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

W.P. (C) NO. 4581 OF 2016

AMIT KUMAR SAA .....Petitioner.

.Vrs.

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

ODISHA VAT ACT, 2004 – S. 74

Decision of the Government to abolish check gates – Action challenged – Provision does not mandate that check posts or barriers should always be established – Discretion of the Government – Due to expansion of roads and bye-passes establishment of check gates and barriers has lost its significance – Government has also adopted substitute mechanism for deployment of interceptive vehicles, G.P.S tracking system and other alternative modes to check the evasion of tax etc. – Impugned decision was taken by competent officers of the state after considering all relevant aspects – Held, state action is justified and does not call for any interference.

(Paras 5,6)

For Petitioner : M/s. Somadarsan Mohanty , R.K.Nayak, F.R. Mohapatra & S.K.Panda

For Opp. Party : Mr. B.P.Pradhan, A.G.A

Date of Order :18.03.2016

ORDER

VINEET SARAN, CJ.

Heard learned counsel for the petitioner as well as learned Addl. Government Advocate appearing for the State-opposite parties and perused the record.

2. This petition has been filed in the nature of Public Interest Litigation by an advocate claiming that the decision of the State Government in abolishing the check gates, with effect from 01.04.2016, under the Commercial Tax and the Transport Organization would be against the interest of the State and the public, and as such it is prayed that such decision taken by the Government on 22.02.2016, on the basis of the minutes of the High Level Committee of Officers headed by the Addl. Chief Secretary held on 17.02.2016, be quashed.

3. The submission of learned counsel for the petitioner is that if the check gates are abolished then there would be every chance of evasion of

tax, which would cause loss of revenue to the State. It is submitted that Section 74 of the Orissa Value Added Tax Act, 2004 (for short,"the Act") provides for establishment of check posts or barriers at such places which may be specified. It is thus contended that since the Act provides for establishment of check gates/check posts, abolition of the same would be against the law and also against the interest of the public at large.

4. We have considered the provisions of Section 74 of the Act as well as perused the minutes of the meeting of Senior Officers of the State Government held on 17.02.2016 proposing to abolish the check gates with effect from 01.04.2016, and are of the opinion that no interference is called for with the decision of the State Government.

5, Section 74 of the Act provides that the Government may, if so required, establish check posts or barriers to avoid evasion of tax. It does not mandate that check posts or barriers should be always established. It is to be established at the discretion of the Government, which it had done so earlier but with the passage of time, and as has been noted in the minutes dated 17.02.2016, the same has lost its significance, which is because of expansion of roads and bye-passes around the check gates. It is also recorded in the said minutes that as a substitute mechanism, there should be deployment of interceptive vehicles, GPS tracking system and other such alternative modes to check the evasion of tax, etc.

6. In our opinion, with the change of times and circumstances, the mode of checking of evasion of tax also requires to undergo a change. It is noted that all the authorized and competent senior officers of the State Government have taken a decision in this regard, and it is not for the Court to interfere with the same. The officials dealing with the matter would be the appropriate authority to take a decision, and merely because there is a provision for establishment of such check posts or barriers, it would not mean that the Act mandates establishment of such check posts. The appropriate authority has taken a conscious decision in the matter after considering all the relevant aspects, which, in our considered view, does not call for any interference. The writ petition is dismissed accordingly.

Writ petition dismissed.

2016 (I) ILR - CUT-633

PRADIP MOHANTY, J. & BISWAJIT MOHANTY, J.

W.P.(CRL) NO. 81 OF 2015

MONOJ KUMAR DASH .....Petitioner

.Vrs.

REPUBLIC OF INDIA & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Art. 226

Writ of habeas corpus – Maintainability – Petitioner was released on anticipatory bail by this Court in Kharavel Nagar P.S. case No 44 of 2013 for the offences under sections 406, 420 and 120-B I.P.C. – Direction by Apex Court for transfer of the above case from State Police agency to C.B.I. – C.B.I. registered second F.I.R. bearing R.C. No. 47/S/2014-KOL Dt. 05.06.2014 for the offences under sections 120-B, 294, 341, 406, 409, 420, 467, 468, 471, 506/34 I.P.C. and sections 3,4 and 5 of Prize Chits and Money Circulation Schemes (Barring) Act, 1978 and arrested the petitioner – Petitioner's application for bail before the trial court and this Court were rejected – Hence the writ petition in the nature of habeas corpus – Previous order of anticipatory bail will not be helpful to the petitioner since C.B.I. registered the subsequent F.I.R. for commission of higher/graver offences – No challenge to the second F.I.R. – No violation of any Statutory Provision – The petitioner was remanded to judicial custody by virtue of a valid order of remand passed by a Magistrate having jurisdiction – Held, detention of the petitioner cannot be said to be illegal – Writ of habeas corpus is uncalled for.

Case Laws Referred to :-

1. (2014) 58 OLR (SC) 905 : Subrata Chattoraj -V- Union of India & Ors.
2. (1966) 3 SCR 344 : State of Bihar v. Rambalak Singh & Ors.
3. (1969) 1 SCC 292 : Madhu Limaye & Ors. v. (Unknown)
4. 1994 (II) OLR 461 : Prafulla Kumar Nayak v. State of Orissa
5. (1997) 1 SCC 416 : D.K. Basu v. State of West Bengal
6. (2011) 1 SCC 694 : Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.
7. (2013) 1 SCC 314 : Mannubhai Ratilal Patel through Ushaben v. State of Gujarat & Ors.
8. (2013) 5 SCC 762 : Vinay Tyagi v. Irshad Ali Alias Deepak & Ors.
9. (2013) 6 SCC 348 : Amitbhai Anilchandra Shah v. Central Bureau of Investigation & Anr.

10. (2014) 8 SCC 273 : Arnesh Kumar v. State of Bihar & Anr.
11. 2014 (II) OLR, 459 : Mrs. N. Ratnakumari v. State of Odisha & Ors.
12. (2014) 10 SCC 754: Abdul Basit Alias Raju & Ors. v. Mohd. Abdul Kadir Chaudhary & Anr.
13. 2013 (1) SCC 314 : Manubhai Ratilat Patel v. State of Gujarat
14. 2013 (II) OLR 912 : Minati Dash v. State of Orissa and others
15. 1970 (3) SCC 501 : Laxman Rao v. Jl. Magistrate, First Cl., Parvatipuram
16. 1974 (4) SCC 14 : Kanu Sanyal v. District Magistrate, Darjeeling
17. 1972 (3) SCC 256 : B. Ramachandra Rao v. State of Orissa
18. 1994 (II) OLR 541 : Purak Chand Chandak & Another v. State of Orissa and another
19. 1980 (2) SCC 565 : Gurbaksh Singh Sibbia v. State of Punjab
20. 2008 (13) SCC 305: Union of India v. Padam Narain Aggrawal
21. 2001 (4) SCC 280 : Prahlad Singh Bhati v. NCT, Delhi
22. 2008 (1) SCC 474 : Hamida v. Rashid
23. 2009 (1) SCC 441 : Nirmal Singh Kohlan v. State of Punjab
24. 2012 (5) SCC 690 : Rashmi Rekha Thatoi v. State of Orissa & others
25. 2007 (8) SCC 770 : Dinesh Dalmia v. CBI,
26. 2013 (3) SCC 77 : Suresh Kumar v. State of Maharashtra
27. 2003 (6) SCC 697 : Islamic Academy of Education v. State of Karnataka

For Petitioner : M/s. Umesh Ch. Patnaik, G.M.Rath, S.Patnaik & S.S.Padhy

For Opp.Parties : Mr. Raghavacharyulu (Spl. Public Prosecutor, C.B.I.) and Mr. V.Narasingh (Standing Counsel, C.B.I.)

Date of hearing : 04.12.2015
Date of judgment:16.03. 2016

JUDGMENT

PRADIP MOHANTY, J.

By means of this writ petition filed in the nature of habeas corpus, jurisdiction of this Court has been invoked to declare the detention of the petitioner pursuant to the order of remand dated 15.09.2014 passed in S.P.E. Case No.42 of 2014 pending on the file of learned Special Chief Judicial Magistrate, C.B.I., Bhubaneswar as illegal and further to issue a writ of habeas corpus directing release of the petitioner forthwith from such illegal detention.

2. The facts giving rise to filing of the writ petition, succinctly put, are as follows:

On 07.02.2013, an FIR was lodged by one Sukumar Panigrahi at Kharvela Nagar Police Station, Bhubaneswar alleging therein that Pradip Sethy and others of Arthatatwa Multipurpose Co-operative Society Ltd. (for short "ATMPCS") cheated him in a deceitful manner and misappropriated Rs.17.00 lakhs from him by fraudulent means. The said FIR was registered as Kharvela Nagar P.S. Case No.44 of 2013 corresponding to C.T. Case No.560 of 2013 on the file of S.D.J.M., Bhubaneswar. During investigation, it revealed that certain financial transactions took place between Arthatatwa Infra India Ltd. and Kamyab Television Pvt. Ltd., of which the petitioner was the Managing Director. The investigating agency called upon the petitioner to appear before it. Apprehending arrest the petitioner approached this Court for anticipatory bail in BLAPL No.15350 of 2013. By order dated 25.06.2013 this Court directed that in the event of arrest the petitioner shall be released on bail by the arresting officer on such terms and conditions as would be deemed just and proper by the arresting officer.

While investigation in Kharvela Nagar P.S. Case No.44 of 2013 was going on, various financial scams nicknamed as chit-fund scams, affecting a large number of depositors across the State of Odisha, came to limelight. As the role of some political and influential personalities behind the said scams was foreseen, predicting biased and perfunctory investigation by the State police agency, one Alok Jena filed Writ Petition (Civil) No.413 of 2013 before the Apex Court seeking transfer of investigation from the State police agency to the Central Bureau of Investigation (CBI). The State Government on being noticed filed an affidavit inter alia stating therein that larger conspiracy angle was being examined in three cases, viz., (i) CID P.S. Case No.39 dated 18.07.2012 registered against M/s Seashore Group of Companies; (ii) Kharvalenagar P.S. Case No.44 dated 07.02.2013 registered against M/s Artha Tatwa Group of Companies; and (iii) EOW P.S. Case No.19 dated 06.06.2013 registered against M/s Astha International Ltd. It was also stated that although charge-sheets have been filed in these three cases, investigation has been kept open under Section 173(8), Cr.P.C. to investigate the larger conspiracy angle. Ultimately, the said writ petition came to be disposed of by the Apex Court on 09.05.2014 along with a batch of similar writ petitions filed in respect of the chit-fund scams which hit the States of West Bengal, Tripura and Assam {See ***Subrata Chattoraj V. Union of India and others***, (2014) 58 OCR (SC) 905}. The Apex Court, while

directing transfer of cases from State Police Agency to CBI, observed as follows:

> 34. In the circumstances, we are inclined to allow all these petitions and direct transfer of the following cases registered in different police stations in the State of West Bengal and Odisha from the State Police Agency to the Central Bureau of Investigation (CBI).
>
> **A. <u>State of West Bengal</u>**:
>
> 1. All cases registered in different police stations of the State Against Saradha Group of Companies including Crime No.102 registered in the Bidhannagar Police Station, Kolkata (North) on 6th May, 2013 for offences punishable under Sections 406, 409, 420 and 120B of the IPC.
>
> 2. All cases in which the investigation is yet to be completed registered against any other company upto the date of this order.
>
> 3. The CBI shall be free to conduct further investigation in terms of Section 173(8) of the Cr.P.C. in relation to any case where a charge-sheet has already been presented before the jurisdiction court against the companies involved in any chit-fund scam.
>
> **B. <u>State of Odisha</u>**: All cases registered against 44 companies mentioned in our order dated 26th March, 2014 passed in Writ Petition (C) No. 413 of 2013. The CBI is also permitted to conduct further investigations into all such cases in which charge sheets have already been filed."

In obedience to the direction of the Apex Court, the CBI on 12.05.2014 constituted a Special Investigating Team (SIT) under Annexure-3. The SIT, CBI registered RC No.47/S/ 2014-KOL dated 05.06.2014 by clubbing 8 FIRs already registered by the State police (including FIR No.44 of 2013 registered on 07.02.2013 by Kharvelanagar P.S.) into one FIR and treated above mentioned 8 FIRs as FIR in the said case. The said case was registered under Sections 120-B/294/341/406/409/420/467/468/471/506/34 I.P.C. and Sections 3, 4 and 5 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

During the course of further investigation, the SIT summoned the petitioner, as the Managing Director of Kamyab Television Pvt. Ltd., to explain receipt of Rs.90.00 lakhs in its two bank accounts maintained with

Axis Bank, Bhubaneswar and Syndicate Bank, Bhubaneswar from the bank account of M/s Artha Tatwa Infra Ltd. maintained with the ING Vyasa Bank, Kharvelnagar Branch Bhubaneswar. The petitioner appeared before the SIT and offered his explanation. But, on 14.09.2014, the SIT notwithstanding the explanation offered by the petitioner arrested him, even though the petitioner produced anticipatory bail order dated 25.06.2013 (Annexure-4) granted by this Court in BLAPL No.15350 of 2013. On 15.09.2014, the SIT produced the petitioner before the learned Special C.J.M., CBI, Bhubaneswar and the petitioner was remanded to judicial custody till 26.09.2014.The bail application of the petitioner, which was filed on the date of his production, i.e., on 15.09.2014 annexing a copy of the anticipatory bail order under Annexure-4, was taken up and dismissed on the next date (16.09.2014) by the learned Special CJM, CBI, Bhubaneswar. The order dated 15.09.2014, whereby the petitioner was remanded to judicial custody, and the order dated 16.09.2014, whereby the bail application of the petitioner was rejected by the learned C.J.M., CBI, Bhubaneswar, have been marked as Annexure-5 series.

Thereafter, the petitioner filed an application for bail under Section 439 Cr.P.C. before the learned Sessions Judge, Khurda at Bhubaneswar which was also dismissed on 25.09.2014. Against the said order of rejection, the petitioner approached this Court for bail under Section 439, Cr.P.C. in BLAPL No.20204 of 2014, but the same was dismissed as withdrawn on 24.12.2014. Meanwhile, on 11.12.2014, the SIT filed preliminary charge-sheet against the petitioner under Sections 120-B/294/341/406/409 /420/467/468/ 471/506/34 I.P.C. and Sections 3, 4 and 5 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 and the learned Special CJM, CBI, Bhubaneswar took cognizance of the offences. After preliminary charge-sheet was filed, the petitioner moved bail for the second time before the learned Special CJM, CBI, Bhubaneswar and the same was also dismissed on 07.01.2015. Against the said order of rejection, the petitioner again moved for bail under Section 439, Cr.P.C. before the learned Sessions Judge, Khurda at Bhubaneswar and the same was also dismissed on 16.02.2015. Aggrieved by the said order of rejection, the petitioner again approached this Court under Section 439, Cr.P.C. in BLAPL No.1224 of 2015 and the said application was dismissed on 15.05.2015.

3. Mr. U.C. Patnaik, learned counsel appearing for the petitioner strenuously urged-

(i) that vide order dated 25.06.2013 passed in BLAPL No.15350 of 2013 the petitioner having been granted anticipatory bail by this Court in connection with Kharvelnagar P.S. Case No.44 of 2013, his arrest on 14.09.2014 and consequent remand to judicial custody on 15.09.2014 in connection with RC No.47/S/2014-KOL dated 05.06.2014 in which FIR in Kharvelnagar P.S. Case No.44 of 2013 was clubbed, was illegal;

(ii) that the Apex Court in judgment dated 09.05.2014 having specifically directed for "further investigation" in Kharvelnagar P.S. Case No. 44 of 2013, wherein charge-sheet was already filed and charges against six accused persons were already framed, registration of second FIR (RC No.47/S/2014-KOL dated 05.06.2014) by the CBI instead of conducting "further investigation", was contrary to the direction of the Apex Court and not legally permissible, and subsequent arrest/detention of the petitioner on 14.09.2014 and remand to judicial custody on 15.09.2014 was unsustainable in law;

(iii) that arrest of the petitioner offended the provisions of Sections 41, 41A and 50 of Cr.P.C. and infringed the fundamental rights guaranteed under Articles 21 and 22 of the Constitution of India; and

(iv) that since not only initial order of remand dated 15.09.2014 is illegal, orders of remand passed by the learned Magistrate later having contravened the provisions of Sections 167 and 309, Cr.P.C., the detention of the petitioner was illegal.

In support of the above submissions, learned counsel for the petitioner placed reliance on the decisions in ***State of Bihar v. Rambalak Singh and others***, (1966) 3 SCR 344; ***Madhu Limaye and others v. (Unknown),*** (1969) 1 SCC 292; ***Prafulla Kumar Nayak v. State of Orissa***, 1994 (II) OLR 461; ***D.K. Basu v. State of West Bengal***, (1997) 1 SCC 416; ***Siddharam Satlingappa Mhetre v. State of Maharashtra and others***, (2011) 1 SCC 694; ***Mannubhai Ratilal Patel through Ushaben v. State of Gujarat and others,*** (2013) 1 SCC 314; ***Vinay Tyagi v. Irshad Ali Alias Deepak and others,*** (2013) 5 SCC 762; ***Amitbhai Anilchandra Shah v. Central Bureau of Investigation and another***, (2013) 6 SCC 348; ***Arnesh Kumar v. State of Bihar and another***, (2014) 8 SCC 273; ***Mrs. N. Ratnakumari v. State of Odisha and others***, 2014 (II) OLR, 459 and ***Abdul Basit Alias Raju and others v. Mohd. Abdul Kadir Chaudhary and another***, (2014) 10 SCC 754.

4. Sri K. Raghavacharyulu supported by Mr. V.Narasingh, learned counsel appearing for the CBI, per contra, submitted that the instant writ petition filed in the nature of habeas corpus was not maintainable, inasmuch as, the petitioner was remanded to judicial custody by virtue of a valid order of remand passed on 15.09.2014 by the learned Magistrate having competent jurisdiction. Such order of remand was passed by the learned Magistrate upon hearing the learned counsel for the respective parties and after due application of mind to the materials placed on record, such as, case diary, arrest memo, medical record, remand report, search and seizure reports and all other relevant documents. Since there was due application of mind to the materials on record and the order of remand dated 15.09.2014 was passed by the learned Magistrate after recording subjective satisfaction, it could not be said that the order of remand of the petitioner to judicial custody suffered from any illegality, much less absolute illegality. Therefore, the detention of the petitioner by virtue of a valid remand order could not be said to be illegal.

He further submitted that it was true that the petitioner was granted anticipatory bail by this Court vide order dated 25.06.2013 passed in BLAPL No.15350 of 2013 in connection with Kharavela Nagar P.S. Case No.44 of 2013. But, as a matter of fact, the petitioner was not named as an accused in the FIR nor was he arrested by the State police. In the said case, charge sheet was filed on 11.07.2013 and cognizance was taken on 27.07.2013 by the learned S.D.J.M., Bhubaneswar under Sections 406, 420 and 120B, IPC. In the said case, charges were also framed by the learned S.D.J.M., Bhubaneswar on 10.02.2014. While the matter stood thus, pursuant to the mandate of the Apex Court issued on 09.05.2014, the CBI registered RC No.47/S/2014-KOL on 05.06.2014 by clubbing eight FIRs already lodged in different police stations against Artha Tatwa Company, including FIR No. 44 of 2013, under Sections 120B/294/341/406/409/420/467/468/471/506/34, I.P.C. and Sections 3, 4 and 5 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978. After registration of the case, the CBI conducted raid, search and seizure operations pertaining to the petitioner on 16.08.2014 and finally on 14.09.2014 the petitioner was arrested on the allegation that he admitted to have received a sum of Rs.90.00 lakhs. The petitioner also confirmed that the grounds of arrest were informed to him in presence of two independent witnesses and his arrest was informed to him as well as to the male member of his family, i.e., to his father and signed twice the memo of arrest, but never disclosed to the investigating officer that he had an anticipatory bail order in his favour. B e that as it may, RC No.47/S/2014-

KOL dated 05.06.2014 was registered by the CBI for commission of higher offences, such as, Sections 409, 467 & 468, IPC, etc. Therefore, learned counsel for the CBI submitted that RC No.47/S/2014-KOL dated 05.06.2014 having been registered by the CBI for commission of higher offences, the anticipatory bail order obtained by the petitioner in connection with Kharvelnagar P.S. Case No.44 of 2013, which was registered for lesser offences, would not ennure to his benefit.

With regard to the question of maintainability of second FIR, learned counsel for the CBI submitted that the FIR in Kharvelnagar P.S. Case No.44 of 2013 was lodged by one complainant against a number of individuals and "ATMPCS" for commission of offences of cheating and breach of trust punishable under Sections 420, 406 and 120B, IPC, whereas FIR in RC No.47/S/2014-KOL dated 05.06.2014 was registered by the CBI for commission of very graver offences, such as, criminal breach of trust by banker and merchant, forgery, etc. punishable under Sections 409, 467 & 468, besides Sections 3, 4 & 5 of Prize Chits and Money Circulation Scheme (Banning) Act, 1978. Therefore, the second FIR in RC No.47/S/2014-KOL dated 05.06.2014 being not for the same cause of action or in respect of the very same offences said to have been committed in the FIR in Kharvelanagar P.S. Case No.44 of 2013, it could not be said the second FIR was not maintainable.

With regard to the contention that arrest of the petitioner was illegal as it violated provision of Sections 41, 41A and 50 of Cr.P.C., Mr. Acharyulu pointed out that in the present case there has been no violation of above noted provisions.

To support his submissions, learned counsel for the CBI placed reliance on the decisions rendered in ***Manubhai Ratilat Patel v. State of Gujarat***, 2013 (1) SCC 314; ***Minati Dash v. State of Orissa and others***, 2013 (II) OLR 912; ***Laxman Rao v. Jl. Magistrate, First Cl.*, Parvatipuram,** 1970 (3) SCC 501; ***Kanu Sanyal v. District Magistrate, Darjeeling***, 1974 (4) SCC 141; ***B. Ramachandra Rao v. State of Orissa***, 1972 (3) SCC 256; ***Purak Chand Chandak & Another v. State of Orissa and another,*** 1994 (II) OLR 541; ***Gurbaksh Singh Sibbia v. State of Punjab***, 1980 (2) SCC 565; ***Union of India v. Padam Narain Aggrawal***, 2008 (13) SCC 305; ***Prahlad Singh Bhati v. NCT, Delhi***, 2001 (4) SCC 280; ***Hamida v. Rashid***, 2008 (1) SCC 474; ***Nirmal Singh Kohlan v. State of Punjab***, 2009 (1) SCC 441; ***Rashmi Rekha Thatoi v. State of Orissa and others***, 2012 (5) SCC 690; ***Dinesh***

Dalmia v. CBI, 2007 (8) SCC 770; ***Suresh Kumar v. State of Maharashtra***, 2013 (3) SCC 77; ***Islamic Academy of Education v. State of Karnataka***, 2003 (6) SCC 697; ***Haryana Financial Corporation & Another v. Jagadamba Oil Mills & Another***, 2002 (3) SCC 496; ***Vishnu Traders v. State of Haryana***, 1995 (SUPP) (1) SCC 461 and ***Muniappan v. State of Punjab***, (2010) 9 SCC 567.

5. This Court heard learned counsel for both the parties and perused the lower court record as well as the records of this Court. This Court also went through the judgments relied on by the respective parties.

6. Before delving into the submissions raised by the learned counsel for the parties, it is of relevance to note at the outset that 'habeas corpus' is a writ in the nature of an order calling upon the person who has detained another to produce the latter before the Court, in order to let the Court know on what ground he has been confined and to set him free if there is no legal justification for the imprisonment. If the detention appears to be in violation of the procedure established by law, the Court has no option but to allow his prayer. It is also clear that when physical restraint is put upon a person in accordance with law, there is no right to habeas corpus unless the law is unconstitutional or the order is ultra vires the statute. The Apex Court in ***Manubhai Ratilal Patel v. State of Gujarat***, 2013 (1) SCC 314 has held that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. In the said judgment, the Apex Court by referring to the judgment in the cases of ***Col. B. Ramachandra Rao v. State of Orissa***, 1972 (3) SCC 256 and ***Kanu Sanyal v. District Magistrate, Darjeeling***, 1974 (4) SCC 141 also held that the court is required to scrutinize the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted.

7. Keeping the above dictum in mind, this Court proceeds to examine the contentions raised by the learned counsel for the parties. According to learned counsel for the petitioner, in view of anticipatory bail granted to the petitioner in Kharvelnagar P.S. Case No.44 of 2013, he ought not to have been arrested by the CBI and remanded to custody. Section 438, Cr.P.C.

stipulates that when a person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session seeking direction for grant of bail under the said section. A perusal of Section 438, Cr.P.C. would show that the grant of bail under the said section is offence specific. It uses the phrase "a non-bailable offence". Therefore, the Apex Court in ***Gurbaksh Singh Sibbia v. State of Punjab***, 1980 (2) SCC 565 held that the Court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective and that the power should not be exercised in a vacuum. The Apex Court in the said case further held that a 'blanket order' of anticipatory bail should not generally be passed. Normally, a direction should not be issued under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever." A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Therefore, the Court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. An order under Section 438, Cr.P.C. is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely.

In ***Prahlad Singh Bhati v. NCT, Delhi***, 2001 (4) SCC 280 the Apex Court held that mere initial grant of anticipatory bail for lesser offence, did not entitle an accused to insist for regular bail even if he was subsequently found to be involved in the case of murder. With the change of the nature of the offence, the accused becomes disentitled to the liberty granted to him in relation to a minor offence, if the offence is altered for an aggravated crime.

From the discussions made above, it is clear that when an accused obtains an anticipatory bail for a lesser offence and thereafter during the investigation it surfaces that accused committed a graver offence and the sections of the concerned FIR are altered or separate FIR is registered in a different police station, depending on the facts, the order of anticipatory bail obtained by accused for the lesser offence would not ennure to his benefit and accused is not entitled to the protection granted under Section 438, Cr.P.C.

In the instant case, as already indicated, on 25.06.2013 the petitioner was granted anticipatory bail by this Court in BLAPL No.15350 in connection with Kharvelnagar P.S. Case No.44 of 2013, which was registered for alleged commission offences punishable under Sections 420, 406 and 120-B, IPC. In obedience to the mandate of the Apex Court vide judgment dated 09.05.2014 rendered in **Subrata Chattoraj** (supra), when the CBI took up the matter for further investigation, on 05.06.2014 it registered a separate FIR bearing RC No.47/S/2014-KOL by clubbing eight FIRs including the FIR in Kharavelnagar P.S. Case No.44 of 2013, for alleged commission of offences punishable under Sections 120B/294/341/406/409/ 420/467/468/471/506/34, IPC and Sections 3, 4 and 5 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978. Thus, the FIR registered by the CBI was for very serious offences like Sections 409 & 467, IPC under which an accused can be sentenced to imprisonment for life or rigorous imprisonment for ten years. Therefore, the anticipatory bail obtained by the petitioner in Kharvelnagar P.S. Case No.44 of 2013 for lesser offences cannot be of any help to the petitioner.

Apart from the above, on perusal of the records it reveals that after anticipatory bail order was passed on 25.06.2013 by this Court in BLAPL No.15350 of 2013, the petitioner was not arrested in connection with Kharavelnagar P.S. Case No.44 of 2013, but after registration of case by the CBI bearing RC No.47/S/2014-KOL for commission of other offences, some of which are of graver in nature, the petitioner was arrested. Therefore, on the basis of earlier anticipatory bail order, the petitioner, who was arrested in connection with RC No.47/S/2014-KOL, could not have been released.

The decision of the Apex Court, as relied on by the petitioner, rendered in ***Siddharam Satlingappa Mhetre v. State of Maharashtra and others***, AIR 2011 SC 312, which lays down that once anticipatory is granted the same should ordinarily remain valid till end of trial, does not take into account a case of present nature where later on serious offences like Sections 409 & 467 have been added. Thus, the said case is factually distinguishable.

8. The second submission of learned counsel for the petitioner is that the Apex Court in judgment dated 09.05.2014 having specifically directed for "further investigation" in Kharvelnagar P.S. Case No. 44 of 2013, registration of RC No.47/S/2014-KOL dated 05.06.2014 by the CBI, is contrary to the direction of the Apex Court and consequently arrest/detention of the petitioner on 14.09.2014 and remand to judicial custody on 15.09.2014 is unsustainable in law. Needless to mention, RC No.47/S/2014-KOL dated

05.06.2014 was registered by the CBI after the judgment dated 09.05.2014 of the Apex Court rendered in **Subrata Chattoraj** (supra). As it reveals, in the said judgment the Apex Court, so far as the State of Odisha is concerned, has directed transfer of all the cases registered in different police stations against 44 companies to the Central Bureau of Investigation (CBI) and also permitted to conduct further investigations into all such cases in which charge-sheets have already been filed. The rationale behind such direction, as observed by the Apex Court in the said judgment, is to conduct effective investigation as to the trail of money collected by the group of companies on which the State police had not made any significant headway because of inter-State ramifications. Further, the investigation conducted till then had put a question mark on the role of regulatory authorities like SEBI, Registrar of Companies and officials of the RBI within whose respective jurisdictions and areas of operation the scam not only took birth but flourished unhindered. The investigation by the State Police in a scam that involved thousand of crores collected from the public allegedly because of the patronage of people occupying high positions in the system will hardly carry conviction especially when even the regulators who were expected to prevent or check such a scam appear to have turned a blind eye to what was going on. That apart, the larger conspiracy angle although under investigation has also not made much headway partly because of the inter-State ramifications, which the investigating agencies need to examine but are handicapped in examining. The above being the reason behind the direction of the Apex Court and since specific direction for investigation by the CBI was sought for in Writ Petition (Civil) No.413 of 2013 filed before the Apex Court, it is incorrect to contend that the Apex Court has permitted CBI only to the extent of conducting further investigation in terms of Section 173(8), Cr.P.C. Rather a reading of paragraphs 30, 31 and 34 of the judgment of the Supreme Court makes it clear that vis-à-vis the six features delineated in para 30, the Supreme Court thought transfer of ongoing investigation from State police to the CBI was imperative. The Supreme Court also made it clear that each of six features/aspects call for investigation by CBI with a view to ensure credibility of such investigation. Accordingly, the Apex Court directed for the investigations into all such cases. Further, in para 34 the Supreme Court expressed its willingness to allow the petitions, one of which was W.P.(Crl) No.413 of 2013 with a prayer for direction for investigation by CBI. In such back-ground, it is reiterated that direction of the Supreme Court for further investigation cannot be confined to mean only for an investigation in terms of Section 173(8), Cr.P.C..

