information given by the accused while in custody or in other words, the statement made by the accused must be recorded by the Investigating Officer and if pursuant to such information or statement, recovery is made, then that information or statement becomes admissible under Section 27 of the Evidence Act.”

The confessional part of the accused in his statement recorded under Section 27 of the Evidence Act is not admissible and only such information given by an accused pursuant to which any fact is discovered is admissible.

In case of **Mohmed Inayatullah –v- State of Maharashtra reported in AIR 1976 SC 483**, it is held as follows:-

“11.....The last but the most important condition is that only “so much of the information” as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word “distinctly” means “directly”, “indubitably”, “strictly”, “unmistakably”.

13.....What the accused stated that, “I will tell the place of deposit of the three Chemical drums which I took out from the Haji Bunder on first August”;

14.....The next step would be to split up the statement into its components and to separate the admissible from the inadmissible portion or portions. Only those components or portions which were the immediate cause of the discovery would be legal evidence and not the rest which must be excised and rejected. Thus processed, in the instant case, only the first part of the statement, viz., “I will tell the place of deposit of the three Chemical drums” was the immediate and direct cause of the fact discovered. Therefore, this portion only was admissible under section 27. The rest of the statement, namely, “which I took out from Haji Bunder on first August”, constituted only the past history of the drums or their theft by the accused; it was not the distinct and proximate cause of the discovery and had to be ruled out of evidence altogether.”

In case of **Baboo and others –v- State of Madhya Pradesh reported in AIR 1979 SC 1042**, it is held as follows:-

“13.....However, it is revealing to refer to the recovery memos, Katarna is recovered from accused No.1 under seizure memorandum Ext. P-8 in which

it is recited that accused No.1 made the statement that he would show the Katarna with which he assaulted Diwan Singh on 21.9.1973 at night. The first part in the sizure memo would be inadmissible because the fact that accused No.1 assaulted Diwan Singh is not discovered in pursuance of the information given by accused No.1. It would be a confessional statement to police officer hit by section 25 of Evidence Act.”

11. The learned trial Court has observed in his judgment as follows:-

“.....Therefore in the evidence of P.Ws. 2, 4 & 5, it is proved that the accused has confessed before police and witnesses that he has stabbed Bhagaban Goud by means of the scissor seized vide Ext.2 and later proved as M.O.1 to cause his death on 5.7.07.”

According to us the learned trial court has committed illegality in relying upon the confessional part of the statement of the appellant made in Ext.1 as it is hit by section 25 of Evidence Act.

The learned counsel for the appellant submitted that the recovery of M.O.1 was made from near the Loyal school which is obviously an open and accessible place to all and therefore no importance can be given on such recovery.

In case of **State of Himanchal Pradesh –v- Jeet Singh reported in 1999 Supreme Court Cases (Criminal) 539**, it is held as follows:-

“26. There is nothing in section 27 of Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is “open or accessible to others”. It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main road side or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses the fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.”

P.W.2 has stated that the accused searched for the scissors at two to three places and lastly brought it out. P.W.2 has further stated that he cannot say as to who was proceeding first and who was following whom, when they were proceeding to the alleged spot of recovery. P.W.5 has stated that police vehicle was

parked in front of Loyala School and police officer first alighted and then they alighted but he does not remember who first alighted and who was following whom.

In view of such statements, it is very difficult to accept that the appellant led the police party and others to give recovery of M.O.1 and that he had previous knowledge about the exact place of concealment of M.O.1.

Mere fact of recovery of a scissor at the instance of the appellant is also not sufficient to base a conviction under section 302 I.P.C.

In case of **Manju @ Mohan Das –v- State reported in Vol. 59 (1985) Cuttack Law Times 180**, it is held as follows:-

“7. Even if it be held that M.O.1 did belong to the appellant, in the absence of other evidence pointing to the guilt of the appellant, the recovery of M.O.1 at the spot coupled with the evidence relating to a previous quarrel, could not sustain the charge. The recovery of a blood stained article of an accused person can be used to corroborate other evidence and it cannot, by itself, prove a charge of murder.”

12. In this case, there is no material on record that after the seizure of the scissor, the same was kept in a sealed cover by the Investigating Officer. The seizure of scissor was made on 6.7.2007 but it was sent for chemical examination only on 3.8.2007. There has been inordinate delay in sending the scissor for chemical examination and there is absolutely no explanation as to why there was such delay. All the articles including the blood stained wearing apparel of the deceased as well as the appellant and the scissor were kept in one card board box and sent for chemical examination.

In case of **Lakshmi Jani –v- State reported in 1985 Cuttack Law Reports 256**, it is held as follows:-

“12.....As observed and held by this Court in 1985 (1) Crimes 593 (Nimai Murmu –v- State) seized articles containing suspected stains of blood should invariably be sent for chemical examination immediately after their seizures. It is necessary and desirable that the police officer recovering articles with suspected stains of blood should immediately take steps to seal them and evidence should be produced that the seals were not tampered with till the articles were sent to the Chemical Examiner for analysis. If such precautions are not taken, the Court may not place the same reliance on the discovery of blood stains on the seized articles as it would have done if necessary precautions had been taken.”

13. The learned trial court has relied upon the evidence of P.W.1 so also the recovery of the scissor at the instance of the appellant coupled with the confession of the appellant before police to convict the appellant. We have already discussed as

to how and why the evidence of P.W.1 is not acceptable and why the recovery of scissor is not sufficient to convict the appellant. In view of our discussions and in view of the evidences discussed above, we are not able to agree with the findings of the trial court. We hold that the chain of evidence is not complete and the prosecution has not established the case against the appellant beyond all reasonable doubt.

In the result, the appeal is allowed and the impugned judgment and order of conviction and sentence is set aside and the appellant is acquitted of the charge under section 302 I.P.C. The appellant is in custody. He is directed to be set at liberty forthwith if he is not required in any other case.

Appeal allowed.

2016 (I) ILR - CUT- 461

I. MAHANTY, J. & R.DASH, J.

WA NO. 5 OF 2013

KIRANBALA ROUT

.....Appellant

.Vrs.

SMT. RASNAMAYEE ROY

.....Respondent

ODISHA GRAMA PANCHAYAT ACT, 1965 – S.31

Election petition – Security towards Cost deposited three days after filing of the election petition – Maintainability – In terms of the 2nd proviso to Section 31 of the Act, Election Tribunal is specifically vested with the authority to exercise his discretion to condone delay – Provision in the Act, 1965 is not similar with the provisions under the Representation of the people Act, 1951 – Held, both filing of election petition and deposit of Security towards cost was within the period of limitation as prescribed under the Act, 1965 – There is no error in the impugned order calling for interference by this Bench.

(Paras 6 to10)

Case Laws Referred to :-

1. AIR 2002 S.C. 3105 : M.Y.Ghorpade v. Shivaji Rao M.Poal & Ors
2. OJC No.4025 of 1993 : Dr. Nirmal Chandra Satpathy v. Jitu Patnaik @ Jitendranath Patnaik & Ors.

For Appellants : M/s. Anupam Rath & M. Panda
For Respondent : M/s. Goutam Mishra & D.K.Patra

Date of hearing : 14.02.2013

Date of judgment : 10.02.2016

JUDGMENT

I. MAHANTY, J.

In the present appeal, the appellant has sought to assail the judgment dated 6.12.2012 passed in W.P.C. No.20648 of 2012 whereby the learned Single Judge upheld the order dated 24.9.2012 passed by the learned Civil Judge (Jr. Division), Jajpur in Election Misc. Case No.6 of 2012. By the said order, the learned Civil Judge (Jr. Division) had rejected the appellant's petition under Section 31 of the Orissa Gram Panchayats Act, 1965.

2. The present case in a nutshell is that, the appellant and the respondent both contested for the post of Sarpanch of Kalamatia Gram Panchayat under Bari Block in the district of Jajpur in the year 2012 Gram Panchayat election. The appellant being the successful candidate, the respondent sought to challenge the appellant's election by filing Election Misc. Case No.6 of 2012 before the Election Tribunal, Jajpur i.e. the Court of the learned Civil Judge (Jr. Division), Jajpur alleging that the appellant was disqualified to hold the post of Sarpanch as she had given birth to three children after the year 1995. Admittedly, the election result was declared on 21.2.2012 and election petition was presented on 2.3.2012. It is averred that the election petition was filed without the necessary deposit of security for costs as required under Section 31 of the Orissa Gram Panchayat Act and the said security towards cost was deposited by way of challan on 5.3.2012 i.e. after three days of filing of the election petition.

3. It was contended by the appellant that this delay of three days in depositing the security money was not in consonance with Section 31 of the Orissa Gram Panchayat Act and accordingly, she filed election petition before the Election Tribunal seeking dismissal of the election petition. Being unsuccessful before the election Tribunal, W.P.(C) No.20648 of 2012 came to be filed before this Court and the same came to be dismissed vide order dated 6.12.2012. Consequently, the present challenge in the present Writ Appeal.

4. The learned Single Judge has dealt with in detail every contention advanced by the appellant as well as the respondent and came to conclude as follows:

“22. In view of the above, this Court is of the opinion that since the election petition was presented on 2.3.2012 without security deposit, which was paid on 5.3.2012 i.e. after three days of the filing of the election petition and both filing of election petition and payment of security deposit were made within the period of limitation, there is substantial compliance of Section 31 of the Orissa Grama Panchayats Act and therefore, the Election Tribunal is justified to entertain the election petition and reject the objection filed by the returned candidate.”

5. The essential challenge in the present appeal pertains to interpretation of Section 31 of the Orissa Gram Panchayat Act which reads as follows:

31. Presentation of petitions- (1) The petition shall be presented on one or more of the grounds specified in Section 39 before the [Civil Judge (Junior Division)] having jurisdiction over the place at which the office of the Grama Sasan is situated together with a deposit of such amount, if any, as may be prescribed in that behalf as security for costs within fifteen days after the date on which the name of the person elected is published under Section 15:

Provided that if the office of the [Civil Judge (Junior Division)] is closed on the last day of the period of limitation as aforesaid the petition may be presented on the next day on which such office is open:

Provided further that if the petitioner satisfies the [Civil Judge (Junior Division)] that sufficient cause existed for the failure to present the petition within the period aforesaid the (Civil Judge (Junior Division)] may in his discretion condone such failure.

(2) No candidate who has been elected to be a member, Sarpanch or Naib-Sarpanch of a Grama Panchayat shall be debarred from holding office as such member. Sarpanch or Naib-Sarpanch merely by reason of any election petition having been filed against him unless his election has been declared void by the [Civil Judge (Junior Division)]”

6. Placing reliance on the aforesaid provision, it is contended on behalf of the appellant that there was no scope for the election Tribunal to exercise any concession or discretion with regard to the statutory compliance required for deposit of security for cost together with the election petition.

It is asserted that both the Election Tribunal as well as the learned Single Judge put great emphasis on the fact that, post filing of the election petition i.e. 3 days after the cost came to be deposited is within the period of limitation. It is contended that such deposit of cost subsequent to the date of filing of the election petition, cannot cure the requirement of Section 31 of Orissa Gram Panchayat Act, in other words, the word “together” would be made redundant, if it is held that the security deposit can be made at any later date after the filing of the election petition.

7. Learned counsel for the appellant in support of his contention placed reliance on an unreported judgment of this Court in the case of ***Dr. Nirmal Chandra Satpathy v. Jitu Patnaik @ Jitendranath Patnaik and others, in OJC No.4025 of 1993***, disposed of by judgment dated 6.9.1993 in which, Hon’ble the Chief Justice B.L.Hansaria (as he then was) while dealing with the challenge to the election of the post of Chairman of Joda Notified Area Council, interpreted the provision of Section 19 of the Municipal Act, 1950 and came to hold that, “Section 19 of the Municipal Act, did exclude by necessary implication the provision of Section 5 of the Limitation Act inasmuch as if application of this Section were to be conceded, the limitation provided by section 19 of the Act would virtually be set at naught, because it would then become open to the District Judge to extend the period of limitation on sufficient cause being shown”.

Learned counsel for the appellant also placed reliance on the judgment of the Hon’ble Supreme Court in the case of ***M.Y.Ghorpade v. Shivaji Rao M.Poal and others, AIR 2002 Supreme Court 3105***. In this matter, a challenge arising out of the election under the Representation of the People Act, 1951 has been made, wherein His Lordship concluded that the requirement including security deposit at the time of presentation of the petition is mandatory.

8. Learned counsel for the respondent, on the other hand, while placing reliance on the judgment rendered by the learned Single Judge sought to highlight the difference between various provisions contended in the Orissa Municipal Act, 1950; the Representation of the People Act, 1951 and the Orissa Gram Panchayat Act, 1965. In this respect, it was submitted that neither Orissa Municipal Act, 1950 nor the Representation of the People Act, 1950 vests power to condone any delay in both, filing of the petition seeking to challenge an election and the statutory deposit as required.

He further submitted that, in the present case, challenge has been made to an election arising out of the Orissa Gram Panchayat Act, 1965 and in terms of the 2nd proviso to Section 31 thereof, the election Tribunal is specifically vested with the authority to exercise his discretion to condone delay. For appreciation, the same is quoted as hereunder:

“Provided further that if the petitioner satisfies the [Civil Judge (Junior Division)] that sufficient cause existed for the failure to present the petition within the period aforesaid the [Civil Judge (Junior Division)] may in his discretion condone such failure.”

9. On perusal of the judgments cited by the appellant, it is clear therefrom that whereas in the case of *Dr.Nirmal Chandra Satpathy* (supra), this High Court was dealing with the matter arising under the “Orissa Municipal Act, 1950” and not the “Orissa Gram Panchayat Act, 1965”.

Under the Orissa Municipal Act, 1950, this Court came to conclude that Section 19 thereof did not conceive of vesting any discretion with the Election Tribunal for condoning any delay and in the absence of any such authority, this Court came to hold that the limitation provided by Section 19 of the Orissa Municipal Act, could not be watered down since the same would introduce great uncertainty as the election could then be challenged virtually at any time. Insofar as the case of *M.Y.Ghorpade* (supra) is concerned, the said case is clearly distinguishable, inasmuch as, Hon’ble the Supreme Court was dealing with the requirement of Section 117 and 86(1) of the Representation of People Act, 1951 and came to conclude that the requirement of making the necessary security deposit at the time of presentation of the petition was mandatory. It is once again reiterated herein that the present case is one where challenge has been made to election under the “Orissa Gram Panchayats Act, 1965” and not under the “Representation of the People Act, 1951”.

10. In the light of the discussions as noted hereinabove, we are of the considered view that there is absolutely no ambiguity nor justification to entertain the present Writ Appeal since the views expressed by the learned Single Judge are in consonance with the requirements of law as stipulated under the Orissa Gram Panchayats Act, 1965 and although the election petition was presented on 2nd March, 2012, the security deposit was made on 5th March, 2012 and both the filing of the election petition as well as deposit of security was within a period of limitation prescribed under the Orissa Gram Panchayats Act, 1965 and consequently, we find no error of law to justify any interference therewith.

11. Accordingly, the Writ Appeal stands dismissed but, in the circumstances without cost.

Writ appeal dismissed.

2016 (I) ILR - CUT- 466

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

W.P.(C) NO. 13328 OF 2015 (WITH BATCH)

SANGHAMITRA DASH

.....Petitioner

.Vrs.

STATE OF ORISSA

.....Opp. Party

(A) CONSTITUTION OF INDIA, 1950 – ART.226

Excise Policy 2015-16 – Clause 4.2.2. of the policy provides to convert all Beer Parlours to IMFL “ON” Shops (Hotel/Restaurants) from 01.04.2015 onwards – Action challenged – No provision in the Act and Rules for such conversion – Main object is to raise the revenue – Clause 4.2.2. is also not compatible with the proposal made vide clause 4.2.11 of such excise policy – It has no reasonability and rationality – Held, the impugned clause being de hors to the constitutional provision and law made there under is illegal, arbitrary, unjust, hence liable to be quashed.

(Paras 18 to 22)

(B) CONSTITUTION OF INDIA, 1950 – ART.226

Policy decision of the Government – Power of Judicial Review by the Court – Court has jurisdiction to interfere if it is found to be arbitrary, unjust and unconstitutional.

Case Laws Referred to :-

1. (1979)3 SCC 212 : Vithal Dattatraya Kulkarni v. Shamrao Tukaram Power
2. (1978)3 SCC 558 : P.N. Kaushal v. Union of India
3. AIR 1967 SC 1368 : Krishan Kumar Narula v. State of J&K
4. (1975)1 SCC 29 : Nashirwar v. State of M.P.
5. (1996)3 SCC 709 : State of A.P. v. McDowell & Co.
6. (1995)1 SCC 574 : Khoday Distilleries Ltd. v. State of Karnataka

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& D.K.Pani
M/s. Arun Kumar Patra & B.Shadangi
M/s. Biswajit Moharana, B.Mohanty,
D.Chhotray & S.Mohanty
M/s. Kunja Sundar Das & R.Mohapatra
M/s. Biswajit Mohanty-3 & R.Mohapatra

For Opp. Party : Mr. J.Patnaik, Addl.Govt.Advocate

Date of hearing : 12.11.2015

Date of judgment : 24.12.2015

JUDGMENT

DR. D.P.CHOUDHURY, J.

The petitioners have got common question of law involved in this writ petitions for which they are disposed of by this common judgment on consent of parties. The petitioners in all the writ petitions challenge the clause 4.2.2 of the Excise Policy relating to excise duty, fee structure and guidelines for the year 2015-16 issued by the Department of Excise, Government of Odisha.

FACTS OF THE CASE :

2. The backdrop of the case of the petitioners is that they are licensees of their beer parlours at different places of the State as described in the writ petitions. It is stated inter alia, that the opposite parties have published new Excise Policy relating to excise duty, fee structure and guidelines (for settlement of excise shops and establishments) for the year 2015-16 vide Annexure-1. Clause 4.2.2 of Annexure-1 states in the following manner :-

“4.2.2 IMFL ‘ON’ SHOPS AND BEER PARLOURS

- a) It has been decided to convert all BEER Parlours to IMFL “ON” Shops (Hotel/Restaurants), As a result from 1st April 2015 onwards, all Beer Parlour ON Shops should either convert to IMFL ON Restaurant or should close their operation.”
- b) New “ON” License for Star Hotels with or without Lodging accommodation and duly financed by banks and other recognized agencies may be allowed with above mentioned license fee.

c) The License fee “ON” shops may be realized in two equal installments.”

3. It is the case of the petitioners that in pursuance of the aforesaid clause, the Superintendent of Excise of the respective districts where the petitioners have opened the Beer Parlour, issued letter for renewal of license of beer parlour for converting the same to IMFL hotel/restaurant by 30.9.2015 during the year 2015-16 subject to fulfillment of terms and conditions and provisions of law vide Annexure-2. It is also stated that the Superintendent of Excise of respective districts issued reminders to adopt the said excise policy otherwise the beer parlour will be closed.

4. The petitioners further averred that in their locality, the State Government has established IMFL “OFF” shop and there is no such provision for the IMFL “OFF” shop whereas the said excise policy clause without having any legal sanctity, has been made applicable to them. It is also stated that in most of the areas, there are members of Scheduled Tribe and Scheduled Caste and there is no necessity of star hotel facility of international standard or national standard so as to follow the said provision of excise policy for the year 2015-16. It is also stated that the financial condition of the local people are not good to fetch income for the petitioners to pay the licence fee in the event of opening of IMFL “ON” shop with restaurant so that the people can consume the beer along with other products

5. of liquor with food. Moreover, there are many restaurants road side available to cater to the needs of people. It is stated by the petitioners that the opposite parties have not taken into consideration the fact that the policy of the State Government will permit the liquor consumed by the citizens instead of prohibiting them. This shows the policy of the State Government is against the public policy and arbitrary resulting the same to be against the natural justice. It is therefore prayed by the petitioners to quash the said clause 4.2.2 of excise policy 2015-16 and consequent notification/letter issued to implement the same.

6. Counter has been filed by O.Ps.1 & 2 and they have submitted therein that the writ petitions are devoid of merit as they are not competent to challenge the policy decision of the Government with regard to the conversion of beer parlour to IMFL “ON” shops. It is also stated that to avoid misuse of licensing conditions, Government have taken policy decision not to grant beer parlour license any more while making provision for conversion of existing beer parlour into IMFL ‘ON’ shops. However, it is stated in the counter that this Court in W.P.(C) No. 5627 of 2010 following

the decision of the Hon'ble Apex Court, have observed that law is well settled that the policy decision taken by the State or its authority/instrumentality is beyond the purview of judicial review unless otherwise consumed beyond arbitrary and unreasonable or in contravention of the statutory provisions or the same infringes the fundamental right of individual. According to this opposite parties, the same license holders having beer parlours have already applied to the State Government to follow the impugned excise policy. If the object of granting license is not achieved, then grant of license which is misused otherwise, cannot per se meet the need of the people. It is also averred in the counter that in lean season, there is less demand of beer for which the beer parlour owners illegally sell IMFL by giving sitting facility to the customers. As such there is discontentment of the public resulting the present excise policy in question to come up. By virtue of new policy, the public can comfortably sit in the restaurant/hotel and enjoy the beer and liquor. Since the impugned excise policy is for the benefit of the people and for achieving the object of excise policy, the writ petitions should be dismissed.

SUBMISSION :

6. Learned counsels for petitioners submit that the excise policy as framed by the State Government is not supported by any provisions of Bihar & Excise Act, 1915 (hereinafter called as 'the Act') or the Rules made thereunder. Mere policy without being legislated under any Act or Rules, cannot be made applicable to the petitioners. He further submitted that by such impugned policy followed by the correspondence of the Excise Department to the Collector and the Superintendent of Excise and consequent letter of the Superintendent of Excise to the petitioners, are violative of Article 14 of Constitution of India because the impugned policy is not applicable to the IMFL 'OFF' shop and only applicable to the beer parlour. It is stated that the impugned policy having said that the licensee either has to renew the license as per the impugned clause 4.2.2 of the Excise Policy 2015-16 or they may close down the shop, is against the Article 19(1)(g) of the Constitution of India as every person has fundamental right to choose the trade or profession. It is also submitted that the licensee-petitioners have been illegally over-burdened being directed to follow the impugned policy, their natural justice has been violated. It is the bone of contention of the petitioners that the said impugned clause is not only unreasonable, unjust and illegal but also they are against the constitutional provisions. So he submitted to quash such impugned excise policy and allow the licensees to operate as usual.

7. Learned Additional Government Advocate appearing for the State submitted that relevant policy regarding conversion of beer parlours to “ON” shops/Restaurants have been duly communicated by the State Government in Excise Department vide letter no. 1067/Ex dated 3.3.2015. He further submitted that the beer parlour license have been granted for selling of beer only for consumption inside the premises but exclusive privilege holders of the beer parlours are selling IMFL in violation of the licenses conditions. According to him, to avoid abuse of license conditions, the Government have taken a policy decision as alleged in the petition. He further submitted that this Court in W.P.(C) No. 5627 of 2010 has clearly held that the policy decision by a State is beyond the purview of judicial review, unless the same is arbitrary, unreasonable and in contravention of the statutory provision or fundamental right. He also submitted that the aforesaid view has also been taken by the Hon’ble Apex Court in the decision reported in **Tamilnadu Education Department, Ministerial and General Sub-ordinate Services Association v. State of Tamilnadu and others**, AIR 1980 SC 379 and **Ekta Shakti Foundation v. Government of NCT of Delhi**, (2006)10 SCC 337. Since the policy is beyond the judicial review, the petitioners have no locus standi to file such petitions. Moreover, it is submitted that in **State of Punjab v. Dewan Modern Breweries Ltd**, (2004) 11 SCC 26, Hon’ble Apex Court have held that trading liquor is not a fundamental right for which the contention of the learned counsel for the petitioners that the policy intervenes their fundamental right, is not correct. According to him every State Government is competent to take policy decision for the benefit of the people but not against the interest of the people. Since the present policy has been frustrated by the Beer Parlour licensees and the consumption of liquor being against the object of public order, such excise policy has been formulated. He further submitted that according to the need of the people in the society, the policy decision has been taken and the beer parlour owners have been given option for such conversion so that they can take advantage of their own license and operate the same for the consolidated period. It is submitted to reject the writ petitions filed by the petitioners.

POINTS FOR DISCUSSION :

8. A. The main point for discussion is whether clause 4.2.2. of Excise policy 2015-16 is against the object of excise policy and against the provisions of law ?
- B. Whether the petitioners are entitled to any relief as prayed for ?

DISCUSSION :

9. It is admitted fact that the petitioners are license holders of beer parlours for the year 2014-15. It is not disputed that the State Government has issued excise duty fee structure and guidelines for the year 2015-16 and the impugned clause 4.2.2 contained therein. Article 47 of the Constitution of India States:

“47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.”

10. The aforesaid provision of the State directive in Chapter IV of the Constitution makes it mandatory for the State for raising level of nutritional standard of living of its people and their health. It also speaks about the total prohibition in the State but for medicinal purposes, there could be use of drinks and drugs which are not injurious to health. This provision has been well deliberated in the decision reported in **Razakbhai Issabhai Mansuri and others**, 1993 Supp(2) SCC 659 in the following manner :

“xx xx xx We are, therefore, of the considered view that in pith and substance it is a law relating to intoxicating liquor providing for regulatory measure and squarely falls under Entry 8 List II of Seventh Schedule. As rightly urged by Mr Subramania Poti, learned counsel for the respondent, if the manufacture of liquor could be prohibited, certainly its manufacture with rotten gur could be regulated. Entry 8 confers the necessary competence on the State Legislature to enact laws for such regulation. We may also add that 1968 Order excludes alcohol from its purview because it is covered by Entry 8 of List II. It is, therefore, incorrect to suggest that the State Legislature was lacking in legislative competence in passing the Amendment Act.” (Para -6)

“xx xx xx A large body of legislation under Article 19(1)(g) when challenged, has been upheld by courts, as being in furtherance of such policy, as valid on the ground of the Directive Principle. So far the intoxicating drinks are concerned their evil effects are well established specially for the Indian society. This was why the

framers of the Constitution considered it fit to include it, in expressed terms, in Article 47 while indicating the duty of the State to raise the standard of living and to improve the public health. It is, therefore, within the authority of the State to prohibit consumption of intoxicating liquor and the State of Gujarat was fully justified when it adopted the policy of prohibition. In order that this policy may succeed, it is not sufficient to merely ban manufacture and consumption of alcoholic drinks. To render it really effective further measures became essential in order to defeat the illegal activities of the anti-social elements engaged in illicit manufacture and illegal distribution of the liquor in the market. It, therefore, became obligatory for the State to take all such steps as found necessary for implementing the prohibition policy, by not only placing restrictions on the manufacture, sale and consumption of liquors but also by adopting such other regulatory measures, essential to achieve the objective.xx xx” (Para -11)

11. With due respect to the aforesaid authority we find that the Bombay Prohibition Act, 1949 was challenged before the Apex Court on the ground that under Article 47, the State Government made restriction on possession of rotten Gur in excess of prescribed limit and regulation of manufacture, use or consumption thereof in terms of permit/license etc. Their Lordships after analyzing all the factors held that in absence of any scientific basis for determining whether Gur became rotten, would not make it arbitrary. Moreover, the Hon’ble Apex Court in **State of Kerala and others v. Kandath Distilleries**, (2013) 6 SCC 573 held :

“9. The State Government, in pursuance of the directions given by the learned Single Judge in *Kandath Distilleries v. State of Kerala*³, again considered the matter and took the view that the Government has to make an “independent assessment of eligibility” of the applicant for the grant of licence. Holding so, the Government passed an Order on 16-3-2006. The operative portion of the order reads as under:

“Whenever, applications for distillery and compounding (blending and bottling) units are received, they are processed separately. The decision taken in each application may be based on the facts and the circumstances akin to the individual application and may not be a common decision. Licences were given on the applications of M/s

Amrut Distilleries, Palakkad; Empee Distilleries, Palakkad; Elite Distilleries, Thrissur and KS Distillery, Kannur during the period as alleged by the petitioner. At the same time applications from Kandath Distillery, S.R. Distillery, Sree Chakra Distillery, Rajadhani Distilleries, etc. were rejected. The Government cannot grant the privilege to all those who had applied for such licence, for a host of reasons. Restrictions have to be imposed, which is permissible under the Constitution. The Government has with effect from 29-9-1999 issued Government Order deciding not to grant fresh licences for distillery and compounding (blending and bottling) unit. The granting of licence for the distillery and compounding (blending and bottling) units is a prerogative of the Government and not the right of the petitioner. The directions and the communications from the offices to the petitioner are only the statutory requirements for processing the application and do not cast any right or claim on the petitioner.

In the above circumstances, the Government finds no reasons to reconsider the request of the petitioner under Section 14 of the Abkari Act. Request of the petitioner is settled accordingly, keeping in abeyance of the judgment of the Hon'ble High Court read 5th paper.

The Excise Commissioner will pass fresh orders on Ext. P-1 within the time-limit prescribed by the Hon'ble High Court.”

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“Right to carry on trade or business in liquor

24. Article 47 is one of the directive principles of State policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. The State has, therefore, the exclusive right or privilege in respect of potable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are *res extra commercium*, cannot be carried on by any citizen and the State can prohibit completely trade or business in potable liquor and the State can also create a monopoly in itself for the trade

or business in such liquor. This legal position is well settled. The State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are *res commercium*. Reference may be made to the judgments of this Court in *Vithal Dattatraya Kulkarni v. Shamrao Tukaram Power, P.N. Kaushal v. Union of India, Krishan Kumar Narula v. State of J&K, Nashirwar v. State of M.P., State of A.P. v. McDowell & Co. and Khoday Distilleries Ltd. v. State of Karnataka.*

25. The legislature, in its wisdom, has given considerable amount of freedom to the decision-makers, the Commissioner and the State Government since they are conferred with the power to deal with an article which is inherently injurious to human health.

26. Section 14 of the Act indicates that the Commissioner can exercise his powers to grant licence only with the approval of the State Government because the State has the exclusive privilege in dealing with liquor. The powers conferred on the Commissioner and the State Government under Section 14 as well as Rule 4 are discretionary in nature, which is discernible from the permissible language used therein.”

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“Mandamus — To issue licence

30. The legislature when confers a discretionary power on an authority, it has to be exercised by it in its discretion, the decision ought to be that of the authority concerned and not that of the court. The court would not interfere with or probe into the merits of the decision made by an authority in exercise of its discretion. The court cannot impede the exercise of discretion of an authority acting under the statute by issuance of a writ of mandamus. A writ of mandamus can be issued in favour of an applicant who establishes a legal right in himself and is issued against an authority which has a legal duty to perform, but has failed and/or neglected to do so, but such a legal duty should emanate either in discharge of the public duty or operation of law. We have found that there is no legal duty cast on the Commissioner or the State Government exercising powers under Section 14 of the Act read with Rule 4 of the 1975 Rules to grant the

licence applied for. The High Court, in our view, cannot direct the State Government to part with its exclusive privilege. At best, it can direct consideration of an application for licence. If the High Court feels, in spite of its direction, the application has not been properly considered or arbitrarily rejected, the High Court is not powerless to deal with such a situation that does not mean that the High Court can bend or break the law. Granting liquor licence is not like granting licence to drive a cab or parking a vehicle or issuing a municipal licence to set up a grocery or a fruit shop. Before issuing a writ of mandamus, the High Court should have, at the back of its mind, the legislative scheme, its object and purpose, the subject-matter, the evil sought to be remedied, the State's exclusive privilege, etc. and not to be carried away by the idiosyncrasies or the ipse dixit of an officer who authored the order challenged. Majesty of law is to be upheld not by bending or breaking the law but by strengthening the law."

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“Discretionary order — Article 14

32. Discretionary power leaves the donee of the power free to use or not to use it at his discretion. (Refer *Drigraj Kuer v. Amar Krishna Narain Singh*¹⁷.) Law is well settled that the exercise of statutory discretion must be based on reasonable grounds and cannot lapse into the arbitrariness or *caprice anathema* to the rule of law envisaged in Article 14 of the Constitution. It is trite law that, though, no citizen has a legal right to claim a distillery licence as a matter of right and the Commissioner or the State Government is entitled to either not to entertain or reject the application, they cannot enter into a relationship by arbitrarily choosing any person they like or discriminate between persons similarly circumscribed. The State Government, when decides to grant the right or privilege to others, of course, cannot escape of the rigour of Article 14, in the sense that it can act arbitrarily. In such a situation, it is for the party who complains to establish that a discriminatory treatment has been meted out to him as against similarly placed persons but cannot demand a licence for establishing a distillery unit, as a matter of right.

33. In *State of M.P. v. Nandlal Jaiswal*, this Court held that: (SCC p. 604, para 33)

“33. ... No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part

with its exclusive right or privilege of manufacturing and selling liquor. But when the State decides to grant such right or privilege to others the State cannot escape [from] the rigour of Article 14 [of the Constitution,] it cannot act arbitrarily or at its sweet will.”

34. We have noticed that the application preferred by M/s Kandath Distilleries (respondent herein) in the year 1987 was for establishing a distillery unit in Palakkad District. So also the applications submitted by M/s Amrut Distilleries, Bangalore and M/s Empee Distilleries, Madras and licences were granted to them for establishing the distillery units in Palakkad District. However, the respondent’s application was not considered. The Commissioner or the State Government has to take an independent decision in each application based on its eligibility and there cannot be any common decision. As held in *Nandlal Jaiswal*: (SCC p. 610, para 38)

“38. ... when the State Government is granting licence for putting up a new industry, it is not at all necessary that it should advertise and invite offers for putting up such industry. The State Government is entitled to negotiate with those who have come up with an offer to set up such industry.”

The State Government cannot grant the privilege to all those who have applied for such a licence in a particular district for a host of reasons. The State Government could restrict the number of distillery licences in a particular district by two and it can also grant a third licence in a particular district as well, but an applicant cannot claim a licence as a matter of right.”

12. With due respect to the aforesaid decision, it is observed that Article 47 empowers the State to take measures for people’s welfare and it has got absolute domain to declare the prohibition policy except use of the same for medicinal purposes. Apart from this, it is clear that a citizen has no fundamental right to trade or business in liquor as beverage and State can also impose restriction on trade and business of liquor as beverage. On the other hand the State have the power to determine the policy to regulate the trade or business of liquor.

13. Now adverting to the present case, we have perused the excise policy, excise duty, fee structure and guidelines for the year 2015-16. In the introduction, the object has been well described in the following manner :

2. Opium, Indian hemp and other narcotic drugs and narcotics.

Taxation of alcoholic beverages should be viewed in the context of establishing a balance between economic, ethical and social considerations. Consumption of alcoholic beverages has considerable adverse effects on health, affecting the long term productivity of the consuming individuals as well as the society. The Excise duties on intoxicants and narcotics are meant to play a restraining role on consumption since it is recognized universally as a demerit good. States also find it an attractive source of revenue as higher tax rates lead to both higher revenues and lower consumption.

Designing a suitable tax structure for this should consider the health costs. Both personal and social. Low tax rates would encourage consumption and lower tax revenues. Excessively high rates would discourage consumption but may also lead to tax evasion and flight of the tax base to neighbouring states, as well as shift to lower quality products. Both the consumption reducing effect and the revenue increasing effect depend on the elasticity of demand and the relevant tax rates. A suitable Excise policy would need to balance these conflicting objectives.

14. From the above paragraph, it is clear that the main object of the excise policy is to raise the revenue and to discourage consumption inasmuch as by increasing the Excise duties of the intoxicants and narcotics it would restrict the consumption but at the same time will earn good revenue for the State. Of course the object of the excise policy is in consonance with Article 47 of the Constitution of India inasmuch as Article 47 directs that State has got right to formulate the Excise policy with the object of prohibition or to regulate the trade or business in liquor by imposing restriction while granting license. The impugned Clause 4.2.2. of the Excise Policy 2015-16 does not elaborate as to how the conversion of beer parlour to IMFL “ON” shop restaurant/hotels will increase the revenue and reduce consumption. If there would be beer parlour converted to IMFL “ON” shop restaurant, more people will be attracted to consume foreign liquor by sitting in the restaurant and taking food and it will increase consumption which is against the Constitutional provision and the object of Excise policy 2015-16.

15. The Bihar and Orissa Excise Act, 1915 (hereinafter called “the Act”) and the Rules framed thereunder do not provide free trade or business in liquor or intoxicants. There is no such provision in the Act and the Rules

made thereunder about conversion of the beer parlour to IMFL “ON” shop restaurant/ hotels. There is provision for imposing restriction on granting license to the manufacturer or seller of IMFL/Beer/O.S. liquor and C.S. liquor, but the present restriction as to close down of the shop in the event of petitioners not converting the beer parlour to IMFL”ON’ shop and restaurant is anathema to the present provisions in the Act and the Rules.

16. Learned Counsel for the State Government has urged that the impugned Clause 4.2.2 has been retained as the beer parlour licence has been misused by the petitioner by allowing the customers to consume the IMFL supplied by the petitioner unauthorisedly and causing huge loss to the revenue. When there are adequate provisions in the Act and Rule made thereunder to regulate the license holders the plea of the State Government appears to be frivolous and unjust.

There is a clause 4.2.11 in Annexure-1 which describes hereunder:

“4.2.11 Model wine shop

It is proposed to allow Model Wine Shops attached to Star Hotel & in Luxury Hotels/Shopping Malls & Complexes with License Fee as specified. Shops would be permitted to sell wine and Low Strength liquor/Beer below 5% V/V in order to boost up sale of wine and Low Strength drinks in the State compared to hard drinks.”

17. From the aforesaid provision of Excise policy it is revealed that the State Government have also decided to open Model Wine shops in the Star Hotels and Luxury Hotels where low strength liquor/beer are to be sold to boost the sale of wine or to reduce the consumption of hard drinks . The definition “beer” means any liquor prepared from malt or grain as per section 2(b) of the Act. Similarly, Section 2(u) spells out that “liquor” means an intoxicating liquor and includes- (i) spirits of wine, rectified spirits, wine, beer, tari, pochwai, fermented liquor made from mohua or molasses, plain spirit made from materials recognised as country spirit base and every liquor consisting or containing alcohol; and (ii) any other intoxicating substance which the State Government may, by notification, declare to be liquor for the purposes of this Act.

17.1. Similarly, as per the definition of Section 2(p) foreign liquor means every liquor imported into India, other, than India made foreign liquor and country liquor and such other intoxicants as may be declared by the State Government to be foreign liquor. There is no definition of wine under the Act or the Rules made thereunder. From the Excise policy 2015-16 it appears that beer has got low strength, whereas wine and other liquor have got high strength of alcohol. When the definition “beer” also includes liquor and

definition of “liquor” includes wine and Clause 4.2.11 directs for sale of wine in Model wine shop to be opened in the Star hotels and luxury hotel to supply low strength wine to the customers, it is not conceived as to how beer having very low strength alcohol after being converted to IMFL “ON” shop with restaurant facility will supply the low strength “beer” including liquor to the customers. If star/luxury hotel owners have got scope of opening Morden wine shop for selling beer/wine of low strength, it will discriminate if Beer parlour which has got low investment are forced to convert same to IMFL “On” shop with restaurant/hotels. Thus, the impugned Clause 4.2.2 is also not compatible with the proposal made vide Clause 4.2.11 of Excise Policy 2015-16.

18. Every policy must have some reasons and rationality. While testing the Excise Policy Clause 4.2.2. as discussed above, we do not find such clause to have passed any test of reasonability or rationality. Moreover, when there is IMFL “OFF” shop in the same locality, there are IMFL “ON” shop in the nearby area and there is proposal for opening model wine shop, there is no logic for opening a beer parlour converted to the IMFL “ON” shop with restaurant facility. Conversely, imposing of restriction i.e. closing down of the beer parlour in the event of refusal by the petitioner to convert the beer parlour to IMFL “ON” shop restaurant will not only cause discrimination, but also will cause loss to other IMFL and simple restaurant license holders. We are, therefore, of the view that the impugned clause being against the object of other provision of Excise Policy 2015-16 duly communicated by the Commissioner of Excise being discriminatory, unjust and unreasonable, the fundamental right as enshrined under Article 14 of the Constitution is violated by the presence of Clause 4.2.2.

19. A policy of the State Government must be clear to take a call and must pass all tests of their constitutionality and constitutional value. A similar issue was raised before this Court in the judgment in **Pradeep Kumar Sahoo v. State of Orissa** in W.P.(C) No. 25913 of 2013 etc. where the Bench led by the then Hon’ble Chief Justice had occasion to examine the excise policy of the excise department as to issue of IMFL ON/OFF shop licence within 50 meters along the national highway. Their Lordships were pleased to rely on the decision in Kadnath Distilleries (supra) and held as under :

“12. xx xx whether licence fee already collected is to be refunded to the extent of curtailing the period of licence or option to shift the shops to any other location, subject to the procedure being followed

and subject to such location being allowed in accordance with the norms, ought to be given. In the present case, clear decision has not been taken to review the policy by a proper procedure and to implement the same in a fair and uniform manner. This may call for interference by this Court. Fairness in decision making is hallmark of a democratic government committed to rule of law. This is the mandate of [Article 14](#) of the Constitution even in dealing with liquor trade by duly licenced traders. Even so, this Court cannot close its eyes to the consideration of public safety and mechanically direct quashing of the order which may be deficient for want of fair procedure. Closing of liquor shops on the Government land and on the National Highways cannot be interfered with resulting in unauthorized encroachment of public land or ignoring the perceived endangering of security on highways by sale of liquor. On these issues, the policy makers have to take a call.

13. In absence of formal and clear Government policy, the Excise Commissioner cannot order closure of shops but at the same time, Court may not interfere without Government taking a policy decision on the issue. Moreover, consequential policy matter of claims for refund of fee or time bound permission to dispose of stock or shift location has also to be dealt with by the State.

14. In the case of [State of Kerala & ors vs. Kandath Distilleries](#) (2013) 6 SCC 573, it was observed "24. [Article 47](#) is one of the directive principles of State policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. The State has, therefore, the exclusive right or privilege in respect of potable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are *res extra commercium*, cannot be carried on by any citizen and the State can prohibit completely trade or business in potable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. The State can also impose restrictions and limitations on the trade or business in liquor

as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are res commercium. Reference may be made to the judgments of this Court in [Vithal Dattatraya Kulkarni v. Shamrao Tukaram Power](#) (1979)3 SCC 212, [P.N. Kaushal v. Union of India](#) (1978)3 SCC 558, [Krishan Kumar Narula v. State of J&K](#) AIR 1967 SC 1368, [Nashirwar v. State of M.P.](#) (1975)1 SCC 29, [State of A.P. v. McDowell & Co.](#) (1996)3 SCC 709 and [Khoday Distilleries Ltd. v. State of Karnataka](#) (1995)1 SCC 574.

15. It will, thus, be just and fair to direct the State to take decision on need to review its policy on the issues which have arisen. In case of licences already granted, if the same have to be discontinued, clear provision may be made about the consequences on the licence fee.”

20. In the aforesaid decision, Their Lordships having not found any clear reasoning and basis for the decision of the Government to formulate such policy thereunder, they directed for taking decision by revisiting the policy and Constitutional provisions. We are, therefore, in terms of the aforesaid decision found that the impugned clause 4.2.2 of excise policy 2015-16 is ambiguous, unjust being contrary to the object of Excise policy and Constitutional provisions. Moreover, we are of the further opinion that basing on the ambiguous policy, restriction imposed as to close down the beer parlours of the petitioners is discriminatory being violative of Article 14 of the Constitution of India. We have gone through the decision in W.P.(C) No. 5627 of 2010 (supra) submitted by the opp. Parties, but the same also resolves that Government policy can be interfered if it is unjust, arbitrary and against Constitutional provisions. We, therefore, have no hesitation to hold that the impugned clause 4.2.2 issued by the State Government to implement the same being dehors to the constitutional provision and law made thereunder is illegal, arbitrary, unjust and improper.

Issue No. A is answered accordingly.

POINT NO.B

21. We have already observed in the aforesaid paragraph that the State Government have got absolute power under Article 47 of the Constitution of India to formulate policy for distribution of nutrition of drinks which are not injurious to health. At the same time we also observe that the State Government have got right to impose restriction while granting license and

petitioners have no fundamental right for trade or business in liquor. We are also of the view that the restriction by the State Government must be rational and reasonable. When Clause 4.2.2. of the Excise policy 2015-16 being conveyed by the Excise Commissioner to implement the same and the same clause is found to be arbitrary, unjust, illegal and discriminatory, we are of the view that such clause in the Excise Policy 2015-16 is liable to be quashed being not sustainable in law. It requires revisit by the State Government. Point No.B is answered accordingly.

CONCLUSION:

22. In view of our observation in Point Nos. A and B, relying upon the case of Kandath Distilleries (supra) and Pradeep Kumar Sahu (supra), the impugned Clause 4.2.2. supported by letter dated 3.3.2015 and consequent letter of respective Superintendent of Excise to petitioners being dehors to the Constitutional provision and the principles of law as discussed above cannot be sustained in law, we hereby quash Clause 4.2.2 in the excise Policy 2015-16, supporting letter dated 3.3.2015 of State Government and other concerned letter of Superintendent of excise to respective petitioners as discussed above. We further direct the State Government to relook to the Clause 4.2.2. and issue fresh policy in this regard if so advised. The writ petition is disposed of accordingly.

Writ petition disposed of.

2016 (I) ILR - CUT- 482

B. K. NAYAK, J.

W.P.(C) NO. 682 OF 2016

KANAK LATA NAYAK

.....Petitioner

.Vrs.

**STATE ELECTION COMMISSIONER,
ODISHA & ORS.**

.....Opp. Parties

ODISHA MUNICIPAL CORPORATION ACT, 2003 – S. 14 (4)

Whether by-election to the office of the Mayor of the Corporation, in which a casual vacancy has occurred, can not be held until all vacant posts of Corporator are filled up by election ? – Held, – No.

In this case Mayor of Cuttack Municipal Corporation resigned from the post of Mayor as well as Corporator – As such casual vacancy arose in the post of Mayor and Corporator – Notification by State Election Commission to hold Election to the office of the Mayor – Notification challenged on the ground that casual vacancy in the office of the Corporator must be filled up before election to the office of the Mayor – No specific provision in the Act and Rules to that effect – Rather Section 14 (9) of the Act and Rule 81 (3) of the Odisha Municipal Corporation (Division of City in to wards, Reservation of seats and conduct of Election) Rules, 2003 provides, that any casual vacancy in the post of Mayor shall be filled up as soon as the casual vacancy occurs – However Section 55 (2) of the Act provides that a casual vacancy occurring in the post of a Corporator shall be held within a period of six months from the date of occurrence of such vacancy – Held, there is no infraction of law in the impugned notification holding election to the office of the Mayor of the Corporation.

(Paras 7 to15)

For Petitioner : M/s. Rajat Kumar Rath, Sr. Advocate,
Subir Palit

For Opp. Parties: M/s. Pitamber Acharya, Sr. Advocate.

Date of Order : 21.01.2016

ORDER

B.K.NAYAK, J.

Heard Mr. Rajat Kumar Rath, learned Senior Counsel for the petitioner, Mr.Pitambar Acharya, learned Senior Counsel for opposite party nos.1 and 2, learned Additional Government for opposite party no.3 and Mr.M.R. Mohanty, learned counsel for intervenor.

2. The petitioner, who claims to be a scheduled caste woman and a resident of Ward No.21 of Cuttack Municipal Corporation, has filed this writ petition challenging the legality and propriety of notification dated 08.01.2016 (Annexure-4) issued by the State Election Commissioner, Orissa-opposite party no.1 for the bye-election for the post of Mayor of Cuttack Municipal Corporation (hereinafter referred to as 'the Corporation') to be held on 22.01.2016, with a further prayer to direct the opposite parties to hold bye election to the post of Corporator of Ward No.21 of the Corporation and thereafter to hold the bye-election to the post of Mayor of the Corporation.

3. The undisputed facts are that the Corporation comprises of 59 wards, out of which 32 wards fall within the Barabati-Cuttack Assembly

Constituency; 21 wards come within the Choudwar-Cuttack Assembly Constituency; and 6 wards pertain to Cuttack Sadar Assembly Constituency. Ward No.21 of the Corporation comes within Barabati-Cuttack Assembly Constituency. Notification no.31141 dated 24.10.2013 (Annexure-2) issued under sub-sections (3) and (4) of Section 14 of the Orissa Municipal Act 2003 (in short 'the Act') read with sub-rule(8) of Rule-80 of the Orissa Municipal Corporation (Division of City into Wards, Reservation of Seats, and Conduct of Election) Rules, 2003 (in short 'the Rules') was published by the State Government reserving the office of the Mayor of the Corporation for scheduled caste woman for the current term 2013-2018 on rotation basis. Accordingly in general municipal election of the corporation held in 2013 one Smt. Anita Behera, a scheduled caste woman was elected as Corporator of Ward no.21 and she was also elected as the Mayor of the Corporation. In view of some allegations made against her, the said Anita Behera resigned from the post of Mayor as well as post of Corporator of Ward No.21 of the Corporation. Her resignation having been accepted as per law, the post of corporator of Ward no.21 and the post of Mayor of the Corporation have fallen vacant with effect from 04.01.2016. The vacancies so caused was intimated by the Commissioner of the Corporation to the Secretary, State Election Commission (opposite party no.2) and also to the Government as per Annexure-3 in terms of Rule-90 of the Rules.

The State Election Commissioner (opposite party no.1) has thereafter issued notification dated 08.01.2016 (Annexure-4) for bye-election to the post of Mayor of the Corporation and no notification has yet been issued for bye-election to the post of Corporator of Ward No.21 of the Corporation.

4. In challenging the validity of the notification under Annexure-4, the learned Senior Counsel for the petitioner raises the following contentions:

- (a) As per the notification of reservation of seats, one ward (ward no.21) pertaining to Barabati-Cuttack Constituency, two wards (ward nos. 39 and 45) falling under Choudwar-Cuttack Constituency and one ward (ward no.51) pertaining to Sadar-Cuttack Constituency of the Corporation have been reserved for scheduled caste women, and that the largest number of wards of the Corporation come under Barabati-Cuttack Assembly Constituency and the only ward reserved for scheduled caste women within this area having remained vacant after resignation of Smt. Anita Behera from the post of Corporator of the said ward, in the election to be held for the post of Mayor as per notification under Annexure-4 the wards of the Corporation coming

within Barabati-Cuttack Assembly Constituency shall go unrepresented and, therefore, the notification under Annexure-4 is bad and unsustainable.

(b) The Commissioner of the Corporation having intimated opposite party nos.1 and 2 about the occurrence of vacancy to the post of Corporator of ward no.21, opposite party no.1 should have immediately conducted bye-election for the said vacancy in terms of Rule-90 of the Rules before proceeding to issue notification under Annexure-4 for holding election to the post of Mayor. It is stated that keeping the post of Corporator of one ward vacant, while proceeding to conduct of election for the post of Mayor of the Corporation, is bad in law as it strikes at the root of the reservation policy.

5. In response, as stated in the counter affidavit of opposite party nos.1 and 2, the Senior Counsel representing them submits that in view of the bar contained in Article 243-ZG of the Constitution, the present writ petition challenging the election notification is not maintainable. It is also submitted that the petitioner has no locus standi to challenge the notification inasmuch as she is merely an aspiring candidate, who intends to contest for the post of corporator of Ward No.21 and Mayor of the Corporation, which is in the realm of speculation. She may get elected or may not get elected for the post of Corporator and as long as she has not been elected as a Corporator, she has no right to contest for Mayor and as such she is a stranger to the case and, therefore, has no right to challenge the notification under Annexure-4. It is further submitted that reservation of wards of the Corporation are not Assembly Constituency wise and, therefore, there is no question of non-representation of the Wards of the Corporation coming within Barabati-Cuttack Constituency. It is stated that there are three existing scheduled caste women corporators in the Corporation, who are eligible to contest for the post of Mayor, which is reserved for scheduled caste woman. It is further submitted that in case of vacancy occurring in the office of the Mayor of a Corporation on account of resignation of the Mayor, the same shall be filled up by election as soon as possible after it fell vacant, in terms of Section 14(9) of the Act read with Rule 81(3) of the Rules, whereas there is no such mandate for filling up the casual vacancy occurring in the post of a Corporator due to resignation or death etc. as soon as possible. On the contrary, as per Section 59 of the Act a bye-election to fill up any casual vacancy in the Corporation (post of a Corporator) shall be held within a period of six months from the date of occurrence of such vacancy.

6. The learned counsel for other opposite parties and intervenor support the contention raised on behalf of opposite party nos.1 and 2.

7. The main legal question that falls for consideration is whether bye-election to the office of the Mayor of the Corporation in which a causal vacancy has occurred cannot be held until all vacant posts of Corporator are filled up by election. It is therefore, necessary to see some relevant provisions of the Act and the Rules.

8. Section 6 of the Act speaks of composition of Corporation. As per clause (a) thereof, there shall be elected Corporators, the number of which shall depend on the population of the Corporation, as per the table appended to clause (a). Under clause (b) the Government shall nominate not more than five persons from amongst the residents of the city having special knowledge or experience in municipal administration. Under clause (c) every member of the House of People and the member of the State Legislative Assembly representing constituencies which comprise wholly or partly the area of the city and who are registered as electors shall also become members of the Corporation.

Section-7 of the Act provides for reservation of Scheduled castes, Scheduled Tribes, Other Backward Classes and women for the wards and of the Corporation on rotation basis.

9. Provision for election of Mayor has been made in Section 14 of the Act. The relevant provisions of Section 14 are quoted hereunder :

“14. (1) Every Corporation shall have a Mayor and a Deputy Mayor.

(2) The Corporators of the Corporation, specified in clause (a) of Section 6 shall

(a) at the first meeting of the Corporation elect a Mayor from among themselves;

(b) at a subsequent meeting, specially convened for the purpose at the instance of the Mayor as soon as may be, but not later than thirty days after the date of election of the Mayor, elect a Deputy Mayor of the Corporation from among themselves:

Provided that where the office of the Mayor of a Corporation is not reserved under sub-section (3) for women or where the Mayor elected under this Act is not a woman, the office of the Deputy Mayor of Corporation shall be reserved for women.

- (3) Notwithstanding anything to the contrary in sub-section (1)-
- (a) offices of Mayor in the Corporations shall be reserved for the Scheduled Castes and the Scheduled Tribes and the number of offices so reserved for the Scheduled Castes and the Scheduled Tribes shall bear, as nearly as may be, the same proportion to the total numbers of such offices as the population of the Scheduled Castes and the Scheduled Tribes, respectively in the Corporation areas of the State bears to the population of such Corporation areas;
- (b) as nearly as may be one-third of the total number of seats reserved under clause (a) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes;
- (c) as nearly as may be one-third (including the number of offices reserved for women belonging to the Scheduled Castes, the Scheduled Tribes and the backward class of citizens) of the total number of offices of the Mayor in the Corporations shall be reserved for women; and
- (d) as nearly as may be, but not less than twenty-seven percentum of the offices of Mayor of Corporations shall also be reserved in favour of backward class of citizens as referred to in clause (6) of article 243T of the Constitution; and
- (e) as nearly as may be, one third of the total number of seats reserved under clause (d) shall be reserved for women belonging to the backward class of citizens.

(4). Reservation of offices of Mayor under sub-section (3) shall be made by the Government by rotation among different corporations in the prescribed manner and shall be published in the Gazette :

Provided that the procedure provided in sub-section (6) of Section 7 relating to reservation of seats in the Corporations for the Scheduled Castes, Scheduled Tribes, Backward class of citizens and Women shall, as far as may be, be applicable for the purpose of reservation of offices of Mayors to be made by the Government under this sub-section.

(5).....

(6).....

(7)....

(8) The first meeting of the Corporation after the general election shall be held on a date, not later than thirty days after the publication of the results of such election and shall be convened by the Director, Municipal Administration.

(9) If any casual vacancy occurs in the office of the Mayor or Deputy Mayor, the Corporators of the Corporation shall, as soon as conveniently may be after the occurrence of the vacancy at a meeting to be convened by the Director, Municipal Administration, elect one from amongst themselves to fill up the vacancy and every Mayor or Deputy Mayor so elected shall hold office so long as the person in whose place he is elected would have been entitled to hold it, if the vacancy had not occurred.”

(10)
11”

10. Sub-section (2) of Section 55 of the Act speaks of filling up a casual vacancy occurring in the post of a Corporator by reason of death, resignation, removal etc. by bye-election which shall be held within a period of six months from the date of occurrence of such vacancy, in the prescribed manner as contemplated Section 59 of the Act.

11. Rule-81 of the Rules makes provision for election of Mayor which runs as under :

“81. Election of Mayor- (1) The election of the Mayor of Municipal Corporation shall be held in the office of the Municipal Corporation or at any other place as may be decided by the Election Commission by the [Corporators] specified in clause (a) of Section 6 of the Ordinance from among themselves at a meeting specially convened for the purpose.

(2) Such meeting shall be convened at the instance of the Election Commission soon after the publication of the names of elected (Corporators) in the Orissa Gazette.

(3) In the case of vacancy in the office of the Mayor of a Municipal Corporation due to any cause other than the expiry of the term of office of the Chairperson, such meeting shall be convened at the instance of the Election Commission as soon as possible.

(4) The meeting to elect the Mayor shall be presided over by an officer authorised by the Election Commission.”

Rule-90 of the Rules speaks about the duty of the Commissioner of the Corporation to intimate about the vacancy occurring in the office of the Corporator or a Deputy Mayor of the Corporation which is quoted hereunder:

“90. Vacancy to be intimated to the Election Commission – (1)

Where a vacancy occurs in the office of (Corporator), or Deputy Mayor of a Municipal Corporation by reason of death, resignation, removal or otherwise, the same shall be reported by the Commissioner concerned Municipal Corporation to the Election Commission forthwith under intimation to the District Magistrate concerned and to Government.

(2) The Election Commission shall take steps to hold bye-elections to fill up such vacancy”

12. There is no specific provision in the Act and in the Rules as to how bye-election is to be held in case of casual vacancy occurring in the office of the Mayor. Therefore, the provisions of Section 14 of the Act read with Rule 81 of the Rules shall apply to such a bye-election. Under Section 14 (2) of the Act it is only the elected Corporators as specified in clause (a) of Section (6) of the Act who shall elect a Mayor from amongst themselves in the first meeting of the Corporation after the general election of the Corporation. Such first meeting shall be held not later than thirty days after the publication of the results of the general election as per sub-section (8) of Section 14. Sub-section (9) of Section 14 speaks of filling up of casual vacancy occurring in the office of the Mayor, which shall be held as soon as conveniently after the occurrence of the vacancy.

Now the question is if the initial election to the office of the Mayor in the first meeting after the general election to the Municipal Corporation can be held with one or more vacancies in the post of elected Corporators, then there would be no hindrance for holding bye-election for filling up casual vacancy in the office of the Mayor with the existing elected Corporators even though some posts of elected Corporators remained vacant for death, resignation or otherwise. Section 14 does not mandate that before proceeding to elect the Mayor of the Corporation it must be ensured that the post of all the elected Corporators are filled up and all such Corporators take part in the election of the Mayor. Since the law mandates that the first meeting of the Corporation after the general election is to be held within 30 days after the publication of the results of the general election to the Corporation where the Mayor is to be elected, it may so happen that on the date fixed for election of

Mayor some posts of Corporators may fall vacant either due to death or resignation. There is no mandate of law that such casual vacancies in the post of Corporators should be filled-up before the Mayor is elected. In spite of existence of some casual vacancies in the post of Corporators the first election of Mayor can be held after the general election. Therefore, there is no reason as to why bye-election to the office of Mayor which has fallen vacant either due to death or resignation cannot be held while causal vacancy in the post of some Corporators still continue to exist.

Therefore, merely because the post of Corporator of Ward No.21 of the Corporation has not been filled up, it cannot be said that the State Election Commissioner is not competent to hold election to the office of the Mayor to fill up the causal vacancy.

13. It is not a case where no Scheduled Caste woman candidate at all is available for being elected to the office of the Mayor. Reservation of seats of Corporators and the Office of the Mayor are done in accordance with the provisions of the Act on rotation, and not on the basis of number of wards falling under the various Assembly Constituencies within the Corporation area. There is no substance in the contention raised on behalf of the petitioner that the reservation policy is going to be frustrated or that the Barabati-Cuttack Assembly Constituency is going to be un-represented in the Mayor election.

14. True, the Commissioner of the Corporation sent intimation to the State Election Commissioner under Rule 90 of the Rules about occurrence of the causal vacancy in the office of the Corporation in Ward No.21 with a request to take steps to hold bye-election to fill up such vacancy. There is no mandate of law that such bye-election to fill up the casual vacancy in the office of the Corporator must be filled up before election to the office of the Mayor is held.

15. In the light of the discussions made above and the conclusion reached, this Court finds no infraction of law in the matter of issuance of notification under Annexure-4 by the State Election Commission for holding election to the office of the Mayor of the Corporation.

In view of the conclusion reached, the question with regard to maintainability of this writ petition and the locus standi of the petitioner are not necessary to be answered.

16. In the result, the writ petition fails and is dismissed.

Writ petition dismissed.

2016 (I) ILR - CUT- 491

S.K. MISHRA, J

CRLMC NO. 4441 OF 2015

**SATYABAN PRADHAN
@ KUNA PRADHAN**

.....Petitioner

.Vrs.

STATE OF ODISHA

.....Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.482

Quashing of Criminal Proceeding – Offence under Sections 341,307, 294 & 34 IPC – Petitioner-accused remained as an absconder and sought for quashing of the proceeding – The co-accused who is alleged to have assaulted the informant faced trial and acquitted – So continuance of the Criminal proceeding against the petitioner who is stated to have caught hold of the informant in the split up case will be a futile exercise and it would amount to abuse of the process of law – Held, the Criminal Proceeding against the petitioner is quashed.

(Para 6)

For petitioner : M/s. Debaraj Mohanty, A.Mishra,
B.Panda & D.Behera

For opposite party : Mr. Lalatendu Samantaray,
Standing Counsel

Date of hearing : 09.11.2015

Date of Judgment:09.11. 2015

JUDGMENT**S.K.MISHRA, J.**

This is an application under Section 482 of the Code of Criminal Procedure, 1973, hereinafter referred as “Cr.P.C.” for brevity. The petitioner is one of the accused in G.R. Case No.1237-A of 1992 of the court of the learned S.D.J.M., Puri, who has been charge-sheeted for the alleged commission of offences under Sections 341, 307 and 294/34 of the I.P.C. The petitioner was not arrested and one Madhab Chandra Sahoo, the co-accused was arrested and released on bail. Later on the case of Madhab Chandra Sahoo was spitted up from the case of the present petitioner. The said case was committed to the Court of Session and it came before the learned Assistant Sessions Judge-cum-C.J.M., Puri bearing S.T. No.74/116 of 1998 for trial.

2. The prosecution examined five witnesses in all and the defence examined none. It is apparent from the case records that the prosecution witness no.1-Gani Sahu, who is one of the eye witnesses, has not supported the case of the prosecution and he has not been cross-examined by the prosecution. It is stated that the informant Pravakara Senapati, who happens to be the injured in this case, is examined as P.W. No.5 and has stated that the occurrence took place about ten years back. He further states that while he was returning from hotel during the noon hour his bicycle dashed against the accused, for which the accused assaulted him, but he has further stated that he does not remember what has happened at that time. Prosecution has also not proved the F.I.R. through this witness. Rest of the witnesses examined on behalf of the prosecution i.e. P. W. No.2-Anil Kumar Sahu, P.W. No.3-Sunil Kumar Sahu and P.W. No.4-Ligam Kumar Behera have not supported the case of the prosecution. They have not been cross-examined by the prosecution by obtaining permission under Section 154 of the Evidence Act. Accordingly, having recorded the evidence of these prosecution witnesses, learned Asst. Sessions Judge has come to the conclusion that there is no evidence on record to conclude that the accused has wrongfully restrained Pravakar Senapati and assaulted him on his face by a stick with an intention to commit murder and has also abused him in obscene languages in a public place to cause annoyance. Accordingly, it was held that the prosecution has failed to bring home the charges under Sections 341, 307, 294/34 of the I.P.C. against the petitioner and the petitioner was therefore acquitted under Section 232 of the Cr.P.C.

3. Now at this stage, learned counsel for the petitioner submits that since none of the prosecution witnesses has supported the case of the prosecution and the learned trial court has acquitted the co-accused under Section 232 of the Cr.P.C., the trial of the present petitioner in the split up case will be a futile exercise and hence, would cause an abuse of process of law. He further states that when the result is almost known in this case, the petitioner should not have to undergo the ignominy of facing a criminal trial. Hence, he prays that the criminal proceeding against the present petitioner be quashed in exercise of jurisdiction under Section 482 of the Cr.P.C.

4. On the last date, the learned Standing Counsel for the State submitted that in cases where processes under Sections 82 and 83 Cr.P.C. were issued, the petitioners should not be favoured with an order under Section 482 of the Cr.P.C., but he failed to cite any authority in support of his contention. In the case of **Satish Mehera v. Delhi Administration and another**, 1996 SCC (Cri) 1104; the Supreme Court in paragraph 15 has held as follows:

“But when the judgment is fairly certain that there is no prospect of the case ending in conviction, the valuable time of the Court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. We are mindful that most of the Sessions Courts in India are under having pressure of workload.....”

In the case of **Central Bureau of Investigation v. Akhilesh Singh**, 2005 (I) OLR (SC) 354, the Supreme Court took note of the fact that in an earlier proceeding the co-accused, who happens to be the main accused and is alleged to have hatched the conspiracy and who had the motive to kill the deceased was discharged under Section 482 of the Cr.P.C. by the High Court, and the order became final, the same having been challenged by the State, the application to discharge the co-accused by the High Court under Section 482 of the Cr.P.C. should be allowed as no purpose would be served in further proceeding with the case against the co-accused.

In case of **Kanhu Behera v. State of Orissa**, 2005 (II) OLR 386, this Court confronted with the similar situation and has held as follows:

“7. In the present case perusal of the case diary reveals that the petitioner is the uncle-in-law of the deceased and the only allegation against him in the F.I.R. is that he along with other family members demanded additional dowry of Rs.5,000/-. Except this allegation, there is no other evidence against him. None of the witnesses except the informant has even taken the name of the petitioner in their statements before the I.O. Since there is no prima facie case against the petitioner for the alleged offences and the principal accused persons have already been acquitted after a full-fledged trial, continuance of the criminal proceeding against the petitioner would be undoubtedly abuse of the process of the Court as in the present facts and circumstances of the case, the chance of conviction of the petitioner is totally bleak”.

5. In the aforesaid case, this Court taking note of the case of **B.S.Joshi and others v. State of Haryana and others**, (2003) 25 OCR (SC) 99, **Sridhar Pani v. State of Orissa and another**, (2003) 25 OCR 447 and **Kanhu Behera v. State of Orissa**, 2005 (II) OLR 386 and **Santosh Kumar Maity v. State of Orissa**, 2006 (II) OLR 308 has held that the principal accused having been acquitted, continuance of the criminal proceeding against the co-accused will amount to abuse of process of law and the proceeding must be quashed. In the case of **Sri Premananda Sahu v. State**

of Orissa, 2012 (II) OLR 961, this Court after taking into account all the relevant decisions on the issue has come to the conclusion and held as follows:

“On analyzing the nature of allegations made by the prosecution against the accused persons and the materials collected during investigation, if it is found that in case of trial against the co-accused persons, the Trial Court, on considering such materials and evidence, has found that the prosecution has failed to prove its case against the said accused persons facing trial and it is found that there can be no other material which, if trial is conducted against the absconding accused, will point towards his guilt, allowing the trial to continue against the absconding accused will be nothing but a futile exercise wasting the hours of the Court, which will inevitably end in acquittal of the accused, who was absconding.

In such situation, it will be always appropriate for the Court, for the ends of justice as well as to prevent abuse of the process of law to quash the proceeding against such absconding accused in its entirety by exercising the inherent power under section 482 Cr.P.C.”

Similar view has been taken by this Court in **Sri Nina @ Niranjan Mohapatra v. State of Odisha**, 2014 (II) OLR 528.

6. In applying the principle laid down in the aforesaid cases, this Court finds that the main accused Madhab Chandra Sahoo, who had allegedly assaulted the informant on his face by means of a stone with an intention to commit his murder, has already been acquitted. The allegation against the present petitioner is that he caught hold of the informant and threw him on the ground and caught hold of him. When the prosecution could not prove the main allegation of commission of offence under section 307 of the I.P.C. against the co-accused and he has been acquitted of the charges under Section 232 Cr.P.C., there is hardly any possibility of proving the case under section 307/34 of the I.P.C. against the present petitioner. So, in this view of the material on record, this Court is of the opinion that it will be appropriate for this Court, for ends of justice and to prevent abuse the process of law to quash the proceeding against the absconding accused i.e. the petitioner in its entirety by exercising the inherent power under Section 482 of the Cr.P.C.

7. Hence, the application is allowed. The Criminal proceeding pending against the present petitioner in G.R. Case No. 1237-A of 1992 of the court of S.D.J.M., Puri for commission of offence under Section 341, 307 and 294/34

of the I.P.C. is hereby quashed. The Criminal Misc. Case is accordingly allowed.
Application allowed.

2016 (I) ILR - CUT- 495

S. K. MISHRA, J.

CRLMC NO. 4568 OF 2015

RAGHUNATH LENKA

.....Petitioner

.Vrs.

STATE OF ORISSA & ANR.

.....Opp. Parties

CRIMINAL PROCEDURE CODE, 1973 – S. 205

Application to dispense with personal appearance – Application rejected – For non-appearance of the petitioner N.B.W. issued against him directing production – Orders challenged – Offence under Sections 341,294 and 324 I.P.C. – Petitioner working at a distant place and it is difficult to attend the Court on each date – Petitioner is neither charged with heinous crime nor avoiding the Courts Proceeding intentionally – Learned Magistrate is not correct to issue N.B.W., instead summons could have been issued at the first instance and Bailable warrant at the second instance – Held, impugned orders are quashed and the petitioner is allowed to be represented by his Counsel.

(Paras 8,9)

Case Law Relied on :-

1. (2007) 12 SCC 1 : Inder Mohan Goswami and another v. State of Uttaranchal &Ors

Case Laws Referred to

1. 2009 Cri. L. J. 2675: Sheela Kumar and others v. State of Bihar through Vigilance.
2. 1998 (1) PLJR 502 : Ram Harsh Das v. State of Bihar.
3. 2007 Cri.L.J. 1358 : Manish Gai v. State of Bihar.

For Petitioners : M/s. Satyabrata Dash
For Opp. Parties : Standing Counsel

Date of Order : 09.11.2015

ORDER

S.K.MISHRA, J.

Heard learned counsel for the petitioner and the learned Standing Counsel for the State.

2. The petitioner has assailed the order dated 08.04.2015 passed by the learned S.D.J.M., Jagatsinghpur in G.R. Case No. 205 of 1996, wherein the application filed by the petitioner under Section 205 of the Cr.P.C. has been rejected.

3. The petitioner being the accused in the case was summoned to answer the charge under Sections 341, 294 and 324 of the I.P.C. Upon submission of charge-sheet, as the offences are bailable in nature, learned Magistrate issued summons to the present petitioner. On 03.07.2003, he appeared in the court and was released on bail. On 13.09.2010, the petitioner was not present and nobody took any steps on his behalf. Hence, N.B.W. was issued against the present petitioner fixing 23.02.2011 for production. On 08.04.2015, Advocate S.N. Routray filed Vakalatnama on behalf of the accused and also filed a petition under Section 205 of the Cr.P.C. to dispense with the personal attendance of the accused. After hearing learned counsel for the petitioner and the learned A.P.P., learned S.D.J.M., Jagatsinghpur has rejected the application. The learned counsel for the petitioner submitted that the petitioner has been working as a daily labourer under a Contractor at Bangalore, hence, it is difficult, time taking and expensive to appear on each date before the learned Magistrate. Hence, the application under Section 205 of the Cr.P.C. may be allowed. However, the petitioner's application was rejected on the ground that the case was lingering for production of the accused and the accused is avoiding police arrest.

4. At the outset, this Court takes note of the order dated 30.09.2010, where N.B.W. was issued against the present petitioner. Keeping in view the case of **Inder Mohan Goswami and another v. State of Uttaranchal and others**, (2007) 12 SCC 1, this Court is of the opinion that the learned Magistrate should have issued bailable warrant in the second instance after his appearance on summons. He has not recorded any reason for issuance of N.B.W. in a bailable case. Hence, this Court finds the procedure adopted by the learned S.D.J.M. is erroneous. Thereafter, even if the procedure adopted by the learned S.D.J.M. is accepted to be correct, the rejection of the application under Section 205 of the Cr.P.C. for the reason that it will only further linger the proceeding, this Court fails to understand how the learned S.D.J.M. intends to complete the trial of the case when the police is unable to arrest the accused and produce him before the court. The petitioner has come to the court through his Advocate only. So when the case proceeds further and the order passed by the learned S.D.J.M., Jagatsinghpur on 08.04.2014 only becomes another impediment in the process of the investigation of the

case. Learned counsel for the petitioner submits that in view of the fact that the petitioner is working at a different place and it is impossible on his part to attend on each date of trial, the application filed under Section 205 of the Cr.P.C. should have been allowed.

5. Learned Standing Counsel, on the other hand, submits that since in the meantime more than five years has elapsed from the date of issuance of the warrant, the application under Section 205 of the Cr.P.C. is not maintainable.

6. Learned counsel for the petitioner submits that Patna High Court in the case of **Sheela Kumar and others v. State of Bihar through Vigilance**, 2009 Cri. L. J. 2675; has held that the petition filed by the accused under Section 205(1) of the Cr.P.C. cannot be rejected solely on the ground that warrants were issued to them prior to the commencement of proceeding under Section 204. The Court further held that Section 205 provides for dispensing of personal attendance of accused and permitting him to appear by his Pleader where summons is issued, if the Magistrate sees reason to do so. The work “summons” mentioned in Section 205 obviously refers “summons” used in Section 204(1)(a),(b).

7. The ratio decided in the aforesaid case is not applicable to the present case as the warrant has been issued after the summons referred to in sub-section 204(1)(a) and (b) of the Cr.P.C. The warrant has been issued against the present petitioner after the appearance of the party in response to the summons issued under Section 204 of the Cr.P.C. However, in the case of **Manish Gai v. State of Bihar**, 2007 Cri.L.J. 1358, the Patna High Court took note of an earlier decision rendered in **Ram Harsh Das v. State of Bihar**, 1998 (1) PLJR 502 and held that application under Section 205 of the Cr.P.C. does not end in issuance of warrant of arrest if at the first instance summons were issued. In that case also summons was issued at the first instance as subsequently warrant of arrest was issued. Hon’ble Patna High Court held that in such circumstance, benefit under Section 205 of the Cr.P.C. is available.

8. Keeping in view the aforesaid consideration and the fact that the petitioner is working at Bangalore and his appearance in the court below would involve considerable time and expense, the application under Section 205 of the Cr.P.C. should be allowed. My aforesaid finding is fortified by the fact that the learned Magistrate, ignoring the direction given in the case of **Inder Mohan Goswami**’s case (supra), has issued N.B.W. instead of issuing B.W. against the petitioner.

9. Accordingly, the order dated 08.04.2015 passed by the learned S.D.J.M., Jagatsinghpur in G.R. Case No. 205 of 1996 is quashed. The CrI. Misc. case is allowed giving liberty to the petitioner to be represented by his conducting counsel on each date of trial under Section 205, Cr.P.C. Consequently, the order dated 13.09.2010 in issuing N.B.W. against the petitioner is also quashed. The CrI. Misc. Case is accordingly allowed.

Application allowed.

2016 (I) ILR - CUT- 498

RAGHUBIR DASH, J.

CRLA NO. 560 OF 2009

SUJIT BEPARI

.....Appellant

. Vrs.

STATE OF ORISSA

.....Respondent

N.D.P.S. ACT, 1985 – S.35

Seizure of “Ganja” from a vehicle – Accused-appellant was an occupant of that vehicle – Nothing was seized from the person of the appellant – Presumption of culpable mental state of the accused – Burden cast on the accused to prove the fact that he had no such mental state by adducing evidence to that effect – However if circumstances appearing in the prosecution case or in the prosecution evidence are such as to give reasonable assurance to the Court that the accused could not have had the knowledge or the required intention, the burden cast on him U/s. 35 of the Act would stand discharged even if he has not adduced any evidence to prove the fact that he had no such culpable mental state. (Para 10)

Case Laws Referred to :-

1. AIR 2000 SC 821 : Abdul Rashid Ibrahim Mansuri -V- State of Gujurat
2. 2003(4) Crimes 60(SC) : Madan Lal & Anr. -V- State of Himachal Pradesh

For Appellant : M/s. N. Sahani & K.Pradhan

For Responden : Addl. Govt. Advocate

Date of hearing : 10.11.2015

Date of judgment : 10.12.2015

JUDGMENT***RAGHUBIR DASH, J.***

This Criminal Appeal is in challenge of the judgment dated 23.10.2009 passed by the learned Additional Sessions Judge-cum-Special Judge, Malkangiri in Criminal Trial No.3 of 2008 (formerly, C.T. No.195 of 2007 in the Court of Sessions Judge-cum-Special Judge, Koraput, Jeypore) wherein the Appellant has been convicted of the offence punishable under Section 20(b)(ii)(C) of Narcotic Drugs and Psychotropic Substances Act (in short 'the Act') and sentenced to undergo R.I. for 10 years and to pay fine of Rs.1,00,000/-, in default, to undergo another term of R.I. for one year.

2. The Appellant is one of the two accused persons against whom the prosecution was lodged. According to the prosecution, on 11.11.2007 at about 5.00 A.M. the S.I. of Excise, Malkangiri with his staff while on patrolling duty received reliable information about illegal transportation of Ganja in one Tata Specio Jeep bearing registration No.OR17D-7300. Sometime thereafter, when the patrolling party noticed that the aforesaid vehicle was proceeding towards Jeypore in a high speed they tried to stop the vehicle. The Excise Officials chased the vehicle and ultimately when they could make the vehicle stop at Govindapalli Forest Check Gate the driver of the vehicle, namely, Narayan Sahu fled away. But, the present Appellant, who was an occupant of that vehicle, made an abortive attempt to run away. He was apprehended on the spot. On being asked he disclosed his identity. Securing the presence of an Executive Magistrate and observing formalities, the Appellant's person was searched but nothing could be found. However, on a search of the jeep in question recovery of 5 jute bags containing suspected Ganja was made. The substance smelled like Ganja. The material was weighed and it was found that in total 144 Kgs. of suspected Ganja was there in all the jute bags. Sample of the seized article was collected from the contents of each of the jute bag and after observing all formalities the collected samples were packed and sealed separately and the articles recovered during the search were seized. The Appellant was arrested and the seized articles were produced before the learned Special Judge. Subsequently, the sample so collected was sent for chemical examination through the S.D.J.M., Malkangiri. C.E. Report confirmed that the sample sent for chemical examination was nothing but Ganja as defined in N.D.P.S. Act. On

completion of enquiry prosecution report was submitted against the Appellant as well as the driver of the jeep showing the latter as an absconder.

3. The defence plea is one of complete denial of all the allegations.

4. During trial, four witnesses were examined from the side of the prosecution. P.W.1 is an independent witness to the seizure but he has turned hostile. P.W.2 is the S.I. of Excise. P.W.3 is one Excise Constable, who was a member of the patrolling party. P.W.4 is the Executive Magistrate who, on the requisition of the complainant, was deputed to the spot to remain present at the time of search and seizure.

Appellant examined himself as D.W.1. Another person is examined as D.W.2.

5. Learned Special Judge having dealt with the evidence available on record found that the witnesses supporting the prosecution are reliable and creditworthy and further observing that offence for which the Appellant was charged could be duly established beyond all reasonable doubts, passed the order of conviction and sentence as a forestated.