Above apart, FIR in Kharvelnagar P.S. Case No.44 of 2013 was lodged by one complainant against Pradip Sethy and others of "ATMPCS" for commission of offences of cheating and breach of trust punishable under Sections 420, 406 and 120B, IPC, whereas FIR in RC No.47/S/2014-KOL dated 05.06.2014 was registered by the CBI for commission of very graver offences, such as, criminal breach of trust by banker, merchant & for forgery, etc., punishable under Sections 409, 467, etc., besides Sections 3, 4 & 5 of Prize Chits and Money Circulation Scheme (Banning) Act, 1978. Therefore, the second FIR in RC No.47/S/2014-KOL dated 05.06.2014 being not for the same cause of action or in respect of the very same offences said to have been committed in the FIR in Kharvelanagar P.S. Case No.44 of 2013, it cannot be said that the second FIR is not maintainable. Furthermore, merely because CBI has registered a new FIR in order to maintain their official paraphernalia, the petitioner cannot say that order of the Apex Court for further investigation has been violated. On the other hand, if the CBI had not registered the FIR and directed its investigation with regard to larger conspiracy and money trail, the intent of the Apex Court in allowing the writ petition before it would have become otiose.

Needless to mention, the petitioner has not challenged registration of second FIR by filing appropriate proceeding. So, in a proceeding of habeas corpus he cannot take the plea of illegality of second FIR for carrying out further investigation, which according to him ultimately vitiates arrest/detention order dated 14.09.2014 and remand order dated 15.09.2014. It is the settled principle of law that that even otherwise filing of second FIR is permissible. In the case of ***Nirmal Singh Kohlan V. Padma Rarain Aggarwal and others,*** reported in 2009 (1) SCC 441, the Apex Court observed that the second FIR would be maintainable not only because there were different versions but when new discovery was made on factual foundations. If the police authorities did not make a fair investigation and left out conspiracy aspect of the matter from the purview of its investigation, it would be appropriate to direct investigation in respect of an offence which is distinct and separate from the one for which the FIR had already been lodged. The Apex Court also observed that if the CBI came to know of commission of other and further offence involving a larger conspiracy which required prosecution against a larger number of persons, who had not been proceeded against at all by local police officers, even lodging of second FIR would not be a bar.

9. Coming to third submission of the learned counsel for the petitioner that arrest of the petitioner offends the provisions of Sections 41, 41A and 50 of Cr.P.C. and infringes his fundamental rights guaranteed under Articles 21 and 22 of the Constitution of India, it is apt to mention here, Section 41 provides for the cases when police may arrest a person without warrant. Section 41(1) stipulates that any police officer may, without an order from a Magistrate and without a warrant, arrest any person under the circumstances mentioned in clauses (a), (b) and (ba) thereof. Clause (a) speaks about the person who commits, in the presence of a police officer, a cognizable offence; Clause (b) says about the person against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, subject to satisfaction of the conditions mentioned in sub-clauses (i) and (ii); and Clause (ba) stipulates that a person against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence. Although in sub-clause (b) of sub-section (1) to Section 41, a condition has been provided that the police officer shall record, while making arrest, his reasons in writing, as a matter of fact the present case does not come within the ambit of Section 41(1)(b). The reason being, in the instant case the petitioner, besides other offences, is allegedly involved under Sections 409 and 467, IPC, which prescribe punishment of imprisonment for life or rigorous imprisonment for ten years, whereas Section 41(1)(b) deals with a case which prescribes punishment of less than seven years or which may extend to seven years. Rather, the present case is clearly covered under Section 41(1)(ba), Cr.P.C. Thus, it cannot be said that there has been any violation of Section 41, Cr.P.C. by non-recording of reason.

Section 41-A provides for notice of appearance before police officer. In sub-section (1) thereof, it is provided that the police officer may, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence to appear before him or at such other place as may be specified in the

notice. This means, the cases, which are covered by Section 41(1), have been excluded from the purview of Section 41-A. The present case, as indicated earlier, is squarely covered by Section 41(1)(ba). Therefore, Section 41-A has no application to the case of the petitioner. So, the question of violation of the provisions of the said section does not arise.

With regard to violation of Section 50, Cr.P.C., the provision of the said section requires that a person arrested to be informed of grounds of arrest and of right to bail. In this context, it is of relevance to note that after registration of the case, the CBI conducted raid, search and seizure operations pertaining to the petitioner on 16.08.2014 and finally on 14.09.2014 the petitioner was arrested on the allegation that he admitted to have received a sum of Rs.90.00 lakhs. As would be evident from the memo of arrest, the grounds of arrest were informed to the petitioner in presence of two independent witnesses and intimation with regard to his arrest was sent to the male member of his family, i.e., his father and in token of the same the petitioner signed twice in the memo of arrest. So, in no stretch of imagination it can be said that arrest of the petitioner violates the provision of Section 50, Cr.P.C.

Now, it is to be seen whether there has been violation of Articles 21 and 22 of the Constitution of India. Article 21 postulates that no person shall be deprived of his life or personal liberty except according to procedure established by law. The object of this article is that before a person is deprived of his life or personal liberty, the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected. In the instant case, the allegation against the petitioner covers commission of cognizable offences and evidently the petitioner was arrested as per the procedure established by law and remanded to judicial custody by the magistrate having competent jurisdiction. Therefore, it cannot be said that there has been violation of Article 21 of the Constitution of India. So far as Article 22 of the Constitution of India is concerned, it is enshrined therein that no person who is arrested shall be detained in custody without being informed of the grounds for such arrest and that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest and no such person shall be detained in custody beyond the said period without the authority of a magistrate. In the case at hand, as stated earlier, the petitioner was arrested on 14.09.2014 and on the very next day, i.e., on 15.09.2014 the SIT, CBI produced the petitioner before the learned Special C.J.M., CBI,

Bhubaneswar, the magistrate having competent jurisdiction, who remanded the petitioner to judicial custody till 26.09.2014. From the arrest memo it reveals that the grounds of arrest were informed to the petitioner in presence of two independent witnesses and intimation with regard to his arrest was sent to his father. In the circumstance, it cannot be said that there has been violation of Article 22 of the Constitution of India.

10. It was lastly submitted by learned counsel for the petitioner that orders of remand passed by the learned Magistrate having contravened the provisions of Sections 167 and 309, Cr.P.C., the detention of the petitioner was illegal. With regard to contravention of Section 167, Cr.P.C., learned counsel for the petitioner specifically submitted that in the instant case, the date of arrest of the petitioner being 14.09.2014 and the date of his remand to judicial custody being 15.09.2014, under the proviso (a)(i) to Section 167(2), Cr.P.C. he should have been remanded maximum for a period of 120 days, i.e., till 14.01.2015. But, even though preliminary charge-sheet was filed on 11.12.2014, the learned Magistrate took cognizance of offences on 10.04.2015. Thus, detention of the petitioner from 14.01.2015 to 10.04.2015 being illegal, he is entitled to be released forthwith. With regard to contravention of Section 309, Cr.P.C., learned counsel for the petitioner particularly urged that the petitioner was under illegal detention on the date of filing of the writ petition as well as on the date of return, inasmuch as, on 01.06.2015, the date on which the writ petition was presented, and on 25.06.2015, which was the date of return, the petitioner was remanded to judicial custody exceeding the period of 15 days. Therefore, the petitioner is liable to be released forthwith.

The above submission of the petitioner is of two folds. The first part pertains to contravention of proviso (a)(i) to Section 167(2), Cr.P.C. whereas the second part relates to contravention of proviso to Section 309(2), Cr.P.C. Before delving into this issue, this Court carefully and meticulously perused the provisions of Sections 167 and 309, Cr.P.C. as well as the records in S.P.E. Case No.42 of 2014 of the court of learned Special C.J.M., CBI, Bhubaneswar. A bare reading of Sections 167 and 309, Cr.P.C., would show that proviso (a)(i) to Section 167(2), Cr.P.C. applies prior to filing of the charge-sheet or prior to taking of cognizance by the court of the offences disclosed in the charge-sheet. Once such charge-sheet is filed or cognizance is taken by the court, the provisions of Section 309(2), Cr.P.C. would come into play. So far as contravention of proviso (a)(i) to Section 167(2), Cr.P.C. is concerned, after Odisha amendment made vide Act 11 of 1997 with effect

from 05.11.1997, proviso (a)(i) to Section 167(2), Cr.P.C. provides that no Magistrate shall authorize the detention of the accused person in custody under this Section for a total period exceeding 120 days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years. In this case, admittedly, the petitioner is involved in an offence punishable with imprisonment for life or imprisonment for a term of not less than ten years. As it reveals from the lower court records, the petitioner was arrested on 14.09.2014 in connection with RC No.47/S/2014-KOL dated 05.06.2014. He was produced before the learned Special C.J.M., CBI, Bhubaneswar on 15.09.2014 and remanded to judicial custody till 26.09.2014. On 26.09.2014, the petitioner was produced and again remanded to judicial custody till 30.09.2014. On 30.09.2014, the petitioner was produced and remanded to judicial custody till 13.10.2014. On 13.10.2014, the petitioner was produced and remanded to judicial custody till 24.10.2014. On 24.10.2014, the petitioner was produced and remanded to judicial custody till 01.11.2014/13.11.2014. On 13.11.2014, the petitioner was produced and remanded to judicial custody till 26.11.2014. On 26.11.2014, the petitioner was produced and remanded to judicial custody till 09.12.2014. On 09.12.2014, the petitioner was produced and remanded to judicial custody till 22.12.2014/02.01.2015/12.01.2015. However, in the meantime, on 11.12.2014 the CBI filed preliminary charge-sheet against the petitioner and other co-accused persons and on the very same day the learned Special C.J.M., CBI, Bhubaneswar took cognizance of offence under Sections 120-B, 406, 409, 411, 420, 468 and 471, IPC read with Sections 4, 5 & 6 of the Prize Chits & Money Circulation Schemes (Banning) Act, 1978. As this fact is clearly borne out from the order-sheet maintained in S.P.E. Case No.42 of 2014 of the court of learned Special C.J.M., CBI, Bhubaneswar, the submission of the learned counsel for the petitioner, that cognizance was taken on 10.04.2015, is without any basis. In fact, on 10.04.2015 supplementary charge-sheet was filed against accused Jagabandhu Panda, Manoj Kumar Pattnaik and Pramod Kumar Panda and the learned Magistrate after perusing the charge-sheet and other documents took cognizance of offence under Section 120-B/406/409/420/34, IPC and Sections 4, 5 & 6 of Prize Cheat & Money Circulation Scheme (Banning) Act, 1978. As the date of arrest of the petitioner was 14.09.2014 and the date of his remand to judicial custody was 15.09.2014, the period of 120 days was to be expired on 14.01.2015. But, as already indicated, since preliminary charge-sheet was filed on 11.12.2014 and cognizance was taken on that day itself, it is well

within the period of 120 days. Thus, the allegation, that the petitioner from 14.01.2015 to 10.04.2015 was under illegal detention, as the period of his remand exceeded 120 days in contravention of the proviso (a)(i) to Section 167(2), Cr.P.C., is contrary to records and thus rejected.

So far as petitioner's second part of submission, which relates to contravention of the provisions of Section 309(2), Cr.P.C., is concerned, this Court is called upon to examine whether or not on 01.06.2015, the date on which the writ petition was filed, and on 25.06.2015, which was the date of return, and on 04.12.2015 when the hearing was concluded, the petitioner was remanded to judicial custody exceeding the period of 15 days and, if so, whether the petitioner is entitled to be released forthwith. At the outset, it is of relevance to note the position of law as delineated in the case of ***Kanu Sanyal v. District Magistrate, Darjeeling***, 1974 (4) SCC 141. In this context, it would be appropriate to quote relevant position of para-4 of the said judgment:

" xx xx xx

This Court speaking through Wanchoo, J., (as he then was) said in A. K. Gopalan v. Government of India:

> *"It is well settled that in dealing with the petition for habeas corpus the Court is to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of the application and the date of hearing".*

In two early decisions of this Court, however, namely, Naranjan Singh v. State of Punjab and Ram Narayan Singh v. State of Delhi, a slightly different view was expressed and that view was reiterated by this Court in B. R. Rao v. State of Orissa, where it was said :

> *"In habeas corpus the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings".*

And yet in another decision of this Court in Talib Husain v. State of Jammu & Kashmir, Mr. Justice Dua, sitting as a Single Judge, presumably in the vacation, observed that :

> "*in habeas corpus proceedings the Court has to consider the legality of the detention on the date of the hearing".*

Of these three views taken by the Court at different times, the second appears to be more in consonance with the law and practice in England and may be taken as- having received the largest measure of approval in India, though the third view also cannot be discarded as incorrect, because an inquiry whether the detention is legal or not at the date of hearing of the application for habeas corpus would be quite relevant, for the simple reason that if on that date the detention is legal, the Court cannot order release of the person detained by issuing a writ of habeas corpus.

xx xx xx"

This being the settled position of law, it is immaterial whether or not the period of remand of the petitioner had exceeded 15 days on the date of filing of the writ petition. Now, it is left to this Court to examine, whether on the date of return, which admittedly in this case was 25.06.2015, and on the date of closing of hearing, i.e., 04.12.2015 the period of remand had exceeded 15 days and, if so, whether the petitioner is entitled to get benefit of the same. Since cognizance was taken on 11.12.2014, as mentioned earlier, from 12.01.2015 onwards, on which date the petitioner was next produced, provisions of Section 309(2) would apply. On perusal of lower court order-sheets, this Court finds that on 12.01.2015, which was the immediate next date after cognizance was taken, the petitioner along with other UTPs was produced and remanded to judicial custody till 26.01.2015/ 07.02.2015/26.02.2015. The petitioner along with other UTPs was next produced on 26.02.2015 and on that date remanded to judicial custody till 11.03.2015/25.03.2015/08.04.2015. He was next produced on 08.04.2015 along with other UTPs and remanded to judicial custody till 21.04.2015/05.05.2015/08.05.2015. But, order-sheet dated 08.05.2015 reveals that on that date although other UTPs were produced, the petitioner could not be produced due to his sickness, as reported by the Superintendent, Special Jail, Bhubaneswar, however, the UTPs were remanded to judicial custody till 22.05.2015/05.06.2015/19.06.2015. As would be evident from order dated 19.06.2015, on that date even though other UTPs were produced, the petitioner could not be produced due to his illness, as reported by the Superintendent, Special Jail, Bhubaneswar, however, the UTPs were remanded to judicial custody till 02.07.2015/ 16.07.2015/30.7.2015. The first proviso to Section 309(2), Cr.P.C., which is relevant for this purpose, reads that no Magistrate shall remand an accused person to custody under this Section for a term exceeding fifteen days at a time. This means, term of remand can be extended in a number of spells/slots at a time but each

spell/slot shall not exceed 15 days. Keeping this interpretation in mind, if each date of remand, as noted above, is examined, it would be seen on the date of return, i.e., 25.06.2015, the period of remand has not exceeded 15 days, as the learned Magistrate has fixed the next date of production in spells/slots which do not exceed 15 days, if one takes into account the first of the bye dates. In any case, in the present case on the date of final conclusion of hearing, i.e., 04.12.2015 as per the last remand order recorded on 26.11.2015, it is apparent that the period of remand is well within 15 days. Therefore, even if there was infirmity in the earlier detention of the petitioner that cannot invalidate his subsequent detention.

11. In view of the discussions made above as well as a holistic reading of the orders under Annexure-5 series would show that the remand order was passed properly by a Court of competent jurisdiction taking into account the back-ground facts indicated therein. Therefore, the detention of the petitioner by virtue of a valid remand order cannot be said to be wholly illegal. In such circumstances, a writ of habeas corpus is uncalled for.

12. Before parting with the case, this Court feels it proper to mention that excepting the decisions dealt in this judgment, all other decisions cited on behalf of the respective parties are distinguishable either in facts or in law and therefore those decisions have not been taken note of during discussion.

13. The writ petition is accordingly dismissed. LCR be sent back immediately.

Writ petition dismissed.

2016 (I) ILR – CUT-652

PRADIP MOHANTY, J. & BISWAJIT MOHANTY, J.

W.P.(C) NO. 4986 OF 2015

PRAJNA LALIT MISHRA .....Petitioner

.Vrs.

O.P.S.C., & ORS. .....Opp. Parties

SERVICE LAW – O.J.S. Examination 2014 to fill up 69 posts of Civil Judges – Petitioner was one of the applicants – She cleared preliminary written examination and appeared in the main written test –

In order to get a call for interview a candidate has to secure not less than 45% marks in aggregate and minimum of 33% marks in each paper – Petitioner, though did well but was not called to the interview – She obtained Xerox copies of answer scripts and found that in "Law of Property" paper, even if she answered three objective type questions under question No. 12(b) correctly she got only 6 marks instead of 9 marks as per the model answers and scheme of valuation – No reason to deprive her from getting full marks – Had she been awarded that 3 marks her total marks would come at 340, i.e., more than 45% in aggregate, entitling her to appear at the interview – Held, direction issued to O.P.No.1 to immediately evaluate the answers to question Nos. 12(b)(ii), 12(b)(iii) and 12(b)(iv) and allow the petitioner to appear at a special interview and if the petitioner comes out success, she should be given appropriate place in the final merit list of O.J.S. Examination 2014 and should be given appointment with full protection of her seniority amongst successful candidates of the 2014 examination as per the re-drawn merit list alongwith all financial and service benefits. (Para 7)

For Petitioner : M/s.Srinivas Mohanty, S.Rautray, S.Banerjee, K.Patra

For Opp.Parties : Mr. P.K.Mohanty, Senior Advocate, P.K.Nayak, D.N.Mohapatra, Smt. J.Mohanty, S.N.Dash, A.Das.Mr. B.P.Pradhan, AGA

Date of Judgment: 02.03.2016

JUDGMENT

BISWAJIT MOHANTY, J.

This is the unfortunate story of a young lady, who despite answering the objective type questions correctly has been deprived of getting full marks for her answers, as a result of which she has filed the present writ petition with a prayer for issuance writ/writs in the nature of Mandamus directing the OPSC (opp. party No.1) to evaluate answers to the Question No.12(b) of "Law of Property" paper properly and to further direct opp. parties to give consequential benefits of such evaluation.

2. The case of the petitioner is that she was a candidate for Odisha Judicial Service Examination, 2014 for filling up 69 posts of Civil Judges out of which 35 posts were earmarked for unreserved category candidates. She was assigned with Roll No.3503 by opp. party No.1. The said examination consisted of three stages, namely, Preliminary Written Examination, Main

Written Examination and Interview. She cleared the Preliminary Written Examination and appeared in the Main Written Examination. As per the advertisement of the opp. party No.1 under Annexure-1, in order to get a call for the last stage of recruitment process i.e. Interview test, a candidate has to secure not less than 45% marks in aggregate and minimum of 33% marks in each paper of the Main Written Examination. According to the petitioner, she did well in the Main Written Examination but when the result of Main Written Examination was declared vide Annexure-3 on 29.09.2014, her Roll number was missing from the list of 52 candidates, who were provisionally selected to appear in the interview to be held from 28.10.2014 to 31.10.2014. When the marks were published in the Website of OPSC, from that the petitioner could come to know that while she has secured more than 33% of marks in each paper, however she has not secured 45% marks in the aggregate. In the aggregate she has secured total 337 marks thus falling short by .5 marks to reach 45% and thus her name was not shown in the provisional list vide Annexure-3. It may be noted here that as per the advertisement under Annexure-1, a candidate has to appear in two compulsory papers of 150 marks each and three optional papers also of 150 marks each in the Main Written Examination. Thus, the total marks in the Main Written Examination comes to around 750 marks, 45% of the total marks comes to 337.5 marks. In such background, in order to know about the details, the petitioner applied for Xerox copies of all answer scripts. On perusal of the answer scripts supplied to her under Annexure-6, she could come to know that in the "Law of Property" paper, she has not been awarded full marks for answers given by her in response to objective type Question No.12(b). Question No.12(b) contained five objective type questions carrying full 15 marks. According to the petitioner though she had answered three questions under Question No.12(b) correctly but instead of getting 9 marks out of 15, she was awarded only 6 marks. Therefore according to her if the examiners were satisfied that she had answered some of the questions of Question No.12(b) of "Law of Property" paper correctly, the examiners should have awarded 3 full marks for each of her answers instead of awarding 2 marks. Accordingly, her case is that she should have been awarded full 3 marks each for giving correct answers to Question Nos.12(b)(ii), 12(b)(iii) and 12(b)(iv) and thus she should have been awarded 9 marks instead of 6 marks for above noted 3 answers. Once she gets 3 more marks, her total marks would stand at 340 and thus she would cross 45% of marks in aggregate and would qualify for the interview. Thus, in gist, the case of the petitioner is that though she has given correct answers to Question

Nos.12(b)(ii), 12(b)(iii) and 12(b)(iv) in the "Law of Property" paper instead of awarding full 9 marks, she has been given only 6 marks in an arbitrary manner which has resulted her disqualification for appearing at the interview. Challenging such arbitrary, unreasonable and irrational evaluation, she has filed the present writ with the prayers as indicated above.

3. Pursuant to notice opp. party No.1 has filed a counter defending the evaluation stating that the answer scripts were evaluated by the eminent Examiners, re-checked by the Chief Examiners and scrutinized by the Scrutinizers. Opp. party No.1 has further stated that Examiners who examined the answer scripts were in the rank of Professors/Readers/Associate Professors/Senior Lectures, in law. It further states that valuation of answer scripts were done on the basis of "Scheme of Valuation" prepared by concerned Chief Examiner and Examiners of relevant papers and valuation was made uniformly in respect of all the candidates. Therefore, the allegation made by the petitioner relating to erratic and arbitrary evaluation by opp. party No.1 is not correct. In such background, according to opp. party No.1 it has done no wrong or illegality in not calling the petitioner for appearing at the interview for recruitment to Odisha Judicial Service, 2014.

4. Heard Mr. Srinivas Mohanty, learned counsel for the petitioner, Mr. Pradipta Kumar Mohanty, learned Senior Advocate appearing for opp. party No.1 and Mr. B.P. Pradhan, the learned Addl. Government Advocate, Mr. Mohanty, learned counsel for the petitioner put stress on the fact that the Question No.12(b) of "Law of Property" paper dealt with objective type questions. Therefore, in case the answers given by the petitioner to Question Nos. 12(b)(ii), 12(b)(iii) and 12(b)(iv) were found to be correct, for each such answer, the petitioner should have been awarded full 3 marks instead of 2 marks. He further submitted that the averments made by the petitioner in the writ petition to the effect that the above noted questions were of objective type have not been disputed by opp. party No.1 in its counter. Further relying on the "Scheme of Valuation" relating to "Law of Property" paper as supplied to the petitioner by opp. party No.1 vide Letter No.498/PSC, dated 27.1.2016, he contended that a perusal of "Scheme of Valuation" itself revealed that the opp. party No.1 expected the answer to Question No.12(b) on "Law of Property" paper to be in 'Yes' or 'No'. This also reflected that Question No.12(b) of "Law of Property" paper dealt with objective type of questions. Relying on the "Scheme of Valuation" on "Law of Property" paper as supplied to the petitioner, Mr. Mohanty vehemently argued that so far as

Question Nos. 12(b)(ii), 12(b)(iii) and 12(b)(iv) were concerned, a perusal of answer scripts as supplied by OPSC under Annexure-6 would show that with regard to above noted 3 questions, the petitioner has given correct answers in tune with "Scheme of Valuation" on "Law of Property" paper. Therefore, he prayed that the petitioner should be given full 3 marks each for correctly answering the above noted 3 questions instead of 2 marks each. Thus, he submitted that petitioner was entitled to 9 marks for answering Question Nos.12(b)(ii), 12(b)(iii) and 12(b)(iv) correctly instead of 6 marks and once the petitioner would get 3 more marks, her total marks would come up from 337 to 340 entitling her to appear at the interview.

5. Per contra, Mr. Mohanty, learned Senior Counsel for the opp.party No.1 defended the evaluation of answer to Question Nos. 12(b)(ii), 12(b)(iii) and 12(b)(iv) saying that they have been properly evaluated by the Examiners, Chief Examiner etc.

6. In this case, a perusal of Question No.12(b) reflects that it deals with objective type questions. For ready reference, Question No.12(b) of "Law of Property" paper is extracted hereunder:

"(b) Whether the following illustrations are sufficient acknowledgement of liabilities: 15

(i) "I am ashamed that the account has stood so long."

(ii) "I admit the loan but I have since repaid the amount."

(iii) "The promissory note which I gave is unstamped. I will not pay it."

(iv) "I wish to look your accounts; in my own account I do not see any amount due to you. Please, therefore, send the account."

(v) "I cannot afford to pay my new debts much less the old debts I owe."

As per "Scheme of Valuation" of "Law of Property" paper as supplied by the opp. party No.1 to the petitioner, the following are the answers to various questions of Question No.12(b) of "Law of Property" paper as indicated above:

(i) - No
(ii) - Yes
(iii) - Yes
(iv) - No
(v) - No

The above also reflects that Question No.12(b) deals with objective type questions.

Now we quote hereunder the answers given by the petitioner to the above noted questions of Question No.12(b):

> "(i) Yes it amount to acknowledgement as the person has admitted his liability.
> (ii) Yes, this a sufficient acknowledgement of liability.
> (iii) Yes, it amounts to sufficient acknowledgement.
> (iv) No, there is no sufficient acknowledgement
> (v) Yes, it amounts to acknowledgement."

7. In such background, we have to assess the rival contentions of the petitioner and opp. party No.1. A perusal of the model answers as per "Scheme of Valuation" of "Law of Property" paper and the answers given by the petitioner as indicated above in the answer scripts shows that she has correctly answered Question Nos.12(b)(ii), 12(b)(iii) and 12(b)(iv) and since she has answered the above 3 questions correctly, there is no earthly reason for depriving her from getting full 3 marks for each such correct answer. It was not disputed by the learned Senior Counsel for the OPSC that full marks for each of the correct answer is 3. Thus if an examinee gives correct answer to the 5 questions contained in Question No.12(b), he or she is entitled to get full 15 marks assigned to such question as indicated in the question paper itself. Therefore, in our considered opinion there has not been proper marking of the answer scripts relating to Question No.12(b) of "Law of Property" paper in tune of "Scheme of Valuation" prepared by the Chief Examiner and Examiners notwithstanding the averment of opp. party No.1 in para-5 of its counter that valuation of answer scripts was done on the basis of "Scheme of Valuation" prepared by the concerned Chief Examiner and Examiners of relevant papers. In such background we direct the opp. party No.1 to immediately evaluate the answers to Question Nos.12(b)(ii), 12(b)(iii) and 12(b)(iv) in the light of observations made above and allow the petitioner to appear at a Special Interview. In case the petitioner comes out successful in the Interview, she should be given appropriate place in the final merit list of OJS Examination of 2014 and should be given appointment accordingly with full protection of her seniority amongst successful candidate of the said examination of 2014 as per the redrawn merit list along with all financial and service benefits. We understand from the bar that as on today a large number of vacancies are there in the post of Civil Judge. In fact out of 69 vacancies

advertised under Annexure-1, as per the affidavit dated 11.2.2016 filed by opposite party no.1 and affidavit dated 10.2.2016 filed by opposite party no.2, OPSC had recommended 52 candidates and they have already been appointed. Out of these 52 candidates, 12 candidates from U.R. category were recommended under Rule 17(3) of Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 on account of non-availability of reserved category candidates. Thus even in the recruitment to Odisha Judicial Service, 2014, 17 posts could not be filled in. We also understand from the bar that in the recruitment examination to Odisha Judicial Service, 2015, out of 69 number of advertised posts, only 21 have qualified for appointment. Thus till date large number vacancies exist. Accordingly, writ petition is allowed. No costs.

Writ petition allowed.

2016 (I) ILR –CUT-658

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

JCRLA NO. 59 OF 2008

RAGHUNATH BHANJ
@ MAHENDRA BHANJA …….. Appellant

.Vrs.

STATE OF ORISSA ……... Respondent

EVIDENCE ACT, 1872 – S.106

Last seen theory – Prosecution has discharged its initial burden in establishing that both the appellant and his wife (deceased) were sleeping in one room on the incident night – Next day morning deceased was found lying dead in a pool of blood – Appellant and a tangia having blood stains found in that room – Premeditated murder – Appellant is bound to explain as to how the death of the deceased was caused and if that remains unexplained by him, then there can be an inference of his guilt as per the provisions U/s. 106 of the Act.