6. The Appellant challenges the impugned judgment on several grounds. Reiterating the grounds narrated in the memo of appeal learned counsel for the Appellant further submits that mandatory provisions contained in Section 50 as well as other provisions of the N.D.P.S. Act have not been complied with for which the impugned judgment is not sustainable. It is further submitted that there are material contradictions in the evidence of the prosecution witnesses going to the root of the case but the learned court below has not properly weighed the same while evaluating the evidence. It is further contended that all the incriminating circumstances were not put to the accused-Appellant during his examination under Section 313(1)(b), Cr.P.C. It is also submitted that independent witness having not supported the prosecution case, it is not safe to rely on the testimony of the interested witnesses. No dispute has been raised on the authenticity or correctness of the opinion expressed by the Chemical Examiner that the sample of the seized substance sent for chemical test was found to be Ganja. Now, the contentions raised by the Appellant shall be taken up one after another.

7. The argument on non-compliance of Section 50 of the Act is not well founded. It is well settled that Section 50 would come into play only in the case of a search of a person as distinguish from search of any premises etc. In this case the contraband article was recovered from the vehicle of which the Appellant was found to be an occupant at the time it was intercepted. Though

search of the Appellant's person is said to have been conducted in presence of an Executive Magistrate nothing has been recovered. Therefore, any departure from proper compliance of Section 50 of the Act does not strike at the root of the case.

Non-compliance of any other specific mandatory provisions of law laid down in the Act has not been pointed out.

8. Though it is contended that recording of the accused statement at the time of examination of the accused under Section 313(1)(b) Cr.P.C. is defective, nothing is pointed out as to how and at what point any defect has occurred so as to enable the Court to find out whether such violation causes prejudice to the accused-Appellant.

9. The contention that there are material contradictions in the testimony of the prosecution witnesses going to the very root of the case is not well founded. No such material contradiction has been pointed out and on perusal of the depositions of P.Ws.1 to 4 no material contradiction could be noticed.

10. Learned counsel for the Appellant forcefully argues that the prosecution has failed to prove that the Appellant was in conscious possession of the seized contraband. It is submitted that mere presence of the Appellant in the vehicle when it was stopped by the Excise Officials after a good chase is not sufficient to raise a presumption that the Appellant was in conscious possession of the "Ganja" in question. Learned counsel for the State, in reply, submits that the Appellant was an occupant of the vehicle and his conduct, immediately after it was detained by the Excise Officials, is sufficient to give rise to an inference that the Appellant was in conscious possession of the "Ganja" He invites attention to the testimony of P.Ws.2 and 3 who have stated that immediately after the vehicle was detained the driver could run away but the Appellant tried his best to run away by throwing one Ganja bag at the Excise staff to hinder them but he could be apprehended at the spot. There are no other facts and circumstances which are relevant for consideration while deciding as to whether the Appellant was in conscious possession of the "Ganja".

Section 35 of the Act lays down that in any prosecution for an offence under the Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state. However, Hon'ble Apex Court have observed in *Abdul Rashid Ibrahim Mansuri v. State of Gujarat; AIR 2000 SC 821* that if circumstances

appearing in the prosecution case or in the prosecution evidence are such as to give reasonable assurance to the Court that Appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any evidence to prove the fact that he had no such culpable mental state. During the trial the Appellant has examined himself and another witness to prove that because of previous enmity the S.I. of Excise has foisted the case on him. Learned Court below has rightly discarded the defence evidence. P.Ws.2 and 3 have adduced sufficient evidence to prove that the Appellant was found to be an occupant of the vehicle when it was stopped and he tried to escape from being captured by throwing one of the bags containing "Ganja" at the reading party members but his attempt could be foiled. It is to be decided as to whether this evidence gives reasonable assurance to the Court that the Appellant could have had the knowledge or the required intention to presume that he was in conscious possession of the seized "Ganja" and whether the Appellant could be said to have discharged the burden cast on him under Section 35 of the Act by adducing evidence to that effect.

It is strange to note that instead of giving explanation as to how the Appellant was travelling in the vehicle carrying "Ganja" he has adduced evidence showing that he has been implicated because of his enmity with the S.I. of Excise. Since he was an occupant of the vehicle and tried to escape when the Excise Officials detained the vehicle and no explanation comes from the defence as to how he was travelling with another occupant of the vehicle, who could run away, and for what purpose he was travelling by the said vehicle, a valid presumption has to be raised against the Appellant that he had the culpable mental state in respect of the seized "Ganja". In the judgment of the Hon'ble Apex Court reported in **2003 (4) Crimes 60 (SC) (Madan Lal and Anr.v. State of Himachal Pradesh)** facts were like this: One car carrying the accused persons therein was intercepted. 'Charas' was seized from the car. The accused persons knew each other. They were travelling together from the same destination. They did not explain how they were travelling by that car. On such facts and circumstances, it was held by the Apex Court that presumption under Section 35 of the Act could be raised against the accused persons including the driver of the car.

Relevant facts and circumstances available in the case at hand are already reflected above. Having regard to the same this Court finds that learned Court below has rightly held the Appellant to be in conscious possession of the seized "Ganja". Once it is presumed that the Appellant was

in conscious possession of the contraband article which has not been satisfactorily accounted for, a presumption under Section 54 of the Act can be raised that the Appellant committed the offence punishable under Section 20(b)(ii)(C) of the Act.

11. It is also argued by the learned counsel for the Appellant that there is no satisfactory evidence to show that the seized contraband article and the sample packets were kept in proper custody and therefore, chance of tampering with the same cannot be ruled out. It is stated by P.W.2 and corroborated by P.W.4 that in presence of the latter (an Executive Magistrate) seizure of the packets containing "Ganja" was made, sample from each of the packets was collected and, thereafter, the packets containing the substance and the sample collected there from were separately packed and sealed using the former's personal brass seal and, thereafter, the brass seal was delivered to be kept in the custody of the Executive Magistrate who executed one zimanama (Ext.7) to that effect. It is argued that when the brass seal was never seized from the custody of P.W.2, (the S.I. of Excise), the question of giving it in the zima of P.W.4 does not arise and as such prosecution's claim that it was given in the custody of P.W.4 has to be viewed with suspicion. Such proposition is not acceptable. The fact that one brass seal was used for the sealing of different packets has been proved and the Executive Magistrate admits that he received the same brass seal from P.W.2 by executing a zimanama. Such evidence cannot be disbelieved merely because a seizure list in respect of the said brass seal has not been prepared.

Since brass seal remained in custody of the Executive Magistrate, tampering of the sealed packets cannot be presumed unless and until it is shown that the seal impressions appearing on any of the sealed packets did not correspond to the specimen impression of the brass seal or, there is evidence of physical tampering with the seal appearing on any of the packets. The chemical examiner's report (Ext.11) reflects that five samples of "Ganja" were received on 17.12.2007 and seal impressions on the sealed packets were identical with the specimen impression of the seal given on the forwarding report accompanying the samples.

This being the nature of evidence available on record, no reasonable doubt can be raised over the proper custody of the seized 'Ganja' as well as the sample packets.

It appears, since the learned court below has awarded minimum punishment as prescribed under the Act, no objection has been raised on the

propriety of the sentence.

12. Having dealt with all the points raised by the learned counsel for the appellant and finding that the impugned judgment is not liable to be interfered with, this Court dismisses the Criminal Appeal confirming the impugned order of conviction and sentence.

Appeal dismissed.

2016 (I) ILR - CUT-504

DR. A.K. RATH, J.

W.P.(C) NO. 8908 OF 2014

NAKULA SAHOO & ORS.

.....Petitioners

.Vrs.

SMT. DURPADI SINGH & ORS.

.....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – S.9

Jurisdiction of Civil Court – Some issues in the suit are exclusively triable by the Tribunal, constituted under the coal Bearing Areas (Acquisition and Development) Act, 1957, while other issues are exclusively triable by the Civil Court – Issues framed and reliefs claimed are inextricably mixed up – Remedy – Held, in such cases only the Civil Court would have the jurisdiction and competence to decide the same. (Para 13)

Case Laws Relied on :-

1. (2014) 16 S.C.C. 51 : Bhanwar Lal and others Vrs. Rajasthan Board of Muslim Wakf & Ors,

Case Laws Referred to :-

1. AIR 1996SC 532 : Laxmi Chand and others Vrs. Gram Panchayat, Kararia & Ors,

2. 94 (2002) CLT 361 : Angada Pujhari Vrs. Kanhei Pujhari & Ors.

3. 86 (1998) CLT 98 : Gadadhara Behera Vrs. State of Orissa & Anr.

For Petitioners : Mr.P.K.Mohapatra

For Opp. Parties: Mr.S.K.Dash & Mr. P.R.Pattnaik.

Date of Hearing : 22.12.2015

Date of Judgment: 22.12.2015

JUDGMENT

DR. A.K.RATH, J.

The seminal point that hinges for consideration of this Court is as to whether the Civil Court lacks jurisdiction to entertain the suit filed by the petitioners, herein or the subject matter of suit lies within the exclusive jurisdiction of the Tribunal constituted under the Coal Bearing Areas (Acquisition and Development) Act, 1957 (hereinafter referred to as “the Act”) ?

2. Sans details, the short fact of the case is that the petitioners as plaintiffs instituted T.S.No.54 of 2000 in the court of the learned Civil Judge (Sr.Division), Talcher. The case of the plaintiffs is that the suit land originally belonged to late Kunjabehari Gajraj Singh. He was issueless. He adopted one Gokul Chandra Singh, defendant no.1 as son. While the matter stood thus, Kunjabehari died in the year 1958 leaving behind his only adopted son as legal heir and successor. Defendant no.1 had sold the said land to the plaintiff nos.1 and 2 and father of plaintiff nos.4 to 7 by means of a registered sale deed dated 18.2.1972 for a consideration of Rs.4500/-. They are in possession of the said suit land since then. Since they were residing at Angul, they could not take steps in the settlement proceeding. The settlement authority recorded the land in the name of defendant no.2, who is wife of defendant no.1. When Hingula Coal Mines Authority came for measurement of the suit land, the plaintiffs knew that the mines authority had already awarded the compensation in favour of defendant nos.1 and 4. On a query made by them, defendants 2 and 4 disclosed that they had purchased the suit land from defendant no.1 by registered sale deed. With this factual scenario, the suit has been filed with the following reliefs:-

- “(i) That the right, title and interest of the plaintiff over the suit land may be declared.
- (ii) That the possession of the plaintiff since 18.2.1972 to till today on the strength of sale deed followed by delivery of possession may be confirmed.
- (iii) That the sale deed executed by the Defendant no.1 in favour of defendant no.2 and 4 may be declared null and void.
- (iv) That direct the defendant no.4 to cause the payment towards compensation award of the suit land dt.22.2.2000 in favour of defendant No.2 and 4 may be declared to be set aside and direct to pay the award in favour of the plaintiff.
- (v) The cost of the suit be decreed in favour of the plaintiff and such other reliefs as be found entitled to.”

3. Pursuant to issuance of summons, defendant no.3 entered appearance and filed written statement contending, inter alia, that the suit land has been acquired by Hingula Coal Mines Authority as per the provisions of the Act. The Central Government is deemed to be in possession of the suit land. Further, the jurisdiction of the Civil Court has been ousted under Section 26 of the Act and the Tribunal constituted under the Act is competent to determine the right, title and interest over the suit land.

4. Defendants 2 and 4 entered appearance and filed an application under Order 7, Rule 11 of C.P.C. for rejection of the plaint. According to them, the Civil Court has no jurisdiction to determine the right, title and interest of the suit land. The Tribunal constituted under the Act has the exclusive jurisdiction to decide any dispute in respect of the suit land. The learned trial court came to hold that the dispute is purely civil in nature. The Special Tribunal constituted under Section 14 of the Act, has not been vested with jurisdiction to declare the sale deed as null and void. Having held so, the learned trial court rejected the application. Thereafter, the defendants 1 to 11 filed a revision before the learned Additional District Judge, Talcher, which was registered as Civil Revision Petition No. 6 of 2002. The learned revisional court held that the Tribunal constituted under the Act is alone competent to decide the right, title and interest over the suit land and the rightful person is entitled to receive the compensation amount. The revisional court further held that when the Tribunal has been empowered to determine the right, title and interest over the acquired land, the question relating to validity of the document can also be incidentally gone into. The relief claimed by the plaintiffs cannot be entertained by the Civil Court. By judgment dated 29.3.2004, the learned revisional court allowed the revision. The instant application under Article 227 of the Constitution of India to lacerate the order said judgment.

5. Heard Mr.P.K.Mohapatra, learned counsel for the petitioners and Mr.S.K.Dash, learned counsel for the opposite parties 1 to 4, 6, 7, 10 and 11 and Mr.P.R.Pattnaik, learned counsel for opposite party no.12.

6. Mr.P.K.Mohapatra, learned counsel for the petitioners submits that exclusion of jurisdiction of Civil Court is not to be readily inferred unless such exclusion is either expressly spelt out in the special statute or clearly implied. He further submits that the Tribunal has no jurisdiction to adjudicate the dispute pertaining to right, title and interest of the property. The Civil Court has alone the jurisdiction to adjudicate such dispute. He relies on decision of the apex Court in the case of *Bhanwar Lal and others Vrs. Rajasthan Board of Muslim Wakf and others*, (2014) 16 S.C.C. 51.

7. Per contra, Mr.S.K.Dash, learned counsel for the opposite parties 1 to 4, 6, 7, 10 and 11 submits that essentially the dispute between the parties pertains to payment of compensation. The question relating to validity of the sale deed can also be incidentally gone into by the Tribunal constituted under the Act for the purpose of determination of compensation. He further submits that in view of the bar contained in Section 26 of the Act, the Civil Court has

no jurisdiction to decide the issue. He relies on the decision of this Court in the cases of Gadadhara Behera Vrs. State of Orissa and another, 86 (1998) CLT 98 and Angada Pujhari Vrs. Kanhei Pujhari and other, 94 (2002) CLT 361 and the decision of the apex Court in the case of Laxmi Chand and others Vrs. Gram Panchayat, Kararia and others, AIR 1996SC 532.

8. Section 14 of the Act provides for method of determining compensation. The same is quoted below:-

“14. Method of determining compensation-(1) where the amount of any compensation payable under this Act can be fixed by agreement, it shall be paid in accordance with such agreement.

- (2) Where no such agreement can be reached, the Central Government shall constitute a Tribunal consisting of a person who is or has been or is qualified to be a Judge of a High Court for the purpose of determining the amount.
- (3) The Central Government may in any particular case nominate a person having expert knowledge in mining to assist the Tribunal, and where such nomination is made, the person or persons interested may also nominate any other person for the same purpose.
- (4) At the commencement of the proceedings before the Tribunal the Central Government and the person interested shall state what in their respective opinions is a fair amount of compensation.
- (5) The Tribunal shall, after hearing the dispute, make an award determining the amount of compensation which appears to it to be just and specify the person or persons to whom the compensation shall be paid; and in making the award the Tribunal shall have regard to the circumstances of each case and to the foregoing provisions of this Act with respect to the manner in which the amount of compensation shall be determined insofar as the said provisions or any of them may be applicable.
- (6) Where there is a dispute as to the person or persons entitled to compensation and the Tribunal finds that more persons than one are entitled to compensation, it shall apportion the amount thereof among such persons and in such manner as it thinks fit.
- (7) Nothing in the Arbitration Act, 1940, shall apply to any proceedings under this section.

- 8) The Tribunal, in the proceedings before it, shall have all the powers which a civil court has while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:-
- (i) summoning and enforcing the attendance of any person and examining him on oath;
 - (ii) requiring the discovery and production of any document;
 - (iii) reception of evidence on affidavits;
 - (iv) requisitioning any public record from any court or office; and
 - (v) issuing commissions for examination of witnesses.”
9. The jurisdiction of the Civil Court has been ousted under Section 26 of the Act. The same is quoted hereunder:-

“26. Jurisdiction of Civil Courts.-Save as otherwise expressly provided in this Act, no Civil Court shall have jurisdiction in respect of any matter which the Central Government or the competent authority or any other person is empowered by or under this Act to determine.”

10. On cursory perusal of Section 14 of the Act, it is crystal clear that where the amount of any compensation payable under the Act can be fixed by agreement, it shall be paid in accordance with such agreement. But then where there is no such agreement, the Central Government shall constitute a Tribunal consisting of a person who is or has been or is qualified to be a Judge of a High Court for the purpose of determining the amount. The Central Government may in any particular case nominate a person having expert knowledge in mining to assist the Tribunal. Sub-section 4 of Sec. 14 of the Act provides that at the commencement of the proceedings before the Tribunal the Central Government and the person interested shall state what in their respective opinions is a fair amount of compensation. Under Sub section (5) of Sec.14 of the Act, the Tribunal after hearing the dispute shall make an award determining the amount of compensation which appears to it to be just and specify the person or persons to whom the compensation shall be paid. In the event there is a dispute between the person or persons entitled to compensation and the Tribunal finds that more persons than one are entitled to compensation, it shall apportion the amount thereof among such persons and in such manner as it thinks fit. Thus, the jurisdiction of the Tribunal is limited to determine the amount of compensation and the persons to whom it is payable.

11. Whether the civil court has jurisdiction to try the suit, when the issues/reliefs are inextricably mixed up and some issues/reliefs raised are exclusively triable by the Tribunal while others exclusively triable by the Civil Court ?

12. In *Ramesh Gobindram v. Sugra Humayun Mirza Wakf*, (2010) 8 SCC 726, the provisions of the Andhra Pradesh Wakf Act, 1995 came up for consideration before the apex Court. The question, which was posed for determination, was whether the Wakf Tribunal constituted under Section 83 of the 1995 Act was competent to entertain and adjudicate upon disputes regarding eviction of the appellants, who were occupying different items of wakf properties ? The apex Court has succinctly stated the approach of the Court while dealing with such cases. The modalities prescribed by the Court are quoted hereunder:-

“11. Before we take up the core issue whether the jurisdiction of a civil court to entertain and adjudicate upon disputes regarding eviction of (sic from) wakf property stands excluded under the Wakf Act, we may briefly outline the approach that the courts have to adopt while dealing with such questions.

12. The well-settled rule in this regard is that the civil courts have the jurisdiction to try all suits of civil nature except those entertainment whereof is expressly or impliedly barred. The jurisdiction of the civil courts to try suits of civil nature is very expansive. Any statute which excludes such jurisdiction is, therefore, an exception to the general rule that all disputes shall be triable by a civil court. Any such exception cannot be readily inferred by the courts. The court would lean in favour of a construction that would uphold the retention of jurisdiction of the civil courts and shift the onus of proof to the party that asserts that the civil court’s jurisdiction is ousted.

13. Even in cases where the statute accords finality to the orders passed by the Tribunals, the court will have to see whether the Tribunal has the power to grant the reliefs which the civil courts would normally grant in suits filed before them. If the answer is in the negative, exclusion of the civil court’s jurisdiction would not be ordinarily inferred. In *Rajasthan SRTC v. Bal Mukund Bairwa*, a three- Judge Bench of this Court observed:-

“There is a presumption that a civil court has jurisdiction. Ouster of civil court’s jurisdiction is not to be readily inferred. A person taking

a plea contra must establish the same. Even in a case where the jurisdiction of a civil court is sought to be barred under a statute, the civil court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or tribunal acts without jurisdiction.”

13. In *Bhanwar Lal* (supra), the apex court had the occasion to consider Section 85 of the Wakf Act, 1995. In the said case, the respondents as plaintiffs filed a civil suit in the year 1980 for possession of the suit property as well as for rendition of accounts impleading the petitioners as defendants therein claiming it to be a wakf property. On coming to know, after filing of the suit, that one trustee had sold the property to the defendants on 28.2.1983. The plaintiffs amended the plaint by adding the relief of declaration to the effect that the said sale deed dated 28.2.1983 was invalid. Pursuant to issuance of summons, the defendants entered appearance and filed written statement. The trial court framed eight issues. The suit, thereafter, went on trial. All the parties laid their evidence. When the matter was ready for final hearing, plaintiffs filed the application under Section 85 of the Act raising the contention that the suit in question could not be tried by the civil court as the jurisdiction was barred. A prayer was made that the plaint filed by them may be returned to be presented before the Tribunal constituted under the Act, which alone had the jurisdiction to try the suit. The learned Additional District Judge allowed their applications holding that the question whether the property in question was wakf property or not, could be decided only by the Tribunal and Section 85 of the Act specifically barred the jurisdiction of the civil court. In the revision petition filed by the defendants challenging the validity of the orders of the learned Additional District Judge, the Rajasthan High Court concurred with the same view. The matter was then carried to the apex Court. The apex Court in paragraph-30 of the report came to hold that the suit is for cancellation of the sale deed, rent and for possession as well as rendition of accounts and for removal of trustees. So far as relief of cancellation of sale deed is concerned, this is to be tried by the civil court for the reason that it is not covered by Section 6 or 7 of the Act whereby any jurisdiction is conferred upon the Tribunal to decide such an issue. Further, relief of possession, which can be given by the civil court, depends upon the question as to whether the sale deed is valid or not. Thus, the issues of sale deed and possession are inextricably mixed with each other and it is the civil court where the suit was filed will continue to have the jurisdiction over the issue and the civil court would be competent to decide the same.

14. The decisions cited by Mr. Dash, learned counsel, are distinguishable in facts. In *Gadadhara Behera (supra)*, the petitioner purchased a land. The land was mutated in his favour. When the land was acquired by the State Government, the Land Acquisition Collector awarded the compensation in favour of a third party. Thereafter the petitioner approached the Land Acquisition Collector and demanded payment of the same to him. The Land Acquisition Collector referred the matter to the Civil Court under Section 30 of the Land Acquisition Act. The learned trial court held that the petitioner alone is entitled to receive compensation. Thereafter the petitioner levied execution case. The learned executing court held that the petitioner can only recover the amount from the party who received the same and not from the Land Acquisition Collector. The said order was challenged before this Court. This Court held that the petitioner cannot be relegated to file a suit for recovery of the said amount from those persons to whom payment was made. In *Angada Pujari (supra)* the question arose whether the petitioner is the adopted son of Kamlu and entitled to a share out of the compensation amount awarded under the Land Acquisition Act. In *Laxmi Chand (supra)*, the issue before the apex Court was the jurisdiction of the Civil Court to take cognisance of the cases arising under the Land Acquisition Act. The apex Court held that the scheme of the Act is complete in itself and thereby the jurisdiction of the Civil Court to take cognisance of the cases arising under the Act, by necessary implication, stood barred. The Civil Court is devoid of jurisdiction to give declaration on the invalidity of the procedure contemplated under the Act. The only right an aggrieved person has is to the constitutional Courts, viz., the High Court and the Supreme Court.

15. It is trite 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. State 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. Thus, the aforesaid cases are distinguishable.

16. On a plain reading of Section 26 of the Act, it would show that the civil court's jurisdiction to entertain the suit or other proceedings stands specifically excluded in relation to any question referred to in Section 14 of the Act. It is evident from the language employed that the exclusion is not

absolute or all pervasive. Prayer with regard to (i) to (iii) quoted in paragraph-2 (supra) made in the suit and the issues with regard to the right, title and interest of the plaintiffs over the suit land and declaration of the sale deed executed by defendant no.1 in favour of defendant nos. 2 and 4 as void, are to be tried by the civil court since the same are not covered under Section 14 of the Act. The Tribunal has not been conferred with any jurisdiction to decide the said issues. The issues of sale deed, possession and compensation are inextricably mixed up with each other. Thus, the learned Civil Judge (Sr.Division), Talcher is competent to decide the same issues.

17. In view of the finding recorded above, this Court has no other option but to quash the judgment dated 29.3.2004 passed by the learned Additional District Judge, Talcher in CRP No.6 of 2002. The order passed by the learned trial court is affirmed. The petition is allowed. No costs.

Writ petition allowed.

2016 (I) ILR - CUT-512

DR. A. K. RATH, J.

O.J.C. NO. 10717 OF 2005

THE CO-OPERATIVE SUGAR INDUSTRIES LTD.Petitioner

.Vrs.

M/S. DHARANI SUGAR & CHEMICALS LTD.Opp. Party

COURT FEES ACT, 1870 – S.35

Whether the word ‘person’ appearing in Clause (vi) of the notification Dt 07.06.1994 issued by the Govt. of Odisha U/s 35 of the Act includes juridical person ? – Held, – yes.

COURT FEES ACT, 1870 – S.7 (xi) (cc)

Exemption of Court fee – Matter between the plaintiff and Government – Defendant has neither alleged over valuation nor an error affecting the jurisdiction of the Court – Held, the defendant has no locus standi to challenge the order passed by the learned trial Court exempting payment of Court fee. (Para 11)

For Petitioner : Mr. S.K.Pattnaik

For Opp. Party : Mr.D.P.Nanda & Mr. S.P.Mishra

Date of Hearing : 11.12.2015

Date of Judgment: 18.12.2015

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

In this application under Article 227 of the Constitution of India, the petitioner has challenged, inter alia, the order dated 20.7.2005 passed by the learned A.D.J., F.T.C.No.3, Bhubaneswar in M.S.No.87 of 2004/149 of 2001. By the said order, the learned trial court recalled the order dated 20.11.2002 exempting the plaintiff-petitioner from payment of court fees.

2. Shorn of unnecessary details, the short facts of the case are that the petitioner is a Cooperative Society, registered under the Orissa Cooperative Societies Act, 1962. The Society established a sugar industry at Panipoila in the district of Nayagarh for manufacturing of sugar. The industry became sick and was given on lease to the opposite party by an agreement dated 12.1.1991. As per the agreement, the opposite party was liable to pay the minimum charge @ Rs.50 lakh per annum except the first year i.e., 1990-91 and also pay the royalty on the quantity of sugar cane crushed. Since the opposite party made default in payment, the agreement was terminated in the year 1998. Thereafter the petitioner as plaintiff instituted M.S.No.149 of 2001 in the court of the learned Civil Judge (Sr.Division), Bhubaneswar impleading the opposite party as defendant for recovery of Rs.23,76,37,000/- towards outstanding liability. Court fee of Rs.71,30,305/- was payable on the plaint. Relying on the notification of the Government of Orissa dated 7.6.1994 issued under Section 35 of the Court Fees Act, 1870, an application was filed to exempt it from paying the court fees. It is stated that the plaintiff-industry was running on heavy loss and could not make payments to its workers as well as employees. As the financial condition of the industry was in doldrums, it could not pay even interest on the loans incurred from different financial institutions. The industry had been closed since 2000-2001. It sustained heavy loss and there was no surplus income to pay the court fees. The annual income of the industry was much less than Rs.12,000/- per annum. By order dated 20.11.2002, vide Annexure-4, the learned trial court allowed the petition and exempted the plaintiff from payment of court fees.

3. Pursuant to issuance of summons, the defendant entered appearance and filed the written statement along with counter claim. The defendant filed an application purported to be under Order 7, Rule 11 of C.P.C. read with

Section 151 of C.P.C. praying, inter alia, to recall the order dated 20.11.2002 and direct the plaintiff to pay court fees as per valuation of the suit. An ancillary prayer was also made that if the plaintiff fails to pay the required court fees within the time stipulated by the court, the plaint be rejected. The plaintiff filed an objection to the same. It is stated that the petition does not come under any provision of Order 7, Rule 11 C.P.C. Further, payment of court fees is a matter between the plaintiff and the State and the defendant cannot challenge the same. By order dated 20.7.2005, the learned trial court allowed the application filed by the defendant and directed the plaintiff to pay court fees on the valuation of the suit within a month.

4. Heard Mr.S.K.Pattnaik, learned Sr.Advocate for the petitioner and Mr.D.P.Nanda, learned Advocate for the opposite party as well as Mr.S.P.Mishra, learned Advocate General for the State of Orissa.

5. Mr.S.K.Pattnaik, learned Sr. Advocate for the petitioner submitted that the defendant has no locus standi to challenge sufficiency of Court-fees paid. Court fee is primarily a matter between the State and the plaintiff. The application filed by the plaintiff to exempt from payment of court fees has been allowed. The same cannot be recalled in an application under Order 7, Rule 11 of C.P.C. He further submitted that the plaint can be rejected under Order 7, Rule 11 of C.P.C. provided the conditions enumerated in the said order are satisfied. But in the instant case, none of the condition stipulated in the said order is satisfied and as such the learned trial court travelled beyond its jurisdiction in recalling the earlier order. According to Mr.Pattnaik, learned Sr. Advocate, once the court fees has been exempted by the Court, it is only the State who is aggrieved by that order. The State of Orissa has not filed any application before this Court challenging the order dated 20.11.2002 passed by the learned court below. The application at the behest of the defendant is a ruse. He further submitted that on a bare perusal of the balance sheet, vide Annexure-3, it would show that the industry had sustained a loss of Rs.55,014,402.75. The industry being a juristic person and the annual income of the industry was much less than Rs.12,000/- for the financial year 2000-2001, the plaintiff is exempted from payment of court fees in view of the notification dated 7.6.1994 issued by the Government of Orissa.

6. Per contra, Mr.Nanda, learned counsel for the opposite party submitted that Clause (vi) of the notification dated 7.6.1994 issued by the Government of Orissa exempts the persons whose annual income does not exceed twelve thousand rupees from payment of court fees. If the said clause

is read with clause (i) to (vii), then a natural person is exempted from payment of court fees, not artificial person. Further, the definition of income mentioned in Clause-(vi) of the notification has to be read and understood as per its dictionary meaning. He further submitted that income means money received over a period of time as a payment for work etc. and as an 'arrival' or "a coming in" i.e., income is what "comes in" or 'received' in the hands of a person in exchange of his services or as an interest on profit on his investment and not as claimed by the petitioner. If the definition of 'income' and 'total income' is taken into account, then the total income irrespective of its sources has to be treated and taken as income for the purpose of calculation of income as per notification of the Government.

7. Mr.Mishra, learned Advocate General on the other hand submitted that the word 'person' appearing in Clause (vi) of the notification dated 7.6.1994 includes an artificial person. But then if the income of such person is less than Rs.12,000/- per annum, then he is exempted from payment of court fees. Referring to the balance sheet, vide Annexure-3, he submitted that the industry sustained a loss of Rs.55,014,402.75 during the financial year 2000-2001 and as such exempted from payment of court fees. He relied on the judgment of this Court in the case of Bijoy Kumar Sahoo Vrs. Gokula Bihari Mohanty and others, AIR 2011 Orissa 183.

8. The following points emerge for consideration of this Court :

- (1) Whether the defendant has any locus standi to challenge the order of the learned Additional District Judge (FTC No.-III), Bhubaneswar exempting the plaintiff from payment of court fees ?
- (2) Whether the word 'person' appearing in Clause (vi) of the notification dated 7.6.1994 issued by the Government of Orissa under Section 35 of the Court Fees Act, 1970 includes juridical person ?
- (3) Whether the annual income of the plaintiff exceeds Rs.12,000/- enabling it from exemption of court fees under the aforesaid notification ?

9. In Mahasay Ganesh Prasad Ray and another Vrs. Narendra Nath Sen and others, AIR 1953 SC 431, the apex Court held that the payment of court fees is a matter primarily between the plaintiff and Government. The said dicta was reiterated in Sri Rathnavarmaraja Vrs. Smt.Vimla, AIR 1961 Supreme Court 1299. In paragraph-2 of the said report, the apex Court held as follows:-

“(2) The Court-fees Act was enacted to collect revenue for the benefit of the State and not to arm a contesting party with a weapon of defence to obstruct the trial of an action. By recognising that the defendant was entitled to contest the valuation of the properties in dispute as if it were a matter in issue between him and the plaintiff and by entertaining petitions preferred by the defendant to the High Court in exercise of its revisional jurisdiction against the order adjudging court-fee payable on the plaint, all progress in the suit for the trial of the dispute on the merits has been effectively frustrated for nearly five years. We fail to appreciate what grievance the defendant can make by seeking to invoke the revisional jurisdiction of the High Court on the question whether the plaintiff has paid adequate court-fee on his plaint. Whether proper court-fee is paid on a plaint is primarily a question between the plaintiff and the State. How by an order relating to the adequacy of the court-fee paid by the plaintiff, the defendant may feel aggrieved, it is difficult to appreciate. Again, the jurisdiction in revision exercised by the High Court under S. 115 of the Code of Civil Procedure is strictly conditioned by cls. (a) to (c) thereof and may be invoked on the ground of refusal to exercise jurisdiction vested in the Subordinate Court or assumption of jurisdiction which the court does not possess or on the ground that the court has acted illegally or with material irregularity in the exercise of its jurisdiction. The defendant who may believe and even honestly that proper court-fee has not been paid by the plaintiff has still no right to move the superior courts by appeal or in revision against the order adjudging payment of court-fee payable on the plaint. But counsel for the defendant says that by Act 14 of 1955 enacted by the Madras Legislature which applied to the suit in question, the defendant has been invested with a right not only to contest in the trial court the issue whether adequate court-fee has been paid by the plaintiff, but also to move the High Court in revision if an order contrary to his submission is passed by the court. Reliance in support of that contention is placed upon sub-sec. (2) of S. 12. That subsection, in so far as it is material, provides :

"Any defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim plead that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient. All questions arising on

such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. If the court decides that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient, the court shall fix a date before which the plaint shall be amended in accordance with the court's decision and the deficit fee shall be paid... ."

10. On a survey of the decisions, this Court in the case of Bijay Kumar Sahoo Vrs. Gokula Bihari Mohanty and others, AIR 2011 ORISSA 183, has succinctly stated the principles in paragraph-15 of the said report, which are quoted below:-

“15. The principles decided in all the aforesaid decisions and the discussion supra must have, by now, answered the questions posed at the outset. The discussion may be summed up as follows :-

(1) The "finality" declared by [Section 12](#) of the Act is limited to the extent that the order on the question of valuation for the purpose of jurisdiction and court-fees is like any other non-appealable interlocutory order and no appeal lies from such an order.

(2) Any mistake or vulnerability in the decision/order in view of the interdict in Rathnavarmaraja's case (AIR 1961 SC 1299) cannot be questioned by the defendant on the ground of any mistake or vulnerability in the decision itself or in the decision making process unless the question also involves jurisdiction of the Court to try the suit or entertain the appeal.

(3) In Courts of limited pecuniary jurisdiction, valuation assumes great importance and since undervaluation goes to the root of maintainability of the suit, a defendant is entitled to raise the objection irrespective of the nature of the suit when the valuation touches the question of jurisdiction. The distinction between error regarding category and an error regarding valuation pure and simple (as discussed supra in Nemi Chand's case) is of no relevance in a revision by the defendant.

(4) So long as the error is not one affecting the jurisdiction of the Court to try the suit or entertain the appeal, the defendant is not affected thereby and in suits filed in Court of unlimited pecuniary jurisdiction, the defendant may not be entitled to question the decision on the valuation. (The question of over-valuation may however be different).”

Point No.1

11. As held by this Court in the case of Bijay Kumar Sahoo (supra) that so long as the error is not one affecting the jurisdiction of the Court to try the suit or entertain the appeal, the defendant is not affected thereby and in suits filed in Court of unlimited pecuniary jurisdiction, the defendant may not be entitled to question the decision on the valuation. But then the question of overvaluation may, however, be different. Admittedly, the pecuniary jurisdiction of the learned Civil Judge (Sr. Division) is unlimited. The instant case is not a question of over valuation. Thus, the defendant has no locus standi to challenge the order passed by the learned trial court, whereby and whereunder, the plaintiff has been exempted from payment of court fees.

Point No.2

12. In exercise of the powers conferred by Section 35 of the Court Fees Act, 1870, the State Government remitted in the whole of the State of Orissa all fees mentioned in Schedule I & II to the said Act payable for filing of cases or proceedings in any Court in Orissa. Accordingly, notification was published on 7.6.1994. On a conspectus of the said notification, vide Annexure-1, it is evident that seven categories of persons are exempted from payment of court fees. Clause (vi) of the notification applies to 'persons' whose annual income does not exceed twelve thousand rupees.

13. In the case of Oriental Pigment Iron (P) Ltd. Vrs. O.S.F.C. and others, W.P.(C) No.14687 of 2008 disposed of on 20.11.2015, the question arose before this Court as to whether the Corporation is an indigent person. Interpreting the provision of Order 33, Rule 1 C.P.C., this Court in paragraph-7 of the judgment held as follows:-

“7. What is the meaning of 'person' appearing in the Order 33 Rule 1 C.P.C. After survey of decisions of various High Courts, the apex Court in the case of Union Bank of India Vrs. Khader International Construction and others, AIR 2001 Supreme Court 2277 held that the word 'person' has to be given its meaning in the context in which it is used. It refers to a person who is capable of filing a suit and this being a benevolent provision, it is to be given an extended meaning. It is further held that a public limited company, which is otherwise entitled to maintain a suit as a legal person, can very well maintain an application under Order 33 Rule 1 C.P.C. The word 'person' mentioned in Order 33 includes not only a natural person, but other juridical persons also.”

Thus, the word 'person' appearing in Clause (vi) takes within its sweep "Juridical Person" as well.

Point No.3

14. On a cursory perusal of the balance sheet, vide Annexure-3, dated 31.3.2000, it is evident that the plaintiff-industry sustained a loss of Rs.19,73,796,93/-. Thus, the annual income of the industry does not exceed Rs.12,000/-

15. The decisions cited by Mr.Nanda, learned counsel for the opposite party in the cases of Dulichand Laxminarayan Vrs. Commissioner of Income of Income Tax, Nagpur, AIR 1956 SC 354, State Trading Corporation of India Ltd. Vrs. Commercial Tax Officer and others, AIR 1963 SC 1811, Commissioner of Income Tax, Madars Vrs. G.R. Karthikeyan, Coimbatore, 1993 Suppl.(III) SCC 222, T.N. Alloy Foundry Co. Ltd. Vrs. T.N. Electricity Board and others, 2004 (III) SCC 392, State of M.P. Vrs. Awadh Kishore Gupta and others, 2004 (I) SCC 691, Mahila Vikash Mandal Colaba and others Vrs. State of Maharashtra and another, 2005 (VI) SCC 184 and Karanataka Bank Ltd. Vrs. State of Andhra Pradesh and others, 2008 (II) SCC 254 are distinguishable in the facts and circumstances of the case.

16. 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 to 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 deduced therefrom. In Padmasundara Rao (Dead) and others v. State 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. Thus, the aforesaid cases are distinguishable.

17. Resultantly, the petition is allowed. The order dated order dated 20.7.2005 passed by the learned A.D.J., F.T.C.No.3, Bhubaneswar in

M.S.No.87 of 2004/149 of 2001 is quashed and the petitioner is exempted from payment of court fees.

Writ petition allowed.

2016 (I) ILR - CUT-520

DR. A.K. RATH, J.

W.P. (C) NO. 11613 OF 2004

ATISH CHANDRA SINHA & ANR.Petitioners

.Vrs.

SMT. MANJUSHREE DASH & ANR.Opp. Parties

CIVIL PROCEDURE CODE,1908 – O- 1, R-10

Whether in a suit for specific performance of contract for sale of property, a stranger or a third party to the contract can be added as defendant in the suit ? – Held, No – The intervener is neither a necessary party nor a proper party to such suit. (Paras 7,8)

For Petitioners : Mr. Bikram Senapati

For Opp. Parties : None

Date of Hearing : 27.01.2016

Date of Judgment: 27.01.2016

JUDGMENT

DR. A.K. RATH, J.

Challenging, inter alia, the order dated 17.9.2004 passed by the learned Additional Civil Judge (Sr. Divn.), Puri in T.S. No.46 of 1993-I allowing the application filed by the intervenor under Order 1 Rule 10 C.P.C., the petitioners have filed this application under Article 227 of the Constitution of India.

2. The opposite party no.1 as plaintiff instituted T.S. No.46 of 1993 in the court of the learned Additional Civil Judge (Sr. Divn.), Puri for specific performance of contract impleading the petitioners as defendants. During pendency of the suit, the opposite party no.2 filed an application under Order 1 Rule 10 C.P.C. for impleadment. It is stated that the plaintiff has filed the

suit in respect of the area Ac.0.046 dec. appertaining to Plot No.475 and 473/1360 under Khata No.6 in mouza-Balukhanda Khas Mahal. He is in possession of the suit property with house standing thereon as a tenant. On 26.11.1967, he has paid an amount of Rs.5,001/- to the defendants. Pursuant to the instruction of the defendants, the Tahasildar had executed an agreement in his favour acknowledging the receipt of money. It is further stated that as per the agreement, it was agreed upon between the parties that in the event the petitioner or any of his nominee would purchase the suit property, an amount of Rs.5,001/- is to be adjusted towards consideration. According to him, his presence is necessary for effectual adjudication of the lis. The defendants filed objection challenging the maintainability of the petition. It is stated that the intervenor is the third party and has no locus standi to file the application. Further the petitioner is the husband of the plaintiff and residing in the house jointly. He has filed a separate suit against the defendants. The petitioner is neither necessary nor proper party to the suit.

3. Learned trial court came to hold that the petitioner claims that he is in possession of the suit land. The petitioner being the husband of the plaintiff is necessary party to the suit and no prejudice will be caused to the defendants if he is added as a party. Held so, learned trial court allowed the application on 17.9.2004.

4. Heard Mr. B. Senapati, learned counsel for the petitioners. None appears for the opposite parties.

5. The sole question that hinges for consideration is as to whether in a suit for specific performance of a contract for sale of property a stranger or a third party to the contract can be added as defendant in the suit. The subject matter of dispute is no more res integra.

6. In *Anil Kumar Singh v. Shivnath Mishra @ Gadasa Guru*, (1995) 3 SCC 147, the apex Court held that since the applicant who sought for his addition is not a party to the agreement for sale, it cannot be said that in his absence, the dispute as to specific performance cannot be decided. In paragraph 9 of the report, it is stated that :

“Since the respondent is not a party to the agreement of sale, it cannot be said that without his presence the dispute as to specific performance cannot be determined. Therefore, he is not a necessary party.”

7. In *Kasturi v. Iyyamperumal and others*, AIR 2005 SC 2813, the apex Court held that in a suit for specific performance of a contract for sale, the plaintiff cannot be forced to add as a party. He does not want to fight unless it is compulsion of the rule of law. He is a dominus litus. In a suit for specific performance of a contract for sale, the issue to be decided is the enforceability of the contract entered into between the parties and whether the plaintiff was/is ready and willing to perform his part of the contract and whether he is entitled to a decree for specific performance of a contract against the defendants. The scope of suit for specific performance of the contract for sale shall be enlarged from the suit for specific performance to a suit for title and possession which is impermissible in law. To decide the right, title and interest in the suit property of the stranger to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be turned into a regular title suit. Therefore, the third party or a stranger to the contract cannot be added so as to convert a suit of one character into a suit of different character.

8. In view of the authoritative pronouncement of the apex Court in the decisions cited supra, the irresistible conclusion is that the intervenor is neither necessary nor proper party to the suit. Learned trial court fell into patent error in allowing the application.

9. Accordingly, the order dated 17.9.2004 passed by the learned Additional Civil Judge (Sr. Divn.), Puri in T.S. No.46 of 1993-I is quashed. The petition is allowed.

Writ petition allowed.

2016 (I) ILR - CUT-522

DR. A.K. RATH, J.

C.M.P. NO. 382 OF 2015

PRASANNA KU. PAIKARAY

.....Petitioner

.Vrs.

PRAKASH KU. PAIKARAY & ORS.

.....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-18, R-3

Rebuttal evidence – Exercise of option where there are several issues – Party beginning ought to intimate the Court about reserving the right to adduce evidence in rebuttal before the opposite party starts

its evidence – However if the party at the outset chooses to call any evidence covered by the option contemplated under Order 18, Rule 2 C.P.C. he/she will not be permitted to give further evidence in rebuttal of the evidence produced by the other party.

In this case the opposite party No. 1 being the plaintiff filed suit for partition – After examining three witnesses he filed a petition under Order 18, Rule 3 C.P.C. praying to grant liberty to adduce evidence in rebuttal to the evidence adduced by the defendants on the ground that defendants had taken a plea that the plaintiff is the adopted son of one Padma Charan Paikray and he has been ousted from the suit property for more than twelve years – Since burden lies on the defendants to prove the same it is necessary on the part of the plaintiff to reserve the right to adduce rebuttal evidence if any after closure of the evidence of the defendants – Defendants filed objection to such petition – Trial Court allowed the application – Order challenged before this Court – It is seen that the plaintiff has not adduced any evidence on the issue of adoption and ouster and the defendants are yet to begin their evidence – Held, there is no perversity or illegality in the impugned order calling for interference by this Court. (Paras 8, 9)

For Petitioner : Mr. Samir Kumar Mishra
For Opp. Parties: Mr. Sidhartha Mishra

Date of hearing : 08.02. 2016

Date of judgment: 17.02.2016

JUDGMENT

DR. A.K.RATH, J

Assailing the order dated 27.12.2014 passed by the learned Civil Judge (Senior Division), Banpur in C.S. No.09/72 of 2014/2013, the instant application has been filed under Article 227 of the Constitution. By the said order, learned trial court allowed the application of the plaintiff under Order 18 Rule 3 CPC and granted permission to the plaintiff to adduce evidence in rebuttal of the evidence produced by the defendants.

2. Opposite party no.1 as plaintiff instituted C.S. No.09/72 of 2014/2013 in the court of the learned Civil Judge (Senior Division), Banpur for partition impleading the petitioner and opposite parties 2 to 5 as defendants. In course of hearing, the plaintiff examined three witnesses. While the matter stood thus, an application under Order 18 Rule 3 CPC was filed by the plaintiff praying therein to grant liberty to him to adduce evidence, if any, after closure of the evidence from the side of the defendants. It is stated that

defendants had taken a plea that the plaintiff is the adopted son of one Padma Charan Paikray and he has been ousted from the suit property for more than twelve years. Burden lies on the defendants to prove the same. Therefore, it is necessary on the part of the plaintiff to reserve the right to adduce additional evidence, if any, after closure of the evidence of the defendants. The defendant no.5 filed an objection to the same contending, inter alia, that hearing of the suit having commenced, the petition is misconceived. By order dated 27.12.2014, learned trial court allowed the application.

3. Heard Mr. Samir Kumar Mishra, learned counsel for the petitioner and Mr.Sidharta Mishra, learned counsel for the opposite party no.1.

4. Mr. Samir Kumar Mishra, learned counsel for the petitioner, submitted that after closure of the evidence of the plaintiff on all issues, the application was filed under Order 18 Rule 3 CPC for permission to adduce further evidence by way of rebuttal evidence to be produced by the defendants on the issue. Such a course is not permissible. He relied on a decision of this Court in the case of Aranya Kumar Panda v. Chintamani Panda and others, AIR 1977 Orissa 87.

5. Per contra Mr.Sidharta Mishra, learned counsel for the opposite party no.1, supported the impugned order.

6. Scope of Order 18 Rule 3 CPC has been succinctly stated by this Court in the case of Rajakishore Biswal v. Mohan Charan Biswal, 2015 (II) OLR 1104. In paragraphs 6 and 7 of the report, it is stated thus:

“6. Order 18 Rule 3 C.P.C., which is the hub of the issue, is quoted hereunder:-

“3.Evidence where several issues.- Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.”

7. On an interpretation of the said Rule, a Bench of this Court in the case of Sri Nilakantha Rath (supra) held that for its application the first condition to be satisfied is that there must be several issues

involved in the suit. The issues referred to in the said provision obviously mean issues of fact, because evidence is required to be led only on issues. Therefore, in order to attract the provision, there must be more than one issue of fact. It was further held that although the provision does not prescribe any particular stage at which the option should be exercised, it is only fair and reasonable that the same should be exercised before the party (exercising the option) begins his evidence and in no case after evidence from the other side has begun. That is because, the other party must know clearly before he begins his evidence that the first party has actually not finished adducing his entire evidence in the suit. The same view was taken in the case of Smt. Prativa Kar (supra) (emphasis laid).”

7. On the anvil of the decision cited supra, the case may be examined.

8. The assertion of the defendants is that the plaintiff is the adopted son of Padma Charan Paikray and has been ousted from the suit land for more than twelve years. The learned trial court has also framed issues on the said point. Since the burden of proving the fact that the plaintiff is the adopted son of Padma Charan Paikray lies on the defendants, the plaintiff has the right to reserve his evidence after completion of the evidence from the other side. Plaintiff has not closed his evidence. The defendants are yet to begin the evidence. As held in Rajakishore Biswal (supra) in order to attract the provision, there must be more than one issue of fact. Although the provision does not prescribe any particular stage at which the option should be exercised, it is only fair and reasonable that the same should be exercised before the party exercising the option begins his evidence and in no case after evidence from the other side has begun. In the instant case, before closure of evidence, the plaintiff filed an application. The defendants have not begun their evidence. Thus the learned trial court is quite justified in allowing the application. In Aranya Kumar Panda (supra), after closure of the evidence of the plaintiff on all issues, the plaintiff filed a petition under Order 18 Rule 3 CPC for permission to adduce further evidence by way of rebuttal of the evidence to be produced by the defendants on the issues, the onus of which lay on them. The learned trial court rejected the petition holding, inter alia, that the onus on the plaintiff to prove all the issues, that the plaintiff had chosen in the first instance to give evidence on all the issues and that the plaintiff had already closed his evidence, the benefit of the provision of Order 18 Rule 3 CPC was not available to him. This Court held that if the plaintiff at the outset chooses to call any evidence covered by the

option contemplated under Order 18 Rule 2 CPC, he will not be permitted to give further evidence in rebuttal of the evidence produced by the defendants. On a reference to the records, this Court found that the plaintiff had not produced any evidence on issue No. 8. After the plaintiff closed his case, certain documents relevant to the issue were produced on behalf of the defendants and the same were proved through witnesses. The plaintiff had no opportunity of inspecting those documents and of adducing any evidence to repel the defendants' case. It was held that the trial court was not justified in holding that the plaintiff had chosen in the first instance to give evidence on all the issues. There is no quarrel over the proposition of law laid down in Aranya Kumar Panda (supra). On a conspectus of the photostat copies of the deposition filed by Mr. Mishra, learned counsel for the petitioner, it is seen that the plaintiff has not adduced any evidence on the issue of adoption and ouster. The defendants are yet to begin their evidence.

9. There being no perversity or illegality in the impugned order passed by the court below, this Court is not inclined to interfere with the same. Accordingly, the petition, sans any merit, is dismissed. No costs.

Petition dismissed.

2016 (I) ILR - CUT- 526

DR. A.K. RATH, J.

CMP NO. 340 OF 2015

MAHESWAR PRADHAN

.....Petitioner

.Vrs.

SUSHAMA NAYAK & ORS.

.....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O- 41, R-27

Whether the appellate Court can admit additional evidence at any stage of the appeal ? – Held, it can only be considered at the time of hearing of the appeal while examining the pleadings and evidence of the parties and the Court can exercise its discretion as per the requirement of the provisions of Clause (b) of Rule 27 of Order 41 C.P.C. – However Court can not admit additional evidence under its inherent power U/s 151 C.P.C.

For Petitioner : Mr. Jayakrushna Mohapatra
For Opp. Parties: Mr. Sidhartha Mishra

Date of hearing : 21.1.2016

Date of judgment: 21.1.2016

JUDGMNET

DR. A.K.RATH, J.

Assailing the order dated 2.2.2015 passed by the learned Addl. District Judge, Bhanjanagar in RFA No.7 of 2013, the present application has been filed under Article 227 of the Constitution of India. By the said order, learned lower appellate court dismissed the application filed by the appellant under Section 151 CPC to admit the agreement to sale as additional evidence.

2. Opposite parties as plaintiffs instituted C.S No.40 of 2012 in the court of learned Civil Judge (Senior Division), Bhanjanagar for a decree directing the defendant to deliver vacant possession of the suit land impleading the petitioner as defendant. The suit was decreed. Thereafter, the petitioner filed RFA No.7 of 2013 in the court of learned Additional District Judge, Bhanjanagar, which is pending adjudication. In the appeal, an application under Section 151 CPC was filed by the petitioner to admit the agreement to sale as additional evidence. The respondents objected to the same. By order dated 2.2.2015, learned lower appellate court rejected the application.

3. Heard learned counsel for the parties.

4. Order 41 Rule 27 CPC deals with production of additional evidence in appellate court. Discretion of the appellate court to allow additional evidence is circumscribed by limitation specified in Rule 27 CPC. When the conditions laid down in the rule are satisfied, then the additional evidence can be taken. Court cannot admit additional evidence under its inherent power.

5. Whether the appellate court can consider the application for additional evidence at any stage of the appeal. The subject-matter of dispute is no more res integra. This Court in the case Sankar Pradhan v. Premananda Pradhan (dead) and others, 2015 (II) CLR 583 held thus:

“7. In *Persotim Thakur Vrs. Lal Mohar Thakur and others*, AIR 1931 Privy Council 143, it is held that under Cl.(1) (b) of Rule 27 it is only where the appellate Court “requires” it, (i.e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain

grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but “when on examining the 5 evidence as it stands some inherent lacuna or defect becomes apparent.” It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. Wherever the Court adopts this procedure it is bound by Rule 27(2) to record its reasons for so doing (emphasis laid). The same view was taken by this Court in the cases of Banchhanidhi Behera Vrs. Ananta Upadhaya and others, AIR 1962 Orissa 9 and State Bank of India Vrs. M/s.Ashok Stores & others, 53 (1982) C.L.T.552.”

6. On the anvil of the decision cited supra, the case of the petitioner may be examined.

7. Hearing of the appeal has not commenced. The appellate court is yet to examine the pleadings of the parties and evidence to adjudge the requirement of provisions of clause (b) of Rule 27 CPC. Application for adducing additional evidence can only be considered at the time of hearing of the appeal.

8. In view of the same, the order dated order dated 2.2.2015 passed by the learned Additional District Judge, Bhanjanagar in RFA No.7 of 2013 is quashed. Learned lower appellate court is directed to consider the application as additional evidence at the time of hearing of the appeal. Since the appeal is of the year 2013, learned lower appellate court shall do well to dispose of the same within a period of two months from the date of production of a certified copy of the order. The petition is disposed of.

Petition disposed of.

2016 (I) ILR - CUT-529

BISWAJIT MOHANTY, J.

W.P.(C) NO. 25358 OF 2014

TIKI RAUT & ORS.

.....Petitioners

.Vrs.

AJAYA KUMAR MOHAPATRA & ORS.

.....Opp. Parties

MOTOR VEHICLES ACT, 1988 – S. 168

Motor accident – Compensation – Premature withdrawal of fixed deposit – Ground is to clearup loans made for the marriage of petitioner No.2 – Application rejected on the ground that object of the fixed deposit for future sustenance would be frustrated – Hence the writ petition – Tribunal should have considered the claimants liberty to apply for withdrawal in case of necessity and for defraying the expenses incurred for the minor – Held, impugned order is quashed – Direction issued for hearing the matter afresh and release of appropriate amount.

(Paras 7,8)

For Petitioners : M/s. B.N.Rath & Mr. A.K.Jena

For Opp. Parties : None

Date of Judgment:18.12.2015

JUDGMENT***BISWAJIT MOHANTY,J.***

In this application, the petitioners have prayed for quashing the order dated 12.8.2014 passed by the learned Motor Accident Claims Tribunal, Berhampur, Ganjam under Annexure-1 refusing premature withdrawal of the fixed deposits made on behalf of the petitioners for defraying marriage expenses of petitioner no.2 and permitting the petitioners to withdraw their compensation amounts as kept in fixed deposit.

2. Heard B.N. Rath, learned counsel for the petitioners.
3. The facts relating to filing of the writ application as stated by the petitioners are as follows:-

Petitioner no.1 is the widow of one Diga @ Digambar Rout. Petitioner nos.2,3, and 4 are children of Petitioner no.1 and late Diga @ Digambar Rout. Late Diga @ Digambar Rout died in a motor vehicle accident leaving the petitioner nos.2,3 and 4 in a helpless condition. After

untimely death of the sole bread earner of the family, the petitioners have filed M.A.C. No.74 of 2012 in the court of 1st M.A.C.T., Berhampur claiming compensation of Rs.6,00,000/-. After filing of the claim case, opposite party no.2 appeared and filed its written statement. Ultimately, on 26.7.2013 the claim case was disposed of in terms of compromise by awarding an amount of Rs.3,70,000/-. Out of the said amount, Rs.1,40,000/- was directed to be kept in a fixed deposit account in the name of Petitioner no.1 and Rs.40,000/- each was directed to be kept in three separate fixed deposit accounts in the names of Petitioner nos.2,3 and 4 in any Nationalized Bank for a period of seven years. It was also indicated that there should be no premature withdrawal of amount deposited in the above manner without prior permission of the Tribunal. The balance amount of Rs.1,10,000/- was directed to be paid to Petitioner no.1. As per the above direction, fixed deposit amounts have been opened for seven years in the Corporation Bank, Berhampur. On 11.7.2014, the marriage of petitioner no.2 was solemnized. Since petitioner no.1 performed the marriage ceremony of petitioner no.2 by borrowing money from her relatives and well wishers, therefore, on 14.7.2014 an application under Annexure-2 was filed before the learned Tribunal for release of the fixed deposits of petitioners, so that the amount could be utilized for clearing the loans so incurred. However, learned Tribunal rejected the application of the petitioners on 12.8.2014 on the ground that since such fixed deposits have been made for future sustenance of the petitioners, this object would be frustrated if premature withdrawal would be allowed. Challenging the same, the present writ application has been filed by the petitioners.

Since no relief has been claimed against opposite party nos.1 and 2, this Court did not choose to issue notice to the said opposite parties.

4. Mr. B.N. Rath, learned counsel for the petitioners submitted that the order dated 12.8.2004 rejecting the application of the petitioners for premature release of the fixed deposit amount of the petitioners is bad in law and the same has been passed without appreciating the facts and materials in their proper perspective and without application of judicial mind. Learned Tribunal failed to appreciate the fact that the compensation amount was awarded for the benefit of the family and since the petitioners have no other viable source of income, the learned Tribunal ought to have released the entire amount of Rs.2,60,000/- kept in fixed deposit in the name of the petitioners in order to clear the loan incurred for performing marriage of petitioner no.2. In any case, he submitted that under the facts and

circumstances, the learned Tribunal has gone wrong in not releasing any amount, which has resulted in grave injustice in this case.

5. In this context, let us examine the law on point. As per the judgment of the Hon'ble Supreme Court in **General Manager Kerala State Road Transport Corporation, Trivandrum –v- Mrs. Susama Thomas and others, (AIR 1994 S.C.1631)** it has been made clear that in case of compensation for death, it is appropriate that the learned Tribunal should keep in mind the principles enunciated in the case of **Union Carbide Corporation –v- Union of India (AIR 1992 S.C.248)** in the matter of appropriate investments to safeguard the feed from being frittered away by the beneficiaries owing to ignorance, illiteracy and exploitation. In that case, Hon'ble Supreme Court offered the following guidelines.

“(i) The Claims Tribunal should, in the case of minors, invariably order the amount of compensation awarded to the minor invested in long term fixed deposits at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may however be allowed to be withdrawn;

(ii) In the case of illiterate claimants also the Claims Tribunal should follow the procedure set out in (i) above, but if lump sum payment is required for effecting purchases of any movable or immovable property, such as, agricultural implements, rickshaw etc., to earn a living, the Tribunal may consider such a request after making sure that the amount is actually spent for the purpose and the demand is not a rouse to withdraw money;

(iii) In the case of semi-illiterate persons the Tribunal should ordinarily resort to the procedure set out at (i) above unless it is satisfied for reasons to be stated in writing, that the whole or part of the amount is required for expanding and existing business or for purchasing some property as mentioned in (ii) above for earning his livelihood, in which case the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid;

(iv) In the case of literate persons also the Tribunal may resort to the procedure indicated in (i) above, subject to the relaxation set out in (ii) and (iii) above, if having regard to the age, fiscal background and strata of society to which the claimant belongs and such other considerations, the Tribunal in the larger interest of the claimant and with a view to ensuring the safety of the compensation awarded to him thinks it necessary to do order;

(v) In the case of widows the Claims Tribunal should invariably follow the procedure set out in (i) above.

(vi) In personal injury cases if further treatment is necessary the Claims Tribunal on being satisfied about the same, which shall be recorded in writing, permit withdrawal of such amount as is necessary for incurring the expenses for such treatment;

(vii) In all cases in which investment in long term fixed deposits is made it should be on condition that the Bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid monthly directly to the claimant or his guardian, as the case may be;

(viii) In all cases Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency. To meet with such a contingency, if the amount awarded is substantial, the Claims Tribunal may invest it in more than one Fixed Deposit so that if need be one such F.D.R. can be liquidated”.

6. For the purpose of this case, guidelines under (i),(v) and (viii) are relevant. A conjoint reading of these three guidelines make it clear that in case of minors the amount of compensation awarded is to be invested in long term fixed deposits at least till the minors attain the majority. However, the expenses incurred by the guardian for such minor be allowed to be withdrawn. Further, the learned Tribunal should grant to the claimants liberty to apply for withdrawal in case of any emergency.

7. In view of the above discussion, this Court has no hesitation to hold that the learned Tribunal has committed grave illegality in totally rejecting the prayer of the petitioners for release of the fixed deposit amounts. It appears that the Tribunal has acted mechanically without application of judicial mind in passing the impugned order. The Tribunal has shut it's eyes to realities of life relating to the expenses required for performing a daughter's marriage. The Tribunal thought that premature release of the amount would have jeopardized the future sustenance of the petitioners. The guidelines (i) and (viii) of the Hon'ble Supreme Court as indicated earlier clearly permit withdrawal in case of necessity and for defraying the expenses incurred for minor. Therefore, under the circumstances, the Tribunal should have considered release of the entire amount deposited against the name of Petitioner no.2, as the Petitioner no.1 has incurred loan in her marriage. Similarly, the Tribunal should have considered releasing a part of the

awarded amount which remains in the fixed deposit account of Petitioner no.1 without jeopardising her future sustenance, as it remains undisputed that Petitioner no.1 has no other viable source of income, without touching the fixed deposit accounts of Petitioner nos.3 and 4.

8. In such background, this Court quashes the impugned order dated 12.8.2014 by which the learned Tribunal has rejected the claim of the petitioners for premature withdrawal and remands the matter to the 1st Motor Accident Claims Tribunal, Berhampur to hear the matter afresh and direct release of appropriate amount keeping in mind the observations made above. The Tribunal shall complete the entire exercise within a period of two months from today. Accordingly, the writ application is partly allowed. No costs.

Writ petition allowed in part.

2016 (I) ILR - CUT- 533

DR. B.R.SARANGI, J

W.P.(C) NO. 22918 OF 2013

RAJANIKANTA PRIYADARSHY

.....Petitioner

.Vrs.

UTKAL UNIVERSITY & ORS.

.....Opp. Parties

EDUCATION – Utkal University declared the petitioner to have passed +3 Arts Courses in the year 2010 – After that petitioner undergone higher studies and passed different courses – Subsequently his +3 result was cancelled declaring him as fail – Action challenged – Before cancellation of the result no notice was issued to the petitioner – Violation of principles of natural justice – Since the petitioner had already acquired higher qualification, the same can not be changed Subsequently being hit by the principles of promissory estoppel – Held, impugned orders passed by the university cancelling the result of the petitioner in +3 Final Degree (Regular) examination 2010 declaring him fail are quashed – Consequently, the petitioner is declared to have passed in +3 final degree examination.

(Paras 25, 26)

Case Laws Referred to :-

1. 1992 (II) OLR 341 : Miss Reeta Lenka v. Berhampur University & Anr.
2. 1984 (I) OLR 564 : David C. Jhan v. Principal Ispat College, Rourkela
3. 1989 (I) OLR 440 : Ambika Prasad Mohanty v. Orissa Engineering College and another
4. 2014 (II) OLR 226 : Dr. (Smt.) Pranaya Ballari Mohanty v. Utkal University and others
5. 1964 AC 40 (196) : (1963) 2 All ER 66 (HL) House of Lords in Ridge v. Baldwin
6. (1967) 2 SCR 625 = AIR 1967 SC 1269 : Dr. Bina Pani Dei
7. (1970) 1 SCR 457 : (1969) 2 SCC 262 A.K. Kraipak v. Union of India
8. AIR 1978 SC 851 : (1978) 2 SCR 272 : (1978) 1 SCC 405, Mohinder Singh Gill case,
9. Canara Bank v. Debasis Das : AIR 2003 SC 2041 : (2003) 4 SCC 557
10. (2005) 6 SCC 321 : Canara Bank v. V.K. Awasthy
11. (2008) 14 SCC 151: Sahara India (Firm) v. Commissioner of Income Tax, Central I

For Petitioner : M/s. Sameer Kumar Das, S.K.Mishra
 For Opp. Parties : M/s. T.Pattnayak, S.Pattnayak,
 M.Ojha.

Date of hearing : 12.12.2014

Date of judgment: 23.12.2014

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

The petitioner has filed this application seeking to quash the notification of the Utkal University dated 24.11.2010 vide Annexure-9 and subsequent notification dated 20.12.2010 vide Annexure-10 cancelling his result in +3 Final Degree (Regular) Examination, 2010 (2007 Admission Batch) declaring him as 'fail'.

2. The short fact of the case in hand is that the petitioner after passing +2 Arts from CHSE, Odisha, Bhubaneswar was admitted to +3 Arts course through distance education under opposite party no.3. On successful completion of the course, the petitioner was declared to have passed the +3 Arts course in the year 2010 vide Annexure-3 with second class honours. Thereafter, the petitioner was admitted to Master in Finance Control (MFC)

in BJB Autonomous College, Bhubaneswar under the Utkal University and at the same time he has also registered his name under the IGNOU in Post Graduate course in M.A. in Public Administration. After successfully completing the course of Master in Finance Control in BJB Autonomous College, the petitioner appeared the examination conducted for the purpose by the Utkal University and has also been declared pass and due certificates has also been granted by the University, which has been annexed as Annexure-4 to the writ petition. Similarly the petitioner has also obtained his pass certificate and mark sheets in M.A. in Public Administration from the IGNOU in December, 2012 vide Annexure-5. While the petitioner was searching for a job, he was confronted with the fact that the mark sheets and certificates of +3 examination do not carry the registration number. Therefore, the petitioner approached the University authorities to get his mark sheets and certificate of +3 examination, 2010 corrected in order to place it for his employment. At that point of time, the petitioner was informed by the University that there is no such mark sheet or provisional certificate in his favour in respect of +3 examination on the plea that he has already declared failed in the said examination by the University since December, 2010 i.e. after six months of the publication of the result. The petitioner applied under the RTI Act with regard to cancellation of his +3 result vide letter dated 3.8.2013 and information was supplied to him on 30.08.2013 declaring him fail which was received on 31.08.2013. The petitioner came to know from the notice of the University that the revised mark sheet of the +3 examination has been issued and vide notifications dated 24.11.2010 and 22.12.2010, the result of the petitioner has been cancelled vide Annexures-9 and 10 respectively conducted by the Utkal University. It is stated that while canceling such result of the petitioner, no opportunity has been given to him. Hence, this writ petition.

3. Mr. S.K. Das, learned counsel for the petitioner states that while canceling the result of the petitioner in +3 Arts examination pursuant to notification under Annexures-9 and 10, there is gross violation of principles of natural justice. After declaration of the result, the petitioner has already undergone higher studies and passed the degree in Maser in Finance Control from Utkal University and thereafter M.A. in Public Administration from the IGNOU. Therefore, at a belated stage, the position which has been acquired by the petitioner cannot be changed. Hence, the entire action is hit by principle of estoppels and this Court should interfere with the same and quash Annexures-9 and 10 respectively.

To substantiate his contention, Mr. Das, learned counsel for the petitioner relies upon the judgments of this Court in *Miss Reeta Lenka v. Berhampur University and another*, 1992 (II) OLR 341, *David C. Jhan v. Principal Ispat College, Rourkela*, 1984 (I) OLR 564, *Ambika Prasad Mohanty v. Orissa Engineering College and another*, 1989 (I) OLR 440 and *Dr. (Smt.) Pranaya Ballari Mohanty v. Utkal University and others*, 2014 (II) OLR 226.

4. Mr. T.N. Pattnaik, learned counsel appearing for the opposite party-Utkal University states that on subsequent verification of the result, the petitioner was declared as failed because of wrong awarding of 35 marks in the subject ISC of Final Year Degree Examination although he had secured in the said subject 15 marks. For such wrong awarding of mark, the petitioner was declared pass and when such mistake was detected, the mistake was corrected and the petitioner was declared fail. The Controller of Examination informed the Director, DDCE, Utkal University to intimate the change of result to the petitioner. If any mistake has been committed by the authority, they are competent to rectify their own mistake. Accordingly, the correction of marks awarded in favour of the petitioner is wholly and fully justified and consequently action taken declaring the petitioner fail suffers from no illegality and irregularity and therefore this Court should not interfere with the same and seeks for dismissal of the writ petition.

5. Considering the contention raised by learned counsel for the parties and after going through the records, it is admitted fact that the petitioner has appeared at the +3 Degree Examination in Arts under correspondence course of the Utkal University and he was declared pass with Second Class Honours. Pursuant to such pass in the examination, provisional certificate and mark sheet had been issued to him vide Annexure-3 by the competent authority and on such pass the petitioner had obtained higher qualification by appearing at the Master in Financial Control under the Utkal University from BJB Autonomous College, Bhubaneswar and also passed M.A. in Public Administration from IGNOU in the year 2012. After obtaining higher qualification when the petitioner applied for job in public organization, during selection he was confronted with the fact that the mark sheet and certificates of +3 examination do not carry the registration number. Therefore, the petitioner approached the University authorities to get the correct mark sheet and certificates of +3 examination in order to place it for his employment and at that point of time, the petitioner was informed that there was no such mark sheet or provisional certificate in his favour in respect of +3 examination as he has declared fail in the said examination by

the University since December, 2010 after six months of the publication of the result. In order to find out the correctness of the information received from the University authority, the petitioner applied for the same under the RTI Act and in compliance to the same, intimation was provided to him declaring him fail vide Annexures-9 and 10. It is stated that while passing such order under Annexures-9 and 10, the minimum requirement law with regard to compliance of principles of natural justice has not been followed. Therefore, the impugned orders under Annexures-9 and 10 have been passed in gross violation of principles of natural justice. Subsequently on the basis of the mark sheet, since the petitioner prosecuted higher studies and obtained higher qualifications, at this stage, any action taken for cancellation of his result without following due procedure of law cannot be sustained in the eye of law. In the peculiar facts and circumstances mentioned above, the following question arises for consideration:

- i) Whether there is non compliance of principles of natural justice;
- ii) Whether the action taken by the University is hit by principle of estoppels.

i) **Violation of principles of natural justice:**

It appears from the documents available on record that while issuing Annexure-9, no communication has been issued to the petitioner. Rather, Annexure-9 itself indicates that intimation has been issued to the Director, DDCE, Utkal University with a request to intimate the petitioner at their end, but the Director, DDCE has not communicated any order to the petitioner with regard to the action taken by the university pursuant to Annexure-9. Clause-7 of the said letter indicates that copy of the said letter was sent to the Editor, the Samaj, Prajatantra, Cuttack, the Sambad and Dharitri, Bhubaneswar with a request to publish the news with free of cost for the benefit of the student. The petitioner verified that no such article was published in the news paper nor any of the authority has informed the petitioner with regard to the notice issued for cancellation of the result in subject ISC of +3 final degree examination, 2010 of Utkal University. Even in Annexure-10 also while canceling the result of the petitioner, no such intimation was issued to the petitioner nor has any opportunity been given to the petitioner pursuant to Annexure-9 so also in Annexure-10 with regard to such cancellation of result. Though the letter indicates that the same has been issued to the Director, DDCE Utkal University to intimate the concerned students and surrender the old mark sheet and provisional certificate and to take a new one, only information was sent to the Editor, the Samaj, Cuttack and the Dharitri, Bhubaneswar for publication of the said news in their

esteemed dalies in the greater interest of the students. It appears that no steps have been taken by the authorities by depositing actual fees before the print media to publish the same nor any intimation was issued to the petitioner by the Director, DDCE, Utkal University and no receipt has been filed intimating that letter has been communicated to the petitioner. Absence of any communication to the petitioner from the University makes it clear that there is gross violation of principles of natural justice as no opportunity of hearing has been given to him before cancellation of the result in Annexure-9.

The meaning of 'natural justice' has been considered several times by judicial pronouncements.

6. 'Natural justice' has been used in a way 'which implies the existence of moral principles of self evidence and unarguable truth'. In Course of time, judges nurtured in the traditions of British jurisprudence, often involved it in conjunction with a reference to 'equity and good conscience'. Legal experts of earlier generations did not draw any distinction between 'natural justice' and 'natural law'. 'Natural justice' was considered as 'that part of natural law which relates to the administration of justice'. Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. During the last two decades, the concept of natural justice has made great strides in the realm of administrative law.

7. Before the epochmaking decision of the *House of Lords in Ridge v. Baldwin*, 1964 AC 40 (196) : (1963) 2 All ER 66 (HL), it was generally thought that the rules of natural justice apply only to judicial or quasi-judicial proceedings; and for that purpose, whenever a breach of the rule of natural justice was alleged, courts in England used to ascertain whether the impugned action was taken by the statutory authority or tribunal in the exercise of its administrative or quasi-judicial power.

8. In India also, this was the position before the decision, dated February 7, 1967, of this Court in *Dr. Bina Pani Dei*, (1967) 2 SCR 625 : AIR 1967 SC 1269 wherein it was held that even an administrative order or decision in matters involving civil consequences, has to be made consistently with the rules of natural justice.

9. In *A.K. Kraipak v. Union of India* (1970) 1 SCR 457 : (1969) 2 SCC 262, the apex Court held that if the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to

draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative inquiry may have more far-reaching effect than a decision in a quasi-judicial inquiry.

10. In the language of V.R. Krishna Iyer, J. (*Mohinder Singh Gill* case, AIR 1978 SC 851 : (1978) 2 SCR 272 : (1978) 1 SCC 405, “..... subject to certain necessary limitations natural justice is now a brooding omnipresence although varying in its play Its essence is good conscience in a given situation, nothing more – but nothing less.

11. In *Canara Bank v. Debasis Das*, AIR 2003 SC 2041 : (2003) 4 SCC 557, the apex Court held that natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties.

12. In *Canara Bank v. V.K. Awasthy*, (2005) 6 SCC 321, it is held that natural justice, is another name for commonsense justice. Rules of natural justice are not codified cannons. But they are principles ingrained into the conscience of man Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideas and human values.

13. In *Sahara India (Firm) v. Commissioner of Income Tax, Central I*, (2008) 14 SCC 151, it is held that rules of ‘natural justice’ are not embodied rules. The phrase ‘natural justice’ is not capable of precise definition. The underlying principle of ‘natural justice’ evolved under the common law, is to check arbitrary exercise of power by the state or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action.

14. Natural justice has been variously defined. It is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have

been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

15. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized states is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. Even an administrative order which involves civil consequence must be consistent with the rules of natural justice. The expression 'civil consequence' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

16. Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is '*nemo judex in causa sua*' or '*nemo debet esse judex in propria causa sua*' that is, 'no man shall be a judge in his own cause'. The second rule is '*audi alteram partem*' that is, 'hear the other side'. A corollary has been deduced from the above two rules and particularly the *audi alteram partem* rule, namely, '*quialiquid statuerit, parte inaudita altera acquum licet dixerit, haud acquum fecerit*' that is, 'he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right' or in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done".

17. Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left open. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated.

18. Notice is the first limb of the principle that no one should be condemned unheard. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time.

19. In view of the fact that notice is the first limb of the principle that no one should be condemned unheard. In the present case while cancelling the result of the petitioner no such notice was issued to him either by the University or by the Director, DDCE nor the same has been published in any of the news papers so that the petitioner could have approached the authority by giving effective reply to such cancellation of the result.

20. In the counter affidavit filed by the opposite party-University, no specific answer has been given to such contention of the petitioner. Rather, it is only stated that the petitioner has been provided necessary information under the RTI Act, 2005 regarding cancellation of his result as evident from Annexure-6 series to the writ petition and the Director, DDCE has also requested to intimate the same to the petitioner to surrender his old mark sheet and provisional certificate and take the new one. But nothing has been spelt out in the counter affidavit with regard to the manner and mode of intimation to the petitioner or intimation thereof by giving notice with regard to cancellation of result. Even in reply to the rejoinder affidavit, it has only been stated that the result having been declared by the university was provisional and it is well within the legal domain of the university to revise the same. The error having been committed can never be allowed to be perpetuated at the hand of the authorities at the helm of affairs. It is further stated that it is the settled position of law that the principle of estoppels does not apply against the statues. But nothing has been indicated with regard to giving notice to the petitioner regarding cancellation of his result. In absence of any specific contention on behalf of the opposite party with regard to

service of notice to the petitioner before taking recourse to cancellation of result, the inevitable conclusion is that there is non compliance of principles of natural justice. Thereby the order under Annexures-9 and 10 cannot be sustained.

ii) **Violation of Principle of estoppels:**

21. Mr. S.K. Das, learned counsel for the petitioner referring to the judgment in *Miss Reeta Lenka* (supra) urged that once a student has been declared pass and has taken admission to another course it implies that he has changed his position, his result cannot be changed or altered or cancelled by the authorities.

22. In *David C. Jhan* (supra), this Court applying the law of estoppels directed the Board authorities not to cancel the result of the student, who has already taken admission to the IA classes.

23. In *Ambika Prasad Mohanty* (supra), this Court held that once a student got permission to higher courses basing on the result given to him, before canceling such result, he is required to be given opportunity to explain or to show cause. In absence of any show cause or opportunity to the students concerned such cancellation is in violation of principles of natural justice.

24. This Court in *Dr. (Smt.) Pranaya Ballari Mohanty* (supra) has taken into consideration the principles of promissory estoppels laid down by the apex Court. In paragraph-14 of the said judgment, this Court held as follows:-

“14. The principle of promissory estoppel has been considered by the apex Court in *Union of India and others v. M/s Anglo Afghan Agencies etc.*, AIR 1968 SC 718, *Chowgule & Company (Hind) Pvt. Ltd v. Union of India and others*, AIR 1971 SC 2021, *M/s Motilal Padampat Sugar Mills Co. Ltd v. The State of Uttar Pradesh and others*, AIR 1979 SC 621, *Union of India and others v. Godfrey Phillips India Ltd.*, AIR 1986 SC 806, *Delhi Cloth & General Mills Ltd. v. Union of India and others*, AIR 1987 SC 2414, *Bharat Singh and others v. State of Haryana and others*, AIR 1988 SC 2181 and many other subsequent decisions also”.

25. In view of the law laid down by the apex Court as well as by this Court discussed above, this Court re-affirms the position of law to the extent that once the result has been published and on that basis the petitioner has

already undergone higher studies and passed in different courses, subsequently his initial result cannot be cancelled on the ground that he has failed in the said examination. It may be noted that while declaring him fail, the minimum requirement of law in compliance to principles of natural justice has to be complied with by giving notice to the petitioner. In absence of any such notice and without giving opportunity to the petitioner, the cancellation has been made, therefore the same cannot be sustained in the eye of law.

26. In view of the aforesaid facts and circumstances of the case and taking into consideration the principles of natural justice and promissory estoppels discussed above and applying the same to the present facts and circumstances, this Court is of the view that before cancellation of result since no notice has been given to the petitioner and once the result has been published on the basis of which the petitioner had already acquired higher qualification, the same cannot be changed subsequently, which is hit by the principles of promissory estoppels. Applying both the doctrine to the present case, the orders dated 24.11.2010 and 20.12.2010 passed by the University under Annexures-9 and 10 respectively are hereby quashed. Consequently, the petitioner is declared to have passed in +3 Final Degree Examination conducted by the DDCE in 2010 basing upon which he has acquired higher qualification shall sustain.

27. Accordingly, the writ petition is allowed. However, no order to costs.
Writ petition allowed.

2016 (I) ILR - CUT- 543

DR. B.R. SARANGI, J.

W.P.(C) NO.15543 OF 2010

BIMAL CHANDRA PRADHAN

.....Petitioner

.Vrs.

MAHANADI COAL FIELDS LTD. & ORS.

.....Opp.Parties

LAND ACQUISITION – BY MCL – Rehabilitation Scheme framed by Government for displaced persons – Acquisition of land belonging to four Co-joint owners – Petitioner is the legal heir of one of the joint owners – His representation for employment rejected – Hence the writ

petition – As per Clause 4 (d) of the Scheme, families who have lost 1/3 of the total agricultural holding, one member from each family shall be provided with employment according to availability – Land measuring Ac 5. 67 dec. acquired out of total area of Ac 6.08 dec. – MCL having provided four employment to the nominees of two joint owners of land can not refuse to provide employment to the nominees of two other joint owners when special LAO in his counter has categorically indicated the eligibility of the petitioner to get employment – Discrimination – Plea that there was no vacancy in category ‘D’ cannot sustain – Held, the impugned order rejecting the representation of the petitioner is quashed – Direction issued to the Opposite party to provide employment to the petitioners as against two vacancies.