(Para 11)

Case Laws Rreffered to :-

1. AIR 1984 SC 1622 : Sharad Birdhichand Sarda –v- State of Maharastr
2. AIR 1991 SC 1388 : Jaharlal Das v. State of Orissa.
3. (2013)1 SC(Criminal) 727 : Budhuram –v- State of Chhatisgar
4. (2014) 2 SC (Criminal) 413: Kanhaiya Lal –v- State of Rajastan
5. 1995 SC(Criminal) 445 : Prem Kumar and another –v- State of Bihar
6. 1993 SC (Criminal) 1096 : Surinder Pal Jain –v- Delhi Administration
7. (2002) 9 SC 626 : State of Bihar v. Laloo Prasad
8. AIR 1976 SC 202 : Bhagwan Singh v. State of Haryana
9. AIR 1977 SC 170 : Rabinder Kumar Dev v. State of Orissa
10. AIR 1979 SC 1848 : Sayed Akbar v. State of Karnataka
11. (2011) 11 SCC 111 : Rameshbhai Mohanbhai Koli and Ors. v. State of Gujarat
12. (1996) 10 SCC 360 : U.P. – v- Ramesh Prasad Misra
13. (2002) 7 SCC 543 : Balu Sonba Shinde v. State of Maharashtra
14. (2006) 13 SCC 51 : Gagan Kanojia v. State of Punjab
15. (2006) 2 SCC 45 : Radha Mohan Singh v. State of U.P.
16. (2007) 13 SCC 360 : Sarvesh Narain Shukla v. Daroga Singh
17. (2009) 6 SCC 462 : Subbu Singh v. State
18. (2012) 4 SCC 327 : In case of Bhajju alias Karan Singh v. State of Madhya Pradesh
20. 2000 SCC (Criminal) 26 : Rammi -v- State of M.P
21. AIR 2011 SC 3690 : Ajitsingh Harnamsingh Gujral -Vs.- State of Maharashtra
22. (2003) 7 SCC 37 : Babu S/o Raveendran -Vs.- Babu S/o Bahuleyan and Anr.
23. 2006 AIR SCW 5300 : Trimukh Maroti Kirkan –V- State of Maharashtra
24. 2006 AIR SCW 5768 : State of Rajasthan –V- Kashi Ram
25. AIR 2011 SC 627 : Surendera Mishra -Vs.- State of Jharkhand
26. JT 1994 (4) SC 1 : Sukhvinder Singh and Ors. –v- State of Punjab

For Appellant : Mr. B.K.Ragada
For Respondent : Mr. Sk. Zafarulla (A.S.C)

Date of hearing : 04. 01. 2015
Date of Judgment: 09.04. 2015

JUDGMENT

S.K.SAHOO, J.

The appellant faced trial in the Court of learned Sessions Judge, Puri in Sessions Trial No.250 of 2007 for offence punishable under section 302 Indian Penal Code for committing murder of his wife Sulochana Bhanja

(hereafter the "deceased") in the night on 26/27.2.2007 at village Brahamanabada under Delanga Police Station in the district of Puri. The learned trial Court vide impugned judgment and order dated 27.6.2008 held the appellant guilty under section 302 IPC and accordingly convicted him of such offence and sentenced him to undergo imprisonment for life and to pay a fine of Rs.1000/-, in default, to undergo R.I. for six months more.

2. The prosecution case, as per the FIR lodged by Deba Bhoi (P.W.6) on 27.2.2007 before Officer-in-charge of Delanga Police Station is that the deceased was his cousin sister and she had been to attend the obsequies of her grandmother to her paternal place and stayed there for about 20 days and returned to her matrimonial house on 26.2.2007 at about 7 p.m. with P.W.6. The deceased prepared food for her in-laws and everybody including the appellant and his father Sikhar Bhanj (P.W.1) took their dinner. The father-in-law and mother-in-law of the deceased slept in one room, P.W.6 and younger brother of the appellant namely Jagannath slept in another room and the appellant and the deceased slept in the 3rd room. During the night, P.W. 6 heard some quarrel between the appellant and the deceased. The younger brother of the appellant Jagannath started crying for which P.W.6 took him and left him near his parents and again came back to sleep. In the early morning at about 6 O' Clock P.W.6 called the deceased but she did not wake up. The appellant was standing outside the house. When the parents of the appellant asked him about the deceased, the appellant told that there was disturbance between him and the deceased last night for which he had killed the deceased. Lighting a lamp, all of them saw that the deceased was lying dead with bleeding injuries. P.W.6 immediately rushed to his sister's house and intimated about the incident and thereafter came to Delanga Police Station to lodge the FIR.

P.W.13 Kunjabihari Patnaik was the Officer-in-Charge of Delanga Police Station. On 27.2.2007 P.W.6 appeared before him in the police station and orally reported the matter which was reduced to writing by P.W.13 and treated as FIR and accordingly Delanga P.S. Case No. 22 dated 27.2.2007 was registered under section 302 IPC. P.W.13 himself took up investigation of the case. During course of investigation, he prepared the spot map (Ext.11/3). The dead body was found lying in the room of appellant with bleeding injuries and accordingly the I.O. held inquest over the dead body vide Ext.1. The Scientific team collected blood stained earth, sample earth from the spot which were seized by the I.O. under seizure list Ext.3/1. The appellant was arrested and the dead body was sent for post mortem

examination. On 28.2.2007 the I.O. seized the wearing apparels of the deceased being produced by the Constable under seizure list Ext.10. He also seized the weapon of offence i.e., Tangia (M.O.V) pursuant to the disclosure statement made by the appellant while in custody. The weapon of offence was sent by the I.O. to the doctor for his opinion with regard to the possibility of the injuries by the said weapon. The wearing apparels, blood stained earth, sample earth and the weapon of offence were sent to SFSL, Bhubaneswar for chemical examination through JMFC, Pipili on 7.6.2007. After completion of investigation, charge sheet was submitted.

3. The defence plea is one of denial.

4. In order to prove its case, the prosecution examined 14 witnesses.

P.W.1 Sikhar Bhanj is the father of the appellant and he stated about the extra judicial confession made by the appellant before him.

P.W.2 Govinda Chandra Mohanty is a co-villager of the appellant and he also stated about the extra judicial confession of the appellant. He is a witness to the inquest.

P.W.3 Santosh Mohapatra stated about the extra judicial confession of the appellant and he is also another witness to the inquest over the dead body.

P.W.4 Baikuntha Mohapatra has stated about the extra judicial confession of the appellant and he is also a witness to the inquest report.

P.W.5 Purna Chandra Mohapatra is a co-villager of the appellant and he did not support the prosecution case for which he was declared hostile.

P.W.6 Deba Bhoi is the cousin brother of the deceased and he stated about the appellant and the deceased sleeping in one room in the night of occurrence, detection of the dead body on the next day morning in a pool of blood with deep injury on her throat in her bed room and also a Tangia having blood stains in that room. He is the informant in the case.

P.W.7 Bhajaman Bhoi is the father of the deceased who also stated about the extra judicial confession of the appellant and recovery of a Tangia from the bed room of the appellant at the instance of the appellant. He is also a witness to the seizure

P.W.8 Abanikanta Pattnaik was the Executive Magistrate, Delanga who was present at the time of inquest over the dead body.

P.W.9 Abhiram Mohapatra was the Asst. Surgeon attached to District Headquarters Hospital, Puri who conducted post mortem examination over the dead body and submitted his report vide Ext.6. He also gave his opinion regarding the query made by the I.O. about the possibility of the injury on the person of the deceased by the weapon of offence.

P.W.10 Prakash Chandra Mallick was the Constable attached to Delang Police Station who carried the dead body for post mortem examination and after post mortem examination produced the wearing apparels of the deceased before the investigating officer which was seized under seizure list Ext.10.

P.W.11 Banambar Behera is related to the deceased being married to her sister and he stated about the intimation received from P.W.6 regarding the murder of the deceased by the appellant

P.W.12 Jyostna Behera is the sister of the deceased and she stated about the intimation received from P.W.6 regarding the murder of the deceased by the appellant.

P.W.13 Kunjabihari Patnaik is the Investigating Officer.

P.W.14 Achyutananda Baliarsingh was the Scientific Officer, DFSL, Puri who visited the spot on 27.7.2007 and collected blood stained earth, sample earth, Tangia from the bed room of the deceased.

No witness was examined on behalf of the defence.

The prosecution exhibited thirteen documents and also marked five material objects. Ext.1 is the inquest report, Ext.2 is the signature of P.W.5 on a piece of paper (statement under section 27 Evidence Act), Ext.3 is the signature of P.W.5 on a piece of paper (seizure list of blood stained earth), Ext. 4 is the signature of P.W.5 on a piece of paper (seizure list of Tangi), Ext.5 is the written FIR, Ext.6 is the post mortem examination report, Ext.7 is the opinion of the doctor on the police query, Ext.8 is the command certificate, Ext.9 is the dead body challan, Ext.10 is the seizure list of wearing apparels of the deceased, Ext.11 is the crime detailed form, Ext.11/3 is the spot map, Ext.12 is the disclosure statement of the appellant and Ext.13 is the carbon copy of the forwarding letter sending exhibits for chemical examination.

The defence has exhibited the Xerox copy of spot visit report as Ext.A.

5. Now it is to be seen how far the prosecution has established that the death of the deceased Sulochana Bhanj was homicidal in nature.

In order to establish such aspect, apart from the inquest report (Ext.1), the prosecution examined the doctor (P.W.9) who conducted autopsy over the dead body on 27.2.2007 as Asst. Surgeon attached to District Headquarters Hospital, Puri and he found a chopped wound of 2" in length, 1" in breadth and 1" deep situated anteriorly on the right side of neck which was extending laterally from the sternal end of right clavicle involving underline muscles and vessels like right external jugular vein and common carotid artery. He opined the cause of death on account of shock and haemorrhage due to injury to the right external jugular vein and common carotid artery. The post mortem report has been marked as Ext.6.

The learned counsel for the appellant did not challenge the evidence of P.W.9 and the findings of the post mortem report (Ext.6). After perusing the evidence on record, the post mortem report (Ext.6) and the statement of P.W.9 Dr. Abhiram Mohapatra, we are also of the view that the prosecution has proved the death of the deceased to be homicidal in nature.

6. In the present case, there is no direct evidence regarding the commission of murder of the deceased and the case is based on circumstantial evidence. The circumstances against the appellant are as follows:-

(i) Extra judicial confession of the appellant before P.Ws.1, 2, 3, 4 and 7;

(ii) Last seen of the deceased in the company of the appellant in the night of occurrence when they went to sleep in their bed room;

(iii) Recovery of the dead body of the deceased from her bed room with deep cut injury on the throat in the morning and the presence of appellant in that room;

(iv) Recovery of the Tangia (M.O.V) pursuant to the disclosure statement of the appellant before police from his bed room.

7. It is the settled law that when a case rests upon circumstantial evidence, it is the duty of the Court to see that each of the circumstances should be fully established by the prosecution and such circumstance cannot be explained under any other hypothesis and the circumstances taken together must form a chain so complete that there is no escape from the conclusion that it is the accused and accused alone and none else who has committed the crime.

In the case of **Sharad Birdhichand Sarda –v- State of Maharastra reported in AIR 1984 SC 1622** their Lordships have laid down five golden principles so as to constitute "Panchasheel" in the proof of a case based on circumstantial evidence which are as follows:-

> "1. the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> 2. the facts so established should be consistent only with the hypothesis of the guilt of the accused that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> 3. the circumstances should be of a conclusive nature and tendency.
>
> 4. they should exclude every possible hypothesis except the one to be proved, and
>
> 5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

In the case of **Jaharlal Das v. State of Orissa reported in AIR 1991 SC 1388**, it is held that the Court as to bear in mind:-

> "9……A caution that in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused."

In case of **Budhuram –v- State of Chhatisgarh reported in (2013)1 Supreme Court Cases (Criminal) 727** it is held as follows:-

> "12.The law relating to proof of a criminal charge by means of circumstantial evidence would hardly require any reiteration, save and except that the incriminating circumstances against the accused, on being proved, must be capable of pointing to only one direction and to no other, namely, that it is the accused and nobody else who had committed the crime. If the proved circumstances are capable of

admitting any other conclusion inconsistent with the guilt of the accused, the accused must have the benefit of the same."

In case of **Kanhaiya Lal –v- State of Rajastan reported in (2014) 2 Supreme Court Cases (Criminal) 413,** it is held as follows:-

"8…….Where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances."

Absence of motive

8. The learned counsel for the appellant submitted that since it is a case based on circumstantial evidence and the prosecution has failed to establish any motive behind the commission of crime, the prosecution case should be disbelieved.

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".

As it appears, absolutely no motive has been established by the prosecution against the appellant for commission of crime. Even though the father, sister, brother-in-law and cousin brother of the deceased have been examined but they have not whispered anything about the previous conduct of the appellant or any hitch between the husband and wife so as to constitute any motive.

The absence of motive in a case which depends on circumstantial evidence is more favourable to the defence as it often forms the fulcrum of the prosecution story and such absence would put the Court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omission and conjecture do not take the place of proof. But to say that the absence of motive would dislodge the entire prosecution story is like giving undue weight to such aspect as motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy.

First circumstance

9. Coming to the extra judicial confession of the appellant before P.Ws.1, 2, 3, 4 and 7, it is found that not only in the FIR lodged by P.W.6 but also during trial all these witnesses have stated about such confession made by the appellant.

P.W.1 is none else than the father of the appellant and he has stated that when the deceased did not wake up in the morning, his wife Nayana (appellant's mother) asked the appellant as to why there was late in rising of the deceased from bed. The appellant disclosed that he had a hitch with the deceased in the last night and he had killed her with an axe.

The learned Counsel for the appellant Mr. Ragada contended that when Nayana has not been examined and in the cross examination, P.W.1 has stated that the appellant never confessed before them to have killed the deceased with an axe and further stated that he has no knowledge about the death of the deceased, no importance to be attached to the statement made in chief examination.

It is seen that P.W.1 has given a complete somersault to his evidence in chief regarding extrajudicial confession of the appellant in the cross examination. The prosecution has not taken any steps before the trial Court to declare this witness hostile and for grant of permission to cross examine him.

In **State of Bihar v. Laloo Prasad reported in (2002) 9 Supreme Court Cases 626**, it is observed that though it is open to the party who called the witness to seek the permission of the Court as envisaged in Section 154 of the Evidence Act at any stage of the examination, nonetheless a discretion has been vested with the Court whether to grant the permission or not. It is further observed that normally when the Public Prosecutor request for the permission to put cross-questions to a witness called by him, the Court used to grant it. It is further observed that if the witness stuck to his version he was expected to say by the party who called the witness in the examination-in-chief, but he showed propensity to favour the adversary party only in cross-examination, in such case the party who called him has a legitimate right to put cross-questions to the witness.

When a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it.

Hon'ble Supreme Court in case of **Bhagwan Singh v. State of Haryana reported in AIR 1976 SC 202**; **Rabinder Kumar Dev v. State of Orissa reported in AIR 1977 SC 170**; **Sayed Akbar v. State of Karnataka reported in AIR 1979 SC 1848** and **Rameshbhai Mohanbhai Koli and Ors. v. State of Gujarat (2011) 11 SCC 111** held that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof. In State **of U.P. – v- Ramesh Prasad Misra reported in (1996) 10 SCC 360**, the Hon'ble Supreme Court held that

evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. A similar view has been reiterated by the Hon'ble Supreme Court in **Balu Sonba Shinde v. State of Maharashtra (2002) 7 SCC 543, Gagan Kanojia v. State of Punjab (2006) 13 SCC 516, Radha Mohan Singh v. State of U.P. (2006) 2 SCC 450, Sarvesh Narain Shukla v. Daroga Singh (2007) 13 SCC 360 and Subbu Singh v. State (2009) 6 SCC 462**.

In case of **Bhajju alias Karan Singh v. State of Madhya Pradesh (2012) 4 SCC 327**, in the context of consideration of the version of a hostile witness, Hon'ble Supreme Court has expressed thus:

> "Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 of Code of Criminal Procedure, the prosecutor, with the permission of the Court, can pray to the Court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the Court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution".

No doubt P.W.1 being father of the appellant thought it proper to support the prosecution case during chief examination but he was clever enough to give a complete different version in the cross-examination and supported the defence case. In the chief examination, he stated that appellant disclosed that he had a hitch with his wife (deceased) in the night and therefore he had killed her with axe but in the cross- examination, he stated that the appellant never confessed before them to have killed his wife with an axe in the night as he had a hitch with his wife. It appears that in order to save his son, P.W.1 has changed his version. The Public Prosecutor has not taken effective steps in such situation which is permissible in law in putting cross-questions after seeking permission from the Court.

In case of **Rammi –v- State of M.P. reported in 2000 Supreme Court Cases (Criminal) 26**, Hon'ble Supreme Court held as follows:-

> "19. A Public Prosecutor who is attentive during cross examination cannot but be sensitive to discern which answer in cross-examination requires explanation. An efficient Public Prosecutor would gather up such answers failing from the mouth of a witness during cross-examination and formulate necessary questions to be put in re-examination. There is no warrant that re-examination should be limited to one or two questions. If the exigency requires any number of questions can be asked in re-examination."

Even if we discard the evidence of P.W.1 relating to extra judicial confession because of his contradictory versions in the chief examination vis-à-vis cross examination, from his evidence it is clearly borne out that P.W.6 had come to leave the deceased in the house of the appellant and on that night P.W.6 also stayed there.

So far as the extra judicial confession before P.W.2, P.W.3 and P.W.4 and P.W.7 is concerned, it appears that such confession was made while the appellant was in the custody of police. Section 25 of Evidence Act prohibits for proving any confession made by an accused to a police officer against such accused. Section 26 of the Evidence Act provides that no confession made by any person whilst in the custody of a police officer shall be proved as against him unless it is made in the immediate present of a Magistrate. Section 25 contemplates a confession to police officer, but the section does not exclude all statements made in the presence of a police officer unless it comes within the meaning of section 26 of the Evidence Act. In the present case when the extra judicial confession is stated to have been made before P.Ws.2, 3, 4 and 7 while the appellant was in police custody, we are unable to place any reliance on it.

Though P.W.6 has mentioned about the extrajudicial confession in the FIR but in Court he has not stated anything on that aspect. 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. Even though P.W.6 has mentioned regarding extrajudicial confession in FIR but in absence of any such statement in Court by him during trial, we are unable to place any reliance on it.

The learned trial court has also not placed any reliance on such evidence. Thus the prosecution has failed to prove the first circumstance against the appellant beyond all reasonable doubt.

Second Circumstance

10. The second circumstance relied upon by the prosecution is the last seen of the deceased in the company of the appellant in the night when they went to sleep in their bed room.

P.W.6 has categorically stated that the appellant and the deceased slept in one room in the night of occurrence. P.W.6 has further stated that in that room where his sister (deceased) and brother-in-law (appellant) had slept on the fateful night, no other person was there in that room or had slept in that room. P.W.1, the father of the appellant has stated about the presence of P.W.6 in the night of occurrence in their house. It is also very natural for the husband and wife to sleep together in their bed room. The other family members of the appellant including P.W.6 were sleeping in different rooms as stated by P.W.6. Nothing has been elicited in the cross-examination of P.W.6 to discredit his version. Thus the prosecution has established that the deceased was last seen in the company of the appellant in the night of occurrence in their bed room.

Third Circumstance

11. The third circumstance relied upon by the prosecution is the recovery of the dead body of the deceased from her bed room with deep cut injury on the throat in the morning and the presence of appellant in that room.

P.W.1 has stated that he proceeded to the bed room of the deceased along with his wife and found the deceased lying dead. P.W.6 has also stated that he proceeded to the bed room of the deceased on the next day morning and found her lying dead in a pool of blood and there was deep injury on her throat. He has also stated about the presence of the appellant in that room. P.W.11 has also stated to have seen the deceased lying dead in the house of the appellant with a cut injury on her neck. The I.O. (P.W.13) has also stated that the dead body of the deceased was lying in a room of the house of the appellant with deep cut injury on the neck and there was profuse bleeding from the said injury and the deceased was lying in a pool of blood. The inquest report Ext.1 also indicates that the dead body was lying in the house of the appellant with bleeding injury. Nothing has been brought out in the cross-examination to disbelieve such circumstance.

The appellant has been specifically asked about the circumstances nos.2 and 3 in the accused statement but he has simply denied the same. In view of such evidence, we are of the view that the prosecution has also proved that the dead body of the deceased was recovered from her bed room with deep cut injuries on her throat in the morning and the appellant was present in that room.

Section 106 of the Evidence Act states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. When the husband (appellant) and wife (deceased) were sleeping together in their bed room in the night and the deceased was found dead with cut injuries on the neck in the morning, it is the appellant who is to explain as to under what circumstances the deceased died.

In case of **Ajitsingh Harnamsingh Gujral -Vs.- State of Maharashtra AIR 2011 SC 3690**, it is held as follows:-

> "29. The evidences of PW.3, PW 4 and PW 5, which we see no reason to disbelieve, thus fully establish that the Appellant was last seen with his wife at about midnight and was in fact quarrelling with her at that time.
>
> 30. The incident happened at 4 or 4.30 a.m. and hence there was a time gap of only about 4 hours from the time when the Appellant was seen with his wife (deceased) and the time of the incident. Thus he was last seen with his wife and there was only a short interval between this and the fire.
>
> 31. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible, vide **Mohd. Azad alias Samin v. State of West Bengal 2008 (15) SCC 449 and State through Central Bureau of Investigation v. Mahender Singh Dahiya 2011 (3) SCC 109, Sk. Yusuf v. State of West Bengal JT 2011 (6) SC 640 .**
>
> 32. In our opinion, since the accused was last seen with his wife and the fire broke out about 4 hours thereafter it was for him to properly explain how this incident happened, which he has not done. Hence this is one of the strong links in the chain connecting the accused with the crime.

33. The victims died in the house of the accused, and he was there according to the testimony of the above witnesses. The incident took place at a time when there was no outsider or stranger who would have ordinarily entered the house of the accused without resistance and moreover it was most natural for the accused to be present in his own house during the night".

In case of Babu S/o Raveendran -Vs.- Babu S/o Bahuleyan and Anr. reported in (2003) 7 SCC 37, it is held that

"14. The second important circumstantial evidence against the accused is that the accused and the deceased were last seen together. To put it tersely, both of them slept together by retiring to the room that night. Last seen together in legal parlance ordinarily refers to the last seen together in the street, at a public place, or at any place frequented by the public. But here, the last seen together is much more than that. The last seen together here is sleeping together inside the bolted room. It is in the evidence of PW-3 and PW-6 that they had dined together and the accused and the deceased were closeted in a room at about 8.30 p.m. Therefore, on the fateful day the accused and the deceased were closeted in a bedroom at about 8.30 p.m. is undisputed and it is for the accused alone to explain as to what happened and how his wife died and that too on account of strangulation.

xx xx xx xx

18. Now the question which remains to be considered is, who is responsible. As already noticed, the accused and the deceased were closeted inside the room. There is no evidence of an intruder. In such a situation, the circumstances leading to the death of the deceased are shifted to the accused. It is he who knows in what manner and in what circumstances the deceased has met her end and as to how the body with strangulation marks found its way into the nearby well. All the aforesaid circumstances, taken together cumulatively lead and unerringly point only to the guilt of the accused".

In **Trimukh Maroti Kirkan –V- State of Maharashtra reported in 2006 AIR SCW 5300**, the Apex Court held that:

"12. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to

plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties……Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of S. 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation".

In case of **State of Rajasthan –V- Kashi Ram reported in 2006 AIR SCW 5768**, the Apex Court held that:

"19…..whether an inference ought to be drawn under Section 106 Evidence Act is a question which must be determined by reference to facts proved. It is ultimately a matter of appreciation of evidence and, therefore, each case must rest on its own facts".

The Court further held that:

"23.....The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails

> to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain".

It appears that as per the evidence of P.W.6, who was sleeping in the same house in a room where the appellant and his wife (deceased) were sleeping in another room and there was none other in the said room except appellant and the deceased only and on the next morning the deceased was found lying dead in a pool of blood with deep injury on her throat and the appellant was found in that room and a tangia having blood stains was also found in that room. It was within the especial knowledge of the appellant and therefore it was incumbent upon him to explain as to how the death of deceased was caused by sustaining chopped wound on the neck and if that remains unexplained by him, then there can be an inference of his guilt as per the provisions of Section 106 of the Indian Evidence Act. Though the appellant is not under any obligation to disprove the prosecution case, yet when the prosecution has proved that death of the wife in a closed room with husband only has been caused in some unnatural way, then the husband is bound to explain such death and if not explained properly then an inference may be made regarding his guilt as per the provisions of 106 of the Indian Evidence Act. The prosecution has discharged its initial burden in establishing that both of the appellant and the deceased were sleeping together in their bed room in the night and the deceased was found dead in the morning with cut injuries on the neck. The appellant has failed to discharge his burden in terms of section 106 of the Evidence Act. This circumstance is very clinching and points to the guilt of the appellant.

Fourth Circumstance

12. The fourth circumstance relied upon by the prosecution is the recovery of the Tangia (M.O.V) pursuant to the disclosure statement of the appellant before police from his bed room.

P.W.13, the I.O. has stated that the appellant in custody gave a statement that he had kept concealed a Tangia in the north-east corner of his

house and disclosed that he would give recovery of the same and accordingly his statement was recorded vide Ext.12 and thereafter the appellant indicated the place where he had concealed the Tangia (M.O.V) and the same was recovered and seized in presence of witnesses and seizure list Ext.4 was prepared. P.W.7 has also stated about such aspect.

P.W.6 on the other hand has stated that in the morning when he found the deceased lying dead in a pool of blood, the appellant was there in that room and a Tangia having blood stains was also found in that room. Thus prior to the lodging of the FIR by P.W.6, the Tangia was lying in an open condition in the room and therefore it appears that the I.O. has staged managed the leading to discovery theory of Tangia to create one more circumstance against the appellant.

In case of **Sukhvinder Singh and Ors. –v- State of Punjab reported in JT 1994 (4) SC 1,** it is held as follows:-

> "17…..Section 27 of the Evidence Act is an exception to the eneral rule that a statement made before the police is not admissible in evidence is not in doubt. However, vide Section 27 of the Evidence Act, only so much of the statement of an accused is admissible in evidence as distinctly leads to the discovery of a fact. Therefore, once the fact has been discovered, Section 27 of the Evidence Act cannot again be made use of to 're-discover' the discovered fact. It would be a total misuse even abuse of the provisions of Section 27 of the Evidence Act".

In view of the evidence available on record to show that the Tangia was lying openly in the room where the dead body was lying which has also been stated by the Scientific Officer (P.W.14) and the Tangia was not found to have contained any blood on chemical examination, we are unable to attach any importance to the circumstance of leading to recovery of the same on the disclosure statement of the appellant.

13. The learned counsel for the appellant submitted that the accused was mad and therefore in view Section 84 of Indian Penal Code, he is liable to be exonerated of the offence.

P.W. 2 has stated that the appellant had mental problem for which he was treated in hospital by his father. P.W. 1 who is the father of the appellant has not whispered anything about this aspect. No other witness has also stated about the same. No medical document has been proved by the defence.

In case of **Surendera Mishra -Vs.- State of Jharkhand reported in AIR 2011 SC 627,** it is held as follows:-

> ”6.....In view of the plea raised it is desirable to consider the meaning of the expression "unsoundness of mind" in the context of Section 84 of the Indian Penal Code and for its appreciation, we deem it expedient to reproduce the same. It reads as follows:
>
> “84. Act of a person of unsound mind.-- Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law”.
>
> Section 84 of the Indian Penal Code is found in its Chapter IV, which deals with general exceptions.
>
> 7. From a plain reading of the aforesaid provision, it is evident that an act will not be an offence, if done by a person who, at the time of doing the same by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law. But what is unsoundness of mind? This Court had the occasion to consider this question in the case of **Bapu alias Gujraj Singh v. State of Rajasthan reported in (2007) 8 SCC 66**, in which it has been held as follows:
>
> “The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts in the past, or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section”.
>
> 8. The scope and ambit of the Section 84 of the Indian Penal Code also came up for consideration before this Court in the case of **Hari Singh Gond v. State of Madhya Pradesh reported in AIR 2009 SC 31** in which it has been held as follows:

> "Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of `unsoundness of mind' in IPC. The courts have, however, mainly treated this expression as equivalent to insanity. But the term `insanity' itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A court is concerned with legal insanity and not with medical insanity".
>
> 9. In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Indian Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Indian Penal Code and it has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application of Section 84 of the Indian Penal Code".

When a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Sec.84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime.

We, therefore, do not see any indication of insanity from the materials found in the room; on the other hand they support the case of premeditated murder. It has not been established that the appellant was insane; nor is the evidence sufficient even to throw a reasonable doubt in

our mind that the act might have been committed when he was in a fit of insanity. Though the appellant has deliberately feigned ignorance and incredibly denied his complicity, the overwhelming persuasive circumstances attending the case and the crucial inculpatory evidence bear chilling testimony unmistakably proving the gruesome offence of murder and its diabolical execution and unerringly establishing the guilt of the appellant beyond all reasonable doubts.

For all the reasons stated above, we, unhesitatingly hold that the conclusion arrived at by the trial Court is logical, tenable, and reasonably sustainable. We, therefore, though for different reasons, agree with the conclusion arrived at by the trial Court and dismiss the appeal.

Appeal dismissed.

2016 (I) ILR –CUT-678

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

SUO MOTU CONTR. 1 OF 2015

STATE OF ORISSA ……..Petitioner

.Vrs.

SUDHA SINGH, S.P., JAGATSINGHPUR & ANR. ……..Respondents

(A) CONTEMPT OF COURTS ACT, 1971 – Ss. 2(c), 12

Interference of Police Officer in discharge of judicial functions of the Magistrate – Suo motu contempt initiated – Alleged contemnors-respondents have expressed remorse and regret and have tendered unconditional apology – The repentance on the part of the alleged contemnors appears to be genuine – This Court, while accepting the same, directed both the respondents to appear before the learned District Judge and C.J.M., Jagatsinghpur and additionally asked respondents No. 1 to appear before the J.M.F.C (P), Kujanga in person in their respective Courts during Court hours and tender unconditional apology in open Court – Held, present contempt proceeding is dropped. (Para 6)

(B) CONTEMPT OF COURTS ACT, 1971 – S.2(c)

Criminal Contempt – It is a matter entirely between the Court and the alleged contemnor – The Court in its discretion accept an

unconditional apology from the alleged contemnor and drop the proceeding for contempt or even after the alleged contemnor is found guilty it may decline to punish him – However, the apology tendered by the alleged contemnor should impress the Court to be genuine and sincere – In case the apology is hollow and there is no real remorse or regret and it was made only to escape from the rigour of the law, the Court may not accept it – Moreover an apology is to be offered at the earliest opportunity but not at the time when the contemnor finds that the Court is going to impose punishment – So before the apology is accepted, the Court must be satisfied that it is bonafide.

(Para 5)

Case Laws Referred to :-

1. AIR 1974 SC 2255 : Baradakanta Mishra -V- Justice Gatikrushna Mishra
2. (2001) 7 SCC 650 : Pravin C. Shah -V- K.A. Mohd. Ali
3. AIR 1955 SC 19 : M.Y. Shareff -V- Hon'ble Judges Nagpur
4. (1991) 3 SCC 600 : M.B.Sanghi -V- High Court of Punjab & Haryana
5. (1972) 3 SCC 839 : Mulk Raj -V- State of Punjab
6. (2010) 11 SCC 493 : Ranveer Yadav -V- State of Bihar

For Petitioner : Mr. Janmejaya Katikia, Addl. Govt. Adv.

For Respondents : M/s.Jayant Das, Senior Advocate,
Satyabrata Pradhan, Manoranjan Padhi,
A.K.Dash, G.N.Sahoo, P.Sahoo
& Pinaki Dutta.
M/s. Ramani Kanta Pattanaik, Sabyasachi Jena,
Bikash Ch. Parija, Rashmi Ranjan Rout.

Date of hearing :13.01.2016
Date of Judgment :21.01.2016

JUDGMENT

S. K. SAHOO, J.

This suo motu contempt proceeding was initiated on 3.2.2015 after perusal of the reports dated 20.01.2015 and 01.02.2015 of the learned District Judge, Jagatsinghpur, addressed to the Registry of this Court. This Court after perusing those reports was of the view that it was a fit case to take suo motu cognizance of criminal contempt of Court, as contemplated under the Contempt of Courts Act, 1971 (hereafter 'the 1971 Act') against Ms. Sudha Singh, Superintendent of Police Jagatsinghpur and Smt. Sabita Majhi, S.I. of Police, Paradip Police Station.

Notices were issued to both the alleged contemnors as prescribed under the 1971 Act and relevant provisions of Chapter-XVII of the Rules of the High Court of Orissa, 1948, framed under section 23 of the 1971 Act, to show cause as to why a proceeding under the said Act would not be initiated against them and further orders as would be deemed appropriate would not be passed.

2. The first report dated 20.01.2015 submitted by the learned District Judge, Jagatsinghpur relates to interference of respondent no.1 Ms. Sudha Singh, Superintendent of Police, Jagatsinghpur in the judicial work of the learned J.M.F.C. (P), Kujanga. It is stated in the report that on 14.1.2015 the learned Magistrate reported him by way of a confidential letter that a phone call was received from S.P., Jagatsinghpur bearing number 9439440000 by the learned Magistrate. The caller asked the learned Magistrate as to why he was sending Complaint Petition under section 156(3) of Cr.P.C. and why he was enquiring about ill treatment during police custody. The caller asked the learned Magistrate to stop it or else she would report against him. The caller also threatened him for showing highhandedness by enquiring about the ill treatment on the accused in G.R. Case No.42 of 2015 arising out of Paradip P.S. Case No.9 of 2015 for the offences under sections 399/402 of Indian Penal Code read with section 25/27 of the Arms Act.

On enquiry by the learned District Judge, it was found that four accused persons were forwarded on 13.01.2015 in the said G.R. Case No.42 of 2015 and it was found that there was no indication of place of arrest and ground of arrest in the arrest-cum-inspection memo by the I.O. and the names and signatures of the witnesses thereon have not been mentioned which is a clear violation of the direction of the Hon'ble Apex Court passed in D.K. Basu's case and the requirement of Section 41-B(b) and (c) read with section 50-A of the Cr.P.C. The accused persons were not also examined by the Medical Officer belonging to State/Central Government service, while being forwarded to the Court, as required under section 54 of Cr.P.C. The Case Diary was also not transmitted to the Magistrate violating Section 167 (1) of the Cr.P.C. and therefore the J.M.F.C. (P) Kujanga had called for an explanation from the concerned Investigating Officer.

According to the learned District Judge, the call made by the S.P., Jagatsinghpur to the JMFC (P), Kujanga is an attempt to interfere in discharge of judicial functions of the Magistrate which is highly contemptuous. It was also indicated that during meeting of the Senior

Officers in the Judgeship of Jagatsinghpur for the months of November & December, 2014, the S.P., Jagatsinghpur had left the meeting hall with a word not to attend such meeting henceforth.

3. The second report of the learned District Judge indicates that the respondent no.2 Smt. Sabita Majhi, S.I. of Police, Paradip Police Station (S.J.P.U.) produced a Juvenile in conflict with law before the Chief Judicial Magistrate-cum-Principal Magistrate, Juvenile Justice Board, Jagatsinghpur in Juvenile Case No.40 of 2015 on 01.02.2015 and during the proceeding, the respondent no.2 threatened the C.J.M. to lodge FIR against him for misbehavior when she was asked to discharge her duty as she refused to identify the signature of the J.C.L. on the bail bond and to release the J.C.L. from custody and put her signature on the order sheet. From the second report, it is further revealed that respondent no.1 Smt. Sudha Singh rang up the learned District Judge in his mobile from her mobile phone and told that J.C.L. was arrested with much difficulties but how could he be released on bail by the C.J.M. The learned District Judge told her that it was a judicial order which can only be assailed in a proper Court and cannot be the subject matter of discussion. The respondent no.1 also informed that the respondent no.2 would also lodge an FIR against the Chief Judicial Magistrate.

4. On notices being issued to both the alleged Contemnors, they appeared and filed their individual show causes.

In the show cause dated 19.02.2015, respondent no.1 Ms. Sudha Singh stated, inter alia, as follows:-

> "17. The deponent has never acted in any manner, so as to cause a Criminal Contempt of Court in terms of the Contempt of Courts Act, 1971. The deponent has always sincerely endeavoured to the best of her efforts to ensure better coordination and harmony in discharge of her duties under law in the context of administration of justice and maintenance of majesty of law.
>
> 18. In view of the above, the *deponent most humbly reiterates and submits unconditional apology to this Hon'ble Court and assures and further undertakes that all and sincere efforts will be made to ensure further smooth functioning and immediate implementation of the orders/directions of this Hon'ble Court*.
>
> 19. The deponent further most humbly submits her *unconditional apology to the Hon'ble District, Judge, Jagatsinghpur, the Hon'ble Chief Judicial*

Magistrate and the Hon'ble Judicial Magistrate First Class (P), Kujang for any perceived misunderstanding which was never intentional nor could have ever been perceived by the deponent and further undertakes that all and sincere efforts will be made to ensure further smooth functioning and immediate implementation of the orders/direction of the respective Hon'ble Courts.

20. The deponent further submits that the sequence of the *events/incidents are most unfortunate and craves the indulgence of this Hon'ble Court and reiterates her unconditional apology and most humbly submits that she shall uphold the Majesty of Justice and the Constitution of India, as she has always done, especially being duty bound having taken the solemn oath while joining the Indian Police Service in the year 2007*.

21. The deponent further most humbly reiterates and prays that this *Hon'ble Court be pleased to most graciously accept her unconditional apology tendered and the above proceedings be dropped and closed*."

In the show cause dated 19.02.2015, respondent no.2 Smt. Sabita Majhi stated, inter alia, as follows:-

"12. That I humbly submit that neither I had any intention to disobey the direction of Hon'ble C.J.M. -cum- Principal Magistrate, Juvenile Justice Board, Jagatsinghpur nor I had threatened the Hon'ble Principal Magistrate to lodge F.I.R. On the other hand I had discharged my lawful duties by putting my signatures in the margin of the order sheet and did not disobey the order of the Hon'ble Principal Magistrate and if my submission before the Hon'ble Principal Magistrate has ever created any disobedience of Hon'ble Principal Magistrate, *I beg unconditional apology for such of my behavior. I further pray your Lordships may be pleased to drop the contempt proceeding initiated against me*."

Respondent no.1 Ms. Sudha Singh by way of an additional affidavit dated 19.03.2015 has stated, inter alia, as follows:-

"2. The preliminary show-cause affidavit dated 19.02.2015 was filed, inter alia, unconditionally apologizing for giving any occasion for any impression that the deponent had any intention of acting in any manner whatsoever that would interfere or tend to interfere with the

intent to obstruct the administration of justice. The apology is not conditional in nature. While unconditionally apologizing, the deponent had placed on record the explanatory narration of events as they actually took place along with supporting documents available with the deponent.

3. The deponent most humbly reiterates that the apology tendered in the preliminary show-cause affidavit dated 19.02.2015 is not conditional in nature in any manner.

4. The deponent most humbly *reiterates and submits unconditional apology* to this Hon'ble Court and assures and further undertakes that all and sincere efforts will be made to ensure further smooth functioning and immediate implementation of the orders/directions of this Hon'ble Court.

5. The deponent further most humbly submits her *unconditional apology to the Hon'ble District Judge, Jagatsinghpur, the Hon'ble Chief Judicial Magistrate and the Hon'ble Judicial Magistrate First Class (P), Kujanga* for any perceived misunderstanding which was never intentional nor could have ever been perceived by the deponent and further undertakes that all and sincere efforts will be made to ensure further smooth functioning and immediate implementation of the orders/direction of the respective Hon'ble Courts.

6. The deponent further submits that the sequence of the events/incidents are most unfortunate and craves the indulgence of this Hon'ble Court in reiterating her unconditional apology and most humbly submits that she shall uphold the Majesty of Justice and the Constitution of India, as she has always done, especially being duty bound having taken the solemn oath while joining the Indian Police Service in the year 2006.

7. The deponent further most humbly reiterates and prays that this Hon'ble Court be pleased to most graciously accept her unconditional apology tendered and be further pleased to direct that the above proceedings be dropped and closed."

Similarly, respondent no.2 Smt. Sabita Majhi in her additional show cause affidavit dated 19.03.2015 has stated, inter alia, as follows:-

"2. That I humbly submit that neither I had any intention to disobey the direction of Hon'ble C.J.M.-cum-Principal Magistrate, Juvenile

> Justice Board, Jagatsinghpur nor I had threatened the Hon'ble Principal Magistrate to lodge F.I.R. On the other hand I had discharged my lawful duties by putting my signature in the margin of the order sheet and did not disobey the order of the Hon'ble Principal Magistrate and as my submission before the Hon'ble Principal Magistrate created disobedience of Hon'ble Principal Magistrate, *I beg unconditional apology for such of my behavior*. I further pray your Lordships may kindly be pleased to drop the contempt proceeding initiated against me."

5. Both the respondents appeared before this Court in person on number of occasions in connection with this contempt proceeding.

We have heard Mr. Jayant Das, learned Senior Advocate appearing on behalf of the respondent no.1 Ms. Sudha Singh Mr. Ramani Kanta Pattanaik, learned counsel for the respondent no.2 Smt. Sabita Majhi and Mr. Janmejaya Katikia, Addl. Government Advocate.

Law is well-settled that so far as criminal contempt is concerned, it is a matter entirely between the Court and the alleged contemnor. It is for the Court in the exercise of its discretion to decide whether or not to initiate a proceeding for contempt. The Court may in the exercise of its discretion accept an unconditional apology from the alleged contemnor and drop the proceeding for contempt or even after the alleged contemnor is found guilty, the Court may, having regard to the circumstances, decline to punish him. The apology tendered by the alleged contemnor should impress the Court to be genuine and sincere. In case the apology is hollow and there is no real remorse or regret and it was made only to escape from the rigour of the law, the Court may not accept such apology. It is the duty of the Court to erase an impression that unconditional apology is not a complete answer to the matters relating to contempt of Courts. An apology is not a weapon of defence to purge the guilty of their offence; nor it is intended to operate as a universal panacea, but it is intended to be evidence of real contriteness. An apology is to be offered at the earliest opportunity but if it is offered at a time when the contemnor finds that the Court is going to impose punishment, it ceases to be an apology and it becomes an act of a cringing coward. It is not incumbent upon the Court to accept the apology as soon as it is offered. Before an apology can be accepted, the Court must find that it is bona fide and is to the satisfaction of the Court. However, Court cannot reject an apology just because it is qualified and unconditional provided the Court finds it is bona

fide. Purpose of proceeding in contempt is mainly to uphold the dignity of the Court and instil confidence in the mind of the people about sanctity of orders by the Courts of Justice. (**Ref:- AIR 1974 SC 2255, Baradakanta Mishra – Vrs.- Justice Gatikrushna Mishra**, **(2001) 8 Supreme Court Cases 650, Pravin C. Shah –Vrs.- K. A. Mohd. Ali, AIR 1955 SC 19, M.Y. Shareff – Vrs.- Hon'ble Judges Nagpur, (1991) 3 Supreme Court Cases 600, M.B. Sanghi –Vrs.- High Court of Punjab and Haryana, (1972) 3 Supreme Court Cases 839, Mulk Raj –Vrs.- State of Punjab, (2010) 11 Supreme Court Cases 493, Ranveer Yadav –Vrs.- State of Bihar**.)

6. We have carefully considered the submissions made by the learned counsels for the respective parties and also gone through the show cause affidavits as well as additional affidavits filed by the respondents.

The separation of powers between the legislature, the executive and the judiciary constitutes the basic feature of the Constitution. Article 50 of the Constitution of India deals with separation of judiciary from executive. The executive and judiciary are independent of each other within their respective spheres. As a part of constitutional scheme, neither the executive nor the legislature should attempt to interfere with the functions of the judiciary operating within its own sphere. Any threat to judicial independence needs to be dealt with strong arm of law.

We are of the view that the sequence of the unfortunate incidents which took place depicts that alleged contemnors/respondents who are supposed to remain within their bounds have tried to cross the 'Laxman Rekha'. However the majesty of law and the dignity of the Court do not permit to be unduly touchy over the issue particularly when there is repentance on the part of the respondents and they have tendered unqualified apology which appears to us to be genuine and sincere and has been offered at the earliest opportunity. Since the alleged contemnor-respondents have expressed remorse and regret for the unfortunate incidents and have also tendered unconditional apology, we are inclined accept the same.

However, looking at the reports of the learned District Judge, Jagatsinghpur, we think it proper that both the respondents Ms. Sudha Singh and Smt. Sabita Majhi should appear before the learned District Judge, Jagatsinghpur as well as Chief Judicial Magistrate, Jagatshinghpur and additionally the respondent no.1 Ms. Sudha Singh shall appear before J.M.F.C.(P), Kujanga in person within a week from today in the respective Courts during the Court hours and tender unconditional apology in open

Court. We hope that the respondents-contemnors henceforth shall maintain the dignity of the Court and shall discharge their duties in right earnest and they will not act in any such manner which undermines the authority of a judicial officer. They are required to act with restraint and conduct themselves in a dignified and respectful manner. With the aforesaid expectations, present contempt proceeding is dropped. However, there shall be no order as to costs.

Proceeding dropped.

2016 (I) ILR –CUT-686

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

W.P.(C) NO. 13987 OF 2015

GEEKSOFT CONSULTING PVT. LTD. ……...Petitioner

.Vrs.

REVENUE SECY. TO GOVT. OF INDIA & ORS. ……Opp. Parties

CENTRAL EXCISE ACT, 1944 – S.11-B

Claim for refund of service tax – Prayer refused – Hence the writ petition – Petitioner being a 100% export oriented unit is not liable to deposit any service tax – Deposit made under a mistake of law can not be held to be service tax and consequently the claim for the petitioner for refund could be entertained by this Court – Held, impugned order is quashed – Direction issued to the opposite parties to take necessary steps on the refund application filed by the petitioner.

(Para 17)

Case Laws Referred to :-

1. (1993) Supp. 4 SCC 326 : Union of India -V- ITC Ltd.
2. (1975) 1 SCC 636 : D. Cawasji & Co. -V- State of Mysore
3. (2010) 28 VST 525 (Mad) : Natraj & Venkat Associates -V- Asst. Commissioner, Service Tax, Chennai II division.

For Petitioner : Mr. C.Panigrahi
For Opp.Parties : Mr. P.K.Ray (Sr. Standing Counsel)

Date of Order : 07.12.2015

ORDER

INDRAJIT MAHANTY, J.

Heard Mr. C. Panigrahi, learned counsel for the petitioner and Mr. P.K. Ray, learned Sr. Standing Counsel for the Central Excise, Customs and Service Tax Department.

In this writ application, the petitioner has sought to challenge the order dated 05.06.2015 under Annexure-4, whereby, the Assistant Commissioner Bhubaneswar Service Tax Division, Bhubaneswar has been pleased to reject an application filed in Form-R by the petitioner-company claiming refund of Service Tax amounting to Rs.2,00,954/- (received on 01.06.2015) purportedly on the ground that "the claim is barred by limitation of time, as required under Section 11B of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

Mr. Panigrahi, learned counsel for the petitioner submits that the bar of limitation under Section 11-B of Central Excise Act, 1944 cannot be applied to the circumstance of the present case since the said bar only applies to "any person claiming refund of any duty of excise and interest". He further submits that since the petitioner is a 100% export oriented unit and, consequently, it is not at all liable to deposit any service tax.

It is fairly admitted on behalf of the Department that there is no dispute about the fact that no service tax was payable by the petitioner and as a corollary thereof the amount deposited by the petitioner cannot tantamount to be held to be deposit of Service Tax. In this respect, reliance was placed on a judgment rendered by the Hon'ble Supreme Court in the case of **Union of India v. ITC Ltd.** (1993) Supp. 4 SCC 326 in which the Hon'ble Supreme Court upheld the view taken by the Division Bench of the Delhi High Court with regard to the question of limitation. On the question of limitation, the Division Bench of the Delhi High Court had observed that "the duty of excise is that which is levied in accordance with law" and that "any money which is realized in excess of what is permissible in law would be a realization made outside the provisions of the Act".

Learned counsel for the petitioner submits that the deposit of Service Tax by the petitioner was made under a mistake of law and, therefore, can be also recovered beyond the period stipulated. In the case of **D. Cawasji & Co. v. State of Mysore**, (1975) 1 SCC 636 although the Supreme Court ultimately rejected the claim for refund on the ground of delay and latches, the Court made certain observation in para-7 & 8 of the said judgment which reads as follows:

"**7.** Section 17(1) (c) of the Limitation Act, 1963, provides that in the case of a suit for relief on the ground of mistake, the period of limitation does not being to run until the plaintiff has discovered the mistake or could, with reasonable diligence, have discovered it. In a case where payment is made under a mistake of law as contrasted with a mistake of fact, generally the mistake becomes known to the party only when a court makes a declaration as to the invalidity of the law. Though a party could, with reasonable diligence, discover a mistake of fact even before a court makes a pronouncement, it is seldom that a person can, even with reasonable diligence, discover a mistake of law before a judgment adjudging the validity of the law.

8. Therefore, where a suit will lie to recover moneys paid under a mistake of law, a writ petition for refund of tax within the period of limitation prescribed, i.e. within three years of the knowledge of the mistake, would also lie. For filing a writ petition to recover the money paid under a mistake of law, this Court has said that the starting point of limitation is from the date on which the judgment declaring as void the particular law under which the tax was paid was rendered, as that would normally be the date on which the mistake becomes known to the party. If any writ petition is filed beyond three years after that date, it will almost always be proper for the court to consider that it is unreasonable to entertain that petition, though, even in cases where it is filed within three years, the court has a discretion, having regard to the facts and circumstances of each case, not to entertain the application."

It would be important to take note herein that the views of the Hon'ble Supreme Court as quoted herein above were expressed in the context of claim for refund arising out of levy being declared unconstitutional and the views were based upon the theory of Unjust Enrichment and the principles incorporated in Section 72 of the Contract Act.

Reliance was also placed upon a judgment of the Hon'ble Madras High Court in the case of **Natraj and Venkat Associates v.Assistant Commissioner, Service Tax, Chennai II division,** (2010) 28 VST 525 (Mad). The self same issue arising in the present case vis-à-vis the rejection of an application for refund of Service Tax and the Scope of Section 11-B of the Central Excise Act, 1944 was taken into consideration and in the said

judgment, the Hon'ble Madras High Court was of the considered view that the bar of limitation prescribed under Section 11-B (1) applied only to "any person claiming refund of any duty of excise and interest. Since there is no dispute in the present fact situation that no service tax was payable by the petitioner as a corollary thereof, what was paid by the petitioner cannot be held to be service Tax and consequently, the claim for petitioner for refund could be entertained by a writ court." The petitioner is also averred in the present writ application that no service tax has been collected by it from its customer and, therefore, even on merits, the petitioner is entitled to seek refund in view of the findings arrived at herein.

Accordingly, the writ application is allowed and the impugned order dated 05.06.2015 passed by the Assistant Commissioner, Bhubaneswar Service Tax Division, Bhubaneswar under Annexure-4 is quashed. The opposite parties are directed to take necessary steps forthwith on the refund application of the petitioner preferably within a period of two months from today.

Writ petition allowed.

2016 (I) ILR – CUT-689

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

W.P.(C) NO. 3113 OF 2015 & W.A. NO. 116 OF 2015

GOURMANI DEI (SINCE DEAD)
& AFTER HER SRIDHAR SAHU & ORS. .....Petitioners

.Vrs.

SHREE JAGANNATH MAHAPRABHU & ORS. ……Opp. Parties

SHRI JAGANNATH TEMPLE ACT, 1955 – Ss. 5, 30, 33

Tender notice for auction of earthen Ghee lamp (Deepa) Shops inside the Shri Jagannath Temple, Puri – Auction challenged – Petitioners claim that they have record of right since time immemorial to sell "Deepa" on payment of nominal fee and their right was protected by the Civil Courts – After the Temple Act came into force, it being a Special Statute excludes application of general law and it became the duty of the temple committee to look after all activities of the temple – Moreover the record of right not described the ghee lamp

shops in favour of the petitioners – Held, petitioners have no permanent heritable right to continue in the Ghee lamp Shops except through a valid licence granted by the temple by following due procedure as per law and opposite parties have right under the Act to put the Ghee lamp Shops into public auction by observing all the principles of general auction to enhance the temple fund for the maintenance and welfare of the temple. (Paras17,18,22)

Case Laws Referred to :-

1. 2016 (I) OLR (SC) 209 : Sri Jagannath Temple Managing Committee -V- Siddha Matha & Ors.
2. (1978) 4 SCC 16 : U.P.State Electricity Board & Anr. -V- Hari Shankar Jain & Ors.
3. 2014 (8) SCC 319 : Commercial Tax Officer, Rajasthan -V- Banani Cements Ltd. & Anr.

For Petitioner : M/s. U.K.Samal, C.D.Sahoo, S.Nayak, S.P.Patra & S.Naik

For Opp.Parties : M/s. P.P. Panda, S.Satpathy & D.Chatterjee

Date of Argument: 08. 02.2016
Date of Judgment : 02.03.2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

This writ petition (W.P.(C) No. 1331 of 2015) came to be filed challenging the tender notice issued by the opp. Parties to auction the earthen Ghee lamps (Deepa) shops inside the premises of temple of Lord Sri Jagannath at Puri.

W.A. No. 116 of 2015 has been filed by the appellants challenging the judgment/order dated 5.2.2015 passed by learned Single Judge of this Court in W.P.(C) No. 11555 of 2015. The subject matter in both Writ Application and Writ Appeal being same, both are disposed of by this common order with consent of learned counsels for both parties.

FACTS :

2. The factual matrix leading to the case of the petitioners is that the Royal family was the founder of Lord Sri Jagannath temple at Puri. The kings of Puri were in direct management and control of the temple, its

properties endowments and affairs till they ruled as sovereign heads of ex-State Puri-Khurda. It is also stated that the temple of Puri was subject to attack by different invaders during Musilm reigns and British rule, but the temple remained being unaffected. The then king, for better administration and affair for the temple brought few families belonging to Oilman community known as "Teli" Caste to Puri for supply of Polanga oil for lighting the temple premises of deity and for selling of earthen ghee lamps with wicks inside the premises of the temple of the deity by the Hindu devotees and worshipers before the deity inside the temple. Such practice was in vogue since time immemorial and is in continuity with certainty having Shastriec reasonableness. From generation to generation the petitioners and their ancestors were/are earning their livelihood from out of their income generated from selling the ghee "Deeps" in the premises of Sri Mandir which was duly allotted by then sovereign head and thereafter by the temple administration. In the ancient days the aforesaid vendors of earthen ghee lamps with wicks in the temple of the deity used to pay few annas as rent or fees to the king who was in the administration or helm of affairs of the temple in question. After the preparation of record-of-right, rights of the shop owners were recognized with payment of Rs.2/- to Rs.5/- per month to the fund of the temple. In the record-of-right it has been clearly mentioned about the Deep Ghee Mahal and payment of Rs.2/- to Rs.5/- per month by the shop owners. The petitioners' family is one of such family. Copy of the record-of-right has been annexed vide Annexure-1. The petitioners' family used to sell the ghee lamps near the temple of Goddess Saraswati inside the inner compound wall of Lord Sri Jagannath temple, Puri. The shop number was 15, but later it was changed to Shop No.26. The petitioners and their ancestors used to earn their livelihood by selling of "ghee lamps".

3. It is stated that on 17.10.2007 the temple administration issued a cancellation notice and directed the petitioners and other family members to refrain from operating the said shop. For that the petitioners in W.P.(C) No. 3113 of 2015 and other family members filed Civil Suit No.27 of 2008 in the court of learned Civil Judge (Junior Division), Puri against the opp. Parties to declare the rights of the petitioners and their family members to sell earthen Ghee lamps with wicks in the suit shop room as long as they continued to pay rent or fees to the present opp. Parties who are defendants in that suit, to declare the present opp. Parties who are defendants in the suit to have no right to cancel, suspend or interfere with the right to sale of earthen Ghee lamps with wicks by the plaintiffs in that suit and to declare the order of

cancellation of license to sell earthen Ghee lamps in the suit shop rooms as illegal and void.

4. It is stated that the suit was decreed partly in favour of the plaintiffs and against the defendants and the opp. Party no.2 was directed to extend all facilities for sale of such Ghee lamps subject to Regulations under Shree Jagannath Temple Act, 1955 (hereinafter called as "the Temple Act"). The present opp. Parties 1 and 2 being defendants in that suit, filed R.F.A. No. 24/78 of 2010-2009 before the court of learned District Judge, Puri against the impugned decree and the learned Additional District Judge, Puri in appeal confirmed the judgment and decree passed by the learned Civil Judge (Junior Division), Puri on 6.5.2010. Then the opp. Parties made an agreement with petitioner no.1 (since dead after filing of the present writ application) for operating the shop on payment of license fee of Rs.1,500/- per month for a period of three years with right of renewal at the instance of the petitioners. The opp. Parties continued to receive the monthly license fee from the petitioners till February, 2015.

5. While the matter stood thus, on 10.2.2015 the opp. Party no.3 issued a tender call notice by inviting applications from the intending bidders for different Ghee lamp shops situated within the premises of Lord Shree Jagannath Temple, Puri. So, on 19.2.2015 the petitioners made representation to the opp. Parties not to put their shop room in auction because of the judgment and decree passed by the competent Civil Court and the petitioners may be allowed to continue with the shop room. It is further averred that as the right of the petitioners to continue with the shop room is the profit-a-pendra, such right cannot be taken away.

6. It is further stated by the petitioners that by virtue of the order passed in W.P.(C) No.11555 of 2008, the auction notice vide Annexure-7 was issued, but the petitioners are not parties to that writ petition for which such auction notice is illegal, un-Constitutional and is violative of natural justice. So, the present writ petition has been filed by the petitioners for addressing their grievance.

7. One of the present petitioners namely Krushna Chandra Sahu along with 33 others had preferred Writ Appeal No. 116 of 2015 against the opp. Parties being aggrieved by orders dated 15.1.2015 and 5.2.2015 passed in W.P.(C) No. 11555 of 2008 by the learned Single Judge of this Court. In that appeal the appellants challenged the enhancement of the license fee towards

Ghee lamp shops allotted to the respective appellants inside the temple premises of Lord Shri Jagannath. The grounds taken in the appeal are similar to the grounds taken in W.P.(C) No. 3113 of 2015. It is only stated in the Writ Appeal that the learned Single Judge has passed the impugned order without perusing the record-of-rights and other documents of the petitioners. It is further stated that the learned Single Judge without considering their right to get license on payment of nominal premium has directed to put all the Ghee lamp shops opened inside the temple into auction with enhanced license fee. So, it is prayed to allow the writ Appeal by setting aside the order passed by the learned Single Judge in W.P.(C) No. 11555 of 2008.