(Paras 8 to 12)

Case Laws Referred to :-

1. (2011) 4 SCC 306 : Pesara Pushpamala Reddy v. G. Veera Swamy
2. (2010) 5 SCC 708 : Land Acquisition Officer V. Karigowola

For Petitioners : M/s. P.Behera & B.A.Prusty
For Opp.Parties : Mr. Sanjit Mohanty (Sr. Adv.)
Naresh Chandra Sahoo

Date of hearing : 25.06.2015

Date of Judgment:14.07. 2015

DR. B.R.SARANGI, J.

The petitioners, who are the legal heirs of the land oustees and displaced persons under the provisions of the Rehabilitation and Resettlement Scheme of the Government of Orissa have filed this writ petition seeking to quash the order dated 04.08.2010 vide Annexure-8 rejecting their representation for employment under the said scheme on the plea that they are coming under Category ‘D’ and therefore, they are not eligible for the same though similarly situated persons have been absorbed in employment under the scheme and further seeking for a direction to provide immediate employment assistance/benefits to them.

2. The short fact of the case in hand is that Mahanadi Coal Fields Ltd. (in short ‘MCL’) is a subsidiary of Coal India Ltd. and a wholly owned Government of India concern, having its registered office and area of operation in the State of Odisha. The father of the petitioners, namely Deba Pradhan was the co-owner of the land measuring Ac.6.08 dec. in Mouza Hensmul, Khata No. 20 along with Iswar Pradhan, Jeevan Pradhan and Laxmidhar Pradhan. The said land measuring an area Ac.6.08 dec. stood

recorded in the name of the eldest brother, namely Iswar Pradhan. Out of the said total area of Ac.6.08 dec., an area of Ac.5.67 dec. was acquired by the MCL for mining purpose for its Ananta Open Cast Mining Project. Accordingly, the father of the present petitioners along with three brothers, as indicated above, lost 60 percent of their land, which was acquired by the MCL for its mining purpose. For rehabilitation and resettlement of the displaced persons/ families due to S.E.C.L. projects at Sambalpur and Dhenkanal Districts, the Govt. of Orissa in Revenue and Excise Department framed an uniform guideline, which has been issued on 02.01.1989 vide Annexure-A/4. As per Clause-4 of the said guideline, the provisions of employment has been prescribed for such displaced persons for their rehabilitation and resettlement. The father of the present petitioners being a displaced person in view of acquisition of his share of land by the MCL for its mining project, is entitled and eligible for all the benefits not only under the provisions of the Land Acquisition Act but also in view of the agreement between the State of Odisha and MCL, which has come into existence due to reorganization of the erstwhile Southeastern Coal Field Ltd., which is a subsidiary of Coal India Ltd. Under the policy decision, in conformity with Office Memorandum dated 03.02.1986 issued by the Government of India in the Ministry of Industries, Department of Public Enterprises (Bureau of Public Enterprises) in the matter of land acquisition and rehabilitation of displaced persons in major project area. The Government of India issued guidelines in the matter of land acquisition project and alleviation of the affected or displaced persons. Under the said policy with regard to rehabilitation aspects of the displaced persons and each land acquisition, it was decided to have a small rehabilitation cell and that will identify the persons who had been treated as dispossessed persons following acquisition of their land and forward a list of such persons to the project authorities. Under the said scheme for rehabilitation and resettlement of the displaced persons/families a list was prepared by the State Government in consultation with the MCL authorities to provide necessary assistance by way of employment or compensation to the displaced persons of the area. The erstwhile South Eastern Coal Field Ltd. (now MCL) proposed to acquire land in the undivided district of Dhenkanal (which now includes the new district Angul) for implementation of its project for development of coal field, the State Government communicated the Collector, Dhenkanal (now Angul) that after careful consideration it has been decided to approve the guideline for rehabilitation of identified persons who are affected of their land being acquired for implementation of mining project. The eligibility and benefit of

employment for such displaced persons, which has been spelt out in the said guidelines of the State Government, was circulated vide letter dated 02.06.1998. The eligibility of a family to have one of its members to avail the employment opportunity was to be ascertained through the joint inquiry by the committee consisting of representations of erstwhile South Eastern Coal Field Ltd. (now MCL) and the Collector of the concerned district. This decision of rehabilitation including employment of one member of the family affect as a condition of acquisition of land was again reiterated by the Government by the letter addressed to the Collector dated 02.01.1989. As a matter of principle MCL also accepted the condition of providing employment assistance for displaced persons/families whose land have been acquired for mining purpose and to provide other benefit prescribed under such policy/guideline meant for rehabilitation and resettlement of displaced persons/families in case of mining project in the State. Since an area of Ac.5.67 dec. out of Ac.6.08 dec. of the petitioners in Mouza-Hensmul under Khata No. 20 was acquired by the MCL for its mining project under Ananta Open Cast Mining Project, the petitioners were entitled to get benefit of the rehabilitation and resettlement scheme pursuant to the guideline of the State Government dated 02.01.1989 vide Annexure-A/4. The petitioners' case was identified and sent to MCL authorities by the Collector, Angul for getting employment under the said scheme being the sons of Deba Pradhan, whose share of land has been acquired by the MCL authorities. Accordingly, petitioner no.1 was asked by the MCL authorities to appear before the Selection Committee on 19.08.1992 for examining his case for employment, vide letter dated 12.08.1992 of the Addl. Chief Personnel Manager, Jagannath Area in Annexure-1. Pursuant to such communication petitioners appeared before the Addl. Chief Personnel Manager, Jagannath Area with all the documents for consideration of their case for employment under the Scheme, but the father of the petitioner was communicated with the letter dated 21.05.1997 under Annexure-2 that the case of the petitioners could not be considered as they do not have vacancies of job for land oustees in Category 'D' as per the Rehabilitation Scheme formulated by the Government of Odisha. Prior to the receipt of such communication from the MCL authorities denying employment to the petitioners, the father of the petitioners along with his another brother namely, Laxmidhar Pradhan had sent a representation addressed to the Collector, Angul with copy to MCL giving therein the details of their land acquired by the MCL for its mining project and also the fact that four employment has already been provided by the MCL to the nominees of other two joint owners of the land, namely, Sri

Iswar Pradhan and Jeevan Pradhan, while refusing to provide such employment to the nominees of the other two land owners of the land namely, Deba Pradhan and Laxmidhar Pradhan vide their representation dated 08.07.1996 in Annexure-3. Similar representation has also been made by Deba Pradhan and Laxmidhar Pradhan to opposite party no.1 on 25.06.1996 vide Annexure-4. In spite of all efforts being made by the petitioners along with their father by running from pillar to post no action has been taken by the authority. Subsequently, in November, 1998 the State Government in the Revenue and Excise Department published another Rehabilitation Scheme for the displaced persons in the mining project of the State which is almost similar to the earlier scheme of the State Government published on 02.01.1989 vide Annexure-A/4, wherein the eligibility criteria for rehabilitation benefits, which has been indicated under the heading 'employment'. Under the said Scheme, it is provided that while setting up of mining project the authorities will have to give preference to the nominated members of the displaced family in providing employment either in the project or its ancillary unit. Challenging the rejection of the grievance for employment the petitioners filed a writ application before this Court in OJC No. 5178 of 2002 and this Court after due adjudication disposed of the said writ petition directing that if the petitioners would file a representation enclosing all the relevant documents within a period of two weeks the authorities concerned shall consider the same on merits. In view of the fact that the petitioners were within the age limit at the time of filing of the application and that the writ petition was pending for last seven years, this Court directed that the authorities shall consider the representation filed by the petitioners liberally and disposed of the same as expeditiously as possible within a period of six months from the date of receipt of such representation, if there is no other impediment. In compliance to the direction of this Court, the petitioners filed a detailed representation before opposite party no.2 by incorporating all the documents as directed well within the time stipulated, but the said representation was rejected on the ground that the petitioners cannot be offered employment as the family is placed in Category 'D' as per the provisions of uniform guidelines for rehabilitation issued by Govt. of Odisha in the year 1989 and their agricultural land in Dera village has not been acquired. It is further stated in the said rejection letter that Category 'D' land oustees are not being considered for employment by MCL except in the village Danara of Hingula Area (the then Kalinga Area) as decided in the 8th meeting of the Rehabilitation Advisory Committee held on 23.05.1998 at Angul. It is further stated that compensation other than employment, if any,

as admissible as per the guidelines shall be provided. Such rejection of representation was communicated vide letter dated 04.08.2010 by MCL to the Collector, Angul which is under challenge before this Court in the present writ petition.

3. Mr. P. Behera, learned counsel for the petitioner strenuously urged that the reasons assigned in rejecting the claim of the petitioners cannot be sustained in the eye of law in view of the fact that the opposite parties are bound by their own Scheme and such scheme has prescribed extension of benefit of rehabilitation resettlement by giving employment to one of the members of the land oustees' family and as such the authorities cannot make a discrimination in extending such benefits to the extent when they have provided four employment to the nominees of two co-owners of the land namely, Iswar Pradhan and Jeevan Pradhan and two employment has also been provided in other cases in 1996. He further submitted that had the petitioners' case been taken into consideration in 1996, the petitioner no.1 being two co-joint owners of the displaced family could have equally got an employment under the scheme and rejection of their claim on the ground that MCL authority cannot offer employment to the family of a displaced person placed in Category 'D' as per the provisions of uniform guidelines for rehabilitation issued by the Government of Odisha in the year 1989. Such action of the authorities is illegal, arbitrary, unreasonable and contrary to the provisions of law, which violates Article-14 of the Constitution of India.

4. Mr. N.C. Sahoo, learned counsel appearing for opposite party nos. 1 and 2, while admitting the factum of acquisition of land for the purpose of open cast mining also admits that as per the rehabilitation guideline dated 02.01.1989, the names of the petitioners were sponsored by the Special Land Acquisition Officer, MCL, Angul and Collector, Angul for joint Scrutiny under Category 'D' for consideration for employment by letter dated 06.09.1991 and as there was no vacancy for the land oustees under Category 'D' and therefore, they are not given employment, which was communicated by the Addl. General Manager, Jagannath area MCL, vide Annexure-2. Thereafter, assailing the said order the petitioners approached this Court in OJC No. 5178 of 2002 and this Court disposed of the writ application on 16.12.2009 directing the authorities to reconsider the matter of the petitioners by taking into consideration the fresh representation filed by them. It is stated that the land losers have been categorized as per the priority and necessity. The petitioners being under Category 'D' their rehabilitation employment is subject to availability of vacancy. Since there was no vacancy was available,

the benefit of rehabilitation employment cannot be extended to them. It is further stated that rehabilitation employment after 23 years of issuance of the notification under Section 4(1) of the Land Acquisition Act, is contrary to the Rehabilitation Assistance Scheme, thereby, no illegalities or irregularities have been committed in rejecting the claim of the petitioners.

5. Clause-2 of the uniform guideline for rehabilitation of the displaced persons/ families due to S.E.C.L. Projects at Sambalpur and Dhenkanal districts vide Annexure-A/4, which deals with eligibility for rehabilitation reads as follows:

“2. A family/person shall be eligible for rehabilitation benefit if:

- a) all the lands of the family have been acquired.
- b) more than 1/3rd agricultural lands along with homestead land has been acquired.
- c) only homestead land has been acquired.
- d) homestead less persons residing in the village.

This is to be ascertained through joint enquiry by a committee consisting of representatives of the South Eastern Coal Fields Ltd. and the Government (Collector of the District).”

Clause-4 of the said Scheme deals with employment which reads as follows:

“4. Employment:

- a) One member from the family sustaining loss of dwelling houses, homestead land and agricultural lands not less than 1/3rd of the total holding shall be provided with employment on a priority basis.
- b) One member of each family having sustained loss of 3 acres of non-irrigated land or 2 acres of irrigated land shall be provided with employment on second priority.
- c) In case of families having lost only homestead land or the total agricultural holding, one member from each family shall be provided with employment according to availability.
- d) In case of families who have lost 1/3rd of the total agricultural holding, one member from each family shall be provided with employment according to availability.
- e) Rehabilitation of other displaced families shall be made through self employment schemes.”

6. In view of the eligibility criteria mentioned in Clause-2 of the guideline and eligibility for employment classified in Clause-4 of the said guideline has mentioned above, since the petitioners' family have lost 1/3rd of the total agricultural holding, one member of each family shall be provided with employment according to availability as per sub-Clause-(d) of Clause-4 of the Scheme. As such, there is no dispute with regard to eligibility to get employment as per the Scheme evolved by the State Government which has been agreed upon by the opposite parties. Admittedly, the petitioners have been classified as Category-'D'. As per the Scheme they are entitled to employment, which has been recommended by the Special Land Acquisition Officer to the Collector, Angul for providing employment in consonance with the guideline. The factum of recommendation has also been admitted in the counter affidavit filed by the opposite party nos. 1 and 2. Therefore, there is no dispute that the petitioners' family are covered under the Scheme evolved by the State Government in Annexure-A/4, rather in view of the admission made by the opposite parties in the counter affidavit, the petitioners are entitled to be provided with employment as per the Scheme evolved by the State Government with only a rider that subject to availability of vacancies. On perusal of the impugned order in Annexure-8, it appears that the opposite parties nos. 1 and 2 have rejected the claim of the petitioners on the ground that Category 'D' oustees are not being considered for employment by MCL except in the village Danara of Hingula Area (the then Kalinga Area) as decided in the 8th meeting of the Rehabilitation Advisory Committee held on 23.05.1998 at Angul. The reasons of rejection of the claim of the petitioners is discriminatory one to the extent that if the villagers of Danara of Hingula Area (the then Kalinga Area) have been decided to extent the benefit of compassionate appointment by way of resettlement, the petitioners have been stood in the same footing ought not to have been discriminated. At the same time the petitioners in para-10 of the writ petition have pleaded as follows:

“10. That even prior to the receipt of the such communication from the Mahanadi Coal field Ltd. authorities denied employment to the petitioner, the father of the petitioner along with his another brother-Laxmidhar Pradhan had sent a representation addressed to Collector, Angul with copy marked to the Mahanadi Coal field Ltd. authority, giving therein the details of their land acquired by the MCL for its Mining Project and also the fact that 4 (four) employment has already been provided by the M.C.L. to the nominees of other two joint

owners of the land Sri Iswar Pradhan and Jeevan Pradhan, while refusing to provide such employment to the nominees of the other two joint owners-Sri Deba Pradhan and Laxmidhar Pradhan. True copy of the representation of Sri Deba Pradhan and Laxmidhar Pradhan addresses to the collector, Angul dtd. 08.07.1996 is annexed herewith an ANNEXURE-3.

Similarly representation had also earlier been made by Sri Deba Pradhan and Laxmidhar Pradhan, addressed to the Chairman-cum-Managing Director, M.C.L. with copy marked to the Collector, Angul giving the details of the land owner and the extend of land acquired by the M.C.L. for its Mining Project and as to how the two joint owners of the said land Sri Iswar Pradhan and Jeevan Pradhan have been provided with four employment to their respective nominees while denying the same benefit of employment to the other two co-owners-Deba Pradhan and Laxmidhar Pradhan. True copy of the representation of Sri Deba Pradhan and Laxmidhar Pradhan dtd.25.06.1996, addressed to the opp. party No. 1 is annexed herewith as ANNEXURE-4.”

7. A specific reply has been given by the opposite party nos. 1 and 2 in their counter affidavit in para-12 which is reads as follows:

“That in reply to the averments made in Para-10 to 12 of the writ petition, it is submitted that since there was no vacancy in category-D, repeated representations is of no relevance. That the co-sharers of the father of the petitioner are similarly placed is incorrect”

8. On perusal of the above mentioned pleadings it is made clear that the petitioners’ case has been ignored by the authorities. While providing four employment to the nominees of two joint owners of the land namely, Iswar Pradhan and Jeevan Pradhan, they have refused to provide such employment to the nominees of two other joint owners namely, Deba Pradhan (father of the petitioners) and Laxmidhar Pradhan. This clearly indicates the arbitrary and unreasonable exercise of powers by the authorities in giving employment to four persons of two joint owners and not giving employment to other joint co-owners is absolutely a discriminatory one. Therefore, the action of the authorities in providing employment on the plea that there was no vacancy in Category ‘D’ cannot sustain in the eye of law. The Special Land Acquisition Officer-opposite party no.4 in his counter affidavit has categorically indicated the eligibility of the petitioners to get employment under the Rehabilitation and Resettlement Scheme evolved by the State Government in

Annexure-A/4. As such, Sub-Clause-(d) of Clause-4 of the Scheme puts a mandate that in case of families who have lost 1/3rd of the total agricultural holding, one member from each family **shall** be provided with employment according to availability. The use of word '**shall**' in its ordinary import is obligatory. Inasmuch as considering the purport of the Scheme the use of word '**shall**' puts a mandate to provide employment to the families of the displaced persons according to availability.

9. In **Land Acquisition Officer V. Karigowola**, (2010) 5 SCC 708, the word '**shall**' in section 23(1) of the Act came up for consideration where the apex Court held that it would have to be construed as mandatory and not directory.

10. In **Pesara Pushpamala Reddy v. G. Veera Swamy**, (2011) 4 SCC 306 referring to the principles of statutory interpretation 12th Edn., 2010, pp. 406-07 (by Justice G.P. Singh), the apex Court has held as follows :

“the use of the word '**shall**' raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such as object and scope of the enactment and the consequences flowing from such construction.”

11. Therefore, taking into consideration the above mentioned interpretation of the word '**shall**' as used in the present context though ordinarily it imports as a obligatory one, but in essence providing employment to one of the families for loss of 1/3rd of the total agricultural holdings, puts a mandate to provide employment to one of its member from each family according to the availability. Thus, denial of benefit on the ground that there is no availability of vacancy cannot sustain in the eye of law. In view of the fact that as per the pleadings available on record if four persons sponsored by two joint owners have been provided employment, the petitioners could not have been denied such employment being the two other co-joint owners of the land oustees.

12. In that view of the matter, the impugned order dated 04.08.2010 rejecting the claim of the petitioners vide Annexure-8 cannot sustain and accordingly, the same is quashed. The opposite parties are directed to provide employment to the petitioners forthwith as against two vacancies within a period of two months from the date communication of this order.

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

Writ petition allowed.

2016 (I) ILR - CUT-553

DR. B. R. SARANGI , J.

W.P.(C) NO. 13941 OF 2012

RABINDRANATH MOHAPATRA

.....Petitioner

.Vrs.

STATE OF ORISSA & ORS.

.....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Art 226

Custodial death – Deceased was 27 years at the time of death and was survived by wife and father – He was assaulted by public and taken to Police Station – Though he complained pain in his chest and abdomen he was not given immediate care and ultimately when he reached hospital he was declared dead – Prima facie negligence found on the part of the police on an inquiry by C.B.I and Magistrate – Failure to provide timely medical treatment amounts to breach of right to life – Held, state is vicariously liable to pay Rs. 5.00.000/- as compensation to the dependants of the deceased, which shall be recovered from the erring officers.

(Paras 17,18)

Case Laws Referred to :-

1. AIR 1997 SC 610 : D.K. Basu v. State of West Bengal
2. AIR 1993 SC 1960 : Smt. Nilabati Behera & Lalita Behera v. State of Orissa
3. (2010) 3 SCC 480 : Kusum Sharma v. Batra Hospital
4. (2009) 9 SCC 221 : Malay Kumar Ganguly v. Dr. Sukumar Mukherjee
5. (2001) 8 SCC 151 : AIR 2001 SC 3660 M.S. Greval v. Deep Chand Sood
6. AIR 1996 SC 2111 : (1996) 4 SCC 332 Poonam Verma v. Ashwin Patel
7. (1995) 5 SCC 659 : AIR 1995 SC 2499 State of Maharashtra v. Kanchanmala Vijaysing Shirke

For Petitioners : M/s. Ranjit Mohanty
C.K.Pradhan, S.Parida

For Opp. Parties : Mr. A.K.Mishra, Addl.Govt. Adv.
Mr. S.K.Padhi, Sr. Adv.

Date of hearing : 22.01.2016

Date of judgment:28.01. 2016

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

The petitioner has filed this application for making a probe into the death of his son, namely, Kuldeep Mohapatra and seeks for payment of

Rs.20 lakhs as compensation due to death of his son in Saheed Nagar Police Station at Bhubaneswar.

2. The factual matrix of the case in hand is that on 5.6.2012 at about 8.00 A.M. one Basanta Kumar Sahu was proceeding through Vani Vihar square on the National Highway by driving his vehicle TATA ACE bearing Regd. No. OR-02-AQ-2833 loaded with centring wood planks. At Sani Mandir on the National Highway, one Kuldeep Mohapatra @ Pigi (deceased) overtook his vehicle by riding a Bajaj Discover Motorcycle and stopped the TATA ACE vehicle and identified himself as Special Squad Inspector to the driver of the TATA ACE and asked for documents of the vehicle and the loaded articles. The driver, Basanta failed to produce the documents, for which Kuldeep Mohapatra @ Pigi snatched Rs.2900/- from the money purse of Basanta and slapped him. Then, Basanta came out of the vehicle and there was tussle between Basanta and Kuldeep. Basanta called the passers-by and the outsiders gathered at the spot and when the public asked about the matter, Kuldeep abused them in obscene language and the public assaulted Kuldeep by fist blows, kick blows by bamboo lathis and plastic pipes. Few people intervened and took both Kuldeep and Basanta to Saheed Nagar Police Station. At the police station, Basanta Sahu lodged a written report before the IIC, which was registered as P.S. Case No. 146 of 2012 and directed the A.S.I. Banamali Das to take up investigation. During investigation, the I.O. visited the spot with the informant, accused and other police staffs, where he seized the motorcycle, bamboo lathis and pipes and also arrested the accused at the spot and returned to police station. Since the accused, Kuldeep Mohapatra was assaulted by the public, the I.O. also lodged the F.I.R. against the public, which was registered as P.S. Case No. 147 of 2012. In the police station at about 2.05 P.M., accused Kuldeep Mohapatra complained of pain in his chest and abdomen and then he was shifted to Capital Hospital, Bhubaneswar, but he was declared dead. Since the accused Kuldeep Mohapatra died in police custody, this writ petition has been filed.

3. On the oral prayer made by learned counsel for the petitioner, vide order dated 18.08.2014, he has been permitted to add Superintendent of Police, C.B.I., Bhubaneswar as opposite party no.4 to the writ petition. Consequentially, C.B.I. caused an inquiry and submitted its report, which has been recorded by order dated 23.04.2015 in the present proceeding. After causing inquiry, on the basis of the evidence adduced in such inquiry proceeding, the C.B.I. authority has come to a finding, paragraphs-5.9 and 5.10 of which read as follows:-

“5.9 Prima facie negligence on the part of suspect Shri Alok Jena, IIC and other police officers for not timely sending the deceased Shri Kuldeep Mahapatra for medical examination and mishandling of the deceased Sri Kuldeep Mahapatra in police custody is clearly made out in the enquiry. There are several facts suggesting towards the custodial violence and death of the deceased Kuldeep Mahapatra in police custody at Saheed Nagar Police Station but the same are not conclusive in nature.

5.10 Magisterial enquiry for this custodial death of deceased Shri Kuldeep Mahapatra is also going on and is not yet complete.”

4. As per the report of the C.B.I. in paragraph-10, since the Magisterial enquiry for the custodial death of the deceased Kuldeep Mahapatra was going on and was not completed by the time the report of the C.B.I. was received, this Court vide order dated 30.10.2015 directed the State Counsel to produce the Magisterial enquiry report before this Court for just and proper adjudication of the matter. In compliance to the same, on 27.11.2015, learned Addl. Govt. Advocate filed a memo annexing a sealed cover document incorporating the magisterial inquiry report of the custodial death of Kuldeep Mahapatra. The finding arrived at by the Magistrate reads as follows:

“..... From the statement of the witnesses and on verification of documents produced in this case, I am of the opinion that the deceased-accused was assaulted by the public while he was committing crime. It is clear that the deceased-accused died while he was being sent to medical for medical examination by the police. So there is no doubt that the deceased-accused died while he was in police custody.”

Further, at the end of the said report, the Magistrate has come to a definite finding to the following effect:

“..... I found that both the I.O. and the then IIC have not tried to save the life of the deceased-accused by providing him timely and effective medical care. Hence, I am of the opinion that both the I.O., Banamali Das and the then IIC, Alok Kumar Jena are negligent in the discharge of their duty.”

5. On perusal of both the reports which have been submitted by the C.B.I. as well as the Magistrate as mentioned above, both have found that due to negligence of the police authority, Kuldeep Mohapatra @ Pigi

(deceased) died in the police station while he was in custody and while he complained pain in his body, he was carried to hospital where he was received dead. Therefore, the inevitable conclusion is that due to negligent on the part of the police authority, Kuldeep Mohapatra @ Pigi (deceased) died while remaining in police custody. If public have assaulted, to save Kuldeep Mohapatra @ Pigi, he was brought to the police station, immediately police should have sent him to hospital for treatment. Instead of sending him to hospital, police registered a P.S. case on the basis of the F.I.R. lodged by Basanta Kumar Sahoo and took up investigation by appointing an inquiry officer and that investigation continued for some time. Thereby, no attention has been given to Kuldeep Mohapatra @ Pigi (deceased), who had sustained bodily injury by the public when he was brought to the police station. More so, the conduct of the police authority is not free from doubts in view of the fact that had action been taken in due time, the life of the deceased could have been saved the death occurred due to sheer negligence on the part of the police authority.

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

“Acting carelessly, a question of law or fact or of mixed fact and law, depending entirely upon the nature of a duty, which the person charged with negligence has failed to comply with or perform in the particular circumstance of each case. A very convenient classification has been formulated corresponding to the degree of negligence entailing liability measured by the degree of care undertaken or required in each case, i.e. (1) ordinary, which is the want of ordinary diligence; (2) slight, the want of great diligence; and (3) gross, the want of slight diligence. A smaller degree of negligence will render a person liable for injury to infants than in the case of adults.”

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

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

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

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

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

11. In *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee*, (2009) 9 SCC 221, the apex Court held that “negligence”, is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence means either subjectively a careless state of mind, or objectively careless conduct. It is not an absolute term but is a relative term. Negligence is strictly nonfeasance and not malfeasance. It is the omission to do what the law requires, or the failure to do anything in a manner prescribed by law. It is the act of which can be treated as negligence without any proof as to the surrounding circumstances, because it is in violation of statute or is contrary to the dictates of ordinary prudence.

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

13. This being the meaning attached to the word “negligence” as held by the apex Court time and again. Applying the same to the present context, it is made clear that the police has acted in breach of his duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would

do. Thereby negligence in common parlance means and imply failure to exercise due care, expected of a reasonable prudent person.

14. Admittedly, Kuldeep Mohapatra @ Pigi (deceased) while under the custody of the police complained of pain in his body and while he was carried to hospital, he was received dead. Thereby, the petitioner who is the father of Kuldeep Mohapatra @ Pigi (deceased) aged about 27 years claims compensation due to death in police custody and filed this writ petition under Article 226 of the Constitution of India claiming compensation of Rs.20 lakhs for death of his son.

15. In *Smt. Nilabati Behera & Lalita Behera v. State of Orissa*, AIR 1993 SC 1960, the apex Court held as follows:

“A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from and in addition to the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the enforcement of the fundamental right is claimed by resort to the remedy in public law under Constitution by recourse to Articles 32 and 226 of the Constitution.”

16. In *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610, it has been held by the apex Court that compensation can be granted under the public law by the Supreme Court and the High Court in addition to private law remedy for tortious action and punishment to wrong doers under criminal law for established breach of fundamental rights.

17. Right to life being a fundamental right enshrined under Article 21 of the Constitution of India clearly indicates that right to live with dignity does not mean a mere animal existence. Therefore, right to life includes the right to medical care. In view of such position, if Kuldeep Mohapatra @ Pigi (deceased) was in custody of the police, may be manhandled by the public, but the duty cast on the police officials was to send him immediately for

medical care. Allowing Kuldeep Mohapatra @ Pigi (deceased) to remain in police station and directing for investigation without taking proper care of the injured Kuldeep Mohapatra @ Pigi itself indicates that due care has not been taken by the police authority causing negligence in their duty. Therefore, failure to provide timely medical treatment amounts to breach of right to life. Consequentially, the State is liable to pay the compensation to the dependents of the deceased. On the basis of the materials available on record, it appears that by the time Kuldeep Mohapatra @ Pigi (deceased) expired, he was 27 years old and was survived by his wife and father.

18. In that view of the matter, this Court is of the considered view that the police authority, who were working under the State are liable to pay the compensation for their negligence causing death of Kuldeep Mohapatra @ Pigi (deceased) in custody. In absence of cogent materials to indicate the contribution made by the petitioner for maintenance of his family, this Court thinks it proper that the State is liable to pay a compensation of Rs.5,00,000/- (Rupees five lakhs) to the dependant of the deceased, which shall be recovered from the erring officers, namely, Alok Kumar Jena, the then I.I.C., Saheed Nagar Police Station and Banamali Das, I.O. of Saheed Nagar Police Station. The entire exercise shall be completed within a period of four months from the date of passing of this judgment.

19. The writ petition is accordingly disposed of. However, there would be no order as to costs.

Writ petition disposed of.

2016 (I) ILR - CUT- 559

DR. B.R. SARANGI, J.

W.P.(C) NOS. 11117 OF 2015 (WITH BATCH)

DIGAMBAR NAYAK

.....Petitioner

.Vrs.

ORISSA LEGISLATIVE ASSEMBLY

.....Opp. Party

SERVICE LAW – Petitioner was appointed as Data Entry Operator in Odisha Legislative Assembly in due process of selection – He jointed the post and discharged his duty – Non-payment of service benefits to him is challenged in this writ petition – Merely because the

State Government appointed a Commission to enquire into the allegations of corruption in the Assembly and that was challenged before this Court and the matter is pending before the Apex Court, that ipso facto can not dis-entitle the petitioner to enjoy the pay fixed in terms of appointment – Moreover when persons junior to the petitioner have been extended such benefits it amounts to discrimination and violative of Article 14 of the Constitution of India – In other way pay and wages being property under Article 300A of the Constitution of India and non-payment of the same, except by authority of law, is violative of the said provision – Nothing has been placed before this Court that benefit admissible to the petitioner in terms of his appointment has been taken away pursuant to law made by the State Legislature, Parliament or by statutory Rules enacted under a statute – State while taking recourse to the executive power can not deprive a person of his property – Held, all the writ petitions are allowed and the opposite parties are directed to extend the benefits admissible to the petitioner in each case in terms of the appointment order.

(Paras 10 to 18)

Case Laws Referred to :-

1. AIR 1952 SC 123 : Kathi Raning Rawat v. State of Saurashtra
2. AIR 1990 SC 820 : Video Electronics Pvt. Ltd v. State of Punjab
3. AIR 2011 SC 1989 : Narmada Bachao Andolan (III) v. State of Madhya Pradesh
4. AIR 2013 SC 1226 : Rajasthan State Industrial Development and Investment Corporation v. Subhash Sindhi Co-operative Housing Society Jaipur
5. AIR 1978 SC 803 : Madan Mohan Pathak v. Union of India
6. AIR 1989 SC 1629 : M/s. Vij Resins Pvt. Ltd. and another v. State of Jammu & Kashmir and others
7. AIR 1995 SC 142 : Jilubhai Nanbhai Khachar etc. etc., v. State of Gujarat and another
8. AIR 1954 SC 92 : State of West Bengal v. Subodh Gopal Bose
9. AIR 1982 SC 33 : M/s. Bisambhar Dayal Chandra Mohan etc. etc. v. State of U.P.,
10. AIR 2003 SC 250 : Hindustan Times and others v. State of U.P. & Anr.
11. AIR 1984 SC 1064: (1984) 3 SCR 325 : Sudhir Chandra Sarkar v. Tata Iron and Steel Co. Ltd.,
12. AIR 1983 SC 1060 : Smt. P. Grover v. State of Haryana and another
13. AIR 1993 SC 1170 : Ram Narain Yadav v. State of Haryana & Ors.
14. AIR 1999 SC 838 : Selva Raj v. Lt. Governor of Island, Port Blair & Ors.
15. AIR 1999 SC 838 : Selva Raj v. Lt. Governor of Island, Port Blair and other

For Petitioners : M/s. R.K.Rath, Sr.Advocate,
P.Rath, J.Mohanty & J.P.Behera
For Opp. Parties: M/s. M.Verma, P.R.Singh & A.K.Rout

Date of hearing : 11.01.2016

Date of Judgment: 21.01.2016

JUDGMENT

DR. B.R.SARANGI, J.

All the above writ petitions having similar cause of action, have been heard together and are disposed of by this common judgment. For better appreciation, the fact of W.P.(C) No.11117/2015 has been taken into consideration for judgment of all the matters.

2. The petitioner has filed this application seeking for the following reliefs:

- (i) Direct the opposite party to confirm the petitioner by discontinuing the probation and declaring him confirmed with effect from 27.02.2006.
- (ii) Direct the opposite party to disburse all financial and service benefits which are attached to the post to which the petitioner has been appointed w.e.f. 27.02.2004.
- (iii) Direct the opposite party to disburse all financial and service benefits handed at Para 10 and Annexure-6 of this Writ Application w.e.f. 27.02.2004.

3. The petitioner was appointed as Data Entry Operator on 26.02.2004 pursuant to advertisement issued on 20.12.2002 vide Annexure-1 by following due procedure of selection by conducting written examination, interview and on proper verification of the certificates. The appointment order under Annexure-2 dated 02.04.2004 indicates that the petitioner was appointed in regular scale of pay of Rs.3050-75-3950-80-4590 with usual D.A. and other allowances as admissible from time to time with effect from the date he joins in his post pursuant to which the petitioner joined the post and discharged his duty against the said post. The advertisement as well as the appointment order indicates that he is entitled to get usual service and financial benefits attached to the post as prescribed by rules and regulations. On the allegation of corruption in purchase of computers and illegal appointments made in the Odisha Legislative Assembly, the State Government appointed Hon'ble Justice C.R. Pal, retired Judge of Orissa

High Court as Commission of inquiry under the Commission of Inquiry Act, 1952 to enquire into the following matters and submit his report:

- (i) The alleged violation of the Recruitment procedure and the illegal and unfair practice adopted in giving appointments and showing favouritism and nepotism by misuse of official position.
- (ii) Alleged corruption committed in purchase of Computers for the Legislative Assembly
- (iii) The role, if any, of any authority/organization/individual in causing violation of the procedure in making the above alleged appointment and purchase; and
- (iv) Any other matter connected with or incidental thereto as the Commission may consider appropriate including any suggestions in relation to the above matters.

The appointment of Commission of Inquiry was challenged by the Speaker of the 12th Orissa Legislative Assembly in W.P.(C) No.905/2007 and this Court vide judgment dated 30.09.2008 passed the following order:

“20. In view of the facts and circumstances mentioned above, this Court is of the opinion that since the State Government has no jurisdiction to take any action in the affairs of the State Legislative Assembly and in sub-section(4) of Section 3 of the Commission of inquiry Act, it has been provided that the report of the Commission is to be laid before the Legislature of the State together with the memorandum of action taken thereon which is not feasible to be complied with and also the affairs of the State Assembly or its Secretariat have not been enumerated in List II or List III of the Seventh Schedule of the Constitution and the State Government has not been conferred with the residuary power as has been conferred to the Central Government under Entry 97 of List II, the appointment of the Commission under the Commissions of Inquiry Act in the instant case beyond the jurisdiction of the State Government. We do not mean here that if in the opinion of the Legislature, some wrong has been done, the same should not be enquired into.

21. In the result, the petition is allowed, the impugned notification dated 15th September, 2004 appointing the Commission with retrospective effect, i.e., with effect from 22nd July, 2004 is held illegal and is accordingly quashed.

However, we cannot debar the Legislature to take appropriate action in accordance with law. The Legislature has full jurisdiction to pass resolution and also entrust the enquiry or investigation to any one in their discretion in accordance with law.

There shall be no order as to costs.”

The said judgment of this Court has been challenged by the State of Orissa before the apex Court which was registered a PC No.6537/2009 converted into Civil Appeal No.1986 of 2014 which is still pending for consideration. During the pendency of the aforesaid Civil Appeal before the apex Court with regard to the legality and propriety of the appointment of Commission of Inquiry and his report, the petitioner has not been paid the financial benefit admissible to the post in terms of appointment under Annexure-2. Hence this application.

4. Mr. R.K. Rath, learned Senior Counsel appearing for the petitioner submits that the petitioner having been duly selected by proper recruitment process and there being no allegation of any kind against him and his appointment having been made against the sanctioned post, he is entitled to get all the consequential benefits in terms of his appointment under Annexure-2. Though in the meantime 11 years have elapsed, he has not been extended all the benefits attached to his post. It is urged that the petitioner is entitled to get the following service and financial benefits :

- i) Service book has not been opened till date.
- ii) Annual increment have not been given.
- iii) GPF account has not been created nor GPF amount as being deducted.
- iv) House Rent allowance have not been released.
- v) Benefits regards sanction of all types of leave has not been given.
- vi) The benefit of revised scale of pay has not been extended under the ORSP Rules 2008.
- vii) No promotion has been given to the petitioner.
- viii) The benefit of revised Assured Career Progression (RACP) Scheme has also not been extended even though he has become eligible for it.
- ix) None of the increments attached to the post have been given to the petitioner.
- x) The benefit of up-gradation since 2009 of scale of pay attached to the post of data entry operator has also not been given to the petitioner because

of which persons junior to the petitioner and who have joined after the petitioner are getting higher scale of pay than the petitioner.

xi) The petitioner has been deprived of promotional opportunities to the next post i.e. Assistant Programmer.

xii) In fact the petitioner without any reason is being continued on probation basis.

Non-grant of such benefits have caused serious prejudice to the petitioner. It is further urged that on the plea of pendency of the Civil Appeal before the apex Court which has been filed against the order passed by this Court, the benefits admissible to the petitioner have not been extended. It is urged that the pendency of the said Civil Appeal has no nexus with the benefits claimed by the petitioner in terms of his appointment order under Annexure-2. Non-extension of all the service and financial benefits attached to his post in terms of the order of appointment under Annexure-2 is arbitrary and unreasonable and violative of Article 14 the Constitution of India. It is further urged that similarly situated persons, who are juniors to the petitioner, have been extended all the service and financial benefits.

5. Mr. M.K. Verma, learned counsel for the opposite party refers to paragraphs 4 to 8 of the preliminary counter affidavit which state as follows:

“4. That it is further submitted that after his appointment during 12th Assembly period there was allegations of violation of Recruitment Procedure and unfair practice adopted in giving appointments and showing nepotism and favouritism. On the strength of such allegation, the State Government appointed Justice Sri C.R. Pall Commission of Inquiry to inquire into the above allegations vide Parliamentary Affairs Department Notification No. 6178/PAD., dated 15.09.2004.

5. That the appointment of Justice Sri C.R. Pal Commission was challenged by Shri Sarat Kumar Kar, Ex-Speaker before the Hon'ble High Court of Orissa in W.P. (C) No. 905 of 2007. The Hon'ble Court of Justice Sri I. M. Quddusi and Justice Sri A. K. Parichha after hearing the matter at length disposed of the writ petition on 30.09.2008 by holding the appointment of Justice Sri C. R. Pal Commission to be illegal and quashed the said notification dated 15th September 2004.

6. That it is pertinent to mention here that the State Government has preferred on S.L.P. (Civil) No. 6537 of 2009 against the order of the Hon'ble High Court passed on 30.09.2008 in the aforesaid Writ Petition and the Hon'ble Apex Court has admitted the S.L.P. and it is pending adjudication.

7. That when the matter stood thus, the Odisha Legislative Assembly Secretariat sought for clarification from the Law Department, Govt. of Odisha as to whether services of the persons appointed during the 12th Assembly period can be regularized and other service benefits can be allowed. The Law Department offered their views on 24.12.2010 which is annexed by the petitioner in the writ petition as Annexure-5.