8. The opp. Parties have not filed counter affidavit in W.P.(C) No.3113 of 2015, but has filed counter affidavit in W.P.(C) No.11555 of 2008. In that counter affidavit they denied about any grant of license to the petitioners in that writ petition including the present petitioners in this writ petition. It is alleged inter alia that on 12.10.2011 the Temple Managing Committee resolved to remove the Ghee lamp shops from 'Bhitar Bedha' to 'Bahar Bedha' to curb inconvenience to the devotees coming to the temple. It is also stated in the counter affidavit in W.P.(C) No. 11555 of 2008 that the petitioners in that writ petition were the licensees of different Ghee lamp shops and the license fees are being collected from them. Such license fee was one of the incomes of the temple. There is no record-of-rights granted to any shop keepers including the petitioners in both the writ petitions to sell Ghee lamps inside the temple premises. The opp. Parties deny about any permanent heritable rights of the appellants to sell the Ghee lamps inside the temple premises. On the other hand to enhance the income of the temple the Managing Committee of the temple enhanced the license fee by putting the Ghee lamp shops into auction. Challenging such decision of the temple Managing Committee writ petition was filed vide W.P.(C) No.11555 of 2008, against which the present Writ Appeal is preferred because the learned Single Judge passed the interim order to put the Ghee lamp shops on auction as the offset price fixed at Rs.50,000/- of the speculating bidding offer. It is stated by the respondents to affirm the order of learned Single Judge.

SUBMISSIONS

9. Learned counsel for the petitioners in W.P.(C) No. 3113 of 2015 and appellants in Writ Appeal No. 116 of 2015 submit that they have got record-of-rights since time immemorial to sell the Ghee lamps inside the temple premises. As such, they having been selling the same generation wise,

acquire heritable right to occupy the Ghee lamp shop and sell Ghee lamps on payment of nominal fee to the Temple Administrator. It is further submitted by the learned counsel on behalf of the petitioners and appellants that the opp. Parties-respondents have no right to put them on the footing of licensee and charge exorbitant license fee and also the opp. Parties have no right to evict them from the respective Ghee lamp license shops. It is further submitted that as per the decision of the competent Civil Court, the petitioners in W.P.(C) No.3113 of 2015 have got their right declared as permanent shop keepers of Shop No.15 (now it is Shop No.26) and the opp. Parties-respondents have no right to put the same into auction and collect enhanced license fee. It is also contended on behalf of the petitioners-appellants that as per the decision of the Hon'ble Apex Court also the petitioners-appellant s have acquired right to sell the Ghee lamps inside the temple as per their rights recorded in the record-of-rights prepared in the year 1954. So, the learned counsel for the petitioners-appellants submitted to allow the writ application and the writ appeal and restrain the opp. Parties-respondents from putting the shops into general auction and collect enhance license fee.

10. Learned counsel for the opp. Parties-respondents submitted that the Civil Court has not declared any permanent heritable right in favour of the petitioners in W.P.(C) No.3113 of 2015 or their ancestors to sell Ghee lamps in Shop No.26, but on the other hand the opp. Parties were directed to allow the petitioners to sell Ghee lamps on payment of license fee, subject to provisions of the Sri Jagannath Temple Administration Act, 1954. It is also contended on behalf of the opp. Parties-respondents that after the enactment of Sri Jagannasth Temple Administration Act, 1954, the temple Managing Committee has got every right to take decision as to rituals of the deities and to take care of the property of the deities. It is also the duty of the Temple Managing Committee to enhance the income of Lord Sri Jagannath by enhancing the temple fund. It is also contended that the license fee collected from the auction of the Ghee lamp shops is one of the income of the deities under the Temple Act, 1954. He submitted that the learned Single Judge of this Court in W.P.(C) No.11555 of 2015 has been pleased to pass order to put the Ghee lamp shops into auction as per the provisions of law and such order cannot be said to be arbitrary or illegal. He, therefore, submitted to confirm the said order of the learned Single Judge of this Court and to dismiss the writ petition as well as the writ appeal filed by the respective petitioners and the appellants respectively.

11. POINTS FOR CONSIDERATION.

(i) Whether the petitioners in both the writ petitions have got any permanent heritable right to continue in the respective Ghee lamp shops including Shop No.26 respectively on payment of necessary license fee?

(ii) Whether the opp. Parties-respondents have got right to put the shops into general auction on the upset price fixed?

DISCUSSIONS

12. POINT NO.(I)

It is admitted by both the parties that Ghee lamp shops have been opened inside the premises of Shri Jagannath Temple, Puri and they are situated at different places inside the temple premises. It is also not disputed that these shops are managed by the petitioners on payment of license fee and they were selling Ghee lamps to the devotees who are offering prayer in the temple. It is also the admitted fact that there is Temple Managing Committee looking after the affairs of Shree Jagannath temple under the Temple Act, 1954. It is not in dispute that both the parties in W.P.(C) No.3113 of 2015 were parties to Civil Suit with regard to the Ghee lamp shop No.15 (now it is Shop No.26) and the same suit was partly decreed in favour of the petitioners and the judgment and decree were also confirmed in appeal by the court of learned Additional District Judge, Puri.

13. The petitioners in W.P.(C) No.3113 of 2015 produced copy of the record-of-rights vide Annexure-1. On going through the same it appears that the Ghee lamp shops are being auctioned on the price fixed by the Temple Administration and each of the shop keepers after selling the Ghee lamps used to pay a premium of Rs.2/- to Rs.5/- to the temple. Thus, the record-of-right has not given any right to the petitioners except the fact that the Ghee shops were put into auction and then allotted the Ghee shop keepers for selling Ghee lamps and receiving premium from them. The petitioners rely upon the copy of the judgment passed by the learned Civil Judge (Junior Division), Puri in Civil Suit No.27 of 2008 on 30.7.2009. That suit was decreed in part in the following terms:-

> "The suit be and the same is decreed partly, on contest against the defendants, without cost.
>
> The defendants are directed to allow any of the plaintiffs to resume sale of ghee deep in suit shop room No.15.

> The defendant No.2 is further directed to extend all the facilities for such sale including supply of electricity as per the terms and conditions subject to regulation by the authority (defendant) under the Jagannath Temple Act, 1954."

Annexure-3 shows that the judgment and decree was challenged before the appellate forum and learned Additional District Judge, Puri passed the following order:-

> "19. In the result, the appeal at the instance of appellants as against revocation of licence stands dismissed as against respondents on contest. Likewise the cross-appeal at the instance of respondents in regard to permanent heritable and irrevocable interest of licence coupled by grant stands dismissed as against appellants on contest. As a necessary corollary the impugned judgment and decree dated 31.7.2009 passed in C.S. No.27 of 2008 by the learned Civil Judge (J.D.), Puri is hereby confirmed. Thus, the Court holds that the appellants have proceeded against the respondents and cancelled the licence without observing all sound judicial principles and thus, in violation of principle of adui alteram partem whereas the respondents have miserably failed to establish heritable interest in respect of licence coupled with grant lost in antiquity."

14. On going through both the documents it appears that both the Courts below have observed that the present petitioners have miserably failed to establish their heritable right in respect of licence coupled with grant lost in antiquity, but at the same time they observed that the present opp. Parties who are defendants should not have cancelled the license without observing sound judicial principle of natural justice. Be that as it may, the Civil Court has not recognized the heritable right or interest of the petitioners in selling the earthen Ghee lamps within the temple premises. It reveals from Annexure-4 that as per the decree the Temple Administration decided to enter into an agreement with petitioner no.1, who is the mother of petitioner nos. 1(a to f) and opp. Party nos.2 and 3 for selling of Ghee lamps at Shop No.26 on payment of license fee. Accordingly, an agreement was made vide Annexure-4 and it is very much clear that the license was granted on payment of Rs.1,500/- per month on every 7th day of succeeding month by the petitioners to the opp. Parties and this license was granted for three years and after three years the opp. Parties would again put the Ghee lamp shops into auction where the petitioners may participate, but the decision will be

taken by the opp. Parties. There are other conditions with regard to maintenance of Ghee lamp shops and selling Ghee lamps to the devotees. Thus, from Annexure-4 it is made clear that no heritable or permanent right was created over the Ghee lamp shops in question. In fact Annexure-6 shows that after expiry of the earlier agreement the deceased petitioner no.1 applied to lease out the same again to the petitioners, but the opp. Parties issued notice to put the Ghee lamp shops including the present Shop No.26 into auction. Also the deceased petitioner no.1 has applied vide Annexure-8 to exempt Shop No.26 from auction stating that they have approached this Court. From all the documents and pleadings, it is clear that in W.P.(C) No. 3113 of 2015 the petitioners have not been able to establish that they have acquired any permanent or heritable right or interest in Shop No.26 to occupy same and sell Ghee lamps to devotees.

15. The preamble of the Temple Act states as follows:-

> " And whereas long period to and after the British conquest the superintendence, control and management of the affairs of the Temple have been the direct concern of successive Rulers, Governments and their officers and of the publisher exchequer; And whereas by Regulation IV of 1809 passed by the Governor-General in Council in 28th April, 1809 and thereafter by other laws and regulations and in pursuance of arrangement entered into with the Raja of Khurda, later designated the Raja of Puri, the said Raja came to be entrusted hereditary with the management of the affairs of the Temple and its properties as Superintendent subject to the control and supervision of the ruling power; And whereas in view of grave and serious irregularities thereafter Government had to intervene on various occasions in the past; And whereas the administration under the Superintendent has further deteriorated and a situation has arisen rendering it expedient to reorganize the scheme of management of the affairs of the Temple and its properties and provide better administration and governance therefore in supersession of all previous laws, regulations and arrangements, having regard to the ancient customers and usages and the unique and traditional nitis and rituals contained in the Record-of-Rights prepared under the Puri Shri Jagannath Temple (Administration) Act, 1952 (Orissa Act XIV of 1952) in the manner hereinafter appearing;"

Section 5 of the Temple Act states as follows:-

> "Notwithstanding anything in any other law for the time being force or custom, usage or contract, Sanad, deed or engagement, the administration and the governance of the Temple and its endowments shall vest in a Committee called the Shri Jagannath Temple Managing Committee constituted as such by the State Government, and it shall have the rights and privileges in respect thereof as provided in Section 33. It shall be a body corporate, having perpetual succession and a common seal, and may, be the said name sue and be sued."

Section 30(1) of the Temple Act states as hereunder:-

> "30(1) Subject to the provisions of this Act the general superintendence of the Temple and its endowments shall vest in the State Government which may pass any orders that may be deemed necessary for the proper maintenance or administration of the Temple or its endowments or in the interest of the general public worshipping in the Temple."

Section 33(1) reads as follows:-

> "33(1) The Committee shall be entitled to take and be in possession of all movable and immovable properties including the Ratna Bhandar and funds and Jewelleries, records, documents and other assets belonging to Temple."

About importance of above provision as incorporated in the Temple Act the Hon'ble Apex Court have held in the decision in **Sri Jagannath Temple Managing Committee Vs. Siddha Math & Others** reported in 2016 (I) OLR(SC) 209 where Their Lordship observed as under:-

> " ……. As far as the Lord Jagannath Temple at Puri is concerned, the State Legislature had already enacted the Temple Act, 1955 and vested the land belonging to the Temple in the Temple Management Committee by virtue of Sections 5 and 30 of the Act of 1955. The object of the said Act was to provide for better administration and governance of the affairs of the Temple and its properties……"

With due respect to the said decision, we are of the view that the Temple Act is meant for management and administration of the entire properties of Shri Jagannath Temple, Puri inasmuch as it is a special Act overriding all general laws, particularly as per Section 2 of the Temple Act the provisions of Orissa Hindu Religious Endowment Act, 1951 has ceased

to apply to the Temple of Lord Jagannath, Puri from the date the Temple Act came into force. This view is re-enforced by the provisions of Section 5 of the Temple Act stating that it is a body corporate and has got perpetual succession.

16. In the case of **U.P. State Electricity Board & Anr. V. Hari Shankar Jain & Ors.,** reported in (1978) 4 SCC 16, where their Lordships held as under:-

> "8. The maxim "Generalia Specialibus non derogant" is quite well known. The rule flowing from the maxim has been explained in *Mary Seward v. The owner of the "Vera Cruz" as follows:*
>
> Now if anything be certain it is this that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.
>
> 9. The reason for the rule that a general provision should yield to a specific provision is this: In passing a Special Act, Parliament devotes its entire consideration to a particular subject. When a General Act is subsequently passed, it is logical to presume that parliament has not repealed or modified the former Special Act unless it appears that the Special Act again received consideration from Parliament....."

In **Commercial Tax Officer, Rajasthan v. Binani Cements Ltd. & Anr.**, reported in 2014 (8) SCC 319 it has been held:

> "46. In Gobind Sugar Mills Ltd. V. State of Bihar this Court has observed that while determining the question whether a statute is a general or a special one, focus must be on the principle subject-matter coupled with a particular perspective with reference to the intendment of the Act. With this basic principle in mind, the provisions must be examined to find out whether it is possible to construe harmoniously the two provisions. If it is not possible then an effort will have to be made to ascertain whether the legislature had intended to accord a special treatment vis-à-vis the general entries and a further endeavour will have to be made to find out whether the specific provision

excludes the applicability of the general ones. Once we come to the conclusion that intention of the legislation is to exclude the general provision then the rule "general provision should yield to special provision" is squarely attracted.

47. Having noticed the aforesaid, it could be concluded that the rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction. This rule is particularly applicable where the legislature has enacted comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject specific provision relating to a specific, defined and descriptable subject is regarded as an exception to and would prevail over a general provision relating to a broad subject"

17. With due respect to the above decisions the maxim "generialia specialis-bus non derogant" is well known for the reason that where there is Special Act, it will override the general Act or the general provision should yield to special provision. Applying the said principle in the facts of the case, we are of the view that the Temple Act being a special statute by express provision excludes the application of the general law as available in Orissa Hindu Religious Endowment Act and all other law with regard to the management and administration of the Shri Jagannath Temple, Puri under the Temple Act and their moveable and immoveable properties. Not only this, but also section 4(d) of the Temple Act defines record-of-rights which means the record-of-rights prepared under the Puri Sri Jagannath Temple (Administration) Act (Act XIV of 1952). As available from the preamble of the Temple act, the record-of-rights should only record having regard to the ancient customs, usages of unique and traditional nities and rituals. Thus, the record-of-right as defined under the Temple Act read with the preamble do not enshrine that the record-of-rights should contain any other right of any person inside the premises of the temple to sell ghee lamps being licensee. On the other hand, as stated above when the entire properties, be moveable or immoveable vest with the Temple Administration and the Managing Committee is in possession of all properties by virtue of sections 5, 30 and 33 of the Temple Act, the question of record-of-rights in favour of the petitioners in both the writ petitions does not arise. Moreover, the learned counsel for the petitioners have not produced any evidence on record through which it could claim ownership over Shop No.26 or any other ghee lamp

shops duly granted by the opp. Parties. Be that as it may, the Temple act being an independent, unique statute and the record-of-rights having not described about any ghee lamp shops or licence created thereon in favour of the petitioners, the contention of the learned counsel for the petitioners that they have got permanent hereditary right thereon is jettisoned.

18. From the aforesaid analysis, we are of the considered view that the petitioners in both the petitions have no right over any ghee lamp shops opened inside the premises of Sri Jagannath temple for selling the ghee lamps except through a valid licence granted by the temple to sell the ghee lamps, by following the procedure as per law. Point No.I is answered accordingly.

POINT NO.II.

19. Section 4 (e) of the Temple act defines temple fund in the following manner:-

"(e) **"Temple Fund"** shall mean the Shri Jagannath Temple Fund constituted under Section 28."

Section 28 (1) of the Temple Act states as follows:-

" 28. (1)There shall be constituted a Fund to be called 'Shri Jagannath Temple Fund' which shall be vested in and be administered by the Committee and save as otherwise provided in this Act, shall consist of

(a) The income derived from the movable and immovable properties of the Temple;

(b) Any contributions by the State Government either by way of grant or by way of loan;

(c) All fines and penalties under this Act;

(d) All recoveries under this Act;

(e) Any other gifts or contributions made by the public, local authorities or institutions."

From the aforesaid provision it is clear that the income derived from the moveable and immoveable properties to the Temple Fund and as per the other provisions of the Temple act it is discretion of the Temple Administration to raise income for the management, administration and the rituals of Lord Sri Jagannath. So, the license fees if realized from ghee lamp shop keepers allotted by the Temple administration is one of the income derived from immovable properties of the temple.

20. Learned Single Judge in W.P.(C) No. 11555 of 2008 has passed the following orders:-

"Order No. 09 dated 11.01.2015.

Heard learned counsel for the petitioners and Mr. Panda, learned counsel for the Opposite Parties.

It appears that the Temple Administration has taken a decision to put the Ghee-Deep stalls to auction and I do not see any infirmity in the said decision.

However, it is open to the petitioners to participate in the auction to be held. The auction shall be held in the months of February, 2015, after giving due notice to the petitioners and the entire process shall be completed by the end of February,2015. As a pre-condition, in the auction to be held, the participants shall not be a defaulters and affidavits to that effect shall be filed by them by 9th March, 2015.

List this matter on 11th March, 2015."

"Order No.10 dated 05.02.2015

With the consent of the learned counsel for the parties, this writ petition is taken up for final decision.

Heard Mr. Rath, learned counsel for the petitioners.

By interim order dated 15.01.2015, this Court permitted the Temple Administration to proceed with the auction-cum-tender.

Mr. Rath, learned counsel for the petitioners submits that since the petitioners are selling lamps in the Temple premises for several years, they should be permitted to match the highest bid in the event they fail to match the highest bid of other bidders.

The participants of the auction should deposit the minimum up set price fixed by the Temple Administration and the Temple Administration is free to put any other condition as required under law. Further, the Temple Administration may provide an opportunity to the petitioners to match the offer of the highest bid subject to the condition that they shall offer minimum price of Rs.50,000/- of the speculative bidding offer. This order has been passed keeping in view the curb of speculative biddings. The entire process shall be completed by 15th March, 2015.

The writ petition is accordingly disposed of.

Issue urgent certified copy."

21. On perusal of the said orders, it appears that this Court has taken into consideration the responsibility of the Temple Administrator and passed order to put the "Depa Mahal" consisting of ghee lamp shops inside the temple by fixing the upset price, so that more income will be generated, which will be credited to the temple fund created under section 28 of the Temple Act. Since the Temple Administration is in management of the moveable and immoveable properties of the deity under section 5 read with section 30 of the Temple Act, it has got exclusive right to earn money from the moveable and immoveable properties of the deity so as to increase the fund which will be utilized for performing the various rituals of the deities including maintenance of the Temple. The procedure of auction is the best way of maintaining transparency without compromising with any individual's choice or supremacy or dominancy. So, by taking into consideration the general policy of auction and with the view to enhance the income of the temple fund the learned Single Judge has passed the impugned orders rightly. So, we are of the view that the order passed by the learned Single Judge is correct, legal and proper and as such, the opp. Parties-respondents have got every right to put the shops into general auction on the upset price fixed by the learned Single Judge of this Court in W.P.(C) No.11555 of 2008. Point No.II is answered accordingly.

CONCLUSION:

22. It has already been held in the aforesaid paragraphs that the petitioners in both the writ petitions have no permanent or heritable right to continue in the respective ghee lamp shops including Shop No.26 on payment of necessary fee. Moreover, it has been held that the opp. Parties-respondents have got right to put the ghee lamp shops into public auction. We have already observed in the aforesaid paragraphs that the order of the learned Single Judge is valid, legal and proper. At the same time while the opp. Parties are going to auction the ghee lamp shops inside the premises of the temple, it must observe all the principles of general auction. In our view there should be auction of the ghee lamp shops for a period of two years at a time, with a substantial amount of offset price to be fixed, so that it will generate income to enhance the temple fund for the maintenance and welfare of the temple. We are of the further considered view that the petitioners in W.P.(C) No.3113 of 2015 have no right over Ghee Lamp Shop No.26 and

the appellants in Writ Appeal also have no right over any ghee lamp shops, which are put to auction and the order of the learned Single Judge in this regard has to be upheld and confirmed.

We, therefore, dismiss W.P. (C) No.3113 of 2015 being devoid of merit. We also dismiss Writ Appeal No.116 of 2015 by affirming the impugned orders passed by the learned Single Judge of this Court in W.P.(C) No.11555 of 2008.

Writ petition dismissed.

2016 (I) ILR - CUT-704

S. C. PARIJA, J.

ARBP. NO. 13 OF 2013

DHRUBA CHARAN MEKAP .....Petitioner

.Vrs.

ACC LTD., MUMBAI & ANR. .....Opp. Parties

ARBITRATION AND CONCILIATION ACT, 1996 – S.11(6)

Application for appointment of Arbitrator – Objection raised that since clause 26.1 of the agreement provides for appointment of sole Arbitrator by the Indian Council of Arbitration and the venue of arbitration shall be at Mumbai, this Court has no jurisdiction to entertain this application – Held, if a Court has no jurisdiction over the subject matter of the dispute at all, the parties by agreement can not confer jurisdiction on such Court – However, where two competent courts have jurisdiction over the subject matter of the dispute, the parties may by agreement confer jurisdiction on any of such courts.

Case Laws Referred to :-

1. 2013 (3) Arb. LR 161 (SC) : Swastik Gases P.Ltd. -V- Indian Oil Corp. Ltd.
2. (1989) 2 SCC 163 : A.B.C. Laminart Pvt. Ltd. & Anr. -V- A.P. Agencies, Salem
3. (2009) 9 SCC 403 : Balaji Coke Industry Pvt. Ltd. -V- Maa Bhagwati Coke Gujarat Private Limited

For Petitioner : M/s. Kshirod K. Rout
For Opp.Parties : Mr. N.R.Rout

Date of Order: 25.2.2016

ORDER

S.C.PARIJA, J.

Heard learned counsel for the parties.

This is an application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of Arbitrator.

The brief facts of the case is that the opposite party no.1 Company had entered into an Agreement dated 01.7.2011 with the petitioner for sale and distribution of cement products purchased from the Company to retail dealers and retail customers, as per the terms and conditions enumerated therein.

Clause-26 of the Agreement provided for arbitration, which reads as under:-

"26. Arbitration

26.1 The Parties hereto shall make an endeavour to settle by mutual conciliation any claim, dispute, or controversy (Dispute) arising out of, or in relation to, this Agreement, including any dispute with respect to the existence or validity or the breach hereof.

Any dispute which cannot be settled within 30 days of consultation as provided above, shall be submitted to arbitration at the request of a Party (affected Party) upon written notice to that effect to the other Party and such arbitration shall be conducted in accordance with the rules of the Indian Council of Arbitration (ICA), which rules as modified from time to time, are deemed to be incorporated by reference into this section (the Arbitration Rules) by a Sole Arbitrator.

The Sole Arbitrator as referred to above shall be appointed by the ICA. The venue of the Arbitration shall be at Mumbai, India. The Sole Arbitrator shall deliver the Award in the arbitration proceedings within three months from reference of any dispute to arbitration.

The Parties agree that the award of the Sole Arbitrator shall be final and binding upon the Parties, and that the parties shall not be entitled to commencement of any action in a court of law upon any matter in dispute arising from or in relation to this Agreement, except for the

enforcement of an arbitral award granted pursuant to this section.

26.2 Jurisdiction

The Courts in Mumbai will have the exclusive jurisdiction in matters arising from the arbitral proceedings and/or matters for injunctory relief's there under."

The case of the petitioner is that during subsistence of the agreement, dispute arose with regard to the supply of cement products and inspite of notice, as the opposite parties failed to resolve the same, the petitioner issued a registered notice dated 17.12.2012 (Annexure-4), demanding appointment of sole Arbitrator and reference of the dispute for arbitration, as provided under Clause-26.1 of the Agreement.

Learned counsel for the petitioner submits that the opposite parties having failed to act in the matter inspite of notice, as per Clause-26 of the Agreement, this Court has the jurisdiction to appoint the Arbitrator in exercise of its powers conferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('the Act' for short).

Learned counsel for the opposite parties with reference to the counter affidavit submits that as Clause-26.1 of the Agreement provides for appointment of sole Arbitrator by the Indian Council of Arbitration and the venue of the arbitration shall be at Mumbai, this Court has no jurisdiction to entertain the present application. In this regard, learned counsel for the opposite parties has relied upon a decision of the apex Court in ***Swastik Gases P. Ltd. v. Indian Oil Corp. Ltd.,*** 2013(3) Arb. LR 161 (SC), in support of his contention that the venue of the arbitration can only be at Mumbai and the Courts in Mumbai have the exclusive jurisdiction in the matter.

It is now well settled in law that parties by agreement cannot confer jurisdiction on a Court. Only where two competent Courts have jurisdiction over the subject matter of the dispute, the parties may by agreement confer jurisdiction on any one of such Courts, to the exclusion of the other. However, if a Court has no jurisdiction over the subject matter of the dispute at all, the parties by agreement cannot confer jurisdiction on such a Court, to the exclusion of the competent Court having jurisdiction over the matter.

The aforesaid principles of law has been elucidated by the apex Court in ***A.B.C. Laminart Pvt. Ltd. and another v. A.P.Agencies, Salem,*** (1989) 2 SCC 163, which is as follows:-

> "16. So long as the parties to a contract do not oust the jurisdiction of all the courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the courts. If under the law several courts would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy."

Similar question came up for consideration before the apex Court in ***Balaji Coke Industry Private Limited v. Maa Bhagwati Coke Gujarat Private Limited,*** (2009) 9 SCC 403, where the Hon'ble Court, while referring to its earlier decisions on the point, has held as under:-

> "26. Faced with the question as to whether an agreement arrived at between two parties that one of the two courts having jurisdiction, would decide all the disputes relating to such agreement, was hit by the provisions of Section 28 of the Contract Act, 1872, this Court in Hakam Singh case (AIR 1971 SC 740) held that where two courts or more have the jurisdiction to try a suit or proceeding under the provisions of the Code of Civil Procedure, an agreement between the parties that one of such courts would have the jurisdiction to decide the disputes arising between the parties from such agreement would not be contrary to public policy and would not, therefore, be contrary to the provisions of Section 28 of the Contract Act, 1872.
>
> 27. The said question once again arose in A.B.C. Laminart (P) Ltd. ((1989) 2 SCC 163), wherein following the decision in Hakam Singh, but relying on the maxim ex dolo malo non oritur actio, this Court held that by an agreement which absolutely ousted the jurisdiction of a court having the jurisdiction to decide the matter, would be unlawful and void, being contrary to public policy under Section 28 of the Contract Act. But so long as the parties to a

contract do not oust the jurisdiction of all the courts, which would otherwise have the jurisdiction to decide the cause of action under the law, it could not be said that the parties had by their contract ousted the jurisdiction of the court.

28. This Court in A.B.C. Laminart case went on to observe that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewithin, if the parties to the contract agree to vest jurisdiction in one such court to try the dispute which might arise between them, the agreement would be valid."

The aforesaid view has been reiterated in *Swastik Gases P. Ltd.* (supra), on which reliance has been placed by learned counsel for the opposite parties. In the said decision, it has been reiterated that the parties by agreement can only confer jurisdiction on a competent Court having jurisdiction over the subject matter of the dispute, to the exclusion of the other Courts. Relevant findings of the apex Court is extracted below:-

"31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section 2(1)(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of clause 18 of the agreement, the jurisdiction of Chief Justice of the Rajasthan High Court has been excluded. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties – by having clause 18 in the agreement - is clear and

> unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner."

In the present case, no part of the cause of action arises at Mumbai, where the registered office of the opposite parties is situated. The parties have entered into agreement at Bhubaneswar and the obligations to be performed under the said agreement were to be performed at Bhubaneswar.

In view of the position of law as detailed above, the contention of the learned counsel for the opposite parties that the Courts in Mumbai alone has the jurisdiction cannot be accepted and the same is accordingly rejected.

From the facts narrated above, it is abundantly clear that there was an agreement between the parties, which had an arbitration clause. The petitioner having raised a dispute and made a demand for appointment of a sole Arbitrator to adjudicate the dispute, which having not been acceded to by the opposite parties inspite of service of registered notice, this Court has the jurisdiction to appoint the Arbitrator in exercise of its powers conferred under Section 11(6) of the Act.

In view of the above, I hereby appoint Shri Yeeshan Mohanty, Senior Advocate, as the sole Arbitrator to adjudicate the dispute between the parties. The venue of the arbitration shall be at the High Court of Orissa Arbitration Centre and the proceeding shall be conducted by the learned Arbitrator as per the High Court of Orissa Arbitration Centre (Arbitration Proceedings) Rules, 2014.

It is needless to say that the fees of the Arbitrator shall be as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015.

ARBP is accordingly disposed of.

Issue urgent certified copy as per rules.

This order be communicated to Shri Yeeshan Mohanty, Senior Advocate, forthwith.

Application disposed of.

2016 (I) ILR - CUT-710

B. K. NAYAK, J.

W.P.(C) NO. 5773 OF 2013

JITENDRA MUDULI .....Petitioner

.Vrs.

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

ODISHA GRAMA PANCHAYAT ACT, 1964 – S.26

Elected Sarpanch found disqualified U/s. 25(1)(v) of the Act by the Collector in exercise of power U/s. 26 of the Act – Whether the Collector has power within the scope of section 26 of the Act to declare the candidate securing next highest votes as elected Sarpanch ? – Held, Collector has no power to make such declaration.

(Para 10)

Case Law Referred to :-

1. 2005(1) OLR 411 : Smt Pramila Pradhan -V- State of Orissa & Anr.

For Petitioner : M/s. Dipti Ranjan Bhokta
For Opp.Parties: M/s. Saroj Ku. Padhi

Date of Order : 27.01.2016

ORDER

B.K.NAYAK, J.

Heard learned counsel for the petitioner, learned Additional Standing Counsel and learned counsel appearing for opposite party No.4.

2. The petitioner challenges the order dated 13.03.2013 passed by the Collector, Nabarangpur in RMC No.01 of 2013 declaring the petitioner, who was elected Sarpanch of Gouda Deopalli Grama Panchayat in the district of

Nabarangpur, disqualified under section 25(1)(v) of the Orissa Grama Panchayat Act, in exercise of power under section 26 of the said Act.

3. Complaint was lodged by the present opposite party no.4 alleging that the petitioner was disqualified under section 25(1)(v) of the Act since she begot three children after the cut off date i.e. 18.04.1994. It was specifically mentioned in the complaint that two daughters were born to the petitioner on 29.08.1996 and 24.04.1999 and a son was born to him on 10.12.2001. On receipt of notice the petitioner filed his show cause stating that the complainant being not a Sarpanch, nor a Naib Sarpanch, nor a Ward Member of the G.P. he has no locus standi to file complaint and that the disqualification as alleged is a pre-election disqualification and therefore the Collector had no jurisdiction to entertain such complaint in a proceeding under section 26 of the Orissa Grama Panchayat Act. The Collector took up enquiry suo motu. The complainant also submitted documents, such as, information received under RTI Act from Community Health Centre, Tentulikhunti under Letter No.282 dated 08.10.2012, copies of Nomination paper and affidavit of the petitioner, copy of transfer certificate granted by U.P.School vide T.C.No.7188. On consideration of the report received from the Community Health Centre along with copies of documents the Collector was satisfied that the petitioner begot three children on 29.08.1996, 24.04.1999 and 10.12.2001 which were after the cut off date and the documents further revealed that the petitioner falsely represented before the Election Officer that he has no spouse.

4. The Collector thus declared the petitioner disqualified under section 25(1)(v) of the OGP Act and at the same time also directed that the candidate obtaining the next highest votes be declared elected for the post of Sarpanch of Gouda Deopalli G.P.

5. Learned counsel for the petitioner submits that no adequate opportunity of hearing was given to the petitioner and the copy of the documents and report received from the CHC were not served on him and therefore the said documents could not have been relied upon by the Collector. It is further submitted by him that within the scope of Section 26 of the Act the Collector has no power to declare the candidate obtaining next highest vote as elected Sarpanch. With regard to non service of copies of documents, particularly the report received from the Medical Officer, CHC, he has relied upon the decision of this Court reported in **2005(1) OLR 411 Smt.Pramila Pradhan –vrs.- State of Orissa and another**.

6. It appears from the order sheet of the Collector's records that after notice the case had been fixed to 12.03.2013 for filing of show cause and on that date both the parties appeared so also the Government Pleader . The writ petitioner filed his counter/show cause and advocate for opposite party no.4 filed hazira and requested for adjournment for submitting further documents and the case was posted to 13.03.2013 on which date advocate for both the parties were heard. The report submitted by the Medical Officer in-charge, Community Health Centre, were perused along with other documents and on the same day the impugned order was passed.

7. Decision in Smt.Pramila Pradhan (supra) on which the learned counsel for the petitioner relied upon is one where in the show cause filed by the disqualified Sarpanch before the Collector, the allegation made against her were specifically denied and therefore, it was held that non-service of enquiry report on the basis of which the proceeding was drawn, on the elected Sarpanch was tantamount to not giving adequate opportunity to rebut the contents of the report.

8. In the present case, it was specifically alleged that the petitioner begot three children after the cut off date, and the birth dates of the children were stated specifically. There is no denial of the said fact in the show cause filed by the petitioner. On the other hand, a plea was taken that the aforesaid disqualification was a pre-election disqualification which was not within the jurisdiction of the Collector to enquire within the scope of section 26 of the OGP Act.

9. Since there is no specific denial of the disqualification as alleged against the petitioner, non-service of a report of the Medical Officer on the petitioner would not amount to denial of opportunity of hearing. The report submitted by the Medical Officer, C.H.C. was fully in consonance with the allegations made in the complaint with regard to birth of three children to the petitioner much subsequent to the cut off date. In such circumstances, I find no infirmity in the order declaring the petitioner disqualified.

10. So far as the other declaration that the candidate securing next highest votes be declared as elected Sarpanch is concerned, this court is of the view that within the scope of Section 26 of the OGP Act, the Collector has no power to make such declaration. Therefore, I set aside the said declaration. The writ application is accordingly disposed of.

Writ petition disposed of.

2016 (I) ILR - CUT-713

B. K. NAYAK, J.

O.J.C. NO. 8956 OF 1993

GORAKHNATH PANDEY & ORS. .....Petitioners

.Vrs.

BUDHI GOND & ORS. .....Opp. Parties.

CENTRAL PROVINCES TENANCY ACT, 1920 – S.12
(As amended vide Orissa "Amendment" Act No XV of 1953)

Land belonging to S.T. person sold to Non-S.T. person vide registered sale deed Dt. 20.03.1963 – Proceeding U/s 23-A of the OLR Act, 1960, which came into force on 01.10.1965, was initiated for recovery of possession form the purchasers in the year 1982 – Original, appellate and revisional authorities passed order of eviction – Hence this writ petition – Provision is clear that a transfer without permission of the competent authority under the proviso to section 12(1)(b) of the Act does not ipso facto become void unless and until it is so declared in an appropriate proceeding initiated under sub-section (4) of Section 12 of the Act – Proviso to subsection (4) of section 12 of the Act clearly bars initiation of any proceeding and eviction of the transferee after 12 years form the date transferee entered into possession – Undisputedly, no proceeding having been initiated in terms of the proviso within the stipulated period, the sale in favour of the petitioners ancestors must be held to be valid and they are not liable for eviction U/s. 23-A of the OLR Act – Held, impugned orders passed by the original, appellate and revisional courts under annexures 1, 2 & 3 are quashed.

For Petitioners : Mr. P.V. Balakrishna Rao.
For Opp. Parties: Mr. P.K. Mohanty, Senior Advocate
Additional Govt. Advocate

Date of hearing : 22.06.2015
Date of judgment: 22.06.2015

JUDGMENT

B.K.NAYAK, J.

Orders under Annexures-1, 2 and 3 passed by the original, appellate and revisional authorities in a proceeding under Section 22-A of the OLR Act are assailed in this writ petition by the petitioners.

2. The disputed land measures Ac.4.65 dec. under khata no.65 of mouza-Kalyanpur, corresponding to previous settlement khata no.36, 44, 8 within the Sub-division of Nuapada, which admittedly originally belonged to one Chandu Gond. After his death, his wife Manjara Bewa sold the said land in favour of Habilal Pandey, the ancestor of the present petitioners by registered sale deed No.329 dated 20.03.1963 for a consideration of Rs.800/-. It transpires that the present opposite party no.1 claiming to be the heir of the original owner initiated a proceeding under Section 23-A of the OLR Act for recovery of possession from the petitioners before the S.D.O., Nuapada, which was registered as Revenue Misc. Case No.2 of 1982. Notices having been sent to the ancestors of the petitioners and they having failed to appear, ex-parte order was passed against them by the S.D.O. on 21.07.1982 directing for restoration of possession of the land appertaining to plot nos.1016, 1048, 1050, 1059, 1166 and 1169 under khata no.65. The said order was challenged by the ancestors of the petitioners before the Additional District Magistrate, Land Reforms, Kalahandi in OLR Appeal No.10 of 1982. Before the appellate authority, the appellants produced the registered sale deed dated 20.03.1963 and contended that they purchased the land for a consideration by way of registered sale deed and they were not evictible. By his order dated 15.4.1983 under Annexure-2 the Additional District Magistrate, Kalahandi found that there was no prior permission of the competent authority for purchase of the case land belonging to the scheduled tribe as required under the proviso to clause (b) of sub-section (1) of Section 12 of the Central Provinces Tenancy Act, 1920 as amended by the Central Provinces Tenancy (Orissa Amendment) Act 1953 (Act XV 1953) in its applicability to the State of Orissa and, therefore, the possession of the appellants under the registered sale deed was unauthorized and they are evictible in accordance with the provision of Section 23-A of the OLR Act. Accordingly, the appellate authority confirmed the order passed by the Sub-Divisional Officer, Nuapada.

3. Aggrieved by the original and appellate orders, the appellants filed OLR Revision no.3 of 1983 before the Collector, Kalahandi. By his order dated 13.09.1985, the Collector confirmed the appellate order passed by the Additional District Magistrate (LR), Kalahandi and dismissed the revision.

4. It is contended by the learned counsel for the petitioners that the sale in violation of the proviso to Section 12 (1) (b) of the C.P. Tenancy Act is not void abinitio and that it can be declared void only in an appropriate proceeding initiated suo motu or on an application by an interested party

under sub section (4) of Section 12 of the said Act as amended by the State of Orissa and that there being no such declaration, the sale must be held to be valid and possession thereunder cannot be said to be unatuhorised so as to attract the provisions of Section 23-A of the OLR Act. It is his further submission that the proviso to sub-section (4) of Section 12 of Act clearly bars initiation of any proceeding and for eviction of the transferee after 12 years from the date the transferee entered into possession and that undisputedly no proceeding having been initiated or taken up in terms of the proviso within the stipulated period, the sale in favour of the petitioners' ancestors must be held to be valid and the petitioners are not liable for eviction under Section 23-A of the OLR Act.

5. Learned Senior Counsel for opposite party No.1 on the other hand contends that a transfer without the permission of the competent authority as required under the proviso to Clause-(b) of sub-section (1) of Section 12 of C.P. Tenancy (Orissa Amendment) Act renders the transfer invalid like that of a transfer in violation of Section 22 of the OLR Act and therefore, the possession of the purchaser must be held to be unauthorised.

6. Sub-section(1) and sub-section (4) of Section 12 of C.P. Tenancy Act as amended by Orissa Act XV of 1953 are quoted hereunder:

> "(1) An occupancy tenant shall not transfer his holding or any portion thereof except to the extent and in the manner hereinafter provided, namely-
>
> He may sublet his right in his holding or any portion thereof for one agricultural year; provided that no contract for such lease shall be made more than four months before the year to which it relates, or shall contain a clause for renewal;
>
> An occupancy tenant shall have the right to transfer his holding or any portion thereof either by sale or mortgage or gift or bequest or otherwise to a bona fide Agriculturist;
>
> Provided that if he is a member of a Scheduled Tribe, he shall not so transfer to any person who is not a member of the same or different Scheduled Tribe except with the previous permission in writing of the Deputy Commissioner.
>
> Explanation – An agriculturist is a person who holds land for the purpose of cultivating it by himself or by members or his family or by hired servants and includes an agricultural labourer.

(c) All such transfers except in case of a bequest or a lease as contemplated under clause (a) shall be by a registered document".

xxx xxx xxx

(4) If any transfer is made in contravention of the provisions of this section, the Deputy Commissioner may, either on his own motion or on application by the transferor or his successor-in-interest, declare the transfer void and evict the transferee from the holding or a part of the holding, as the case may be;

Provided that no such transfer shall be declared void or such transferee liable to eviction after the expiry of twelve years from the date of his coming into possession of the holding or a part of the holding in pursuance of such transfer."

7. Section 22 of the OLR Act requires permission of the competent revenue authority for transfer of any land belonging to S.C. or S.T. in favour of a person not belonging to such S.C. or S.T. Sub-Section(1) of Section 22 of OLR. Act explicitly makes a declaration that any transfer of a holding or part thereof by a S.C. or S.T. to a non-S.C or non-S.T. shall be void, meaning thereby that the sale shall be invalid abinitio.

However, in Section 12 of the C.P. Tenancy (Orissa Amendment) Act there is no such provision that the sale in contravention of the proviso to Section 12(1)(b) shall be void. The consequence of a transfer in violation of the proviso as aforesaid is envisaged under Sub-section (4) of Section 12, which is to the effect that in a proceeding initiated before the Deputy Commissioner either suo motu or an application of a transferee or his successor-in-interest, the sale can be declared void. The proviso to sub-section (4) further stipulates that no transfer shall be declared void or such transferee be liable for eviction after expiry of 12 years from the date of his coming into possession of the holder. Therefore, it is quite evident that a transfer without permission of the competent authority under the proviso to Section 12(1)(b) of the Act does not ipso facto become void unless and until it is so declared in an appropriate proceeding initiated under sub-section (4) of Section 12. In other words, it means that the sale shall continue to be valid unless it is declared void in an appropriate proceeding.

8. Admittedly no proceeding in terms of sub-section (4) of Section 12 of C.P. Tenancy (Orissa Amendment) Act has been initiated. Even such proceeding could not have been initiated after March, 1975 since such

proceeding would have been barred under the proviso to sub-section (4) and therefore the petitioners are not liable to be evicted.

9. The authorities under the OLR Act have gone wrong in holding that the possession of the petitioners or their ancestors in pursuance of the sale is unauthorized under section 23-A of the OLR Act and therefore, the impugned orders cannot be sustained.

The writ petition is accordingly allowed and the impugned orders under Annexures-1, 2 and 3 are quashed.

Writ petition allowed.

2016 (I) ILR – CUT-717

S. K. MISHRA, J.

CRLMC NO. 4582 OF 2015

JAGANNATH MAHAPATRA …..…..Petitioner

.Vrs.

STATE OF ORISSA & ANR. ……Opp. Parties

CRIMINAL PROCEDURE CODE, 1973 – S.205

Complaint case – Offence U/ss. 341, 420, 466, 468, 471, 294 & 506 I.P.C. – Application by accused to dispense with personal attendance before court – If personal attendance of the accused is not necessary for trial in the case or if the accused is a busy public functionary or paradanashini lady or sick or infirm then personal attendance of such accused can be dispensed with.

In this case the petitioner-accused is a super class contractor and he is busy in the line work and he is suffering from chronic diseases and since his identification is not necessary in the trial, the learned Magistrate should not have rejected his application U/s. 205 Cr.P.C – Held, the impugned order is quashed – Direction issued to the learned Magistrate to dispense with the attendance of the accused petitioner if prayed afresh. (Paras 5, 6, 7)

Case Laws Referred to :-

1. 1988 CRI.L.J. 1573 : Raghunath Das & Ors. -V- Hari Mohan Pani
2. 2005 (II) OLR 86 : Pravakar Sarangi -V- State of Orissa

For Petitioner : M/s. Tukuna Kumar Mishra & D. Dash
For Opp. Parties : Mr. Somanath Mishra, A.G.A.

Date of : 06.11.2015

JUDGMENT

S.K.MISHRA, J.

The petitioner, a Super Class Contractor is aggrieved by the order dated 07.10.2015 passed by the learned Sub-Divisional Judicial Magistrate, Nabarangpur in 1.C.C. No.07/2014, wherein his application under Section 205 of the Code of Criminal Procedure, 1973, hereinafter referred to as 'the Code' for brevity was rejected.

2. A 1.C.C. was initiated by Debadutta Mohapatra against the present petitioner for alleged offence under Sections 341, 420, 466, 468, 471, 294 and 506 of the IPC. He was summoned to appear before the learned SDJM, Nabarangpur. He filed an application under Section 205 of the Code on 21.09.2015 to dispense with his personal attendance before the court. The learned Magistrate held that the allegation leveled against him appears to be grave and serious in nature. He further held that the petitioner is residing at a little distance from the court and the documents filed in support of his illness do not reveal a disease of such magnitude as to prevent him appearing from the court to answer the allegation. Therefore, the learned Magistrate rejected his application under Section 205 of the Code and posted the case to 06.11.2015 for appearance of the parties.

3. The learned counsel for the petitioner submits that the petitioner is an elderly person, aged about 56 years. He is suffering from chronic diseases like diabetes, high blood pressure for which he is under intensive medical care since 1998. The learned counsel also submits that the petitioner is a Super Class Contractor and he has to attend his duties for timely execution of work undertaken by him. Hence, the learned counsel for the petitioner submits that the order passed by the learned Magistrate should be set aside and the petition filed by the petitioner under Section 205 of the Code should be quashed.

4. The learned counsel for the petitioner relying upon the case of ***Raghunath Das and others vs. Hari Mohan Pani,*** 1988 CRI.L.J.1573 contends that in a 1.C.C., if petition is filed under Section 205 of the Code, the complainant has no right to be heard. It is appropriate to quote the exact word used by Hon'ble Justice S.C. Mohapatra in the aforesaid case.

> " **3.** Representation is a mode of a appearance of an accused. It is a matter between the Court and the accused. In prosecutions initiated on police report, the Public Prosecutor has a right to be heard on the question of bail. So far as a prosecution initiated on compliant, the Magistrate while issuing summons has also power to direct the appearance of an accused through a Lawyer complainant has no right to heard. He can, however, bring to the notice of the Court at any stage the facts of an accused misusing the benefit of representation for appropriate order. Accordingly, I am not inclined to issue notice to the complainant which would have the effect of delay in disposal of this revision and the prosecution shall be delayed."

Thus, this Court is of the opinion that there is no necessity of issuing notice to the opposite party no.2. This Court feels it expedient that orders can be passed after hearing the learned Addl. Government Advocate for the State.

5. The learned counsel for the petitioner further cites the reported case of ***Pravakar Sarangi vs. State of Orissa,*** 2005 (II) OLR 86, wherein this Court has allowed the application under Section 205(1) of the Code in a similar case where cognizance of the offence was taken under Sections 420, 468, 471, 467, 120-B of the IPC. This Court in the aforesaid case has held that if personal identification of the accused is not necessary for trial of the case, if the accused is a busy public functionary or paradanashini lady, or sick or infirm person, then personal attendance of such accused can be dispensed with. Admittedly, in this case, the petitioner and the complainant were well known to each other and there is no question of identification of the accused and the same is not in dispute. The learned counsel for the petitioner undertakes that he shall not take up a plea regarding the identity of the accused during trial.

6. So, a cumulative reading of facts along with case law cited, this Court is of the opinion that since the petitioner is a Super Class Contractor and he is busy in the line of work and he is also suffering from chronic diseases, on the top of it, his identification is not necessary at the trial, the learned Magistrate should have allowed the application under Section 205 of the Code.

7. Accordingly, the CRLMC is allowed. The order dated 07.10.2015 passed by the learned SDJM, Nabarangpur in 1.C.C. No.07/2014 is hereby quashed so far as it relates to rejection of application under Section 205 of the Code. The learned Magistrate is directed to dispense with the attendance of the present petitioner in 1.C.C. No.07/2014, if a fresh petition is made in that regard.The CRLMC is disposed of. Application allowed.

2016 (I) ILR – CUT-720

DR. A.K. RATH, J.

W.P.(C). NO.11898 OF 2004

GOPAL @ GOPAL CHANDRA OJHA & ORS. .....Petitioners

.Vrs.

RAMAKANTA OJHA & ORS. .....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-1, R-10 (2)

Whether application for transposition of defendant no 13 as plaintiff can be allowed when the suit had abated ? Held, No. – When the suit had abated and was no longer pending, application for transposition under order 1 Rule 10 (2) C.P.C. filed by defendant No 13 as plaintiff was not maintainable.

In this case the sole plaintiff died leaving behind his widow and daughters – No application for substitution filed within the stipulated period – After the suit abated defendant No 13 filed application for transposition as plaintiff – Since the suit had abated and was no longer pending the learned trial court is not correct in allowing the application for transposition – Held impugned order is quashed.

(Paras 4 to 8)

For petitioners : Mr. D.P.Mohanty
For Opp. Partie : Mr. A.C.Mahapatra

Date of Hearing : 04.11.2015
Date of Judgment :10.11.2015

JUDGMENT

DR. A.K.RATH, J.

The instant petition is filed to laciniate the order dated 18.8.2004 passed by the learned Civil Judge (Jr. Division), Bhadrak in C.S.No.43 of 1999-I, whereby and whereunder, the learned trial court allowed the application of defendant no.13 for transposition to the position of plaintiff.

2. One Rama Chandra Ojha filed a suit for declaration of title and confirmation of possession along with the defendants 11 to 19, for declaration that the Consolidation Record of Right is wrong and for permanent injunction restraining the defendants 1 to 10 from disturbing his possession in the court of the learned Civil Judge (Jr. Division), Bhadrak, which was registered as C.S.No. 43 of 1999-I. Opposite party no. 1 was

defendant no.13 and the present petitioners were the contesting defendants no. 1 to 10 except the defendant no.6. During pendency of the suit, defendant nos.6 and 16 died and due to non-substitution, the suit has abated against them on 3.10.2002. Similarly, during pendency of the suit, the sole plaintiff died on 2.11.2002 leaving behind his widow and daughters. After the death of the plaintiff, his legal heirs did not take steps for their substitution. But then defendant no.13 filed an application for transposition as plaintiff on 1.2.2003. He had also filed another application for substitution of the legal heirs of the plaintiff. Defendants 1 to 10 filed an objection to the same. By order dated 18.8.2004, the learned trial court allowed the application of defendant no.13 and transposed him as plaintiff.

3. Heard Mr.D.P.Mohanty, learned Advocate for the petitioners and Mr.A.C.Mohapatra, learned Advocate for the opposite parties.

4. The sole question that hinges for consideration of this Court is as to whether application for transposition of defendant no.13 as plaintiff can be allowed when the suit had abated ?

5. The Court may transpose the defendant as plaintiff in exercise of its power under Rule 10(2) of Order 1 C.P.C.. The same is quoted hereunder:-

> "(2) Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

6. What is the meaning of the words "at any stage of the proceedings" appearing in Order 1 Rule 10(2) of C.P.C. ? At any stage of the proceedings means during pendency of the suit. Power under Rule 10(2) of Order 1 C.P.C. can be exercised, if the proceedings are alive and pending. When the suit has abated and is no longer pending, application for transposition under Order 1 Rule 10 (2) C.P.C. filed by the defendant no.13 as plaintiff is not maintainable.

7. The sole plaintiff died on 2.11.2012 leaving behind his widow and daughters. No application for substitution was filed within the stipulated

period. The suit had abated. Thereafter, defendant no.13 filed an application under Order 1 Rule 10 (2) C.P.C. for transposition as plaintiff. In view of the fact that the suit had abated and was no longer pending, the learned trial court has travelled beyond its jurisdiction in allowing the application for transposition.

8. In wake of the aforesaid, the order dated 18.8.2004 passed by the learned Civil Judge (Jr.Division), Bhadrak in C.S.No.43 of 1999-I is quashed. Accordingly, the petition is allowed. No costs.

Writ petition allowed.

2016 (I) ILR – CUT-722

DR. A.K. RATH, J.

W.P.(C) NO. 10304 OF 2009

GHANASHYAM DAS TEKRIWAL .....Petitioner

.Vrs.

SMT. JAYANTI TIWARI & ORS. .....Opp. Parties

(A) CIVIL PROCEDURE CODE, 1908 – O-11, R-1

Interrogatories – Plaintiff prayed for a direction to O.P.Nos. 1 to 3 to answer interrogatories put by them – Prayer rejected on the ground that question sought for in the interrogatories can be put in the cross-examination by the Plaintiff – Hence the writ petition – The right to administer interrogatories is neither absolute nor unqualified – A suit contemplates two sets of facts i.e. facta probanda (facts constituting party's case), and facta probantia (facts constituting evidence) – A party is entitled to know only facta probanda and not facta probantia – Held, the question sought for in the interrogatories can be put in cross-examinations is per se no ground to reject the application – Impugned order is quashed. (Paras 7, 8)

(B) CIVIL PROCEDURE CODE, 1908 – O-11, R-1

Interrogatories – Object – To save expenses and enabling a party to obtain an admission from his opponent which makes the burden easier – The interrogatories are permissible with regard to matters which are relevant to the facts directly in issue.

(Para 4)

Case Law Referred to :-

1. Vol.XXXI (1965) CLT 294 : Ganga Devi -V- Krushna Prasad Sharma
2. 1988(I) OLR-379 : Sri Janaki Ballav Patnaik -V- Bennett Coleman & Co. Ltd. & Ors.
3. AIR 1972 SC 1302 : Raj Narain -V- Smt. Indira Nehru Gandhi & Anr.

For Petitioner : Mr. Anupam Das
For Opp. Parties : Mr. Piyush Kumar Mishra

Date of Hearing :12.01.2016
Date of Judgment: 20.01.2016

JUDGMENT

DR. A.K. RATH, J.

Assailing the order dated 21.2.2009 passed by the learned Civil Judge (Jr. Divn.), Panposh, Rourkela in C.S. No.45 of 2007, the instant petition has been filed under Article 227 of the Constitution of India. By the said order, learned trial court rejected the application filed by the plaintiffs under Order 11 Rule 1 C.P.C. for a direction to the defendant nos.1 to 3 to answer the interrogatories.

02. The petitioner as well as opposite party nos.5 to 9 as plaintiffs instituted C.S. No.45 of 2007 in the court of the learned Civil Judge (Jr. Divn.), Panposh, Rourkela for declaration of right, title and interest and permanent injunction impleading the opposite party nos.1 to 4 as defendants. The plaintiffs filed an application under Order 11 Rule 1 C.P.C. for a direction to the opposite party nos.1 to 3 to answer the interrogatories put by them. The same was objected by the defendants. By order dated 21.2.2009, learned trial court rejected the application on the ground that the question sought for in the interrogatories can be very well put in cross-examination by the plaintiff.

03. Heard Mr. Anupam Das, learned counsel, appearing on behalf of Mr. G. Mishra, learned counsel for the petitioner and Mr. Piyush Kumar Mishra, learned counsel for the opposite party nos.1 to 4.

04. The scope of Order 11 Rule 1 C.P.C. has been succinctly stated by this Court in *Ganga Devi v. Krushna Prasad Sharma,* Vol.XXXI (1965) CLT 294. In paragraph 8 of the said report, it is held that :-

> "It would now be pertinent to examine the scope of Order 11, Civil Procedure Code. The main object of interrogatories is to save

expenses by enabling a party to obtain an admission from his opponent which makes the burden of proof easier. It would certainly not to be extended to prying into the evidence wherewith the opposite party intends to support his case. The interrogatories are permissible with regard to matters which are relevant to the facts directly in issue. In certain circumstances, however, they may be extended to other facts not directly in issue, but in connexion with which existence, non-existence, nature or extent of right, liability or disability, asserted or denied in the suit or proceeding necessarily follows. Sometimes it is used to show that the defence set up is unfounded. These, in substance, are generally the matters to which interrogatories should be directed. Under Order 11, Civil Procedure Code, interrogatories can be administered in the same manner as is done in England for discovering the facts in issue *A.I.R. 1914 Cal. 767.* In *Attorney-General v. Gaskil,* (1882) 20 Ch. D. 519, Cotton, L.J., observed—

The right to discovery remains the same, that is to say, a party has a right to interrogate with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised on the pleadings. It was said in argument that it is not discovery where the plaintiff himself already knows the fact. But that is a mere play on the word 'discovery'. Discovery is not limited to giving the plaintiff a knowledge of that which he does not know, but includes the getting an admission of anything which he is to prove on any issue which is raised between him and the defendant. To show that the pleadings have raised issues and that therefore interrogatories should not be allowed is another fallacy. The object of the pleadings is to ascertain what issues are. The object of the interrogatories is not to learn what the issues are but to see whether the party intelligently can obtain an admission from his opponent which makes the burden of proof easier than it otherwise would have been.

Order 11, rule 6, Civil Procedure Code, enacts the nature of objections that can be advanced to the interrogatories. It says that any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit or that the matters enquired into are not sufficiently material at that stage, or on any other ground, may be taken on affidavit in answer. To say that the question must relate to definite, existing and relevant circumstances and must not be merely in the hope of

discovering some flaw in the opponent's case, or with the object of filling a blank in the interrogatories."

05. In *Sri Janaki Ballav Patnaik vs. Bennett Coleman & Co. Ltd. and others,* 1988(I) OLR-379, this Court held that administering of interrogatories is to be encouraged, as it is a means of getting admission and tends to shorten litigation. It is a valuable right of which a party should not lightly be deprived.

06. In *Raj Narain vs. Smt. Indira Nehru Gandhi and another,* AIR 1972 SC 1302, the apex Court held that questions that may be relevant during cross-examination are not necessarily relevant as interrogatories. The only questions that are relevant as interrogatories are those relating to "any matters in question". The interrogatories served must have reasonably close connection with "matters in question".

07. The right to administer interrogatories is neither absolute nor unqualified. A suit contemplates two sets of facts, i.e., (1) facta probanda (facts constituting party's case), and (2) facta probantia (facts constituting evidence). A party is entitled to know only facta probanda and not facta probantia. Thus question sought for in the interrogatories can be put in cross-examination is per se no ground to reject the application under Order 11 Rule 1 C.P.C.

08. In view of the above, the order dated 21.2.2009 passed by the learned Civil Judge (Jr. Divn.), Panposh, Rourkela in C.S. No.45 of 2007 is quashed. Learned trial court is directed to consider the interrogatories sought for by the plaintiffs in the light of the principles enunciated above and fix time to answer the same. The petition is allowed.