8. That in view of the aforesaid facts and circumstances, the present deponent is unable to regularize the service of the petitioner and release the service benefits to the petitioner.

6. On the basis of the facts pleaded above, it appears that the benefit admissible to the petitioner has not been extended due to pendency of S.L.P. (Civil) No.6537 of 2009 which has been filed by the State of Orissa against the order dated 30.09.2008 passed by this Court in W.P.(C) No.905/2007 by which this Court quashed the notification dated 15.09.2004 holding that the appointment of Commission of Inquiry is illegal. Essentially the notification was issued to appoint Hon'ble Justice C.R. Pal, retired Judge of Orissa High Court as Commission of Inquiry which was under challenge before this Court in the aforesaid W.P.(C) No.905/2007. The Commission of Inquiry was appointed to cause an inquiry into the allegation of violation of Recruitment Procedure and unfair practice adopted in giving appointment and showing nepotism and favouritism by misusing official position along with allegation of corruption in purchase of computers. But, the said notification in Annexure-4 dated 15.09.2004 having been quashed by this Court, the same is subject matter of Civil Appeal before the apex Court for consideration. Therefore, the apex Court is in seisin over the matter with regard to the legality and propriety of the judgment dated 30.09.2008 passed by this Court in W.P.(C) No.905/2007 quashing Annexure-4 appointing Hon'ble Justice C.R. Pal as Commission of Inquiry to cause an inquiry into the allegation of violation of Recruitment Procedure and unfair practice adopted in giving appointments and corruption in purchase of computers. In the event the apex Court holds that the judgment passed by this Court is not correct, then the report submitted by the Commission of Inquiry will be

taken into consideration. If for any reason the apex Court upholds the judgment of this Court then the order quashing the appointment of the Commission of Inquiry vide notification dated 15.09.2004 shall stand confirmed. In any case, any order passed by the apex Court may not prejudice the petitioner as appointment of the petitioner has not been challenged by any of the parties either before this Court or before the apex Court. As none has assailed the selection of the petitioner who is really “person aggrieved” before any forum, non-extension of the benefits admissible to the petitioner in terms of the appointment order under Annexure-2 amounts to violation of Article 14 of the Constitution of India. As the juniors to the petitioner have been extended such benefits, the petitioner has been discriminated.

7. In *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123 and *Video Electronics Pvt. Ltd v. State of Punjab*, AIR 1990 SC 820, the apex Court held that “Discrimination” means an unjust, an unfair action in favour of one and against another. It involves an element of intentional and purposeful differentiation and further an element of unfavourable bias; an unfair classification. Discrimination under Article 14 of the Constitution must be conscious and not accidental discrimination that arises from oversight which the State is ready to rectify.

8. In *Narmada Bachao Andolan (III) v. State of Madhya Pradesh*, AIR 2011 SC 1989, the apex Court has explained the phrase “discrimination”.

9. In *Rajasthan State Industrial Development and Investment Corporation v. Subhash Sindhi Co-operative Housing Society Jaipur*, AIR 2013 SC 1226, the apex Court has also explained the scope of discrimination.

10. Mr. R.K. Rath, learned Senior Counsel appearing for the petitioner further urged that pay and wages are ‘property’. No one can be deprived of the same except by authority of law. ‘Law’ means law as enacted by State Legislature or Parliament or by a statutory rule enacted under a Statute. To substantiate his contention, reliance has been placed on **Madan Mohan Pathak v. Union of India**, AIR 1978 SC 803, wherein the apex Court was examining the validity of the Life Insurance Corporation (Modification of Settlement) Act of 1976. The settlement had created a right to bonus in favour of the Class III and Class IV employees of the Corporation and the Act adversely interfered with that settlement. The question for consideration

of the seven-Judge Bench was whether bonus payable under the settlement was 'property' within the meaning of Art. 31(2) and whether stopping payment of bonus amounted to compulsory acquisition of property without payment of compensation. The Court ultimately held that bonus was property and the legislation was bad. In paragraph-30 at page 814, the apex court held as follows:

“It is clear from the scheme of fundamental rights embodied in Part III of the Constitution that the guarantee of the right to property is contained in Article 19(1)(f) and clauses (1) and (2) of Article 31. It stands to reason that 'property' cannot have one meaning in Article 19(1)(f), another in Article 31 clause(1) and still another in Article 31, clause (2), 'Property' must have the same connotation in all the three Articles and since these are constitutional provisions intended to secure a fundamental right, they must receive the widest interpretation and must be held to refer to property of every kind.”

At p. 360 (of SCR) : (at p. 821 of AIR) of the Reports, the Court again stated that every form of property, tangible or intangible, including debts and choses in action constituted property. In this group of cases before us the executive grant or the contract created interest in the petitioners and there is no room to doubt that by such process in favour of the petitioners property right had been created.

Similar view has also been taken in **M/s. Vij Resins Pvt. Ltd. and another v. State of Jammu & Kashmir and others**, AIR 1989 SC 1629.

11. In **Jilubhai Nanbhai Khachar etc. etc., v. State of Gujarat and another**, AIR 1995 SC 142, the validity of the provisions contained in Section 2 of Bombay Land Revenue Code and Land Tenure Abolition Laws (Gujarat Amendment) Act, (8 of 1982) was under consideration. While considering such provision, the apex Court held that right to property under Article 300A is not a basic feature or structure of the Constitution. It is only a constitutional right. The Amendment Act having had the protective umbrella of Ninth Schedule habitant under Article 31B, its invalidity is immune from attack by operation of Article 31A. Article 300A with heading “Right to Property” with marginal note reads thus”

“ **Art. 300A: Persons not to be deprived of property, save by authority of law: - No person shall be deprived of his property save by authority of law” which is restoration of Art. 31 (1) of the Constitution.**”

12. Referring to the case of **State of West Bengal v. Subodh Gopal Bose**, AIR 1954 SC 92, the apex Court held that the word 'deprived' in Clause (1) of Art. 31 cannot be narrowly construed. The apex Court held that Clauses (1) and (2) of Art. 31 dealt with the topic of 'eminent domain', the expressions 'taken possession of' or 'acquired' according to Clause(2) have the same meaning which the word 'deprived' used in Clause(1). In other words, both the clauses are concerned with the deprivation of the property; taking possession of or acquired used in clause (2) is referable to deprivation of the property in Clause (1). The word "law" used in Article 300 A must be an Act of Parliament or of State Legislature, a rule or statutory order having force of law. The deprivation of the property shall be only by authority of law, be it an Act of Parliament or State Legislature, but not by executive fiat or an order. Deprivation of property is by acquisition or requisition or taken possession of for a public purpose.

13. In **M/s. Bisambhar Dayal Chandra Mohan etc. etc. v. State of U.P.**, AIR 1982 SC 33 wherein in paragraph-41 the apex Court held that the State Government cannot while taking recourse to the executive power of the State under Art. 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. It is, therefore, necessarily subject to Art. 300A. Eminent domain, therefore, is a right inherent in every sovereign state to expropriate private property for public purpose without its owner's consent which inheres in Art. 300A and it would be exercised by the authority of law and not by executive fiat or order. In view of the aforesaid provision the question then is what is the meaning of the word 'property' used in Art. 300A and whether it is amenable to eminent domain. The word 'property' connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate or status. Property, therefore, within the constitutional protection, denotes group of rights inhering citizen's relation to physical thing, as right to possess, use and dispose of it in accordance with law. Therefore, the word "property" used in Article 300A must be understood in the context in which the sovereign power of eminent domain is exercised by the State and expropriated the property. Therefore, Art.300A gets attracted to an acquisition or taking possession of private property, by necessary implication for public purpose, in accordance with law made by the Parliament or of a State Legislature, a rule of a statutory order having force

of law. Consequentially, there is no deprivation without any sanction of law. Deprivation by any other mode is not acquisition or taking possession under Art. 300A. in other words, if there is no law, there is no deprivation.

14. The apex Court in **Hindustan Times and others v. State of U.P. and another**, AIR 2003 SC 250 taking into consideration **Sudhir Chandra Sarkar v. Tata Iron and Steel Co. Ltd.**, AIR 1984 SC 1064: (1984) 3 SCR 325 held that the pension and gratuity are well-known measures of social security. Therefore, the employer cannot have an absolute discretion not to pay any gratuity even when it is earned. The apex Court held that deprivation of the benefit of right to property can be inevitable in accordance with law. The expression 'law' within the meaning of Article 300A would mean a Parliamentary Act or an Act of the State Legislature or a statutory order having the force of law. Therefore, the authority taking recourse to the executive power of the State under Article 162 cannot deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is therefore, necessarily subject to Article 300-A. The word "law" in the context of Article 300-A must mean an Act of Parliament or of a State Legislature, a rule, or a statutory order, having the force of law, that is positive or State made law. Therefore, it can be safely held that non-grant of pay in terms of appointment letter is in violation of Article 300A of the Constitution of India, which is a constitutional right. The petitioner can only be deprived of such benefit by law enacted by State Legislature or Parliament or by Statutory Rules enacted under the Statute. Nothing has been placed before this Court that benefit admissible to the petitioner pursuant to the terms of appointment has been deprived of pursuant to law made by the State Legislature, Parliament or by Statutory Rules enacted under the Statute. Only contention raised is that by virtue of the notification, a commission of enquiry was appointed, which on being assailed has been set aside by this Court and the said decision has been challenged before the apex Court and is pending for consideration. That ipso facto cannot disentitle the petitioner to enjoy the pay fixed in terms of appointment. As it is a 'property', the petitioner cannot be deprived of the same except by authority of law.

15. Mr. R.K. Rath, further urged that every employee is entitled to scale of pay attached to the post. To substantiate his contention, he has relied upon the judgment of the apex Court in **Smt. P. Grover v. State of Haryana and another**, AIR 1983 SC 1060, wherein pay in a promotional post has been

denied to the petitioner. The apex Court held that the petitioner is entitled to be paid the salary of a District Education Officer from the date she was promoted to the post until she retired from service.

Similarly in **Ram Narain Yadav v. State of Haryana and others**, AIR 1993 SC 1170, the petitioner in the said case was discharging the duty of Deputy Secretary and he was deprived of getting his salary on the scale admissible to the said post. The apex Court held that since the petitioner was discharging the duty, he is entitled to get the scale admissible to the post.

16. In **Selva Raj v. Lt. Governor of Island, Port Blair and others**, AIR 1999 SC 838, the appellant had worked in the higher post though temporarily and in an officiating capacity, his salary was to be drawn during the time against the post of Secretary (Scouts) and the said scale of pay was admissible to the appellant even though he was in officiating capacity not in regular promotee applying the principle of quantum merit. Since the appellant only worked by holding the post, he is entitled to get such benefit. In view of such position, it is made clear that since the petitioners in the aforesaid cases have been appointed pursuant to the appointment order issued by the opposite party in the scale of pay admissible to the post, they cannot be deprived of getting such benefit merely on the ground of pendency of Civil appeal before the apex Court wherein the validity of notification issued for appointment of a commission of inquiry by the State Government is under challenge. In that view of the matter, this Court is of the view that the petitioners are entitled to get scale of pay admissible to the post as they have been validly appointed and deprivation thereof on a flimsy ground is not permissible.

17. Applying the said law laid down by the apex Court to the present case, if the persons juniors to the petitioner have been extended the regular scale of pay and the petitioner has not been extended such benefit, though working in similar situation with similar nature of post with same scale of pay, non-extension of the benefits as due admissible at par with the juniors amounts to discrimination. The 'pay' and 'wages' being the property the same cannot be denied by the executive fiat as the petitioners are protected by 'law'. Therefore, applying the law laid down by the apex Court mentioned supra, the action of the authority in not extending the benefits to the petitioner in terms of the appointment letter amounts to arbitrary and unreasonable exercise of power and quite discriminatory one, therefore violates Article 14 of the Constitution of India.

18 Consequentially, all the writ petitions are allowed and the opposite parties are directed to extend the benefits admissible to the petitioner in each of the cases in terms of the appointment order under Annexure-2 and work out such benefits within a period of four months from the date of communication of this judgment.

Writ petitions allowed.

2016 (I) ILR - CUT-571

D. DASH, J.

R.S.A. NO. 134 OF 2008

SABITRI PANIGRAHI & ORS.

.....Appellants

. Vrs.

**KRUSHNA CH. PANIGRAHI (DEAD)
HIS L.R. SANTOSH KU. PANIGRAHI**

.....Respondent

EVIDENCE ACT, 1872 – S.111

Burden of Proof – Sale transaction between parties in a fiduciary relationship – Defendant is the adopted son of the plaintiff – When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove the same – But when a person is in a fiduciary relationship with another and the later is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position and he has to prove that the transaction is genuine and bonafide – Held, even if fraud is alleged by the plaintiff because of the fiduciary relationship, the burden lies on the defendant to prove due execution of the sale deed by the plaintiff and it was his free and voluntary act both physical and mental. (Para 10)

For Appellants : M/s. Ashok Kr. Mohapatra, A.K.Mohapatra,
N.C.Rout, S.K.Padhi, A.R.Swain, M.Routray,
S.Tripathy, A.K.Panda.

For Respondent: M/s. D.P.Saranghi, D.P.Parija, K.C.Baral,
P.C.Patnaik, N.C.Singh, B.Parija, A.Baral.

Date of hearing : 09.11.2015

Date of judgment: 18.12.2015

JUDGMENT

D. DASH, J.

This appeal has been filed challenging the judgment and decree passed by the learned Ad hoc Additional District Judge, (Fast Track Court-

IV), Bhubaneswar in R.F.A. No.05 of 2004. The respondent as the plaintiff had filed the suit numbered as O.S. No.322 of 2000 (O.S. No.53 of 1991) for setting aside the sale deed dated 11.05.1988 and for permanent injunction. The suit having been dismissed by the trial court the unsuccessful plaintiff had carried the appeal. The lower appellate court has allowed the appeal and set aside the judgment and decree passed by the trial court. The impugned sale deed has been declared to be illegal, void and not binding on the plaintiff-respondent; ex-consequenti, his right, title and interest have been declared. It may be stated here that the original defendant having died during suit, the present appellants were substituted in his place as his legal representatives in the trial court, and they having lost the legal battle in the lower appellate court, are now the appellants here.

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. The case of the plaintiff is that he had purchased the suit land in the year 1974 and has been residing thereon by remodelling his double storied building. It is stated that the natural born son of the plaintiff was not pulling on well with him for which he was residing at Berhampur and on 29.01.1988 the plaintiff's wife passed away. The plaintiff was allotted with a shop room in the railway market at Khurda road and he was running his business there. A notice was issued to him to cancel the said lease hold plot on the false allegation that there has been encroachment at his end concerning the immovable properties. Then serious disturbance was going on in the family and a dispute among the family members of the plaintiff was pending in High Court. Thus, the plaintiff was under terrible mental pressure as being tortured due to above. When such was the state of affair in the month of May, 1988, he fell ill. It is alleged that taking advantage of all these situations, the defendant no.1 in the garb of getting a power of attorney executed in his favour to look after the matters of the plaintiff; in connivance with the scribe and other witnesses created a sale deed and got it executed in respect of the suit land. The said sale deed is said to be the outcome of manipulation. The plaintiff never intended to sale the suit property to the defendant and he at that point of time was even aware of it. It is stated that the plaintiff believing that he and the defendant had gone to the Sub-Registrar for execution of a deed of power of attorney as it was so necessary then in the described situation had done everything. However, it was taken undue advantage of by the defendant, who managed to obtain the sale deed in respect of the suit land

showing it to have been sold for a meagre consideration of Rs.4,000/- when the market price of the suit land at that relevant point of time was Rs.1,00,000/- at the minimum. The plaintiff asserts that he was never aware of the nature of the said deed as sale deed nor its contents were ever read over and explained to him and in fact, he was then not in a fit state of mind. He under good faith just put his signatures at the places indicated in the deed and as desired by the scribe, who had also connived with the defendants. On a fine morning when the defendant threatened to dispossess the plaintiff advancing his right, title and possession based on the sale deed purported to have been executed by him in favour of the defendant, it was to the utter surprise of the plaintiff. So, he obtained the certified copy of the sale deed and found to his astonishment as to how fraud was practiced upon him and the situations which were then prevailing have been taken undue advantage of. It is also stated that the plaintiff had absolutely no necessity to execute the said sale deed. So, he filed the suit claiming the reliefs as already stated.

3. The defendants contested the suit by filing written statement. While traversing the plaintiff's averments, they have stated that the plaintiff was all along mentally fit even after the death of his wife and he was running his business and managing the restaurant. It is also admitted that the natural born son of the plaintiff was not pulling well with him and then the defendant was looking after the plaintiff having good relationship with him. He claims to have never persuaded the plaintiff to execute any power of attorney to look after the case matter. It is stated that the plaintiff on his own wanted to install a weight grind machine in order to have better earning and with a view to install such a machine, he was in need of money. So when he approached the defendant to finance for the same, he also out of his love and affection towards the defendant wanted to sell the eastern half of the disputed plot to him as he then is said to have given land to the western half of the disputed plot to his natural son Santosh. It is the further case of the defendant that as per the instruction of the plaintiff the sale deed was scribed and out of his free will and volition, after having fully understood the nature of the deed and its contents and he then signed on the sale deed. The defendant has denied the case of the plaintiff that he had ever managed to get the sale deed by practicing fraud or exercising undue influence over the plaintiff. He asserts the sale deed to be valid and genuine and claims that the title in respect of the suit land has flown to his hands by virtue of the said sale deed executed by the plaintiff for valuable consideration and he has been clothed with the title for the same.

4. With the above rival pleadings, the trial court framed seven issues. Taking up issue no.3 for decision at first, upon analysis of evidence at its level, answer has been rendered against the plaintiff. The sale deed has been held to be valid and genuine to have clothed the defendant with the title in respect of the suit land. In respect of issue no.4, the same answer has been given and those findings have practically led the trial court to dismiss the suit.

5. The unsuccessful plaintiff having moved the lower appellate court by carrying an appeal, there had arisen the need on the part of the lower appellate court to examine the pregnability of the findings of the trial court mainly in respect of the validity of the sale deed dated 11.05.1988 (Ext.1). The lower appellate court approached the matter by first of all given emphasis on the admitted relationship between the plaintiff and the defendant that the defendant is the adopted son of the plaintiff. In that view of the matter, it has placed the burden of proving the due execution of the sale deed and in turn its acceptability as also the right claimed by the defendant banking on it upon the defendant. It has then gone to examine the evidence of the defendant in the back drop of all the prevailing conditions and circumstances concerning the parties, their mental state as also the nature of the property in question to ascertain the sustainability of the transaction. The lower appellate court held that the trial court has erred in law by not approaching the matter in that way. At the end of that exercise, in the ultimatum the sale vide Ext.1 has been held to have not been duly established as such, repelling all the suspicious circumstances surrounding the same and accordingly the sale deed has been held to be invalid in the eye of law. Consequently, the finding has emerged that the defendant has acquired no right, title and interest over the suit land by virtue of that so-called sale deed (Ext.1). With the above, the trial court's findings have been negated and the judgment and decree non-suited the plaintiff having been set aside, finally the suit has been decreed granting the relief as prayed for.

6. The appeal has been admitted on the following substantial questions of law.

“(a) Whether any fiduciary relationship as to the adoption between the plaintiff (present sole respondent) and the defendants (present appellants) as held by the lower appellate court be elicited in view of lucid bar under the law and the conditions sine-qua-non for a valid adoption?”

(b) Whether the burden of proof can be shifted to the adversary in a case where a party instituting the suit based upon his own plea and allegation as to the factum of fraud?"

7. Learned counsel for the appellant submits that the lower appellate court without any legal justification has upset the findings of the trial court being simply swayed away by the relationship of the plaintiff and the defendant as that of the adoptive father and adopted son. According to him, law does not create a bar for the father to sale any immovable property to his son for valuable consideration and that itself is not a circumstance to be so viewed with suspicion against the validity of the transaction of sale. It is his next submission that the circumstances stated by the plaintiff to be prevailing then at the time of sale ought to have been held to be the creations for the purpose. It is submitted that when on his own showing the plaintiff is a literate person running a restaurant and carrying out business activity, simply because of this relationship, it was not proper on the part of the lower appellate court to place the burden of proof as regards the valid execution of the sale deed by the vendor being aware of the nature of the transaction and the contents thereon upon the dependent. According to him, it is not permissible in law in that case to call upon the vendee to establish all those. Thus, he contends that the lower appellate court instead of calling upon the plaintiff to establish the case of fraud and undue influence, misrepresentation etc. has erroneously cast the said liability upon the defendant. He also submits that in the facts and circumstances of the case and in view of the evidence on record, the findings of the trial court are to be restored as those are just, proper, based on sound appreciation of evidence on record with the legal backing.

8. Learned counsel for the respondent, on the other hand, supports the findings of the lower appellate court and the judgment and decree passed in favour of the plaintiff. According to him, the trial court had committed grave error of law by overlooking the aspect that in view of the rival case of the parties, it was for the defendant to establish by leading, clear, cogent and acceptable evidence as to how he has acquired the right, title and interest over the suit land and that in the case in hand, necessarily, by proving valid execution of the sale deed by the vendor removing all the suspicious circumstances which are admitted as also have come out in evidence. It is his submission that in view of the relationship between the vendor and the vendee, the court is to proceed to approach the matter with due care and caution which has been rightly resorted to by the lower appellate court. He

finally submits that the finding of the lower appellate court are unassailable being based on sound appreciation of evidence on record in the touchstone of the settled position of law covering the subject and the grave error both in law and fact as committed by the trial court having been duly rectified and set at right, no interference with the same is warranted.

9. Often the sale transactions between the parties in a fiduciary relationship are questioned on the ground of fraud, misrepresentation or undue influence. When fraud misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position and he has to prove that there was fair play in the transaction and that the apparent is real, in other words that the transaction is genuine and bona fide. In such a case, the burden of proving the good faith in the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relationship to another has a duty to protect the interest given to his care and the Court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast against the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, and that no advantage has been taken of his position.

10. Section 111 of the Evidence Act says that when there is a question as the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. In the case in hand the undisputed position stands that natural born son of the plaintiff was not pulling on well with the plaintiff and he was staying at a distant place. The defendant is the adopted son of the plaintiff whose wife died on 29.01.1988 whereas the transaction was taken place on 11.05.1988 just after three and half months. So in such state of things and in that mental conditions there arises a reasonable inference, that the plaintiffs being dependent upon the defendant and the plaintiff must be then reposing confidence upon the defendant. So, even if fraud is alleged by the plaintiff because of the fiduciary relationship as also the prevailing circumstances as narrated above, the burden certainly lies on the defendant to prove due

execution of the said deed by the plaintiff that it was his free and voluntary act both physical and mental. In the instant case accepting the parties none have been examined. The original defendant's wife is the lone witness from his side. None of the witnesses of the sale have been brought to the witness box. The original sale deed has also not seen the light of the day and instead its certified copy has been proved. There remains no such explanation. P.W.1 has no personal knowledge as regards execution of Ext.1. The scribe has also not come to depose that he had scribed the document as per the instruction of the plaintiff. The plaintiff has specifically stated that he had gone to execute the power of attorney in favour of the defendant and instead the sale deed has been taken out by the defendant in connivance with the scribe and witnesses to the deed.

Thus the defendants being under the legal obligation to adduce clear, cogent and acceptable evidence in establishing the execution of Ext.1 are found to have failed in discharging that when the plaintiff has stated that at the point of time he has no necessity to sale the land and there was no passing of consideration in order to counter the same, there remains no evidence from the side of the defendants. Moreover, the very pleading of the defendants in the written statement that the plaintiff wanted to give half of the disputed plot to the original defendant as he had already given the other half to his natural born son, rather runs counter to the case of the defendant that there was a sale transaction with passing of consideration. Thus, it is seen that the defendants have utterly failed to discharge the burden of proof in sustaining the transaction (Ext.1) and this Court is unable to cull out any justifiable reason so as to arrive at a finding to the contrary. The discussions as above provide the answers to the substantial question of law framed for the purpose of admission of the appeal. No other substantial question of law has been urged in course of hearing of the appeal for being answered.

11. In the result, the appeal stands dismissed. In the facts and circumstances, there would be no order as to cost.

Appeal dismissed.

2016 (I) ILR - CUT-578**S. PUJAHARI, J.**

CRA NO.151 OF 1991

TIRTHA RANA & ORS.

.....Appellants

.Vrs.

STATE OF ORISSA

.....Respondent

CRIMINAL TRIAL – Prosecution failed to explain injuries on the accused – Two results would follow – Firstly the evidence of the prosecution witnesses is untrue and secondly the version of the appellants that they sustained injuries at the time of occurrence is highly probalised – In this case prosecution has not explained injuries on five appellants, although some of them sustained grievous injuries – Trial Court erred in accepting the version of such witnesses inimically disposed of to the accused/appellants – Held, the impugned judgment of conviction and sentence is setaside.

(Paras 8 to 12)

Case Laws Referred to :-

1. (1976) 4 SCC 394 : Laxmi Singh and Ors. v. State of Bihar
2. (1968) 3 SCR : Mohar Rai v. State of Bihar.
3. (2001) 2 SCC 688 : Sudhir and Ors vrs. State of M.P
4. 1990(Supp) SCC 145 : Nathi Lal and Ors. vrs. State of U.P. and Anr.,

For Appellants : M/s. A.K.Nanda

For Respondent : Addl. Govt. Adv.

Date of hearing : 27.03. 2015

Date of judgment : 23.11.2015

JUDGMENT**S. PUJAHARI, J.**

The appellants herein this appeal call in question the judgment of conviction and order of sentence dated 30.05.1991 passed against them in Sessions Case No. 66/17 of 1990 by the learned Addl. Sessions Judge, Titilagarh. The learned Addl. Sessions Judge, Titilagarh vide impugned judgment and order held each of the appellants guilty of the charges under Sections 147/148/307/323/325 of IPC and sentenced each of them to undergo R.I. for one month under Section of 147 IPC, R.I. for one month under Section 148 of IPC and R.I. for one year under Section 307 of IPC with the order the sentences imposed shall run concurrently, but no separate sentence was awarded to the appellants for their conviction under Sections 323/325 of IPC. During the course of the appeal, the appellant no.1 namely, Tirtha Rana having died, the case against him stands abated.

2. The case of the prosecution is that on 2.8.1989 early in the morning, the appellants forming an unlawful assembly, being armed with Thenga, Tangia and other deadly weapons said to have assaulted one of the member of informant party, namely, Krushna Rana (P.W.4) who was in the embankment of the village tank namely Jugen Bandha. Getting the news of the same when his relatives namely, Jujesti @ Judhistir Rana, Budu Rana, Duta Rana, Dhuble Rana and Muljit Rana arrived there, they were also assaulted by the present appellants. The matter was reported to the police at Titlagarh Police Station vide P.S. Case No. 82 of 1989. The police on investigation found substance in the information and charge sheeted the appellants for the aforesaid offences.

3. Taking into consideration the aforesaid case which was supported by the materials on record collected during investigation, the trial court framed the charges against the appellants for alleged commission of offences punishable under Sections 147/148/307/323/325 of IPC. As the appellants pleaded not guilty to the charge, they faced their trial. The prosecution, examined as many as seventeen witnesses and also exhibited certain documents and material objects in order to bring home the charge against the appellants. In their defence, the appellants, who had taken the plea of false implication and specifically pleaded the informant party to have assaulted them due to previous animosity with regard to possession of the Kumbharmunda Bhaga land, when they were in the said land for cultivation for which the counter case vide Titilagarh P.S. Case No. 81 of 1989 corresponding to Sessions Case No. 35/10 of 1990 pending against them, did not examine independent witness, but exhibited certain documents. However, on conclusion of trial placing reliance on the evidence available on record, the trial court returned the judgment of conviction and order of sentence as stated earlier.

4. Assailing the aforesaid judgment of conviction and order of sentence, it has been submitted by the learned counsel appearing for the appellants that since the aforesaid case was a counter case to the case instituted against the informant party by the appellants and all the so called injured persons in this case were interested witnesses being inimically disposed of to the appellants, the trial court should not have held the appellants guilty of the charges on their versions, more particularly, when the case and counter case was not tried one after the other by the trial court and disposed of simultaneously. Therefore, it has been submitted that the judgment of conviction and order of sentence passed against the appellants are unsustainable in the eye of law.

5. In response, it has been submitted by the learned counsel for the State that no doubt the aforesaid was a counter case to the case instituted against the informant party at the instance of the present appellants, but the appellants having raised no objection during the trial of their case independently though counter case was pending and also the trial court having recorded the finding that it was a case of free fight between two groups, the judgment of conviction and order of sentence cannot be questioned on the aforesaid ground. Furthermore, it is submitted that since evidence is there disclosing the fact that the appellants assaulted the informant party members forming an unlawful assembly and such evidence is unimpeachable in character and suffers from no infirmity, the trial court rightly held the appellants guilty of the charges. Hence, this appeal challenging the judgment and order of conviction and sentence, is devoid of merit, is also the submission of the learned counsel for the State.

6. On perusal of the evidence on record, it would go to show that P.W. 1-Muljit Rana, P.W. 2-Dhule Rana, P.W. 3-Judhistir Rana, P.W. 4-Krushna Rana, P.W. 5-Duta Rana, P.W. 9-Muni Rana and P.W. 10-Abhiram Rana who are injured witnesses are inimically disposed of with the appellants. They deposed that when the appellants were assaulting on Krushna Rana, P.W.4 in the Jugen Bandh, they arrived there, but they were also assaulted by the appellants and sustained the injuries. Their such version is also corroborated by the version of P.W. 15, the Doctor who examined them. Some of the independent witnesses such as P.W. 6, P.W. 7 and P.W. 8 have also corroborated the aforesaid version. Placing reliance on the same, the trial court recorded the conviction and sentence against the appellants as stated earlier without appreciating the injuries sustained by the appellants. So also the plea of the appellants were not considered in proper perspective.

7. It appears that many of the appellants such as deceased appellant no. 1- Tirtha Rana, appellant no. 7-Alekh Rana, appellant no. 6-Udhaba Rana, appellant no.5-Bhuta Rana had sustained injuries. The injury sustained some of them are not superficial inasmuch as Tirtha Rana and Alekh Rana had sustained fracture as disclosed from the evidence of P.W. 15, Dr. R.N. Ratha, who had examined the appellants as well as the informant party members on that day. The evidence of the doctor in this regard has also been corroborated by the injury report vide Ext. A to E. The prosecution party has no explanation for the same inasmuch as none of the witnesses to the occurrence examined by the prosecution made any whisper under what circumstances the above appellants sustained the injuries during the course of fight with the

prosecution party. The witnesses particularly the injured witnesses are interested and inimically disposed of with the appellants, for possession of Kumbharmunda Bhag land. In the aforesaid premises, when they have not explained the injuries sustained by the appellant during the course of the fight, it cannot be said that they have spoken the whole truth, particularly, when the appellants have taken a plea that when they were cultivating their aforesaid bhag land, they were assaulted by the prosecution party members, appears to be probable and the same has impact on the acceptance of evidence of the prosecution adduced in this case against them, as worthy of credence.

8. The Apex Court in the case of **Laxmi Singh and Ors. v. State of Bihar**, reported in (1976) 4 SCC 394 have held as follows:

“xxx xxx Where the prosecution fails to explain the injuries on the accused, two results follow:

- (1) that the evidence of the prosecution witnesses is untrue; and
- (2) that the injuries probalilise the plea taken by the appellants.”

In the case of **Laxmi Singh** (supra), the Apex Court has placed reliance on the decision in the case of **Mohar Rai v. State of Bihar**, reported in (1968) 3 SCR wherein it has been held as follows:

"The trial court as well as the High Court wholly ignored the significance of the injuries found on the appellants. Mohar Rai had sustained as many as 13 injuries and Bharath Rai 14. We get it from the evidence of P.W. 15 that he noticed injuries on the person of Mohar Rai when he was produced before him immediately after the occurrence. Therefore, the version of the appellants that they sustained injuries at the time of the occurrence is highly probalilised. Under these circumstances the prosecution had a duty to explain those injuries... In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probalilise the plea taken by the appellants.”

9. In view of the aforesaid law laid down by the Apex Court, since in this case prosecution has not explained the injuries sustained as many as five of the appellants in this case and the injury sustained by some of them are grievous in nature, the trial court should not have placing reliance on the

aforesaid evidence of the interested and inimical witnesses recorded the finding of conviction against the present appellants particularly when the appellants have taken probable plea that they were assaulted when they were in possession of their land by the prosecution party members who are inimically disposed of to them appears to be probable and corrode the credibility of the version of the witnesses to the occurrence examined by the prosecution.

10. Coupled with the same, the case was also not tried simultaneously with the counter case one after another and disposed of simultaneously by the same court in spite of the mandate of law laid down by the Apex Court in this regard. Reliance in this regard can be placed on two decisions of the Apex Court in the case of **Nathi Lal and Ors. vrs. State of U.P. and Anr.**, reported in 1990(Supp) SCC 145 which has been followed in the case of **Sudhir and Ors vrs. State of M.P.**, reported in (2001) 2 SCC 688.

11. In view of the aforesaid, this Court is constrained to observe that the trial court erred in accepting the version of the witnesses inimically disposed of to the appellant while appreciating the evidence on records holding the appellants guilty of the charges including the deceased appellant in which they have been found guilty. Therefore, the judgment of conviction and order of sentence passed against the appellants are unsustainable.

12. Resultantly, for the forgoing reasons, this criminal appeal is allowed. The judgment of conviction and order of sentence are set aside. Consequently, the appellants are acquitted of the charge in which they were found guilty. They be discharged from their bail bonds. LCR be returned forthwith along with a copy of this Judgment.

Appeal allowed.

2016 (I) ILR - CUT-582

B. RATH, J.

W.P.(C) NO. 11199 OF 2013

PABITRA MOHAN MOHATO & ORS.

.....Petitioner

.Vrs.

**BHARAT PETROLEUM CORPORATION
LTD. & ORS.**

.....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-23, R-1 (3) (b)

Application for withdrawal of suit with liberty to institute fresh suit –Whether the Court below is justified in allowing for withdrawal of

the suit but rejected the liberty to file fresh suit – Held, since the provision has a positive intention the application should have been allowed as a whole. (Para 12)

For petitioner : M/s. Susanta Kumar Dash,
A.K.Otta, A. Dhalsamanta,
B.Pr. Dhal

For opposite parties : M/s. Sri Gautam Mukherji, Sri Nivas
Patnaik, T.P. Paul, A. C. Panda.
Sri Gautam Misra, Sri D.K. Patra

Date of hearing : 4.12.2015

Date of Judgment: 4.12.2015

JUDGMENT

BISWANATH RATH, J.

This petition has been filed against an order dated 8.2.2013 passed by the Civil Judge (Jr. Divn.), Rourkela in C.S. No.12/2003, thereby partly rejecting an application under Order 23, rule 1(3)(b) of C.P.C. at the instance of the plaintiff.

2. Short background involved in the case is that the Civil Suit bearing No.12/2003 was filed at the instance of the present petitioners. After advancement of the suit to a great level, an application at the instance of the petitioners was filed under Order 23 Rule 1(3)(b) of C.P.C. seeking the leave of the Court for withdrawal of the suit with liberty to file a fresh suit. The defendants objected to such petition and considering the rival contentions of the parties, the said application was disposed of by the trial Court by passing the impugned order. By the impugned order, the trial Court while allowing the application of the plaintiffs for withdrawal of the suit, rejected the prayer for granting liberty to file a suit afresh.

3. In assailing the impugned order, learned counsel for the petitioners submitted that when the trial Court has taken up the application under Order 23 Rule 1 (3) of the C.P.C., it was incumbent upon the trial Court either to allow the application as a whole or to reject the same as a whole and had no business for partly allowing the application thereby affecting the right of the petitioners for filing of a fresh suit.

4. It is next contended that the trial Court in allowing the petition partly has committed error of law and the impugned order is contrary to the provision contained in the statute. Referring to an order of this Court passed in W.P.(C) No.18935 of 2009, learned counsel for the petitioners submitted

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of claim,

It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.”

Reading of the aforesaid provision makes it clear that where the Court is satisfied that there are sufficient grounds for allowing the plaintiffs to institute a fresh suit for the subject matter of the present suit or part of the claim thereof, it may on such terms as it thinks fit should grant permission to the plaintiffs to withdraw such suit or such part of the claim with liberty to institute a fresh suit. The provision as quoted hereinabove has a positive intention.

8. From perusal of the impugned order, it clearly discloses that the trial Court after considering the rival contentions of the parties even though permitted the plaintiffs to withdraw the suit but refused the prayer for granting liberty to file a fresh suit. Looking to the purport of the provision and looking to the prayer of the plaintiffs in the application, the plaintiffs not only sought for withdrawal of the suit but has also sought for liberty to file a fresh suit. Entire reading of the impugned order is totally silent on the prejudice to the other side in the event the plaintiffs are permitted to refile the suit.

Be that as it may, present is a case where the trial Court has already permitted the plaintiffs for withdrawing the suit which order is not assailed by any of the aggrieved party.

9. This Court in deciding a case in between *Sri Krupa Bhoi vs. Sri Keshan Majhi & Othrs* in *W.P.(C) No.18935 of 2009* decided on 1.12.2015 has come to observe that the trial Court in view of the provision contained in Order 23 Rule 1(3)(b) of the C.P.C. could have either refused to withdraw the suit and granted leave to file a fresh suit or allowed for withdrawal of the suit and leave to file a suit but having allowed for withdrawal had no other opinion than to also grant leave to file a fresh suit.

Coming back to the citation cited at the instance of the opposite party No.3 vide *AIR 2007 Orissa 31* it is observed here that the reason for withdrawal of the suit and refiling of a fresh suit in the cited decision is not sufficient and the institution of the fresh suit would be greatly prejudice to the other parties on filing of the fresh suit. The cited decision is clearly

distinguishable in view of difference in the facts and circumstances involved in the present case.

10. Perusal of the application at the instance of the plaintiffs in the present case gives a clear picture that the plaintiffs were not able to get proper relief so that he had no other option than to file a fresh suit. Further the objection of the defendant No.3 even went to the extent of no objection in the event the plaintiffs are permitted for withdrawal and the only objection therein was that the application was filed at the fag end of the case. The other two defendants have not even filed any objection to the application under Order 23 Rule (1)(3) (b) of C.P.C.

11. Under the circumstances, this Court is of the view that once the trial Court allowed the plaintiffs to withdraw the suit following the provisions contained in Order 23 Rule 1(3)(b) of C.P.C. the trial Court had no other option than also allow the plaintiff to file a fresh suit.

12. In view of the above, this Court is inclined to interfere in that part of the order rejecting the prayer of the petitioners for granting liberty to file a fresh suit and sets-aside that part of the order impugned, thereby allowing the application under Order 23, Rule 1(3)(b) of the C.P.C. as a whole.

13. However, considering the fact that the suit is permitted to be withdrawn after ten years of its institution and in the contesting of the defendants each of the defendants is entitled to Rs.3,000/- (Rupees three thousands) as cost for their being forced to face an unnecessary litigation, which amount to be paid to each of the defendants within one month hence.

14. The writ petition stands allowed subject to the cost as awarded hereinabove.

Writ petition allowed.

2016 (I) ILR - CUT-587

BISWANATH RATH, J.

O.J.C. NO. 11935 OF 1998

SUDAM SAHOO

.....Petitioner

.Vrs.

DISTRICT JUDGE, CUTTACK & ORS.

.....Opp. Parties

EVIDENCE ACT, 1872 – Ss. 137, 138

Cross-examination – Right of an adverse party – Defendant No. 3 having filed written statement supporting the case of defendant No.1 can not be said to be an adverse party to cross-examine the witness of defendant No. 1 – Held, impugned orders allowing defendant No. 3 to cross-examine D.W.1 are set aside. (Paras 6,7)

Case Law Referred to :-

1. AIR 1981 Gujarat 190 : Hussens Hasanali Pulavwala -V- Sabbirbhai Hasanali Pulavwal & Ors.

For Petitioner : M/s.S.K.Dash, S.K.Mishra,
B.Mohapatra & C.S.Dash

For Opp. Parties : Mr. Bebekananda Bhuyan (O.P.5)
M/s. D.Satpathy (O.P.3)

Date of Hearing : 04.01.2016

Date of Judgment: 11.01.2016

JUDGMENT***BISWANATH RATH, J.***

This writ petition has been filed assailing the impugned orders under Annexures-3 and 4 passed by the learned Civil Judge (Senior Division), Second Additional Court, Cuttack as well as the District Judge, Cuttack in the matter of an application at the instance of the plaintiff debarring defendant no.3 to cross- examine the witness of defendant no.1 and consequently to delete the cross-examination already recorded on behalf of defendant no.3.