Writ petition allowed.

2016 (I) ILR – CUT-726

DR. A. K. RATH, J.

W.P. (C) NO. 14934 OF 2009

BAJRANGLAL GUPTA …….Petitioner

.Vrs.

BHARATI AIRTEL LTD. ……..Opp. Party

CIVIL PROCEDURE CODE,1908 – S.20

Place of suing – Whether the parties by their consent and mutual agreement can confer jurisdiction on a Court ? – Held, No.

(Paras 4 to 9)

For Petitioner : Mr. Gopal Krishna Mishra
For Opp. Party : Mr. Hari Sankar Mishra

Date of Hearing :15.02. 2016
Date of Judgment: 26.02.2016

JUDGMENT

DR. A.K.RATH, J.

This application under Article 227 of the Constitution of India challenges the order dated 23.9.2009 passed by the learned Civil Judge (Jr.Division), Ist Court, Cuttack in C.S.No.39 of 2007. By the said order, the learned trial court allowed the application filed by the defendant under Order 14 Rule 2 C.P.C. and held that the Court has no territorial jurisdiction to try the suit and simultaneously directed the plaintiff to value the suit properly and pay the proper court fees.

2. The petitioner as plaintiff instituted C.S.No.39 of 2007 in the court of the learned Civil Judge (Jr.Division), Ist Court, Cuttack for specific performance of contract, mandatory injunction and certain ancillary releifs impleading the opposite party as defendant. Pursuant to issuance of summons, the defendant entered appearance and filed written statement challenging the territorial jurisdiction of the Court. While the matter stood thus, the defendant filed an application under Order 14 Rule 2 C.P.C. to decide the question of jurisdiction of the Court as preliminary issue. It is stated that by virtue of Clause 27 of the Agreement dated 21st August, 2004, the Courts at Bhubaneswar only be the competent Court of jurisdiction in case of any dispute that may arise from out of the said agreement. Further, the plaint has not been properly valued and the Court fees have not been paid.

The plaintiff filed an objection to the same. It is stated that the issue of jurisdiction is a mixed question of fact and law and the same cannot be decided as a preliminary issue. The plaintiff has never agreed to submit the jurisdiction of the Court at Bhubaneswar. The agreement is oppressive and unfair. Further the Court at Bhubaneswar has no jurisdiction to adjudicate the suit and jurisdiction cannot be conferred on the said court. By order dated 23.9.2009 the learned trial court came to hold that in view of the agreement between the parties, the competent Court at Bhubaneswar has got jurisdiction to try the suit. Simultaneously the learned trial court directed the plaintiff to value the suit properly and pay the proper court fees.

3. Heard Mr.Gopal Krishna Mishra, learned counsel for the petitioner and Mr.Harisankar Mishra, learned counsel for the opposite party.

4. The question does arise as to whether it is open to the parties to a confer jurisdiction on a Court which it does not possess under C.P.C.?

5. Clause 27 of the Agreement is quoted hereunder:-

> "27.That the Courts at Bhubaneswar only shall be the competent courts of jurisdiction in case of any dispute that may arise from and out of this agreement in respect of the said Demised Portion."

6. Hakum Singh Vrs. Gemmon (India) Ltd., AIR 1971 S.C.740, is the first leading decision of the apex Court on this point. In the said case, the contract was entered into between the parties for construction of work. An agreement provided that notwithstanding where the work was to be executed, the contract shall be deemed to have been entered into at Bombay and Bombay Court alone shall have jurisdiction to adjudicate the dispute between the parties. The question before the Court was whether the Court at Bombay alone had jurisdiction to resolve such dispute. The Supreme Court held thus:-

> "By Clause 13 of the agreement it was expressly stipulated between the parties that the contract shall be deemed to have been entered into by the parties concerned in the city of Bombay. In any event the respondents have their principal office in Bombay and they were liable in respect of a cause of action arising under the terms of the tender to be sued in the Courts of Bombay. It is not open to the parties by agreement to confer by their agreement jurisdiction on a Court which it does not possess under the Code. But where two Courts or more have under the Code of Civil Procedure jurisdiction

to try a suit or proceeding on agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Contract Act." (Emphasis laid)

7. The principle enunciated in Hakam Singh (supra) had been reiterated in the subsequent decisions i.e., Globe Transport Corporation v. Triveni Engineering Works and another., (1983) 4 SCC 707, A.B.C. Laminart (P) Ltd. & another v. A.P.Agency, Salem, (1989) 2 SCR 1, Patel Roadways Ltd., Bombay v. Prasad Trading Co., (1991) 4 SCC 270, R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd., (1993) 2 SCC 130, Angile Insulations v. Devy Ahsmore India Ltd. & another, (1995) 4 SCC 153, Shriram City Union Finance Corporation Ltd. v. Rama Mishra, (2002) 9 SCC 613 and New Moga Transport Co. v. United India Insurance Co. Ltd. & others (2004) 4 SCC 677.

8. On the anvil of the decisions cited (supra), the case of the petitioner may be examined.

9. This case is covered by clauses (a) to (c) of Section 20 C.P.C.. On a cursory perusal of the plaint filed in the Court, it is evident that no part of cause of action has arisen within the territorial jurisdiction of the Court at Bhubaneswar. The parties by their consent and mutual agreement cannot confer jurisdiction in the Courts at Bhubaneswar, which lacks the jurisdiction. In view of the same, the order dated 23.9.2009 passed by the learned Civil Judge (Jr.Division) Ist Court, Cuttack in C.S.No.39 of 2007 is quashed. So far as direction of the learned trial court to the plaintiff to make proper value of the suit and pay proper court fees is concerned, the same remains unaltered. The reasons assigned by the learned trial court cannot be said to be perfunctory or flawed.

10. The petition is allowed to the extent indicated above. No costs.

Writ petition allowed.

2016 (I) ILR – CUT-729

DR. A. K. RATH, J.

W.P. (C) NO. 16513 OF 2007

NOBLE GAS LTD. .....Petitioner

.Vrs.

NOBLE GAS WORKER'S UNION .....Opp. Party

CIVIL PROCEDURE CODE,1908 – S. 9

Petitioner as plaintiff filed suit for permanent injunction to restrain the defendant-worker's Union from holding demonstrations etc. causing hindrance in the production of the industry – Jurisdiction of the Civil Court questioned on the ground that the dispute comes under the purview of the Industrial Disputes Act, 1947 – Suit dismissed by the trial Court U/s 151 C.P.C. – Hence the writ petition – Neither the dispute is an industrial dispute nor does it relate to the enforcement of any right under the I.D. Act. – Moreover holding demonstrations etc. are in no way connected with the employment or the terms of employment or with the conditions of labour of any person – The present dispute is also not trade dispute – Held, the suit is maintainable in its present form and the Civil Court has jurisdiction to decide the same – Impugned order passed by the trial Court is quashed. (Paras 15 to 18)

Case Laws Referred to :-

1. AIR 1975 SC 2238 : The Premier Automobiles Ltd. v. Kamlakar Shantaram.
2. AIR 1969 SC 966 : Wadke and others Railway Board, New Delhi and another v. Niranjan Singh.
3. AIR 1995 SC 2001 : P.M. Metropolitan and others, etc. v. Moran Mar Marthoma and another etc.,
4. AIR 1969 SC 966 : Railway Board, New Delhi and another v. Niranjan Singh.

For Petitioner : Mr. Ramakanta Mohanty Sr. Adv.
For Opp. Party : None
Amicus Curiae : Mr. D.P.Nanda

Date of Hearing : 05.02.2016
Date of Judgment:15.02. 2016

JUDGMENT

DR. A.K. RATH, J.

The instant petition under Article 227 of the Constitution of India is to quash the order dated 11.12.2007 passed by the learned Civil Jude (Jr. Divn.),

Jajpur Road in C.S. No.62 of 2007, whereby and whereunder the learned trial court allowed the application filed by the defendant under Section 151 C.P.C. and held that the dispute comes under the purview of the Industrial Disputes Act, 1947 (hereinafter referred as the "I.D. Act") and as such civil court has no jurisdiction to maintain the civil suit and accordingly dismissed the suit.

2. The petitioner as plaintiff instituted C.S. No.62 of 2007 in the court of the learned Civil Judge (Jr. Divn.), Jajpur Road for permanent injunction restraining the defendant's union from holding demonstrations, dharanas, blockages, gherao, shouting, slogans, putting up loudspeakers, causing hindrance in the egress and ingress of the materials required for the purpose of production of the industry within a radius of 500 metres of the factory site. The case of the plaintiff is that it is an industry engaged in production of oxygen. The defendant worker's union is a union of the workers of the plaintiff. They are openly expressing to stop production, man-handling the officers and staffs of the company. Virtually they have stopped production of the company. Their sole intention is to extract money from the Manager. The illegal and unauthorized activities of the defendant worker's union are detrimental to the smooth running of the company. The activities of the union are intended to cause permanent loss of the company. They are determined to obstruct normal functioning of industry. Members of the defendant worker's union including it's office bearers are threatening the workers, employee and officers of the plaintiff company. They are threatening to confine the officers of the company. Also they are threatening the customers and transporters. On 12.04.2007, they have forcibly snatched away wage registers of the company for which the workers could not get their wages for the month of March. Regularly they closed the main gate of the unit forcibly and stopped production/transaction of the unit. With this factual scenario, the suit was filed.

3. Pursuant to issuance of summons, the defendant entered appearance and filed a comprehensive written statement denying the assertions made in the plaint. It is stated that the plaintiff-industry is engaged in production of oxygen for industrial purpose. The factory is running well. The Managing Director is getting huge amount of profit in each year. Large numbers of workers have been appointed for production purpose of the factory. The Managing Director has not given minimum wages to the workers for which the workers demanded 14 points chapter of demands on 31.3.2004. The worker's union also demanded to enhance their house rent, medical benefit, etc. But the Managing Director issued notice to retrench the workers and to

lay out the factory for repairing purpose. Instead of giving wages to the employees, the Managing Director intended to retrench the workers and appointed fresh contract labourers with low salary in order to get huge profit. They have neither threatened nor confined Directors nor closed the main gate. They have not snatched away the wage register on 12.4.2007. Since the Managing Director has not given the minimum wages to the workers, on a demand being made by the Union Secretary of the Labour Department, the Manager produced the wage register before the Labour Department. The District Labour Officer on 11.5.2007 has given remark that the Managing Director has contravened Rule 21(6) of Orissa Minimum Wages Rule 1954 whereafter show cause was issued to the Managing Director. It is further stated that the workers have not been involved in dharanas, blockages, gherao, shouting, etc. Further the court has no jurisdiction to entertain the case under Section 2(f) of the I.D. Act.

4. While the matter stood thus, the defendant filed an application under Section 151 C.P.C. to dismiss the suit as not maintainable. It is stated that the dispute between the plaintiff and defendant comes under the purview of I.D. Act. It is an industrial dispute. Thus the Labour Court is competent to entertain the matter.The plaintiff filed objection challenging the maintainability of the petition stating therein that the maintainability of the suit can be decided at the final hearing of the suit. Further the suit for permanent injunction is not coming under the purview of the I.D. Act. There is no prohibition in the I.D. Act for filing of civil suit. Relying on a decision of the apex Court in the case of *The Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke and others,* AIR 1975 SC 2238, learned trial court came to hold that the workers of the plaintiff company have raised certain demands, but the management is not interested to fulfill the same. So the dispute arises. The matter is also referred to the Labour Court, which is still pending. Thus the dispute between the employer and employee pertaining to enforcement of right or obligation created under the I.D. Act comes under the purview of Section 2(k) of the I.D. Act and as such the civil court has no jurisdiction. Held so, the learned trial court allowed the application filed by the defendant under Section 151 C.P.C. and dismissed the suit as not maintainable.

5. Heard Mr. R.K. Mohanty, learned Senior Advocate for the petitioner. None appears for the opposite party in spite of valid service of notice. Considering the legal issues involved, this Court appointed Mr. D.P. Nanda, learned Advocate, as Amicus Curiae. Mr. Nanda also argued the matter with vehemence.

6. Mr. Mohanty, learned counsel for the petitioner submitted that there is no provision in the I.D. Act to decide the nature of dispute enumerated in the plaint. He further submitted that the suit for permanent injunction is maintainable.

7. Mr. Nanda, learned Advocate, submitted that there is no bar either in the I.D. Act or Trade Union Act to decide the nature of dispute as stated in the plaint. The suit for permanent injunction is maintainable.

8. The sole question that hinges for consideration is whether on the facts and in the circumstances of this case, the civil court has jurisdiction to entertain the suit ?

9. To appreciate the contentions of the learned counsels, it is necessary to set out Section 9 C.P.C.

> "**9. Courts to try all civil suits unless barred** – The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> [*Explanation – I* – A suit in which the right to property or to an office is contested in a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.
>
> [*Explanation –II]* – For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.]"

10. The words "civil nature" have not been defined in the C.P.C. What is the meaning of the words ? The Supreme Court in the case of *Most. Rev. P.M. Metropolitan and others, etc. v. Moran Mar Marthoma and another etc.,* AIR 1995 SC 2001. The Supreme Court held thus :-

> "xxx xxx xxx
>
> One of the basic principles of law is that every right has a remedy. *Ubi jus ibi remediem* is the well known maxim. Every civil suit is cognisable unless it is barred, 'there is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers

no such right to sue' Smt. Ganga Bai v. Vijay Kumar & Ors., AIR 1974 SC 1126. The expansive nature of the Section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debars entry to only those which are expressly or impliedly barred. The two explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the Section to such religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of a civilised jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally key to the Section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the ambit of the Section by use of the word `shall' and the expression, `all suits of a civil nature' unless `expressly or impliedly barred'.

Each word and expression casts an obligation on the court to exercise jurisdiction for enforcement of right. The word `shall' makes it mandatory. No court can refuse to entertain a suit if it is of description mentioned in the Section. That is amplified by use of `expression, `all suits of civil nature'. The word `civil' according to dictionary means, `relating to the citizen as an individual; civil rights'. In Black's Legal Dictionary it is defined as, `relating to provide rights and remedies sought by civil actions as contrasted with criminal proceedings'. In law it is understood as an antonym of criminal. Historically the two broad classifications were civil and criminal. Revenue, tax and company etc, were added to it later. But they too pertain to the larger family of `civil'. There is thus no doubt about the width of the word `civil'. Its width has been stretched further by using the word `nature' along with it. That is even those suits are cognisable which are not only civil but are even of civil nature. In Article 133 of the Constitution an appeal lies to this Court against any judgment, decree or order in a `civil proceeding'. The expression came up for construction in S.A.L. Narayan Row & Anr. etc. etc. v. Ishwarlal Bhagwandas & Anr. etc. etc. AIR 1965 SC 1818. The Constitution Bench held `a proceeding for relief against infringement of civil right of a person is a civil proceedings'. In Arbind Kumar Singh –v- Nand Kishore Prasad & Anr. AIR 1968 SC 1227 it was held `to extend to

all proceedings which directly affect civil rights'. The dictionary meaning of the word `proceedings' is `the institution of a legal action, `any step taken in a legal action.' In Black's Law Dictionary it is explained as, `In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like'. The word `nature' has been defined as, `the fundamental qualities of a person or thing; identity or essential character; sort; kind; character'. It is thus wider in content. The word `civil nature' is wider than the word `civil proceeding'. The Section would, therefore, be available in every case where the dispute has the characteristic of affecting one's rights which are not only civil but of civil nature."

11. The expression "civil nature" is wider than the expression "civil proceeding". Considering the present case on the anvil of the decisions cited supra, a conclusion is irresistible that the suit is of civil nature.

12. The learned trial court misread and misapplied the ratio in the case of *The Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke and others,* AIR 1975 SC 2238. The principles applicable to the jurisdiction of the civil court in relation to an industrial dispute have been succinctly stated in paragraph 23 of the report. The same is quoted hereunder.

"xxx xxx xxx

(1) If the dispute is not industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil Court.

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.

(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.

(4) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is

> either Section 33C or the raising of an industrial dispute, as the case may be."

13. The present case has been examined on the principles enunciated in *The Premier Automobiles Ltd.* (supra). Neither the dispute is an industrial dispute nor does it relate to the enforcement of any right under the I.D. Act. The reason assigned by the learned trial court that the present dispute comes under Section 2(k) of the I.D. Act is difficult to fathom. Section 2(k) of the I.D. Act defines the "industrial dispute". Industrial dispute means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. By no strength of imagination, it can be said that the dispute of the present nature is an industrial dispute. Holding demonstrations dharanas, bloackages, gherao, shouting, slogans, putting up loudspeakers, causing hindrances in the egress and ingress of materials to the industry are no way connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.

14. Section 18 of the Trade Unions Act, 1926 provides immunity from civil suit in certain cases. The same is quoted hereunder.

> "**18. Immunity from civil suit in certain cases**—(1) No suit or other legal proceeding shall be maintainable in any Civil Court against any registered Trade Union or any [office-bearer] or member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills.
>
> (2) A registered Trade Union shall not be liable in any suit or other legal proceeding in any Civil Court in respect of any tortious act done in contemplation or furtherance of a trade dispute by an agent of the Trade Union if it is proved that such person acted without the knowledge of, or contrary to express instructions given by, the executive of the Trade Union."

Section 2 (g) of the Trade Unions Act, 1926 defines 'trade dispute'. It means any dispute between employers and workmen or between workmen and workmen, or between employers and employers which is connected with the employment or non-employment, or the terms of employment or the conditions of labour, of any person, and "workmen" means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises. There is no scintilla of doubt that the present dispute is not a trade dispute.

15. The case may be examined from another angle. In *Railway Board, New Delhi and another v. Niranjan Singh,* AIR 1969 SC 966, the General Manager of Northern Railway had prohibited the railway employees from holding meetings within the railway premises including open grounds forming part of those premises. In violation of the order passed by the General Manager, the respondent, who was one of the employees of the Railway and a trade union worker, held meetings. He was removed from services for disobedience of the order of the General Manager. An argument was advanced that the order of the General Manager has contravened the provisions of Article 19 of the Constitution of India and as such the said order was not binding. The same is not per se a ground to remove the respondent. The Supreme Court held that the General Manager had every right to prohibit holding of meetings in the railway premises. Thus violation of the order entailed punishment. Paragraph 12 and 13 of the report is quoted hereunder.

> "12. It was not disputed that the Northern Railway is the owner of the premises in question. The fact that the Indian Railways are State Undertakings does not affect their right to enjoy their properties in the same manner as any private individual may do subject only to such restrictions as the law or the usage may place on them. Hence unless it is shown that either under law or because of some usage the railway servants have a right to hold their meetings in railway premises, we see no basis for objecting to the direction given by the General Manager. There is no fundamental right for anyone to hold meetings in government premises. If it is otherwise there is bound to be chaos in our offices. The fact that those who work in a public office can go there does not confer on them the right of holding a meeting at that office even if it be the, most convenient place to do so.

> 13. It is true that the freedoms guaranteed under our Constitution are very valuable freedoms and this Court would resist abridging the ambit of those freedoms except to the extent permitted by the Constitution. The fact that the citizens of this country have freedom of speech, freedom to assemble peaceably and freedom to form-associations or unions does not mean that they can exercise those freedoms in whatever place they please. The exercise of those freedoms will come to an end as soon as the 'right of someone else to hold his property intervenes. Such a limitation is inherent in the exercise of those rights. The validity of that limitation is not to be judged by the tests prescribed by Sub-Arts. (2) and (3) of Article 19. In other words the contents of the freedoms guaranteed under Clauses (a), (b) and (c), the only freedoms with which we are concerned in this appeal, do not include the right to exercise them in the properties belonging to others. If Mr. Garg is right in his contentions then a citizen of this country in the exercise of his right under Clauses (d) and (e) of Article 19(1) could move about freely in a public-office or even reside there unless there exists some law imposing reasonable restrictions on the exercise of those rights."

16. Thus, the fundamental right enshrined in Article 19 of the Constitution of India is not a weapon in the hands of the workers union to hold demonstrations, dharanas, blockages, gherao, shouting, slogans inside the factory premises.

17. In view of the analysis made in the preceding paragraphs, this Court holds that the suit in present form is not maintainable. The civil court has jurisdiction to decide the dispute.

18. Accordingly, the order dated 11.12.2007 passed by the learned Civil Jude (Jr. Divn.), Jajpur Road in C.S. No.62 of 2007 is quashed. This Court holds that the suit is maintainable in its present form. This Court records its appreciation for the valuable assistance rendered by Mr. D. P. Nanda, learned Advocate. The petition is allowed.

Writ petition allowed.

2016 (I) ILR – CUT-738

DR. B.R. SARANGI, J.

W.P.(C) NO. 21514 OF 2013

SUBHAYA PRUSTY ……..Petitioner

.Vrs.

UNION OF INDIA & ORS. ……Opp. Parties

SERVICE LAW – Advertisement made and recruitment process started – Change of norms in the advertisement without notice to candidates and general public – Process of selection under the changed norms is violative of Article 16 of the Constitution of India.

In the instant case advertisement made for recruitment in Assam Rifles – One post in Electrical Trade for the State of Odisha – Petitioner was the sole candidate having requisite qualification – He was found fit in written test, physical efficiency test and was found medically fit – Petitioner's candidature was rejected as per the policy laid down in Para-2, sub paras XIII and XVI(2) Dt. 25.6.2009 which does not form part of the advertisement – Held, impugned Order rejecting the candidature of the petitioner for the post of electrician in respect of State of Odisha can not sustain, hence quashed – The opposite parties are directed to take necessary follow up action for giving employment to the petitioner against the post advertised.

(Paras 5 to 14)

Case Laws Referred to :-

1. (2014) 9 SCC 329 : Nawal Kishore Sharma v. Union of India & Ors.
2. (2009) 3 SCC 227 : Amlan Jyoti Borooah v. State of Assam & Ors.
3. (2008) 3 SCC 512 : K. Manjusree v. State of Andhra Pradesh & Anr.
4. 2005 (2) Supreme 615 : Secretary, A.P. Public Service Commission v. B.Swapna and Ors,
5. 100 (2005) CLT 465 : Mrs. Madhumita Das and another v. State of Orissa & Ors.
6. 2011 (I) ILR-CUT 398 : Chandrama Bhusan Sarangi v. Union of India & Ors.
7. (O.J.C. No. 2607 of 2001 : Girish Mohanty v. Union of India & Ors.

For Petitioner : M/s. Sidheswar Mallik, P.C.Das.
For Opp.Parties : Mr. A.Mohanty (C.G.C.)
Mr. L.Jena (C.G.C.)

Date of hearing : 04.01.2016
Date of judgment : 19.01.2016

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner has filed this application seeking to quash the order dated 27.8.2013 issued by the authority vide Annexure-4 rejecting his candidature for enrollment into Assam Rifles for Electrical Trade on the plea "Found low-in-merit against your State".

2. The factual matrix of the case in hand is that an advertisement was published in employment news by the Director General Assam Rifles, Silong for recruitment in Assam Rifles for various posts. So far as State of Orissa is concerned, one post in Electrical Trade has been advertised and the recruitment rally was scheduled to be held at Dimapur (Nagaland), NRS-Dimapur and Lokhra (Assam). The advertisement also indicates that the application should reach by 8.9.2012 and application received beyond that date shall not be entertained. The petitioner having got requisite qualification as per clause-7 and clause-9 of the advertisement for electrical trade, i.e. 10^{th} class pass and possesses ITI certificate, applied for the said post. As per clause-14, the written test will consist of only OMR based objective type multiple choice question to be answered using a pen. The question paper will be of 100 marks. Clause 16 of the advertisement provided that candidates who qualify in all respect will be placed in merit list depending upon the category wise vacancies allotted to the states and instruction to join the training centre or enrolment will be issued on the basis of the merit list. The petitioner was the only candidate from the State of Orissa for the one post in electrical trade reserved for Orissa who submitted his application for the post of electrician on 27.7.2012 pursuant to the advertisement. Accordingly, he has been called on 25.8.2012 to report before the Presiding Officer Recruitment and Selection Board at Lokhra (Assam) on 25.9.2012 along with the original documents. He appeared the written test conducted on 25.9.2012 and having qualified vide letter dated 26.10.2012 in Annexure-3 was called upon to report for medical examination on 26.10.2012 at Assam Rifles Composite Hospital, Shokhubi, Dimapur in the State of Nagaland. In response to the same, petitioner appeared in the medical test. But on 27.8.2013 he has been issued with an order vide Annexure-4 in his home address at R.M. Patna in the district of Puri that his candidature has been rejected due to the reason "found low-in-merit against your state". Hence this application.

3. Mr. Sidheswar Mallik, learned counsel for the petitioner strenuously urged that the petitioner being the only candidate from the State of Orissa for single post of electrician reserved for the state of Orissa, there is no question of determination of comparative merits between the parties and rejection of his candidature is contrary to the advertisement issued in Annexure-1. It is stated that once the petitioner qualified in the written test and physical efficiency test and was found medically fit for such appointment, denial or rejection of his candidature on the plea of "low in merit against your state" cannot sustain in the eye of law. It is further urged that the plea of rejection of candidature is contrary to the terms of the advertisement issued in Annexure-1. The qualitative requirement mentioned in clause-9 of the advertisement only stipulates the educational qualification. It is stated that since the petitioner has got requisite qualification, he has been called to appear in the test as per the advertisement itself. The determination of low in merit on the basis of percentage of marks has not been indicated in the advertisement itself. Apart from the same, it is urged that since all the correspondences have been made in the home address of the petitioner in the district of Puri, Orissa, the cause of action has arisen within state of Orissa, therefore this Court has got jurisdiction to entertain this application. To substantiate his contention, he has relied upon the judgments in ***Nawal Kishore Sharma v. Union of India and others,*** (2014) 9 SCC 329, ***Amlan Jyoti Borooah v. State of Assam and others,*** (2009) 3 SCC 227 and ***K. Manjusree v. State of Andhra Pradesh and another,*** (2008) 3 SCC 512.

4. Mr. A. Mohanty, learned counsel and Mr. L. Jena, learned counsel have appeared for opposite party nos. 1and 2 separately, but they have relied upon the composite counter affidavit filed by opposite party nos. 1 and 2 and state that the final selection of the candidates was made on the basis of the merit in each category. The cut off percentage of marks for passing in unreserved/general/ex-serviceman categories was 35% and the cut off percentages of marks for passing in reserved categories SC/ST and OBC was 33%. It is stated that the petitioner secured only 33% of marks and though the petitioner was declared pass in OBC category, he did not qualify as an unreserved candidate for the post advertised as he could not meet the eligibility criteria for the said category. It is further stated that this writ petition is not maintainable before this Court as this Court has lacked territorial jurisdiction to hear the matter. Therefore, they seek for dismissal of the writ petition.

5. On the basis of the facts pleaded above, it appears that the candidature of the petitioner has been rejected as per the policy laid down in Para-2, Sub paras XII and XVI of MHA U.O. No.I 45023/6/2008-Pers-II dated 25.06.2009. Merit list in each category namely General, OBC, SC, ST and Ex-Servicemen is prepared separately in respect of each States/UTs on the basis of aggregate marks obtained in the written test. The final selection of the candidates is made in order of merit in each category. The qualitative requirement being applicable to each category, minimum percentage of mark has been fixed for Unreserved/General/Ex-serviceman categories at 35% and cut off percentages of marks for passing in reserved categories i.e. SC/ST/OBC has been fixed at 33%. Since petitioner secured 33% marks, he has been declared pass in OBC category, but he did not qualify as an unreserved candidate by securing 35% of marks. Therefore, he has been intimated vide Annexure-4 that he being low in merit list, he has not been selected for recruitment to the post advertised pursuant to Annexure-1. But the reasons which has been assigned has not been indicated to the petitioner in any manner whatsoever and for the first time new plea has been taken by the opposite parties which has not been intimated to any of the candidates pursuant to the advertisement issued in Annexure-1.

6. In ***K. Manjusree*** (supra), the apex Court held that in a recruitment process, selection criteria has to be prescribed in advance. Rules of game cannot be changed afterwards. The minimum qualifying marks for interview prescribed after the interviews were over was held not permissible. The minimum qualifying marks both for written examination and interview can be prescribed in advance, but not after the process of selection is over.

7. In ***Amlan Jyoti Borooah*** (supra), the apex Court held that the selection test should be done in the order mentioned in the advertisement and any deviation from the advertisement itself should be in conformity with the principles of natural justice.

8. In ***Secretary, A.P. Public Service Commission v. B. Swapna and others***, 2005 (2) Supreme 615, the Andhra Pradesh Public Service Commission had initially advertised for recruitment to eight posts of Asst. Public Relation Officers. Subsequently seven more vacancies were advertised. Therefore, the recruitment was made for fifteen vacancies. The selection was finalized on 2.7.1996. During the currency of the wait list the competent authority again notified 14 more vacancies on 14.4.1997 to be filled up by the candidates from the wait list. In that case, the apex Court held that there were two principles in service laws, which were indisputable.

Firstly, there could not have been appointment beyond the advertised number and secondly, the norms of selection could not have been altered after the selection process had started. In paragraph-16 of the said judgment, the apex Court states as follows:-

> "The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by Learned Counsel for the applicant-respondent No.1 it was unamended rule, which was applicable. Once a process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a certain criteria e.g., minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If the Rule is expressed in a language which is fairly capable of either interpretation it ought to be considered as prospective only."