2. The short fact involved in the case is that petitioner as plaintiff filed Title Suit No.591 of 1990 praying therein for a decree with a declaration to the effect that Registered Sale Deed No.4679 dated 8.11.1989 executed by opposite party no.3 in favour of opposite party no.5 as void and inoperative in the eye of law. After filing of the written statement separately by opposite

party nos.3 and 5, trial was commenced. During evidence, the opposite party no.3 i.e. defendant no.1 examined his power of attorney selling his share in favour of opposite party no.5 (the defendant No.3 in the court below) involving a sale deed sought for declaring as bad. After the examination-in-chief of D.W.1 is over finding the trial court permitting the defendant no.3 i.e. Opposite party no.5 to cross examine the D.W.1, the plaintiff / petitioner filed a petition seeking a direction from the trial court debarring the opposite party no.5 i.e. defendant no.3 from cross examining the of D.W.1. The said petition was heard by the trial court and the trial court after considering the contention of the plaintiff as well as the contesting defendant no.3 -present opposite party no.5 by order dated 27.11.1997 even though appreciated the contentions of the petitioner, but while disposing the application by the impugned order allowed the defendant no.3 to put question to the witnesses converted the portion already recorded in cross-examination, as chief at the instance of defendant no.3. Being aggrieved by the said order, the petitioner preferred Civil Revision No.164 of 1997. The revisional authority disposed the revision dismissing the same.

3. In assailing the impugned orders vide Annexures-3 and 4, Sri Dash, learned counsel appearing for the petitioner contended that since defendant no.3 is the purchaser of the property belonging to defendant no.1 by virtue of a power of attorney from the defendant no.1 and having filed a written statement in the line of the written statement of defendant no.1, there was no adversary between defendant no.1 as well as defendant no.3 and it is in this context, urged that the courts below have not only failed to appreciate the above factual background of the case vis-à-vis considering the claim of the defendant no.3 for cross-examination of D.W.1 also failed in appreciating the provisions contained in Section 138 of the Indian Evidence Act, 1872. Sri Dash, learned counsel also contended that both the courts below have failed to appreciate the judgments so cited by the plaintiff in both the courts below in the case of *Hussens Hasanali Pulavwala v. Sabbirbhai Hasanali Pulavwala & others*, A.I.R. 1981 Gujarat 190 and it is under the circumstances contended that both the courts below passed the impugned orders not only contrary to the provisions in the Code of Civil Procedure but also otherwise contrary to the settled position of the land.

4. Per contra, Sri B.Bhuyan, learned counsel appearing for the defendant no.3, the present opposite party no.5 contended that even though the opposite party no.5 is the purchaser of the disputed land by virtue of Registered Sale Deed No. 4679 dated 8.11.1989, the opposite party no.3 in

chief examination of D.W.1 failing to refer to the Registered Sale Deed, the defendant no.3 had a right to cross-examine the D.W.1 for establishing the Registered Sale Deed dated 8.11.1989. Further, in view of the provision contained in Section 138 of the Indian Evidence Act, 1872, since the plaintiff has a right of cross-examination, it would be better if the plaintiff cross-examine the D.W.1 after the D.W.1 is being cross-examined by the D.W.3. Sri Bhuyan, learned counsel also further contended that under the above circumstances and the provision of law, there is no harm in allowing the defendant no.3 to examine the D.W.1 ahead of cross-examination of the D.W.1 and under the circumstances, Sri Bhuyan, learned counsel for the opposite party no.5 contended that the courts below have not committed any error of law. Consequently, there is no scope in interfering in the impugned order.

5. Undisputed fact involved in the case remains that the petitioner is the plaintiff and the opposite party no.5 is the defendant no.3 in a suit for declaring the Registered Sale Deed No. 4679 dated 8.11.1989 executed by opposite party no.3 in favour of opposite party no.5 as void one and inoperative in the eye of law. There is also no dispute that the opposite party no.3 has sold the particular property by virtue of the above registered sale deed through the power of attorney under examination as D.W.1. There is also no dispute that there is no adversity in between the opposite party no.3 and opposite party no.5 involving the claim of the plaintiff. Perusal of the written statements filed by both the parties also makes it clear that the stand of both these above opposite parties runs parallel. Further, undisputed fact remains is that after the closure of the chief of the opposite party no.1 by the defendant no.1, the trial court having allowing the defendant no.3 to cross-examine the defendant no.1, the plaintiff filed a petition for debaring the defendant no.3 from cross-examination of D.W.1.

6. Perusal of the impugned order of the trial court clearly reveals that the trial court considering the application at the instance of the plaintiff, even though appreciated the stand taken by the petitioner but by the impugned order vide Annexure-3 while permitting defendant no.3 from putting questions to D.W.1 has further directed to treat the evidence recorded through defendant no.3 by way of cross examination as chief through defendant no.3. The questions, therefore, now fall to be decided are that (1) If the defendant no.,3 is entitled to cross-examine the D.W.1? and (2) If the Defendant no.3 is entitled to examine the D.W.1 ahead of D.W.1 is being cross-examined by the contesting plaintiff and defendants.

Now coming to decide the question no. 1. On perusal of the impugned order vide Annexure-3, this Court finds that upon realising the point raised by the plaintiff, the trial court by the impugned order directed not to treat the recorded portion through defendant no.3 as cross-examination but to treat the same as examination on behalf of defendant no.3. Now, therefore, it is clear that the trial court by impugned order in no means is permitting the defendant no.3 to cross-examine the D.W.1. Now coming to answer on the question no.2, it is first required to go through the provisions of the Indian Evidence Act, 1872 to find out as to what is the order of examination. For this purpose, it is relevant here to refer to the provisions contained in Sections 137 and 138 of the Indian Evidence Act, 1872.

Section 137 and 138 of the Indian Evidence Act, 1872 reads as follows:

“137.

Examination-in-chief

The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Order of examinations

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief”

Reading of the Section 137 of the Indian Evidence Act, makes it clear that the first step is the examination of a witness by the party who calls him, which is called as examination-in- chief and the next step is cross-examination of a witness already put to examination-in-chief by the adverse party and after the examination-in-chief and the cross-examination is over, there is scope for reexamination of a witness on being called for by a party subsequent to cross-examination by the party, who had called him. If we

look to the provision contained in Section 138 of the Indian Evidence Act, this provision makes it clear that a witness shall be first examined in chief (then if the adverse party so desires) cross-examined, then (if a party calling him so desires) re-examined. A conjoint reading of both the above provisions make it clear that there are three stages of examination of a witness i.e. (1) examination in chief, (2) cross-examination by the adversary party and (3) re-examination by the party, who had called such a witness after the cross-examination and, therefore, there is no scope for additional cross-examination or re-examination by a party, who is not adverse to the person, who has examined any such witnesses. Therefore, not only there is no scope for the defendant no.3 to cross-examine the D.W.1 but there is also no scope for the defendant no.3 being not a adverse party to the Defendant no.1 to re-examine the D.W.1. As the provision of re-examination only entitles a person for re-examination of a witness by whom the witness has been called, this Court finds both the courts have miserably failed to appreciate the above aspect and thus arrived at the wrong and erroneous impugned orders. Both the Courts below also failed to appreciate the decision reported in AIR 1981 Gujarat - 190.

7. Under the circumstances, this Court observes that both the courts have failed to appreciate the provisions of order of examination as well as the scope of re-examination or cross-examination by a party of a particular witness and, therefore, the order of the trial court even treating the statements recorded through defendant no.3 as chief-examination of defendant no.3, is also unwarranted, being contrary to the provisions of Sections 137 and 138 of the Indian Evidence Act, 1872. Consequently, the Revisional order vide Annexure-4 also becomes bad. In the result, this Court while allowing the writ petition, sets aside the orders of the courts below vide Annexures-3 and 4 and thereby allow the application of the plaintiff-petitioner for debaring defendant no.3 from cross-examination or examination-in-chief the D.W.1.

8 Since the suit is of the year 1990, this Court directs the trial court to dispose of T.S.No.591 of 1990 consequently re-numbered as 944-94 within a period of four months from the date of this judgment.

9. The writ petition stands allowed but however, there is no order as to cost.

Writ petition allowed.

2016 (I) ILR - CUT-592

BISWANATH RATH, J.

W.P.(C) NO. 3942 OF 2009

**SADANANDA MUTIKA @ MUTUKA
SADANANDA**

.....Petitioner

. Vrs.

LADI TRINATH RAO & ORS.

.....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-6, R-17

Amendment of written statement – Prayer refused – Order challenged – Suit for permanent injunction – Trial not commenced – Amendment sought for in no way inconsistent to the pleadings – Wide and unfettered discretion to allow amendment at any stage of the proceedings – Courts are often more liberal to allow amendment of the written statement than the plaint – Trial court failed to appreciate the factual as well as legal aspects involved in the suit – Held, the impugned order is set aside and the application for amendment is allowed.

(Paras 7 to 10)

Case Laws Referred to :-

1. . JT 2006 (7) SC 139 : Baldev Singh & Ors. etc. v. Manohar Singh & Anr. etc.
2. 56(1983) C.L.T. 400 : Hundari Bewa vs. Kaluni Dei & others as
3. AIR 1977 (SC) 680 : M/s. Modi Spinning and Weaving Mills Co.Ltd. & Anr. V. M/s. Ladha Ram & Co.

For Petitioner : M/s. A.K.Nanda, G.N.Rana & G.N.Sahu

For Opp. Parties : M/s. C.Ananda Rao, S.K.Behera & A.K.Rath

Date of hearing :10.11.2015

Date of Judgment:16.11.2015

JUDGMENT***BISWANATH RATH, J.***

This matter arises out of an order dated 4.02.2009 passed by the Civil Judge (Senior Division), Gunupur in Civil Suit No.54/2004 thereby rejecting an application for amendment of the written statement filed by the defendant-petitioner under Order-6, rule-17 of C.P.C.

2. Short fact involved in this case is that the opposite parties as plaintiffs filed the suit seeking a relief for permanent injunction against the defendant-

petitioner restraining them from interfering in the peaceful possession of the plaintiffs over the suit land and for such other reliefs as the Court deems fit and proper in the interest of justice.

3. Following service of notice the present petitioner filed a written statement on behalf of defendant Nos.1 & 3. During pendency of the suit the petitioner-defendants filed an application under Order 6, rule 17 C.P.C. seeking amendment of the following paragraphs :

“After Para No.11 the following the Para is to be added.

That the defendant No.1 is in peaceful continuous possession over the entire lands which are within the boundaries mentioned in the plaint by the plaintiff since his fore-fathers till today with the knowledge of one and all of the locality including the plaintiff as such even otherwise the defendant no.1 have prescribed his right title over the suit schedule property which are within the boundaries mentioned in the plaint by their uninterrupted continuous possession in assertion of his own right since his grant fathers time till-today and the plaintiff has lost his title if any.

That at the prayer portion after para No.2 following Para is to be added.

To declare the right title and possession of the suit schedule property in favour of the defendant No.1 within the boundaries mentioned in the plaint by adverse possession.”

Considering the rival submissions of the parties, the trial Court by the impugned order rejected the application at the instance of the petitioner-defendant on the premises that the petition for amendment of written statement cannot be allowed at that stage of the suit and it further held that the petition has been filed to delay the disposal of the suit as well as creating a new case.

4. Mr. A.K. Nanda, learned counsel for the petitioner contended that the trial had not commenced by the time of filing of the amendment application. The rejection vide the impugned order was against the settled principle of law, the Trial Court failed in appreciating the provision contained in Order 6 rule 17 of the C.P.C. Further the trial Court also failed in appreciating the settled position of law permitting raising of inconsistent pleas and taking away the admission in the interest of justice as well.

5. On his appearance Mr. C.A. Rao, learned senior advocate for the opposite parties submitted that in view of the specific pleading in the written statement, the attempt of the petitioner taking away the admissions was impermissible in the eye of law. Further the petitioners could not have been permitted to raise an inconsistent plea by way of amendment and in the event, any such permission is granted, there would be vital shifting in the admission of the petitioners in their written statement. It is in these premises, Mr. Rao, learned senior advocate contended that the order of the trial Court is justified.

Heard learned counsel appearing on behalf of both parties.

6. From perusal of the pleading of the petitioners in their written statement filed in the trial Court, the petitioners had a clear pleading vide Paragraph Nos.-2, 3 & 11 which reads as follows :

“2. That the allegation made in Para No.4 (f) and (ii) of the plaint of the plaintiff are true. It is a fact that the plaintiff has got lands at Gopalpur Mouza which stands recorded in the name of his late father Ladi Sanyasi under Khata No.51/108, Plot No.140/360, Ac.1.36 cents, Plot No.141/361, Ac.0.64 cents, Plot No.141/362, Ac. 2.00, Plot No.4/363/415. Ac.1.93 cents total extent of Ac. 5.93 cents.

3. That the allegations in Para No.4(iii) of the plaint of the plaintiff is false. That the above land though stands recorded in the name of late ladi Sanyasi the father of the plaintiff late ladi Sanyasi and evenafter him the plaintiff has not cultivated the above lands and yet it is lying follows : -

XXXX XXXX

11. That the plaintiff has filed this case mentioning the lands which stands recorded n the name of his late father and obtained the injunction order in his favour and managed to mis-guide the process server of the Hon’ble Court to affix the red flag and notice on the lands of the defendant No.1 & 3.

7. Now looking to the amendment as reflected hereinabove and the pleadings of the petitioner as quoted hereinabove, this Court observes that the petitioners had already a pleading in relation to their peaceful continuous possession over the disputed property since long and they had also a clear claim in the same paragraph that the disputed lands belongs to the defendant Nos.1 & 3. So considering the aforesaid aspects, this Court is of the view that the amendment sought for was in no way inconsistent to the pleadings already therein.

This Court further observes that the trial Court erred in law in appreciating the facts involved in the matter and thereby arrived at a wrong conclusion.

8. Now coming to the law on the subject in a case in between Baldev Singh & Ors. etc. v. Manohar Singh & Anr. etc. as reported in JT 2006 (7) SC 139 the Hon'ble Apex Court came to hold that in case of amendment of written statement, the Courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case. In further consideration of the provision of law on the subject, the Hon'ble Apex Court in the very same judgment again came to hold that in view of the proviso under Order 6 rule 17 of C.P.C., which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings. Similarly, in the very same judgment, the Hon'ble Apex Court has also held that there is no clear bar in withdrawing an admission. However, it is relevant for the Courts to consider as to whether the amendment brought in is consistent with the pleadings already there in the written statement and relevant for the purpose of effective adjudication of the *lis*.

Similarly, in another decision in the case of Hundari Bewa vs. Kaluni Dei & others as reported in 56(1983) C.L.T. 400, this Court in considering the effect of amendment of the written statement in paragraph '9' came to hold as follows :

“9. The Courts exist for deciding the rights of parties and not to punish them for mistakes they make in the conduct of their cases, and they do not exist for the sake of discipline, but for the sake of deciding matters in controversy, permission to correct an error or mistake should be granted unless it be fraudulent or intended to overreach and where such withdrawal does not cause injustice to the other side, or such injury which may not be compensated by costs. The rules of procedure are intended to sub-serve justice. Where the Court is satisfied that the admission was made by inadvertence or erroneously and there was no malafide on the part of the applicant, it would be denial of justice not to permit the party to withdraw the admission or correct the mistake. In *Panchdeo Narain Srivastava v. Km. Jyoti Sahay and another*, it was observed :

“..... An admission made by a party may be withdrawn or may explained away. Therefore, it cannot be said that by amendment an admission of fact cannot be withdrawn.....”

In Gobinda Sahoo v. Ram Chandra Nanda and another, it was said :

“..... Where an admission appears to have been made by inadvertence or erroneously in ignorance of the true legal position due to the fault of the advocate, an amendment may be allowed even though the effect of an admission may be taken away.”

Above decisions clearly supports the case of the petitioner.

9. Considering the citations at the instance of the learned senior advocate for the opposite parties in the case of M/s. Modi Spinning and Weaving Mills Co. Ltd. & Anr. V. M/s. Ladha Ram & Co. as reported in AIR 1977 (SC) 680, this Court finds that the fact & situation involved in the above reported case does not match the fact involved in the present case. Therefore, the citation has no support to the present case.

10. Under the circumstances and particularly in view of the findings arrived at hereinabove and the settled position of law as narrated hereinabove, this Court is of the view that the trial Court failed in appreciating the factual as well as legal aspects involved in the matter and thereby arrived at a wrong and erroneous order impugned in the present writ petition. This Court while setting aside the impugned order allows the application under Order 6, rule 17 at the instance of the petitioner and while doing so, directs the petitioner to file his amended written statement within a period of two weeks from today.

Since the order has been passed after hearing the parties, this Court further directs both the parties to appear before the learned trial Court with certified copy of this judgment on 30th November, 2015 and the trial Court shall do well in disposing the Civil Suit bearing C.S.No.54/04 as expeditiously as possible preferably within a period of six months from today.

12. The writ petition succeeds to the extent directed hereinabove. However, there shall be no order as to cost.

Writ petition allowed.

2016 (I) ILR - CUT-597**S.N.PRASAD, J.**

W.P.(C) NO.19470 OF 2015

MALABIKA MURMU

.....Petitioner

.Vrs.

STATE OF ODISHA & ORS.

.....Opposite parties.

ANGANWADI WORKER – Appointment – Petitioner and one Parbati Tudu applied for the post – Parbati was selected having secured highest marks in Class-VIII examination – Petitioner challenged the authenticity of the marksheet – Sub-Collector on enquiry found it to be forged and while rejecting the engagement of Parbati directed for fresh selection – Writ petition filed by the petitioner challenging the part of the order directing for fresh selection – No provision in the guideline to go for fresh selection but there is provision for verification of certificates – In this case date of verification was fixed to 19.05.2015 – So verification of certificates can not be said to be a mere formality – If authorities would have verified the marksheet, candidature of Parbati was bound to be rejected and petitioner would have been selected and question of fresh selection would not arise – Held, the impugned order directing fresh selection is setaside – Direction issued to the authorities to issue engagement order to the petitioner.

Case Laws Referred to :-

1. 2013(I) OLR 391 : Smt. Sukanti Jena -v- State of Odisha & Ors.
2. 2012(Supp.-I) OLR 718: Surya Kanti Sahoo -vs- Secretary, Department of Women and Child Devellpment,Odisha & Ors.

For petitioner : M/s. S.P.Dash

For opposite parties : Addl. Govt.Advocate

Date of Order : 23.11.2015

ORDER**S.N.PRASAD, J.**

Petitioner is aggrieved with that part of the order dated 30.9.2015 passed by the Sub-Collector-cum-Enquiring Officer, Panchpir, Karanjia by which the Sub-Collector on the one hand come to conclusion that the selection was not genuine and as such selected candidate namely Smt. Parbati Tudu has been disengaged with direction upon the opposite parties to go for fresh selection.

Petitioner being aggrieved with that part of the order to the effect that the authorities have passed order regarding going for fresh selection has approached this Court by way of this writ petition.

Case of the petitioner is that in pursuance to the advertisement dated 4.5.2015 three candidates namely, present petitioner, Parbati Tudu and Smt. Pravasini Mohanta had submitted their applications and on scrutiny it was found that Smt. Pravasini Mohanta is an outsider of the area of operation of the Chandaposi Sahi Mini Anganwadi Centre as well as her candidature was rejected. After her rejection, selection process was started in between the present petitioner and Parbati Tudu, Parbati Tudu was selected on the basis of the highest marks obtained in Class-VIII examination. Petitioner raised her objection on 29.6.2015 with respect to the authenticity and genuineness of mark sheet produced by Parbati Tudu at the time of selection. Objection of the petitioner having been registered by the appellate authority as Anganwadi Case No.15 of 2015, enquiry has been conducted with respect to veracity and genuineness of mark sheet produced by Parbati Tudu. The Sub-Collector-cum-Enquiring Officer issued notice to all the selected candidates and also upon the Headmaster of Bislamunda High School who has produced original records and submitted that only transfer certificate has been issued to Parbati Tudu not mark sheet. Opposite party no.2 after verifying the original record and after going through the statement of the Headmaster of the concerned school who has specifically asserted that the mark sheet, based upon which, Parbati Tudu has been selected, has not been issued by the school, has passed an order of disengagement, however direction has been passed for fresh selection.

Petitioner being aggrieved with that part of the order of the Sub-Collector regarding going for fresh selection has approached this Court on the ground that if the authorities would have acted in proper manner at the time of verification of documents with regard to genuineness of certificates, the petitioner would have been selected but due to the laches on the part of the selection committee Parbati Tudu has been selected and subsequently her engagement was rejected after verifying documents produced by the Headmaster of the school.

It has been submitted that when the Sub-Collector-cum-Enquiring Officer has come to conclusion that fraud has been committed by the selected candidate namely Parbati Tudu and her engagement has been rejected, hence petitioner being second candidate would have been selected and engaged. He has further submitted that if the authorities would have acted in proper

manner the petitioner would have been selected but due to laches on the part of the authorities in no verifying the documents, rightful claim of the petitioner has not been considered as such petitioner cannot be made to suffer due to laches and negligence committed by the selection committee.

Learned counsel for the opposite party-State has contested the case by relying various paragraphs of the counter affidavit wherein it has been stated that there is no guideline to engage next candidate in case of disengagement resulting in vacancy and there is no provision of waiting list.

Having heard learned counsel for the parties and on perusal of documents available on record the fact which is not in dispute that in pursuance to the advertisement dated 4.5.2015 the petitioner along with two other candidates participated in the selection process. One candidate being outsider her candidature has been rejected. Only two candidates namely present petitioner and Parbati Tudu remains in the fray. Parbati Tudu has placed reliance upon the mark sheet of 8th Class examination and on the basis of highest marks secured in the 8th Class examination she has been selected and engaged being highest scorer of marks in the examination.

Petitioner has raised objection regarding veracity of the 8th class mark sheet before the Sub-Collector, on the complaint having been made by the petitioner before the Sub-Collector, Sub-Collector initiated proceeding and issued notices to the selected candidates and Headmaster of the concerned school with a direction to come out with specific report for verification of 8th Class certificate of the successful candidate along with the document which was produced before the selection Committee. Headmaster of the school has appeared before the Sub-Collector and has submitted that only transfer certificate has been issued from the school in question and no mark sheet has been issued which has been produced by the successful candidate before the selection committee. The Sub-Collector after considering all these aspects of the matter and after providing opportunity of being heard to the petitioner, has come to finding that selection of the successful candidate is not genuine as such order of disengagement has been passed with a direction to go for fresh selection.

Grievance of the petitioner is against that part of the order by which direction has been issued to go for fresh selection which according to the petitioner is absolutely incorrect and without application of mind because of the fact that the petitioner is the sole genuine candidate after disengagement of the first candidate if the authority would have acted in proper manner in scrutinizing the testimonials, the petitioner would have been selected.

Second ground taken by the petitioner is that if the authorities would have acted in proper manner and if the documents which have been produced by the successful candidate would have been corroborated from the original document, there would not have been question of selection of Parbati Tudu.

I find substance in the contention advanced by learned counsel for the petitioner on the ground that even in the guideline there is provision of verification of certificate and date of verification as also fixed in this case on 19.5.2015. For verification of certificates/documents it cannot be said to be mere formality. When there is specific date of verification of documents the authorities could have verified from its original or even by calling original record. This procedure has not been done while verifying documents of Parbati Tudu which has subsequently been found to be engaged on the basis of forged certificate as such disengaged.

Question of going for fresh selection would not arise because of the reason that authorities if during the process of verification of documents verified from its original certificates, candidature of Parbati Tudu was bound to be rejected and in that situation petitioner would have been appointed as Anganwadi Worker but due to latches on the part of the selection committee, Parbati Tudu has been engaged disclaiming original right of the petitioner.

Advertisement was published on 4.5.2015, disengagement order has been passed on 4.8.2015, it is merely more than three and half months and it is not also that one or two years has elapsed, but the ground which has been taken in the counter affidavit that there is no provision in the guideline to go for fresh selection it is not seems to be proper ground because of the reason that wrong candidate has been selected and subsequently Sub-Collector being Chairman of the Selection committee has found that the selection is based upon forged document, order of disengagement has been passed, hence Sub-Collector ought to have issued order regarding engagement of the petitioner being rightful candidate in the selection process.

In this respect, learned counsel for the petitioner has placed reliance upon the single bench judgment of this Court in the case of **Smt. Sukanti Jena –v- State of Odisha and others** reported in 2013(I) OLR 391. Referring to paragraph-12 of the said order it has been submitted that this Court has deprecated action of the authorities in going for fresh selection after engagement order has been cancelled.

Learned counsel for the petitioner has also placed reliance upon the judgment of this Court in the case of **Surya Kanti Sahoo –vs- Secretary,**

Department of Women and Child Development, Odisha and others reported in 2012(Supp.-I) OLR 718 wherein also A.D.M. has passed order of disengagement of selected candidate but when that order has been reversed by learned Single Bench under writ jurisdiction which was subsequently been challenged in writ appeal the Hon'ble Division Bench of this Court has been pleased to quash that part of order directing engagement of second candidate in the selection process. Applying the ratio of these two orders, in my considered view, part of the order by which fresh selection process has been directed to be conducted, is not sustainable, on the ground that there is no latches on the part of the petitioner, if the authorities would have resorted to proper procedure of selection, petitioner would have been selected.

Accordingly, the part of the order to go for fresh selection is set aside.

In the result, writ petition is disposed of, directing the authorities to issue engagement order in favour of the petitioner within three weeks from the date of receipt of copy of this order.

Writ petition disposed of.

2016 (I) ILR - CUT-601

K.R. MOHAPATRA, J.

F.A. NO. 82 OF 2000

**RAMA CH. PRUSTY (SINCE DEAD)
HIS L.R. RABINDRA KU. PRUSTY & ANR.**

.....Appellants

. Vrs.

BIDYADHAR PRUSTY & ORS.

.....Respondents

(A) HINDU LAW – Joint property – Doctrine of blending – In order to establish that the separate or self-acquired property of a coparcener is blended with a joint family property, the following ingredients have to be established :-

1. There must be a coparcenary joint family in existence;
2. Property in question must be separate or self-acquired of a Hindu coparcener;
3. He allows such property to be used by joint family;
4. Such action of the coparcener must be out of his own volition ;
5. He must have an intention of waiving, Surrendering and/or abandoning his claim of separate rights over such property.

(Para 11)

(B) PARTITION ACT, 1893 – S.4

Dwelling house of joint family – Sell to stranger by co-sharer – Right of family member to pre-empt share purchased by

stranger/outsider – A coparcener/co-owner/Co-sharer can exercise the right of pre-emption only when the transferee has sued for partition of his/her purchased property by filing suit for partition.

In this case defendant No.1 being a co-sharer has sold the ancestral dwelling house, i.e., “C” schedule property to defendant No. 10, an outsider – Plaintiff filed suit to re-purchase such property U/s. 4 of the Act – Defendant No. 10 has not filed any suit for partition and allotment of “C” schedule property to the share of his vendor (Defendant No.1) – Held, the right of pre-emption for purchase of property U/s 4 of the Partition Act is not available to the plaintiff.

(Para 14)

(C) TRANSFER OF PROPERTY ACT, 1882 – S.44

There is no law which provides that a co-sharer must only sell his/her share to another co-sharer – So strangers/outsiders can purchase shares even in a dwelling house – Section 44 provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house – Section 44 also protects the family members against intrusion by an outsider into the dwelling house – The only manner in which an outsider can get possession is to sue for possession and claim separation of his share.

(Para 14)

Case Laws Referred to :-

1. AIR 1961 SC 1268 : Mallesappa Bandeppa Desai and another-v- Desai
Mallappa alias Mallesappa and another.
2. 1985 (I) OLR 186 : Brundaban Padhan -v- Krishna Pradhan.
3. AIR 2003 SC 3800 : D.S.Lakshmaiah and another Vs.
L. Balasubramanyam and another
4. AIR 1994 SC 1722 : Ram Janam Singh -v- Stae of Uttar Pradesh & Anr.
5. AIR 1963 SC 1601 : Lakkireddi Chinna Venkata Reddi and others Vs.
Lakkireddi Lakshmama.
6. AIR 1968 SC 1276 : G.Narayana Raju (dead) by his legal representative Vs.
Chamaraju.
7. 1988 (I) OLR 309 : Kishore Chandra Sahu and Anr Vs. Rukuna Sahu & Anr.
8. 38 (1972) CLT 325 : Balabhadra Nisanka and others Vs. Suka Dibya & Ors.

For Appellants	: Mr. Ramakanta Mohanty, Sr. Adv. M/s. R.N.Mohapatra, S.K.Mohanty, B.K.Mohanty,S.N.Biswal & S.Mohanty.
For Respondents	: M/s. Bibekananda Bhuyan, P.K.Jena, D.P.Mohapatra & Miss P.Das.

Date of Judgment: 11.12.2015

JUDGMENT

K.R. MOHAPATRA, J.

This appeal has been filed assailing the judgment and decree dated 24.01.2000 and 11.02.2000 respectively passed by the learned 1st Additional Civil Judge (Senior Division), Cuttack in T.S. No.15 of 1979. During pendency of the suit, the original plaintiff, namely, Rama Chandra Prusty died and his legal heirs (the appellants herein) were brought on record who prosecuted the suit.

2. The suit was filed for a decree for partition of schedule 'B', 'D' and 'E' properties of the plaint as per the compromise petition filed by the plaintiff, defendant Nos. 2, 3, 4, 11, 13, 14 and 15 and also for a decree holding that the entire 'C' schedule property is the exclusive property of the plaintiff. The plaintiff further prayed that in case 'C' Schedule property is held to be joint family property of Rama Chandra Prusty (the original plaintiff) and his deceased father (defendant No.1), namely, Bidyadhar Prusty and the same being homestead property, the plaintiffs have got a right to repurchase the same under Section 4 of the Partition Act through the process of Court.

3. One Krushna Prusty was the common ancestor, who died leaving behind three sons, namely, Kartika, Panu and Banchhanidhi. B' schedule property was the ancestral properties of the parties in which surviving members of each of the three branches had 1/3rd interest. Nidhi and Bidyadhar, the sons of Kartika, effected a partition of movables in the year 1932 in which Bidyadhar had got some cash and five mahan of bell metals and they separated themselves in mess, but the family of defendant No.1, namely, Bidyadhar remained joint. Bidyadhar-Defendant no. 1 was the Karta of the family. Defendant No.1 acquired 'C' schedule property with a thatched house thereon from out of joint family nucleus, more particularly from the cash and movables he got in partition. Though 'C' schedule property was acquired in the name of Bidyadhar, the same was treated to be the joint family property as Bidyadhar amalgamated the same with 'B' schedule property. As the ancestral dwelling house was in a dilapidated condition, the defendant No.1, his wife Suma and the plaintiff moved to the newly purchased house situated over 'C' schedule property and stayed therein till 1955 when the house collapsed due to heavy rain. Thereafter, the defendant No.1 and other family members came back to the ancestral house after making some repairing therein and the 'C' schedule property was being used as 'Bari' (kitchen garden). There was an open latrine over the 'C' schedule property which was being used as such by the family members. Defendant No.2, namely, Makara, the natural brother of the plaintiff,

immediately after his birth was given in adoption to Kokila, the daughter of Banchhanidhi. After the death of the adoptive parents, defendant No.2 started residing with defendant No.1 over 'B' schedule properties. Subsequently, the plaintiff and defendant No.1 constructed a pucca house over 'C' schedule property. Defendant No.1 in order to deprive the plaintiff from his share over 'C' schedule property sold the same to defendant No.10, a stranger to the joint family, without any legal necessity. Such sale was nominal and sham transaction. When the said fact came to the knowledge of the plaintiff, the plaintiff demanded partition to which Bidyadhar turned a deaf ear. Hence, he filed the suit for the aforesaid relief.

4. Defendant Nos. 1 and 2 filed joint written statement, but subsequently they did not contest the suit. Defendant No.10 filed his written statement denying the plaint allegations and stated that 'C' schedule property originally belonged to one Moti Bewa and defendant No.1 had entered into an agreement to purchase the same from her. When said Moti Bewa did not execute the sale deed as agreed upon, defendant No.1 filed the suit for specific performance of contract in the Court of Ist Munsif, Cuttack. The suit was decreed in favour defendant no.1 and the sale deed was executed in his favour through Court vide registered sale deed dated 21.05.1934. Accordingly, the 'C' schedule property was recorded exclusively in the name of defendant No.1 in the Major Settlement. Defendant No.1 for his legal necessity sold the 'C' schedule property in favour of defendant No.10 after obtaining due permission under the provisions of Urban Land Ceiling Act and from Khasmahal authority. Defendant No.10 also specifically denied the allegation that 'C' schedule property was purchased out of joint family nucleus. It was the specific case of defendant No.10 that the 'C' schedule property was the self acquired property of defendant No.1 which he had purchased out of his own income and he was in exclusive possession over the same. Thus, defendant No.1 contended that the prayer for repurchase under Section 4 of the Partition Act could not be granted in favour of the plaintiff. He further contended that the suit was not maintainable without a prayer for declaration of title and possession. Thus, he prayed for dismissal of the suit.

5. During pendency of the suit, defendant No.1, namely, Bidyadhar Prusty died and his name was deleted vide order dated 07.02.1992. Similarly, names of defendant Nos. 5 to 9 were also deleted vide order dated 21.02.1992 as they had no interest in the suit property. During pendency of the suit, the plaintiffs effected compromise with defendant Nos. 2 to 4 and defendant Nos. 11 to 15 vide order dated 13.05.1992 in respect of other

properties involved in the suit except 'C' schedule property. In the said compromise, Schedules-'B', 'D' and D/1 were partitioned and the plaintiffs were allotted Schedule 'X' property mentioned in the compromise petition. Likewise, defendant Nos. 2 to 4 and 14 and 15 got 'Y' schedule property mentioned therein. It was also admitted in the said compromise that defendant No.2 was not adopted by Kokila and he was the son of defendant No.1. Defendants 11 to 13 did not claim any share in the suit properties out of their own volition. Part of 'B' Schedule property purchased by defendant No.1 from one Nidhi was treated to be joint family property and was accordingly partitioned as per the terms of the compromise. Similarly, 'D' schedule property purchased in the name of Suma (wife of defendant no.1) after her death became the joint family property and was partitioned as per the terms of compromise. However, terms of the compromise specifically revealed that the plaintiff will continue the suit as against defendant No.10 in respect of 'C' schedule property only and other defendants would not lay any claim over the same. Thus, in view of the compromise recorded as aforesaid, the only dispute remained to be decided in the suit was in respect of 'C' schedule property between the plaintiffs vis-à-vis defendant No.10.

6. Taking into consideration the rival pleadings of the parties, learned Civil Judge framed as many as eleven issues, out of which Issue Nos. 4, 5 and 7 are vital for consideration in this appeal which are quoted hereunder :-

“4. Whether Bidyadhar Prusty (dead Defendant No.1) purchased the 'Schedule 'C' property out of the joint family fund/movables and cash which he got in the partition with his brother in the year 1932?

5. Whether the 'C' schedule property is the self acquired property of Bidyadhar?

7. Whether the 'C' schedule property was blended with the joint family property and treated as part of the joint family property?”

7. On a reading of the pleadings in the plaint, it is manifest that the plaintiffs claimed 'C' schedule property to have been acquired from joint family nucleus and claimed partition of the same. In the alternative, they contended that in case 'C' schedule property is held to be self-acquired property of Bidyadhar, the same was thrown to the joint stock to be used by the member of the joint family and it had lost its character of being exclusive property of defendant No.1. Further, defendant No.10, the purchaser of 'C' schedule property being a stranger, the plaintiff had a right to repurchase the same under Section 4 of the Partition Act. Thus, in the aforesaid backdrop, the pleadings and materials available on record are to be assessed to consider as to whether the appellants are entitled to the relief sought for.

8. Mr. R.K. Mohanty, learned Senior Advocate appearing for the appellants referring to para-6 of the plaint submits that there was a partition between Nidhi and Bidyadhar in the year, 1932 in which cash and immovable fell to the share of Bidyadhar (defendant no. 1). The defendant no. 1 was looking after the family as Karta and had negligible extent of homestead land in 'B' Schedule property which was insufficient. Thus, the defendant no.1 acquired 'C' Schedule property from out of the joint family nucleolus by utilizing the cash given to him in the partition made in the year, 1932. A thatched house was standing over the suit land. Originally 'C' Schedule property was owned and possessed by one Moti Bewa, who had entered into an agreement with the said Bidyadhar to sell the property. When Moti Bewa failed to perform her part of contract, Bidyadhar (defendant no.1) filed a suit for specific performance of contract before the court of learned 1st Munsif, Cuttack and by virtue of the decree passed in the said suit, 'C' Schedule property was sold and recorded in his name and delivery of possession was given to him. After purchase, said defendant no. 1 thrown the 'C' Schedule property to the joint stock voluntarily. As a matter of fact, the ancestral dwelling house of the joint family was in a dilapidated condition for which the defendant no. 1, his wife Suma and his son (original plaintiff) moved to the newly purchased house situated over 'C' Schedule property and stayed there till 1955, when the house collapsed due to heavy rain. Thereafter, they came back to the ancestral house after making necessary repairing and 'C' Schedule property was being used as Bari (Kitchen Garden) and open latrine situated over 'C' Schedule property was being used by family members till the suit was filed. He also relied upon the depositions of P.Ws. 2 and 3. P.W. 2 in his evidence stated that he had learnt that in the family partition each brother (Nidhi and Bidyadhar) got 11.00 decimals of land and 5 Mahana of Bell Metals and Rs. 500/- in cash. The plaintiff (Rama Chandra Prusty) was two to three years old at that time, who was living jointly with his parents. Bidyadhar (defendant no. 1) was the Karta of the family. He also deposed in para-2 of his deposition that Bidyadhar told P.W. 2 that he purchased 'C' Schedule property out of the money which he got in partition. In cross-examination, he denied to the suggestion that Bidyadhar has not purchased the suit land out of cash of Rs. 500/- which he got in partition. Mr. Mohanty further submitted that the defendant no. 1 (Bidyadhar) in his written statement (Ext. B) stated that 'C' Schedule land was his self acquired property. Mr. Mohanty further submitted that the said statement cannot be taken into consideration as defendant no. 1 did not adduce any evidence. Moreover, he being the Karta and Manager of

the family, it is for him to prove by adducing clear and satisfactory evidence that he purchased the suit 'C' Schedule property from his own fund. In support of his submission, he relied upon the decision in the case of *Mallesappa Bandedda Desai and another -v- Desai Mallappa alias Mallesappa and another*, reported in AIR 1961 SC 1268, wherein the Hon'ble Supreme Court has held as under:-

“15. In this connection it is necessary to bear in mind that Respondent 1 has not shown by any reliable evidence that the expenses for the said litigation were borne by him out of his pocket. It is true that both the courts have found that Respondent 1 purchased certain properties for Rs 600 in 1925 (Ex. B-4). We do not know what the income of the said properties was; obviously it could not be of any significant order; but, in our opinion, there is no doubt that where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparceners.....” (Emphasis Supplied)

9. Mr. Bhuyan, learned counsel for the respondents, on the other hand, submitted that there is no quarrel over the law laid down by the Hon'ble Supreme Court in the case stated above. However, the plaintiff has to prove his case and cannot succeed on the weakness of the defendants. It is his submission that when the plaintiff has come to the Court with a definite plea that 'C' Schedule property was purchased from the joint family fund, it is for him to prove that the joint family has sufficient nucleus to acquire the property and the joint family nucleus was used for purchase of the property. When the initial burden of proof is discharged by the plaintiff, the onus shifts to the defendants to rebut the same. Thus, the law laid down by the Hon'ble Supreme Court is only applicable when the plaintiff discharges the initial burden of proof. In support of his case, Mr. Bhuyan relied upon the decision in the case of *Brundaban Padhan -v- Krishna Pradhan*, reported in 1985 (I) OLR 186, wherein a Division Bench of this Court in paragraph-7 of the said judgment has laid down the law as follows:

“7. It is well-established in law that there is no presumption that a family, because it is joint, owns joint family property or any property whatsoever. Thus, in a suit for partition, the burden of proving that a

particular item of property is a joint family property rests entirely on the plaintiff who claims it to be so. In order to establish that the acquisition of any property in the name of any of the individual members of the coparcenery was, in fact, joint family property, the plaintiff must prove that the family was possessed of some property, the surplus, out of the income of which, was sufficient for the acquisition of the said property by the joint family. Once it is established that the joint family had property from out of the income of which there was a surplus sufficient for the acquisition of other properties, keeping in view the value of such properties the presumption of law is that it is the joint family which has acquired the property even though the acquisition was in the name of the individual member. The said presumption is rebuttable by showing that the property was the separate and self-acquired property of the particular member in whose name it stands or was acquired. The aforesaid presumption of law is available in the case of acquisition in the name of a coparcener, i.e., a male member of the joint family. But there is no such presumption available in the case of property standing or acquired in the name of a female member of the family.”

10. The aforesaid two decisions are not in conflict with each other so far as the principles of law decided therein. Similar view has also been taken in the case of *D.S.Lakshmaiah and another Vs. L.Balasubramanyam and another* reported in AIR 2003 SC 3800, in order to analysis the rival contentions of the parties, it is to be seen whether the plaintiff has been successful in discharging the initial burden of proof by establishing that the joint family had sufficient nucleus to acquire ‘C’ Schedule property and the said nucleus was utilized in acquiring ‘C’ Schedule property. The pleadings of the plaintiffs disclose that ‘C’ Schedule property was purchased by Bidyadhar by utilizing the cash which he got in partition of the year, 1932. P.W. 2 also throws some corroboration to the aforesaid pleadings made in the plaint by deposing that Bidyadhar during his lifetime told him that he had purchased ‘C’ Schedule land out of the money which he got in partition. However, during cross-examination, he refused to have any personal knowledge of such partition and deposed that he was only 10 years old at the time of such partition. P.W. 3 who is none other than the son of original plaintiff, also deposed that Bidyadhar paid the consideration money out of cash of Rs. 500/- which he got in partition. He also denied the suggestion to the effect that Bidyadhar purchased the suit ‘C’ Schedule land out of his own income. However, P.W. 3, Rabindra Kumar Prusty, admitted in his evidence

that at the time of partition, his father (the original plaintiff) was a minor. He also deposed in para-5 of his cross-examination that the financial condition of Bidyadhar Prusty was very good. He had never taken any loan from anybody. At the time of partition, P.Ws. 2 and 3 were minors and they did not have any personal knowledge about the partition and the property fell to the share of Nidhi and Bidyadhar in such partition. In that view of the matter, the evidence of P.Ws. 2 and 3 regarding partition and allotment of share do not inspire confidence with regard to allotment of hard cash in favour of Bidyadhar. Moreover, since P.Ws. 2 and 3 had no direct knowledge regarding source of purchase of the suit 'C' Schedule property, the same cannot be taken into consideration. There is no other material available on record which can be relied upon to come to a conclusion that the schedule 'C' property was acquired from joint family nucleus. Moreover, the plaintiffs have miserably failed to establish by adducing cogent evidence to show as to whether Bidyadhar (defendant no.1) had received any hard cash in the partition of 1932. On the other hand, it is the statement on oath of P.W. 3 that the financial condition of Bidyadhar was sound and he had not incurred any loan in his lifetime. In view of the discussions made above, the plaintiffs have miserably failed to discharge the initial burden of proof cast on them to bring home their contention that 'C' Schedule property was purchased by Bidyadhar from the joint family nucleus. Accordingly, this Court endorses the analysis and finding of the learned trial court with regard to Issue Nos. 4 and 5. The only conclusion that can be deduced from the above is that 'C' Schedule property is the self-acquired property of Bidyadhar.

11. The next question that falls for consideration is whether 'C' Schedule property was blended with the joint family property and treated as part of the joint family property. To consider the issue, it is profitable to discuss the law on this point. The decision in the case of *Ram Janam Singh –v- Stae of Uttar Pradesh and another*, reported in AIR 1994 SC 1722, enumerates the doctrine of blending as follows:

6. To pronounce on the question of law presented for our decision, we must first examine what is the true scope of the doctrine of throwing into the "common stock" or "common hotchpot". It must be remembered that a Hindu family is not a creature of a contract. As observed by this Court in *Mallesappa Bendeppa Desai v. Desai Mallappa*⁹ that the doctrine of throwing into common stock inevitably postulates that the owner of a separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property. The existence of a coparcenary is absolutely necessary before a

coparcener can throw into the common stock his self-acquired properties. The separate property of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. The separate property of a Hindu ceases to be a separate property and acquires the characteristic of a joint family or ancestral property not by any physical mixing with his joint family or his ancestral property but by his own volition and intention by his waiving and surrendering his separate rights in it as separate property. The act by which the coparcener throws his separate property to the common stock is a unilateral act. There is no question of either the family rejecting or accepting it. By his individual volition he renounces his individual right in that property and treats it as a property of the family. No longer he declares his intention to treat his self acquired property as that of the joint family property, the property assumes the character of joint family property. The doctrine of throwing to the common stock is a doctrine peculiar to the Mitakshra School of Hindu law. When a coparcener throws his separate property into the common stock, he makes no gift under Chapter VII of the Transfer of Property Act. In such a case there is no donor or donee. Further no question of acceptance of the property thrown into the common stock arises.”

In *Lakkireddi Chinna Venkata Reddi and others Vs. Lakkireddi Lakshmama*, reported in AIR 1963 SC 1601, the decision describes the principles of doctrine of blending as follows:-

“9. Law relating to blending of separate property with joint family property is well-settled. Property separate or self-acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein: but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other member of the family were allowed to use the property jointly with out of generosity to support persons whom the holder was not bound to support, or from the failure to maintain separate accounts, abandonment cannot be inferred, for an act of generosity or kindness will not ordinarily be regarded as an admission of a legal obligation. It is true that Butchi Tirupati who was one of the devisees under the will of Venkata Konda Reddy was a member of the joint family consisting of himself, his five brothers and his father Bala Konda. It

is also true that there is no clear evidence as to how the property was dealing with, nor as to the appropriation of the income thereof. But there is no evidence on the record to show that by any conscious act or exercise of volition Butchi Tirupati surrendered his interest in the property devised in his favour under the will of Venkata Konda Beddy so as to blend it with the joint family property. In the absence of any such evidence, the High Court was, in our judgment, right in holding that Lakshmama was entitled to a fourth share in the property devised under the will of Venkata Konda Reddy.”

A similar view has also been taken in a decision of the judgment of the Hon'ble Supreme Court rendered in the case of *G.Narayana Raju (dead) by his legal representative Vs. Chamaraju*, reported in AIR 1968 SC 1276. This Court had also an occasion to deal with the doctrine of blending in a judgment in the case of *Kishore Chandra Sahu and another Vs. Rukuna Sahu and another*, reported in 1988 (I) OLR 309. Thus, to sum up the principles decided in the aforesaid decisions, it can be said that in order to establish that the separate or self-acquired property of a coparcener is blended with a joint family property following ingredients have to be established.

1. There must be a coparcenary joint family in existence;
2. Property in question must be separate or self acquired of a Hindu coparcener;
3. He allows such property to be used by joint family;
4. Such action of the coparcener must be out of his own volition;
5. He must have an intention of waiving, surrendering and/or abandoning his claim of separate rights over such property.

Thus, the rival contentions of the parties have to be examined on the principles stated above.

12. Mr. Mohanty, learned Senior Advocate submitted that though he has come up with a definite case that the property was purchased from a joint family nucleus but in the alternative the plaintiffs in para-6 of the plaint have clearly pleaded that the defendant no. 1 voluntarily blended 'C' Schedule property with the common stock. He further contended that it has been graphically pleaded by the plaintiff that 'C' Schedule property was purchased from the joint family nucleus. Thus, even if there is no material to prove acquisition of 'C' Schedule property from out of the joint family fund, the plaintiffs have a right to abandon such a plea and proceed with their

alternative plea that 'C' Schedule property being the self-acquired one was voluntarily thrown to the common hotchpot as has been admitted by the acquirer in his written statement, the defendant no. 1, the same loses its character of being a separate property of the defendant no. 1 and is to be considered as a joint family property.

13. Mr. Bhuyan, on the other hand, submitted that the plea taken in the plaint is inconsistent and not compatible with each other. In construing a plea in any pleading, the Court must keep in mind that a plea is not an expression of art and science but an expression through words which may be pointed, precise and consistent. As per law, one should not be allowed to take inconsistent or multifarious plea to achieve his goal by hook or crook. Thus, the theory of nucleus and theory of blending being inconsistent cannot go together. The law is no more *res integra* on this issue as elucidated in the case of *Balabhadra Nisanka and others Vs. Suka Dibya and others*, reported in 38 (1972) CLT 325. In the instant case, the defendant no. 1 has specifically denied the plea of blending of 'C' Schedule property and assumption of its joint family character, by filing his separate written statement (Ext. B) and as per law, the defendant no. 1 is only competent person to say about the blending. His pleading in the written statement is admissible as relevant piece of evidence as per Section 32 of the Evidence Act, 1872. On the other hand, the plaintiffs have taken a positive plea that 'C' Schedule property is a joint family acquisition and not the separate property of defendant no. 1 and as such, the theory of blending is not at all available to him, in the absence of positive admission regarding acquisition of 'C' Schedule property by defendant no. 1 from his own fund. Had the defendant no. 1 intended to purchase the suit land from the joint family nucleus, he would have purchased the same in the names of the family members. He further submitted that in the sale deed, i.e. Ext. A, the defendant no. 1 has referred the 'C' Schedule property as his separate property. While applying for permission from the Khasmahal authority as well as the Urban Land Ceiling Authority, there is no reference to the suit property as joint family property. In the Major Settlement, 'C' Schedule property has been exclusively recorded in the name of Bidyadhyar (defendant no. 1) alone and the plaintiffs had never objected to the same. Thus, the intention of defendant no. 1 was very much clear that he had purchased 'C' Schedule property from out of his own fund and was never thrown to the common stock for the benefit of the joint family.

14. Analyzing the pleadings of the parties, it is apparent that the plaintiffs have never made any positive admission to the effect that 'C' Schedule property is the exclusive property of defendant no. 1 which is first and foremost characteristic to be pleaded and proved to attract the doctrine of blending. Moreover, execution of Ext. A itself makes it abundantly clear that the defendant no. 1 had never intended to throw 'C' Schedule property to the joint stock for being used for the benefit of the members of the joint family by waiving and abandoning his exclusive rights over the same. From the conduct of defendant no. 1, his intention was very much clear. No doubt, there is some evidence on record which go to show that the entire family of Bidyadhar including original plaintiff, namely, Ramachandra were staying in the thatched house standing on 'C' schedule property till 1955. The thatched house collapsed during that year due to heavy rain. Thereafter, the same was being used as Bari (kitchen garden) and open latrine on schedule 'C' property was being used by the family members. Mere fact that other members of the family were allowed to use the property jointly with himself (defendant no. 1), it cannot be inferred that the defendant no. 1 had abandoned and/or waived his exclusive right over 'C' Schedule property as held in the case of *Lakkireddi Chinna Venkata Reddi and others* (supra). Thus, the plaintiffs have signally failed to satisfy any of the ingredients of doctrine of blending, as referred to above, to establish that 'C' Schedule property was blended with the joint stock/thrown to the joint stock and it has assumed the character of the joint family property. In that view of the matter, findings on Issue No. 7 arrived at by the learned trial court needs no interference.

The next question arises as to whether the plaintiffs have a right of re-purchase as provided under Section 4 of the Partition Act.

Law is well-settled that a coparcener/co-owner/co-sharer is permitted to exercise his right of re-purchase under Section 4 of the Partition Act only when the transferee has sued for partition of his/her purchased property by filing a suit for partition. In the instant case, the transferee, namely, defendant no. 10 has not filed any suit for partition and for allotment of his purchased property to the share of his vendor. In the case of *Babulal -v- Habibnoor Khan (Dead) by L.Rs. and others*, reported in AIR 2000 SC 2684, the Hon'ble Supreme Court held as follows:-

“10. Therefore, one of the basic conditions for applicability of Section 4 as laid down by the aforesaid decision and also as expressly mentioned in the section is that the stranger-transferee must sue for

partition and separate possession of the undivided share transferred to him by the co-owner concerned. It is, of course, true that in the said decision it was observed that even though the stranger-transferee of such undivided interest moves an execution application for separating his share by metes and bounds it would be treated to be an application for suing for partition and it is not necessary that a separate suit should be filed by such stranger-transferee. All the same, however, before Section 4 of the Act can be pressed into service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had arisen for him to move under Section 4 of the Act because of the stranger-transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased.....”

A similar view has also been taken in a decision in the case of ***Gautam Paul –v- Debi Rani Paul and others***, reported in AIR 2001 SC 61, wherein the Hon’ble Supreme Court in paragraph 23 held as follows:-

“23. We are in agreement with this opinion. There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus strangers/outsideers can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of pre-emption, under Section 4, is exercised the conditions laid down therein have to be complied with. As seen above, one of the conditions is that the outsider must sue for partition. Section 4 does not provide the co-sharer a right to pre-empt where the stranger/outsideer does nothing after purchasing the share. In other words, Section 4 is not giving a right to a co-sharer to pre-empt and purchase the share sold to an outsider anytime he/she wants. Thus even though a liberal interpretation may be given, the interpretation cannot be one which gives a right which the legislatures clearly did

not intend to confer. The legislature was aware that in a suit for partition the stranger/outsider, who has purchased a share, would have to be made a party. The legislature was aware that in a suit for partition the parties are interchangeable. The legislature was aware that a partition suit would result in a decree for partition and in most cases a division by metes and bounds. The legislature was aware that on an actual division, like all other co-sharers, the stranger/outsider would also get possession of his share. Yet the legislature did not provide that the right for pre-emption could be exercised “in any suit for partition”. The legislature only provided for such right when the “transferee sues for partition”. The intention of the legislature is clear. There had to be initiation of proceedings or the making of a claim to partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. There is a difference between a mere assertion that he has a share and a claiming for possession of that share. So long as the stranger-purchaser does not seek actual division and possession, either in the suit or in execution proceedings, it cannot be said that he has sued for partition. The interpretation given by Calcutta, Patna, Nagpur and Orissa High Courts would result in nullifying the express provisions of Section 4, which only gives a right when the transferee sues for partition. If that interpretation were to be accepted then in all cases, where there has been a sale of a share to an outsider, a co-sharer could simply file a suit for partition and then claim a right to purchase over that share. Thus even though the outsider may have, at no stage, asked for partition and for the delivery of the share to him, he would be forced to sell his share. It would give to a co-sharer a right to pre-empt and purchase whenever he/she so desired by the simple expedient of filing a suit for partition. This was not the intent or purpose of Section 4. Thus the view taken by Calcutta, Patna, Nagpur and Orissa High Courts, in the aforementioned cases, cannot be said to be good law.”

In the case of *Prahallad Ch. Mohanty and another -v- Surendra Nath Mohanty and others*, reported in AIR 2008 Orissa 122, this Court held that right of pre-emption is also available to a coparcener, if one of the members of the joint family the suit for partition impleading the stranger as a

party to the suit. But, the view taken in the case of Prahallad Ch. Mohanty (supra) cannot be considered good law and as a precedent, in view of the decision of the Hon'ble Apex Court in the case of Gautom Paul (supra) which was not taken into consideration by this Court. In the instant case, partition in respect of Schedule 'B', 'D' and 'E' properties has already been decreed by way of compromise. The suit is only confined to 'C' Schedule property over which the plaintiffs claim exclusive right and there is no prayer for partition of 'C' Schedule property. The defendant no. 10 has also not filed any suit for partition and allotment of 'C' schedule property to the share of his vendor-defendant no.1. Moreover, it has been held that 'C' Schedule property is the self-acquired property of Bidyadhar (defendant no.1). Thus, the right of pre-emption for purchase of property under Section 4 of the Partition Act is not available to the plaintiffs.

15. In view of the above, the appeal being devoid of merit is dismissed, but in the circumstances, there shall be no order as to cost.

Appeal dismissed.

2016 (I) ILR - CUT- 616

J. P. DAS, J.

CRA NO.181 OF 1992

PRASANTA NAIK

.....Appellant

.Vrs.

STATE OF ORISSA

.....Respondent

PENAL CODE, 1860 – Ss 363,366.

Whether conviction of the appellant U/s 363 I.P.C. is sustainable in law when he has been acquitted by the trial Court U/s 366 I.P.C. with an observation that the victim was a consenting party ? – In the instant case the victim was not a child of tender years unable to think for herself but also she had attained the age of discretion and is on the verge of attaining majority having sufficient maturity to know what was good and bad for her – Held, conviction of the appellant U/s 363 I.P.C. is not sustainable after his acquittal U/s 366 I.P.C.

(Paras 6 to10)

Case Laws Referred to :-

1. A.I.R. 1965 S.C.-942 : S. Varadarajan vrs. State of Madras).

2. (1990) 2 OCR-161 : Chaitan Charan Jena vrs. State of Orissa,
3. A.I.R. 1995 S.C. 2169 : Shyam and another vrs. State of Maharashtra

For Appellants : M/s. Saktidhar Das, T.K.Deo,
A.K.Choudhury & Mr. Prasanna
Kumar Mohanty (Amicus Curiae).

For Respondent : ASC

Date of hearing : 08. 01.2016

Date of Judgment: 28.01. 2016

JUDGMENT

J.P. DAS, J.

This appeal is directed against the judgment dated 20th April, 1992 passed by the learned Additional Sessions Judge, Paralakehemundi in Sessions Case No.11/188 of 1991/1990, convicting the appellant under Section 363 of the Indian Penal Code ('I.P.C.' in short) and sentencing him to undergo R.I. for five years and to pay a fine of Rs.2,000/-(rupees two thousand) in default to undergo further R.I. for six months.

2. The prosecution case was that on 14.01.1990, the informant one Babu Sahu Naik orally reported before the Mohana Police Station that his 15 years old daughter Ramani and his son Dusasan had gone to a Bamboo Depot of Gadadharpur for labour work on 05.01.1990. On 10.01.1990 since his daughter fell ill, she was coming back home along with one Malli Naik of the village of the informant when the accused-appellant along with his bother one Sukanta Naik forcibly took her to their village. The said Malli Naik informed this matter to the informant and hearing this, the informant along with his wife proceeded to the village of the accused-appellant and saw their daughter in his house. When the informant wanted to bring back his daughter, the accused-appellant did not leave her and coming back to the village, the informant informed the matter to his elder brother and waited for about four days but since his daughter did not come back, reported the matter at the Police Station orally on 14.01.1990. Pursuant to the report, concerned P. S. Case No.7 of 1990 was registered under Sections 363/34 of the I.P.C. and investigation was taken up. In course of investigation, the victim was rescued and was left with her parents after being medically examined, and after completion of investigation, charge-sheet was placed against the present accused-appellant under Sections 363 and 366 of the I.P.C. Charges were framed accordingly to which the accused-appellant pleaded not guilty and faced the trial.

3. In course of hearing, seven witnesses have been examined on behalf of the prosecution as against none preferred in defence. On consideration of the materials placed before the Court during trial, the learned Additional Sessions Judge, Paralakhemundi found and held the accused guilty only under Section 363 of the I.P.C. and passed the impugned judgment of conviction and sentence.

4. The appeal memo was filed with the contentions that there was no iota of evidence that the accused-appellant took the victim forcibly apart from the fact that there were lot of contradictions in the prosecution evidence. It was further submitted that when the learned trial court held the accused not guilty under Section 366 of the I.P.C. observing that the victim was a consenting party to have accompanied the accused, holding the appellant guilty under Section 363 of the I.P.C. is not sustainable in law. It was further submitted that the learned trial court also failed to appreciate that the victim was more than 18 years of age despite the specific evidence of the informant-father and the fact that the evidence of the doctor was not convincing.

5. Since at the time of hearing, learned counsels for the appellant did not appear, Mr. Prasanna Kumar Mohanty, Advocate was appointed as an Amicus curie and the matter was heard at length. Learned Amicus curie submitted before the Court that the only point for consideration in the present case is when it was held by the learned trial court that the victim was a consenting party and stayed in the house of the accused-appellant without any force or coercion and accordingly the accused-appellant was acquitted of the offence under Section 366 of the I.P.C. whether to hold him guilty under Section 363 of the I.P.C. is sustainable in law?

6. The aforesaid contention regarding the offence under Section 366 of the I.P.C. has been put to rest in the observation of the learned trial court in paragraph-11 of the impugned judgment that :-

“However in the present case, it has been held that the victim had been with the accused with the consent having intention to marry the accused. So the ingredient of the offence U/s 366 has not been proved.”

After holding as aforesaid, learned Additional Sessions Judge, went on to observe that so far as Section 363 of the I.P.C. is concerned, it has been proved that the victim girl was under age and hence, her consent was no consent in the eye of law. The finding of the trial court that the victim was a consenting party and had accompanied the accused-appellant to marry him

consequentially holding that the offence under Section 366 of the I.P.C. has not been made out, has not been challenged by the State. The observation that the victim was a minor and hence, her consent was no consent and accordingly holding the accused-appellant guilty under Section 363 of the Indian I.P.C. is under challenge before this Court. It was contended by the learned Amicus curie that excepting the evidence of the doctor basing on ossification test, no other material was produced before the trial court to hold that the victim was a minor. It was further submitted that the informant-father of the victim stated in his evidence in paragraph-10 of the cross-examination that his elder daughter died since three years, after about 8 to 9 years of her marriage, and by the time of her marriage, the victim-girl was 8 to 9 years old. Thus, as per the own statement of the father of the victim, the victim was of more than 19 years of age. No school document or any other material regarding the age of the victim was placed on behalf of the prosecution. Further, the doctor stated in his evidence that on examination, he opined that the age of the victim was about 14 years and below 16 years. It is the settled position of law that even the opinion of the doctor is to be given with two years of "Plus" and "Minus" benefit in favour of the accused. Apart from that, even assuming that the victim was aged about 16 years, since it has been the observation of the learned trial court that she voluntarily accompanied the appellant to marry him, there can be no denial that she had already attained the age of discretion. It has been the observation of the Hon'ble Apex Court that when the girl, who though a minor had attained the age of discretion and is on the verge of attaining majority and there is no suggestion that there was application of any force or blandishment by the accused to compel her to leave the lawful guardianship of her parents, no inference can be drawn that the accused is guilty of taking away of the girl out of keeping of her parents. It was further held that when the victim willingly accompanied the accused, the law does not cast upon the accused the duty of taking her back to her father's house or even of telling her to accompany him (A.I.R. 1965 S.C.-942, **S. Varadarajan vrs. State of Madras**).

7. In the instant case, the victim was not a child of tender years, who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good or what was bad for her. It was the prosecution case that when the victim and her friend after getting down from the bus were on the way to their village, the present appellant along with another person forcibly took away the victim on a bicycle and kept her in his house. It was further alleged that the father and mother of the victim went to the house of the accused-appellant to bring back

their daughter but the accused-appellant did not allow her to go. All these allegations of the prosecution have been disbelieved by the learned trial court on detailed evidence on record to conclude that there was no force applied by the accused-appellant and the victim was a consenting party to have accompanied the accused and to have stayed in his house till she was brought by the police.

8. It was observed in the case of S. Varadarajan (supra) referring to a decision of this High Court reported in A.I.R. 1949 Orissa 22 that mere passive consent on the part of a person in giving shelter to the minor does not amount to taking or enticing of the minor but the active bringing about of the stay of the minor in the house of a person by playing upon the weak and hesitating mind of the minor would amount to “taking” within the meaning of Section 361 of the I.P.C. But as stated earlier, in this case, there was neither any force applied nor there was evidence to show that the accused detained the victim in their house by exercising any force or by playing upon the weak mind of the victim. It was also held in the said decision that even assuming that a minor cannot in law abandon the guardianship of her lawful guardian, the accused person in whose company she is later found cannot be held guilty of having taken her out of the keeping her guardian unless something more is established. In a subsequent judgment passed by the Hon’ble Apex Court reported in A.I.R. 1995 S.C. 2169, **Shyam and another vrs. State of Maharashtra** in similar circumstances, it was observed that :-

“The prosecutrix cannot be said to have been tied to the bicycle as if a load while sitting on the carrier thereof. She could have easily jumped off. She was a fully grown up girl may be one who had yet not touched 18 years of age, but, still she was in the age of discretion, sensible and aware of the intention of the accused Shyam, that he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam the appellant on her own and in that sense there was no “taking” out of the guardianship for her mother.”

9. Similarly, in a case reported in (1990) 2 OCR-161; **Chaitan Charan Jena vrs. State of Orissa**, it was held by this Hon’ble Court in similar circumstances that whatever may be the age of the victim at the time of incident, if it was found that she had attained sufficient maturity of

understanding and she had attained the age of discretion so as to have the capacity to know the full import of what she was doing and it was found that she voluntarily accompanied the accused, in such circumstances, it cannot be said to be a case of kidnapping.

10. In view of the aforesaid facts and the positions of law, I am of the considered view that in the instant case after acquitting the accused-appellant of the offence under Section 366 of the I.P.C., to hold him guilty under Section 363 of the I.P.C. in the peculiar circumstances of the case is not sustainable in law. Accordingly, the appeal is allowed, the impugned judgment of conviction and sentence passed by the learned Additional Sessions Judge, Paralakhemundi in S.C. Case No.11/91/S.C. Case No.188/90 GDC is set aside and the accused-appellant is set at liberty. The bail bond furnished by the accused-appellant at the time of filing of the appeal stands discharged.

Before parting, I must put a word of appreciation on record for the able assistance provided by Mr. Prasanna Kumar Mohanty, learned Advocate as Amicus curiae for disposing this matter.

Appeal allowed.

2016 (I) ILR - CUT-621

DR. D.P.CHOUDHURY, J.

CRIMINAL APPEAL NO. 217 OF 1991

AMAR KUMAR SAHU

.....Appellant

.Vrs.

PANCHANAN TRIPATHY

.....Respondent

CRIMINAL PROCEDURE CODE, 1973 – S.256(1)

Whether in a Complaint Case after examination of the witnesses by the prosecution and defence and after recording of accused statement, the Magistrate has the power to acquit the accused U/s. 256 (1) Cr.P.C. for non-appearance of the complainant and his advocate ? – Held, No – Personal attendance of the complainant is not essential at that stage – Impugned order passed mechanically without applying judicial mind – Held, impugned order of acquittal, being de hors to the provision of law, is set aside – The case is remanded to the learned SDJM to take up hearing of the case.

(Paras 16 to 19)

Case Laws Referred to :-

1. AIR 2008 SC 1296 : S. Anand -V- Vasumathi Chandrasekhar
2. (1998) 1 SCC 687 : Associated Cement Co. Ltd. -V- Keshvanand

For Appellant : M/s. P.K.Dhal, D.Nayak, D.P.Dhal,
S.K.Nayak & B.K.Sinha

For Respondent : M/s. S.K.Mishra, R.K.Patnaik & B.P.Mohanty

Date of Argument:14.12.2015

Date of Judgment: 22.12.2015

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

The appellant assails the order dated 10.6.1991 passed by learned Judicial Magistrate First Class, Jeypore in ICC No.84 of 1987 wherein the Court below has acquitted the respondent under section 256(1), Cr.P.C.

FACTS

2. The backdrop of the case of the complainant is that respondent-editor-publisher-printer of newspaper "Banamani" which is printed and circulated every fortnight. The appellant who is the complainant of the Court below, is in a dignified position in the society. His all brothers are Doctors, Engineers and Advocates. The complainant has business in Rayagada, the then undivided district of Koraput. The complainant being the Director of Gas Company at Jeypore has the respectable position in the society. He is also life Member of Bhubaneswar Club, Bhubaneswar and Rotary Club, Jeypore. It is the further case of the complainant that complainant is wholesale dealer in foreign liquor under the liquor licence at Jeypore and Rayagada. He being the licensee of foreign liquor, has to follow provisions under Excise Manual and at no point of time he was defaulter before the Excise Department.

3. It is alleged, inter alia, that the respondent being the editor of the newspaper "Banamani" published a news item on 15.8.1987 under the heading "Bhejal Mada Karabarare Amar Sahoonka Bhumika". Under that title respondent published stories imputing the character of the complainant. It is averred that the respondent has published that the complainant was involved in illegal liquor business being connived with Excise Inspector. Not only the news item spoiled the future but also defamed the business of the complainant by alleging that foreign liquor shop no.7 of Jeypore Town which was situated at Dhapaguda, now under the process of being shifted to the place being managed by the complainant. Complainant averred that the entire

allegations made in the newspaper are false and it is published just to tarnish the image of the complainant in society. So the complainant filed a complaint to take cognizance of the offence under sections 500, 501 and 502 I.P.C. against the respondent-accused person. Learned Magistrate after taking cognizance directed respondent to face trial.

4. After appearance of the respondent, prosecution witnesses were examined, statement of accused was recorded. During defence stage D.W.1 & 2 were examined, cross-examined. After examination and cross-examination of D.W.2 was over, complainant filed petition to recall D.W.2 for further cross-examination and it was allowed. While the matter stood thus, learned Court below without going to the status of the case directed the prosecution to produce the witnesses for hearing fixing the date to 18.12.1990 for taking step by the complainant to procure attendance of P.Ws. for further hearing. On 5.6.1991 the complainant and his Advocate remained absent. No step was taken by them but the Presiding Officer was availing vacation for which the matter was deferred to 10.6.1991 for further orders. On the later date also complainant and his witnesses remained absent, but the accused was acquitted under section 256(1) of the Cr.P.C. for their absence on 5.6.91. So the petitioner challenges the said order of acquittal in this appeal. Hence the appeal.

5. The plea of the respondent as revealed from the cross-examination made to the P.Ws. is about total denial to the charge made against him.

SUBMISSION

6. It is submitted by the learned counsel for the appellant that the order passed by the learned court below is against the principle of law. According to him learned Magistrate has erred in law by acquitting the accused without following the necessary procedure to be followed before acquitting the accused under section 256, Cr.P.C. He submitted that after the hearing reached the defence stage, there is no occasion to return to the previous stage of prosecution. When D.W.2 was to be further cross-examined, the order of the learned Magistrate directing the complainant to produce P.Ws. is absolutely erroneous and without application of mind. He further submitted that in the event of non-appearance of complainant for hearing learned Magistrate should have closed the case or should have made further enquiry or allowed to issue notice to defence witness to appear but ought not to have acquitted to the accused for the reasons unknown to law. He further submitted that the court below has committed error by throwing the burden on the appellant instead of going through the previous order, where it has

been mentioned that the Presiding Officer was absent. For the absence of the Presiding Officer the party should not be punished. On the whole he submitted that the impugned order acquitting the accused is against the principle of natural justice, and is irregular and unjust for which the same should be set aside and proceed to award even justice.

7. Learned counsel for the respondent submitted that the order of the learned Magistrate is not unjust because the complainant and his Advocate were absent on the date when the date fixed for hearing. According to him, under section 256 (1) Cr.P.C. when the case is fixed for hearing, on the same day if the complainant or his Advocate remained absent, it is the prerogative of the concerned Court to pass the order of acquittal as the complainant and his Advocates remained absent. He further stated that on the date of hearing of the case when the complainant and his Advocate remained absent, the Court had no means to act different but to record an acquittal of the accused. He submitted that the order of the learned Magistrate should be affirmed by dismissing the appeal.

POINTS FOR DETERMINATION

8. In this appeal only question arises :

“Whether the impugned order of acquittal passed under section 256(1) Cr.P.C. is legal and proper?”

DISCUSSIONS

9. It is better to place the relevant order sheet where the defence was directed to produce D.W.2 for cross-examination by the complainant. The order sheet dated 10.9.1990 is placed below.

“ 10.09.1990 Counsel for both the sides present. The counsel for the complainant filed a petition to recall the D.W.2. Copy of the said petition served by the opposite party. Heard on the petition. The counsel for the accused fairly conceded to recall the D.W.2. Hence the said petition is allowed. The defence directed to produce the D.W.2 for cross-examination by the complainant. Heard on the petition filed by the accused. The said petition is allowed. The defence is directed to procure the attendance of D.W.2 for cross-examination on 10.10.1990. Accused as before.

Sd/-
J.M.F.C.”

Thereafter the case was transferred to the learned J.M.S.C. and again it was restored to the file of learned J.M.F.C., Jeypore on 26.11.1990 but on 28.11.1990 learned J.M.F.C. passed the order fixing the case to 18.12.1990 for re-cross-examination of D.W.2. For better appreciation the order dated 18.12.1990 is placed below:-

”The accd. is present. The advocate for the comlt. files written process.
Issue summon to P.Ws. fixing 7.2.91 for trial.
Accused is as before.

(Dictated)
Sd/-
J.M.F.C.”

10. The aforesaid order shows that the date was fixed to 7.2.1991 for examination of P.Ws. Accordingly the matter went on, on the background that the witness for the complainant is to be examined. For better clarification the order dated 30.3.1991 and subsequent orders dated 5.6.1991 and 10.6.1991 as available on record are produced for better appreciation.

“30.3.1991 On 29.3.1991 is being holiday. The record is put up today. To-day is clearance day. Both the parties and one witness is present. Call on 5.6.1991 for hearing. Complainant to take steps for appearance of other witnesses within seven days. Accused is as before

Sd/-
J.M.F.C.

5.6.1991 P.O. is on Summer Vacation. Accused is present. The compliant and his Advocate are also absent. No steps taken on behalf of the complainant. Put up on 10.6.1991 for further orders before the P.O. Accused is as before.

(Dictated)
Sd/-
J.M.F.C./C

10.6.1991 Accused is present. The complainant and his Advocate are also absent today. Perused the order dated 5.6.1991. The complaint was absent on 5.6.1991 and was taken no steps on behalf of him on which date the case was posted for hearing. Hence the accused is acquitted under section 256 Cr.P.C. and set at his liberty forthwith. Accused is as before.

(Dictated)
Sd/-
J.M.F.C.”

19.7.1991 The record is put up before me, since the petition is filed on behalf of the complainant. One affidavit, is also filed on behalf of the complainant. It is prayed in the petition to restore the case and to take up further trial. But on perusal of the order sheet, it is seen that on 5.6.1991, the complainant and his Advocate were absent on that day. P.O. was availing summer vacation, no final order was passed and the record was posted to 10.6.1991 on that day also neither the complainant nor the Advocate of the complainant turned up. Hence, the final order passed on that day. It was ordered that since no steps taken on behalf of the complainant, the accused is acquitted under section 256(1) of Cr.P.C. And at this stage even though the record is in this Court before the consignment, I have no jurisdiction to pass any order on the petition filed on behalf of the complainant. Hence, the petition is rejected.

(Dictated)
Sd/
J.M.F.C.”

11. From the aforesaid order, it is abundantly clear that the concerned court went on adjourning the case for hearing on the side of the complainant, although after the case of the complainant closed, defence has already adduced two witnesses(D.Ws.1 &2). At the stage of defence petitions were filed by the complainant to re-cross-examine D.W.2.

12. Section 256, Cr.P.C. states:-

“256. Non- appearance or death of complainant.

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day: Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub- section (1) shall, so far as may be, apply also to cases where the non- appearance of the complainant is due to his death.”

Thus the word “hearing” in a summons case as appears in Section 256, Cr.P.C. has to be understood in a proper perspective. On this score position in law is no more *res integra*.

13. It is reported in the case of **S. Anand vs. Vasumathi Chandrasekhar** in Criminal (Appeal) No.311 of 2008 [AIR 2008 SC 1296], where their Lordships of the Apex Court held:-

“10. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of complainant have already been examined.

11. The date was fixed for examining the defence witnesses. Appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence.

12. The accused was entitled to file an application under Section 311 of the Code of Criminal Procedure. Such an application was required to be considered and disposed of by the learned Magistrate. We have noticed hereinbefore that the complainant did not examine herself as a witness. She was sought to be summoned again for cross-examination. The said prayer has not yet been allowed. But, that would not mean that on that ground the court would exercise its discretionary jurisdiction under Section 256 of the Code of Criminal Procedure at that stage or the defence would not examine his witnesses.

13. Presence of the complainant or her lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter.”

14. With due respect to the decision, it must be observed that the word “hearing” as available in Section 256, Cr.P.C. must be read with reference to the stage where the presence of complainant or his Advocate is absolutely

necessary. It is clear that the presence of complainant would have been more necessary at the time of adducing evidence from the side of the complainant. On the other hand, the word "hearing" should be confined to the stage of prosecution or the complainant to adduce the evidence inasmuch as it is prosecution to prove charge beyond all shadow of doubts and jurisprudence makes it clear that accused is presumed to be innocent until contrary is proved. When the case of the prosecution is closed as happened in this case and at the stage of defence the D.Ws.1 and 2 have been examined and cross-examined, further cross-examination by the complainant is an option where the presence of complainant or his Advocate were not absolutely necessary resulting acquittal of the accused. So the presence of the complainant or his Advocate would have been absolutely necessary at the stage of the adducing evidence by the complainant.

15. It is reported in **Associated Cement Co. Ltd. v. Keshvanand** (1998) 1 SCC 687 where Their Lordships observed para-17 :

“**17.** Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the section. The first is, if the court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. The second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice.”

16. With due respect to the decision, it is very much clear that the court has to exercise discretion by applying judicial mind and cannot mechanically pass the order of acquittal under section 256(1), Cr. P. C. in any stage of hearing of the summons case in the event of absence of complainant or his

Advocate. In the aforesaid decision it is observed by Apex Court that in all dates the presence of complainant and his Advocate is not mandatory requiring action to be taken against the complainant or affecting his case. On the other hand, the accused cannot obtain the order of acquittal to sub-serve justice.

17. It appears from the order dated 5.6.1991 the complainant and his Advocate were absent. The Presiding Officer of the court was also absent. The Magistrate in charge of that Court adjourned the case to pass further order by the Presiding Officer in seisin of the matter fixing date on 10.6.1991. It is the duty of the court remaining in charge of another court to apply the mind instead of passing order mechanically. Similarly, the court in seisin over the matter also passed order on 10.6.1991 merely because of absence of complainant and his Advocate and thereby the affecting rights of the parties without going to the previous orders. He ought to have gone through the previous order dated 5.6.1991 when he was absent by availing summer vacation. Not only this but also it is the duty of the court while passing the acquittal order has to go through the previous order sheets to find out whether the order going to be passed, is correct or not. A court is required to pass order by applying judicial mind but not otherwise. When the stage of hearing on prosecution side had been completed adducing evidence by the prosecution and case is landed at the stage of defence as happened in this case, the learned court below should have avoided to pass order of acquittal and he was required to pass order of adjournment of the case for further hearing or close the hearing of the case as the presence of complainant and his Advocate were not absolutely necessary either on 5.6.1991 or on 10.6.1991. Be that as it may, the impugned order dated 10.6.1991 is not legal and proper, requiring the interference. The point for discussion is answered accordingly.

CONCLUSION

18. In view of the aforesaid analysis and the duty of court as explained, the impugned order of acquittal dated 10.6.1991 being de hors to the provision of law and decisions of the Hon'ble Apex Court, is not sustainable in law.

19. Hence the order of acquittal passed by the learned court below is hereby set aside. Now the case is remanded to the learned S.D.J.M., Jeypore who is to afford opportunity to the complainant to re-cross-examine D.W.2 on 19.1.2016. Both parties are directed to remain present in the court of learned S.D.J.M., Jeypore on that day and receive instruction. If the

complainant or his Advocate would not re-cross-examine D.W.2 on 19.1.2016, the matter would be closed. If there is any application from the side of defence to adduce further evidence, learned S.D.J.M., Jeypore is directed to take up the hearing of the case on day to day basis, but at any rate learned S.D.J.M., Jeypore shall dispose of case according to law by end of February, 2016 as it is a case of 1991. The Criminal Appeal is disposed of accordingly.

Appeal disposed of.