9. Similar question came up for consideration before this Court in ***Mrs. Madhumita Das and another v. State of Orissa and others,*** 100 (2005) CLT 465, wherein the question before this Court was not that the modalities fixed by the Committee/Full Court were illegal, but the question is that once norms were published in the advertisement for notice of all, whether it could be changed at a later stage without notice to any of the candidates and general public and without issuing any corrigendum to the advertisement in question. In our opinion once an advertisement was issued to fill up a post in any office under the State, it is the duty of the recruiting authority to give necessary information to all in a precise and clear manner and relying upon the judgment in ***Secretary, A.P. Public Service Commission*** (supra), this Court has come to a conclusion, which reads as follows:-

> "Once selection process was started the norms fixed in the advertisement could not have been changed and if they were liable to be changed then the same should have been published in the like manner in which initial advertisement was published. Non-publication of the norms changed subsequently after starting of the

selection process was violative of Article 16 of the Constitution and thus is not sustainable in the eye of law."

10. Applying the principles laid down by the apex Court mentioned above to the present context, it appears that the reliance placed on the policy dated 25.6.2009 has not been indicated in the advertisement issued in Annexure-1 to bring the same to the notice of the candidates. Therefore, determination of eligibility criteria on the basis of percentage of marks secured in a qualitative recruitment without being advertised in Annexure-1 cannot sustain in the eye of law.

11. So far as territorial jurisdiction of the Court is concerned, it is to be seen whether any part of the cause of action has arisen within the State of Orissa. The cause of action has been defined to mean every fact, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. Right to invoke Article 226 of the Constitution of India to enforce Fundamental rights and other legal rights against the State or authority or its agency is a constitutional right. Such right should not be made illusory or unenforceable upon narrow construction of the concept of cause of action.

12. In ***Chandrama Bhusan Sarangi v. Union of India and others,*** 2011 (I) ILR-CUT 398, this Court held that High Court can exercise power to issue writ, direction or order for enforcement of any of the fundamental rights conferred by Part-III of Constitution or for any other purpose, if cause of action wholly or in part has arisen within the territorial jurisdiction of High Court. The expression 'cause of action' means bundle of facts which petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court. Therefore, question of territorial jurisdiction must be decided on facts pleaded in petition. Similar view has also been taken by this Court in ***Girish Mohanty v. Union of India and others*** (O.J.C. No. 2607 of 2001, disposed of on 03.03.2015).

13. In ***Nawal Kishore Sharma*** (supra), the apex Court categorically held that cause of action partly arose at his native place High Court within whose territorial jurisdiction, he received the letter has jurisdiction to entertain the application. Further it is held that as cause of action for the purpose of Article 226 (2) of Constitution of India must be assigned the same meaning of cause of action as given under Section 20 (c) of the Code of Civil Procedure,1908. In that view of the matter, since all the correspondences have been made in the local address of the petitioner,

which is within the territorial jurisdiction of this Court and part of cause of action arose within State of Orissa, this Court has got jurisdiction to entertain this application. The objection with regard to jurisdiction is answered accordingly.

14. In view of the foregoing discussion made above, since the policy laid down in Para-2, Sub-Para-XIII and XVI (2) dated 25.6.2009 does not form part of the advertisement in Annexure-1, any action pursuant to such policy being contrary to the provisions of law, the order impugned in Annexure-4 rejecting the candidature of the petitioner for the post of Electrician pursuant to advertisement in Annexure-1 in respect of State of Orissa against single post cannot sustain in the eye of law. Accordingly, the order dated 27.8.2013 in Annexure-4 is hereby quashed. The opposite parties are directed to take necessary follow up action for giving employment to the petitioner against the post advertised within a period of three months from the date of communication of this judgment.

15. Accordingly, the writ petition is allowed. However, there would be no order to costs.

Writ petition allowed.

2016 (I) ILR - CUT-744

DR. B.R. SARANGI, J.

W.P.(C) NOS. 2997, 4898 & 3639 OF 2008

AKSHAYA KUMAR PATRA .....Petitioner

.Vrs.

M.D., ANDHRA PRADESH POWER GENERATION CORPORATION LTD. & ORS. .....Opp. Parties

(A) SERVICE LAW – Petitioner-employee availed revised scales of pay from 1998 – Impugned order passed re-fixing his pay and directing recovery of the excess amount already paid to him – Action challenged – Held, direction for re-fixation of pay and refund of salary after lapse of 10 years, can not sustain in the eye of law. (Para 13)

(B) SERVICE LAW – Excess unauthorized payment to employee – Recovery – Under the following situations, recoveries by the employers would be impermissible in law :-

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

(Para 12)

Case Laws Relied on :-

1. (2015)4 SCC 334=AIR 2015 SC 696 : State of Punjab & Ors. -V- Rafiq Masih (White Washer)

Case Laws Referred to :-

1. AIR 2012 SC 2951 : Chandi Prasad Uniyal & Ors. -V- State of Uttarkhand & Ors.
2. 2014 (Supp-II) OLR 951 : Ras Bihari Mandal -V- N.T.P.C. Ltd. & Anr.
3. (1995) Sup.(I) SCC 18=1995 AIR SCW 1780 : Sahib Ram -V- State of Haryana
4. 1994(2) SCC 521 : Shyam Babu Verma -V- Union of India
7. (2014) 8 SCC 883 : State of Punjab v. Rafiq Masih

For Petitioner : M/s. J.K.Khuntia & A.K.Rout
For Opp.Parties : M/s. Kamal Ray & A.K.Baral
M/s. B.K.Nayak-1 & D.K.Mohanty

Date of hearing : 05.01. 2015
Date of Judgment: 28.01.2016

JUDGMENT

DR. B.R.SARANGI, J.

All these above mentioned writ petitions having involved similar cause of action, they were heard together and are disposed of by this common judgment.

2. W.P.(C) Nos. 2997 and 3639 of 2008 have been filed to quash the letter dated 6.2.2008 issued by the Andhra Pradesh Power Generation Corporation Ltd. vide Annexure-9 whereas W.P.(C) No. 4898 of 2008 has been filed to quash the very same letter dated 6.2.2008 in Annexure-7 for fixation of pay and recovery of the amount already paid since re-revision has not been done in accordance with law.

3. For better appreciation, it would be suffice to state the fact of W.P.(C) No.2997 of 2008. The factual matrix of the case in hand is that Machhakund Hydro Electric Joint Scheme is a joint venture of Andhra Pradesh Government and Government of Odisha having 70% and 30% share respectively in the said project. As per the minutes of discussion, the employees of both the States will be governed by their respective States' service condition. Due to commencement of the Electricity Reforms Act, Machhakund Hydro Electric Joint Scheme and Andhra Pradesh State Electricity Board were reformed and renamed as Andhra Pradesh Power Generation Corporation having the same principles and guidelines which prevailed earlier. The petitioner in W.P.(C) No. 2997 of 2008 was appointed as Lower Division Clerk in the year 1978 under the Government of Odisha in Energy Department and posted at Balimela Hydro Project pursuant to which he joined at Balimela on 4.6.1982. He was transferred to Rengali Hydro Electric Circle and joined there on 04.06.1982. During his continuance at Rengali, he was promoted to the post of Upper Division Clerk in the year 1990 and was transferred to Upper Indravati Project, where he joined. Again, he was transferred to Rengali Hydro Electric Circle in the year 1991. While he was so continuing, Orissa Hydro Power Corporation was created pursuant to the Orissa Electricity Reforms Act 1996. Consequentially, the services of the petitioner along with other employees of the State Government working under the Electrical Construction Projects were placed under the jurisdiction of the Orissa Hydro Power Corporation. The petitioner was transferred to Machhakund Hydro Electric Joint Scheme where the State of Odisha is having 30% share in the project including the staffs and assets. The petitioner joined at Machhakund on 3.6.1993 where he exercised his option to come under the Andhra Pradesh State Electricity Board pay scales and the same was allowed as per the terms and conditions applicable to Machhakund Project. Accordingly, his pay was fixed at Rs.4,375/- in the post of U.D.C as per the Andhra Pradesh State Electricity Board Revised Pay Scales, 1994, which commenced from 1.7.1990 and expired on 30.6.1994. Thereafter, Andhra Pradesh State Electricity Board revised Scales of Pay Rules, 1998

came into force with effect from 1.7.1998. The petitioner exercised his option to come over to the said revised pay scales with effect from 1.2.1999 on the date of earning his next increment. The petitioner was put under suspension by his parent Department, i.e. O.H.P.C. Ltd. on 5.1.1999 A.N. and the same was effected w.e.f. 6.1.1999 F.N. As per the existing rules, the petitioner received his salary for 5.1.1999 in the scale of pay fixed in terms of Andhra Pradesh State Electricity Board Revised Pay Regulations, 1998 in the manner as is applicable to the employees of Andhra Pradesh State Electricity Board in the retirement/ death on or after 1.4.1998 but before 1.7.1998 As the petitioner joined in Machhakund on 3.6.1998 i.e. before the cut-off date the petitioner was included in the 1994 Pay Revision, which was the existing pay scale for the purpose of revised Pay Scales of 1998, vide Clause No. 2(ii) of the Board Proceedings No.225 dated 5.1.1999 before expiry of 1994 negotiated wage settlement, i.e., before 30.6.1998 for which financial benefits is allowed w.e.f. 1.7.1998 instead of 1.4.1998. Accordingly, the scale of pay of the petitioner was revised in 1998 Pay Revision with effect from 1.2.1999, i.e. from the date of earning his next increment fixing his pay at Rs.8,235/-. Consequentially the petitioner was extended with the Pay Revisions of 1994, 1998, 2002 and 2006. But all on a sudden opposite party no.2 communicated a letter on 6.2.2008 indicating that the pay revision of the petitioner has been wrongly done from 1998 till 2006, which he is not entitled to get and further directed for recovery of the amount already paid to him. Accordingly, the pay of the petitioner has been revised from Rs.21,215/- to Rs.12,150/-. It is stated that similarly situated persons like the petitioner have got the said benefits and their pay has been revised as against 30% of Orissa quota after commencement of pay revision of 1990 and the petitioner having availed the revised scales of pay from 1998 and in the meantime 10 years having elapsed, the impugned letter re-fixing his scale of pay and directing for recovery of the amount cannot be sustained in the eye of law.

4. Mr.J.K.Khuntia, learned counsel for the petitioner urged that such re-fixation of scale of pay and direction for recovery pursuant to Annexure-9 without affording any opportunity of hearing to the petitioner is hit by Article 14 of the Constitution of India. It is further urged that if the similarly situated persons working against 30% Orissa quota deployed at Machhakund Project has been extended with such benefits, the direction given for recovery of the salary after a lapse of more than 10 years is an arbitrary exercise of power and the same should be quashed. To substantiate his contention, he has placed reliance on **State of Punjab and others v. Rafiq Masih (White Washer)**, (2015) 4 SCC 334= AIR 2015 SC 696.

5. Mr.K.Ray, learned counsel for opposite party no.3 strongly urged that if benefit has been extended by the authority by mistake and if the said mistake has been brought to the notice of the authorities, they have every right to make such correction and therefore, the fixation of salary of the petitioner having been done erroneously and in audit the same having been detected, the authorities have not committed any illegalities or irregularities by issuing the order in Annexure-9 by re-fixing his scale of pay and directing for recovery of the excess amount already paid to the petitioner. In order to substantiate his argument, he has relied on the decision of the apex Court in **Chandi Prasad Uniyal and others v. State of Uttarkhand and others,** AIR 2012 SC 2951 and of this Court in **Ras Bihari Mandal v. N.T.P.C. Ltd. and another**, 2014(Supp-II) OLR 951.

6. Mr.B.K.Nayak-1, learned counsel for opposite party no.4 supports the stand taken by opposite party no.3 and states that if benefit has been extended to the petitioner under mistake, the same can also be rectified when the same was brought to the notice of the authorities and therefore, no illegalities or irregularities have been committed in re-fixing the salary of the petitioner and directing for recovery of the excess amount already paid to the petitioner. He has also relied upon the judgment of this Court in **Ras Bihari Mandal(supra)**.

7. On the basis of the facts pleaded above, it is admitted fact that the petitioner, who is an employee of the State of Odisha has been posted at Machhakund Project, which has been established on the joint collaboration of the State of Andhra Pradesh and State of Odisha and the petitioner's posting was against 30% Odisha quota pursuant to which he joined in the post on 3.6.1998. On option being called, the petitioner exercised the same and availed the benefit of revised scales of pay of 1998 and accordingly, his pay has been revised and he has been extended with the benefits as mentioned above. It appears that the petitioner was extended with the benefits of Revised Scales of Pay of 1994, 1998, 2006 and 2008 as against the post held by him, but all on a sudden after lapse of 10 years, the impugned order has been issued by re-fixing his pay and directing for recovery of the excess amount already paid to him. This Court while entertaining the writ petition passed interim order on 29.2.2008 directing stay of operation of the order dated 6.2.2008 in Annexure-9 so far as it relates to the petitioner. In the meantime, on attaining the age of superannuation, the petitioner has already retired from service.

8. The sole question now to be considered is whether the authorities are justified in re-fixing the pay of the petitioner and directing for recovery of the excess amount already paid to him after a lapse of 10 years.

9. The opposite party no.3 has relied on **Chandi Prasad Uniyal (supra)** wherein the apex Court has held that any amount paid/ received without authority of law can always be recovered barring few exceptions of extreme hardships, but not as a matter of right. In such situations law implies an obligation on the payee to repay the money, otherwise, it would amount to unjust enrichment. The apex Court also held that recovery of excess paid public money cannot be limited only to cases of fraud or misrepresentation. The concept of fraud or misrepresentation is not applicable to such situation. Excess payment made due to wrong pay fixation is liable to be recovered. More so, when there was clear stipulation in the fixation order that in case of wrong/ irregular fixation, the institution in which the employee works would be responsible for recovery of over payment made.

10. In **Ras Bihari Mandal(supra)** this Court has also taken a view relying upon the judgment of the apex Court that excess payment made due to wrong release of increments and if a mistake is committed by the authority, the same can be rectified and if the mistake is brought to the notice of the authority, then they have every right to make such corrections. Therefore, payment made inadvertently is recoverable from the salary of the petitioner.

11. The judgment of the apex Court in **Chandi Prasad Uniyal (supra)** mentioned above in which the judgment in **Sahib Ram v. State of Haryana** (1995) Supp.(I) SCC 18= 1995 AIR SCW 1780) was taken into consideration, since there was an apparent difference of views expressed on the one hand by the apex Court in **Shyam Babu Verma v. Unon of India (1994(2) SCC 521** and **Sahib Ram v. State of Haryana**, 1995 Supp(1) SCC 18 and in other hand in **Chandi Prasad Uniyal (supra)**, the matter was referred to a larger bench of three judges, but the apex court while disposing of the reference, the three- Judges Bench in **State of Punjab v. Rafiq Masih**, (2014) 8 SCC 883 has recorded the following observation:

> "6. In our considered view, the observations made by the Court not to recover the excess amount paid to the appellant therein were in exercise of its extraordinary powers under Article 142 of the Constitution of India which vest the power in this Court to pass equitable orders in the ends of justice.

xx xx xx xx

13. Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgments and the latter judgment.

14. In that view of the above, we are of the considered opinion that reference was unnecessary. Therefore, without answering the reference, we send back the matters to the Division Bench for their appropriate disposal."

12. Consequence thereof, the apex Court in **State of Punjab v. Rafiq Masih (supra)** has made their endeavour to lay down the parameters of fact situations wherein the employees who are beneficiaries of the wrongful monetary gains at the hands of the employer, may not be compelled to refund the same and the apex Court held that the instant benefit cannot extend to an employee merely on account of the fact that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee. In paragraphs 7 to 10, the apex Court held as follows :

"7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by6 the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this court exempted employees from such recover, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and

therefore, arbitrary. And accordingly, the interference at the hands of this court.

8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.

9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality can be found in Articles 14 to 18 contained in Part III of the Constitution of India, dealing with "fundamental rights". These articles of the Constitution, besides assuring equality before the law and equal protection of the laws, also disallow discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracized section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39,39-A,43 and 46 contained in Part IV of the Constitution of India, dealing with the "decretive principles of State Policy". These articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice----social, economic and political, be inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.

10. In view of the aforestated constitutional mandate, equity and good conscience in the matter of livelihood of the people of this country

has to be the basis of all governmental actions. An action of the state, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, that the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India."

Finally in paragraph 18, the apex Court has held as follows :

"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or

arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

13. Applying the law laid down in **State of Punjab v. Rafiq Masih(supra)** to the present facts to since the case of the petitioner falls within the parameters of Clause (i) to Clause (iv) as delineated above, the principles laid down by the apex Court in **Chandi Prasad Uniyal (supra)** and of this Court in **Ras Bihari Mandal(supra)** have no application. This Court is of the considered view that the direction given for re-fixation of pay and refund of salary after lapse of 10 years period, cannot sustain in the eye of law.

14. In view of the fact and law discussed above, the impugned orders in Annexure-9 so far as it relates to the petitioner in W.P.(C) Nos. 2997 and 3639 of 2008 and Annexure-7 in W.P.(C) No. 4898 of 2008 are hereby quashed.

15. The writ petitions are accordingly allowed. No cost.

Writ petitions allowed.

2016 (I) ILR - CUT-753

DR. B.R. SARANGI, J.

O.J.C. NO. 2580 OF 2001

CHARANJIT KAUR ……..Petitioner

.Vrs.

S.E.RLY., CALCUTTA, WEST BENGAL & ANR. ……Opp. Parties

RAILWAY ACCIDENT – Deceased was a physically handicapped person – While crossing the railway line, his artificial foot was entangled in the gap of the track and he was ran over by a train – General people used such railway line with the knowledge of the authorities for quite a longtime – No remedial measures, either for construction of any flyover or footbridge over the railway line – Negligence on the part of the railway authorities leading to the above untoward incident – Deceased was working as a guest house attendant with a monthly salary of Rs. 3000/-P.M. – He was survived by his old parents, wife, two daughters and a son who are minors – Held, direction issued to the railway authorities for payment of Rs. 4,00,000/-

as compensation alongwith 7% interest from the date of accident till the date of actual payment – In this case interest is awarded as there is gross negligence on the part of the authority to the extent that in order to wipe out the evidence, the deceased was cremated without causing inquiry, which is not permissible under law.

(Para 10)

Case Laws Referred to :-

1. 2012 (I) OLR 468 : Laxmi Priya Sahoo & Anr. -V- Div.Rly.Manager, E.Co.Rly. & Anr.
2. 2015 (I) OLR 1100 = 2015 (I) ILR-CUT-627 : Edgula Babu Rao & Ors. -V- The General Manager, E.Co.Rly. & Ors.

For Petitioner :M/s. R.Mohapatra, M.K. Mohapatra S.K.Bisi, P.Jena

For Opp.Parties :M/s. K. Jena, A.K.Mohapatra, S.K.Dash. M/s. A.K.Mishra, S.K.Ojha, N.R.Pandit, H.M.Das, A.K.Sahoo, B.K.Jena, S.K.Khandayatrai

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Date of hearing : 02.03.2016
Date of judgment: 15.03. 2016

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is the widow of late Manjit Singh, has filed this application seeking for a direction to the opposite parties to pay adequate compensation for untoward accident that took place on 11.10.1998 causing death of her husband.

2. The factual matrix of the case in hand is that the petitioner's husband late Manjit Singh came from Jamshedpur to Rourkela to attend the marriage ceremony of his niece at Panposh Basti (Raghunathpalli) on 10.10.1998. After attending the marriage, he left the house at about 12.20 A.M. on 11.10.1998 to catch the train for Jamshedpur. He was a physically handicapped person and using artificial right leg for last 22 years. From the inception of Bombay-Howrah Railway line, the inhabitants of Raghunathpalli Basti which is otherwise known as Panposh Basti are using to cross over the railway line which is closed to Panposh Chhak for either catching train or bus or Auto Rickshaw to go to any destination or even for marketing purposes which is within the knowledge of railway authorities. On 11.10.1998, late

Manjit Singh while crossing over the railway line, run over by Puja Special (Express Train) as because his artificial foot was somehow entangled in the gap of the track and the gap was caused due to negligence of railway and by the time he retrieved his leg, the train ran over him resulting in his sudden death. The G.R.P.S. took up the matter and without any proper enquiry or establishing the identity of the victim, cremated the body without conducting post mortem. When late Manjit Singh did not reach Jamshedpur on 14.12.1998, a missing report was lodged before Raghunathpalli police station of Rourkela. Information of his missing was flashed to all the police stations including G.R.P.S., but of no result. On 16.10.1998, Mahinder Singh and Kuldeep Singh who are cousins of late Manjit Singh came to know about running over of train on a man at Ponposh Railway Station and after making personal enquiry, requested the Sub-Collector, who in turn authorized the Magistrate to exhume the body in presence of witnesses and after exhumation, the dead body was identified as of Manjit Singh. Consequentially, G.R.P.S., U.D. Case No. 21 of 1998 dated 31.10.1998 corresponding to G.R. No. 208 of 1998 was registered for the unnatural, sudden and accidental death of Manjit Singh and final report was submitted by O.I.C., Rourkela G.R.P.S. indicating that the cause of death of the deceased was due to accidental run over by the train (Puja Special) on 11.10.1998 at about 2.20 A.M. and there was no suspicion of any foul play. Accordingly, it has been noted in the final form that "under the above facts and circumstances, I close the case declaring the death of the deceased due to accidental run over by train. There is no suspicion of any foul play." The deceased Manjit Singh had left behind his old parents, wife, two daughters and a son, who are minors and dependant on him. The deceased was working in Payal Talkies at Jamshedpur as guest house attendant and was being paid a monthly consolidated salary of Rs.3000/- and was the only earning member of the family and his pay was the only source of income of the family. After his death, the family suffered a misery and as such the entire livelihood of the family has been affected due to untoward accident that took place on the fateful night. Hence, the wife of the deceased Manjit Singh has filed this application claiming compensation.

3. Mr. P. Jena, learned counsel for the petitioner strenuously urged that due to the untoward incident, the petitioner being the legal heir of the deceased is entitled to get compensation. In order to substantiate his contention, reliance has been placed on the judgments in ***Laxmi Priya Sahoo and another v. Divisional Railway Manager, East Coast Railway and***

another, 2012 (I) OLR 468 and ***Edgula Babu Rao and others v. The General Manager, East Coast Railway and others***, 2015 (I) OLR 1100 : 2015 (I) ILR-CUT-627.

4. Mr. K. Jena, learned counsel though initially appeared on behalf of opposite party no.1, subsequently Mr. A.K. Mishra, learned counsel appeared on behalf of opposite party no.1 and filed counter affidavit. But at the time of call, none appeared for opposite party no.1. This being a year old case, considering the counter affidavit filed by opposite party no.1, wherein it is urged that the death of the husband of the petitioner had not been caused due to railway accident nor due to untoward incident as defined under section 124 (A) of the Indian Railway Act so as to hold the Railway liable for any compensation and death has been occurred due to deliberate negligence on the part of the deceased. It is stated that the deceased was not a bonafide passenger of the train, therefore the claim so made cannot sustain in the eye of law and accordingly he seeks for dismissal of the writ application. It is further urged that the petitioner has not disclosed the number and name of the train in which the deceased had travelled and also has not disclosed the purchase of any ticket. It is stated that while crossing the railway line if the incident occurred that itself cannot be stated to be violative of safety rules, thereby the death of the petitioner's husband was due to the fault of railway cannot sustain. Accordingly, the claim of compensation as prayed for in the writ application has been denied.

5. On the basis of the facts pleaded, there is no iota of doubts that the death of the husband of the petitioner has been caused due to the run over by the train and the G.R.P.S. has registered U.D. Case No. 21 of 1998 corresponding to G.R. Case No. 208 of 1998 on 31.10.1998 after long lapse of the incident on 11.10.1998. Even if the petitioner has not disclosed the number and name of the train that ipso facto cannot disentitle her to get compensation as the factum of death is due to running over of train is admitted. In final form submitted after investigation, it has been stated that case was closed declaring the death of the deceased due to accidental run over by train and there is no suspicion of any foul play. Section 124 (A) of the Railway Act which has been inserted by way of amendment of (Railway Amendment Act 28 of 1994) clearly states that no compensation shall be payable under the section by railway administration if the passenger died or suffered injury due to clauses- A to E mentioned therein. None of the provisions is applicable to the present context, thereby the petitioner cannot

be deprived of getting compensation as claimed in the present writ application.

6. On perusal of section 11 of Railway Act, 1989 it appears that the Central Government is empowered to execute all necessary works for convenient running of the trains in the country. Under Section 18 of the Railways Act, 1989 that corresponds to section 13 of the Railway Act, 1890 for the said convenient running of the trains, the authorities may construct suitable gates, chains, bars, etc. at the level crossing. The aim and object of the legislation is to protect the living beings who are supposed to be affected by the running of the trains and for that Parliament authorizes the railway authorities to work in a responsible manner with a view to see that the persons who will be crossing the railway crossing either to reach residences or other places shall not be affected. The railways would work in crossing a footway on level, as to the mode of working their railway, as to the rate of speed, and signaling and whistling and other ordinary precautions in the working of a railway to do every thing which is reasonably necessary to secure the safety of persons who have to cross the railways by means of the footway.

7. From the date of inception of Bombay-Howrah Railway line, the inhabitants of Raghunathpalli Basti which is otherwise known as Panposh Basti used to cross over the railway line which is closed to panposh chhak for either catching train or bus or auto rickshaw to go to any destination or even for marketing purposes, which is within the knowledge of railway authorities and no remedial measures have been taken for quite long time leading to an untoward incident of accidental death caused to the husband of the petitioner. This clearly amounts to negligence on the part of the railway authority for which the petitioner claims compensation for premature death of bread winner of the family at a premature age. The deceased being a physically handicapped persons and was moving with artificial foot which was entangled in the gap of the track, which was caused due to the negligence of the railway. By the time, the deceased retrieved his leg, the Puja Special train has already run over him, resulting in his sudden death. Instead of enquiring into the matter and establishing the identity of the victim, the G.R.P.S. took up the matter and cremated the body without conducting post mortem. That further shows the negligence of the railway authority because of the reason to wipe out the evidence such undue act has been done. But on the basis of the missing report lodged before the Raghunathpalli police station when subsequent inquiry was caused, G.R.P.S. U.D. Case No. 21 of 1998

corresponding to G.R. Case No. 208 of 1998 was registered on 31.10.1998. In the final report, it has been specifically stated that cause of death of the deceased was due to accidental run over by the train and there was no suspicion of any foul play. The negligence on the part of the railway authority being apparent on the face of record and taking into account the social status of the deceased, this Court is of the considered view that the petitioner is entitled to compensation as claimed by her.

8. Similar question came up for consideration before this Court in ***Laxmi Priya Sahoo and another*** (supra), wherein while crossing an unmanned level crossing along with the pillion rider, the motor cycle faced an accident and the person expired due to ran over of the train Jaswantpur Special Express and the pillion rider sustained severe injuries on his person. Taking into account various judgments of the High Courts as well as the apex Court, this Court directed for payment of compensation of Rs.4,00,000/- for death of the person and Rs.65,000/- for the injured person and also awarded interest at the rate of 7% per annum from the date of claim made till realization.

9. In ***Edgula Babu Rao and others*** (supra), due to run over by Tirupati-Bilaspur train on a girl, on the basis of the information given by the driver, U.D. Case No. 34 of 2006 dated 21.8.2006 was registered in Rayagada, G.R.P.S. and such run over was due to negligence on the part of the railway authority and as no ply over had been constructed to allow the local people of the locality to cross over the railway line, this Court awarded ex-gratia amount of Rs.3,00,000/- to the bereaved family.

10. Applying the ratio decided in the aforementioned judgments (supra) to the present context, it appears that due to the negligence on the part of the railway authority for having not constructed any fly over or foot bridge over the railway line, death has occurred to the deceased. Therefore, there is gross negligence on the part of the railway authority entitling the petitioner to get compensation. Accordingly, this Court directs the railway authority for payment of compensation of Rs.4,00,000/- (Rupees four lakhs) to the petitioner within a period of three months from the date of passing of the judgment along with interest at the rate of 7% from the date of accident till actual payment is made. The interest is awarded in view of the fact that there is gross negligence on the part of the railway authority to the extent that in order to wipe out the evidence, the deceased was cremated without causing inquiry, which is not permissible under law.

11. Accordingly, the writ application is allowed.

Writ applicaton allowed.

2016 (I) ILR - CUT-759

DR. B.R SARANGI, J.

O.J.C. NO. 15595 OF1998

BHABANI SANKAR MISHRA .....Petitioner

.Vrs.

DIVISIONAL MANAGER, S. E. RLY., KHURDA ROAD & ORS. .....Opp. Parties

SERVICE LAW – Advertisement Dt 3.3.1997 for recruitment of physically handicapped persons in Group-C category under South Eastern Railway – Petitioner applied for the post – His application was not accepted as his name was not sponsored by Employment Exchange – In an earlier writ petition this Court directed the opposite parities to accept his application – There after his application was accepted but he was not called for written and viva voce tests – Hence the present writ petition – Though in the mean time selection process is over but the petitioner failed to implead the selected candidates as opposite parties have not provided him the information under the RTI Act – Opposite parties have also failed to produce the selection process file despite several adjournments granted by this Court – Adverse inference against opposite parties and doubt about the fairness in conducting the interview – Held, petitioner should be considered for the post of Group-C which has been advertised on 3.3.1997 after subjecting him to written and viva-voce tests.

(Para 7,8,9)

Case Laws Referred to :-

1. 83 (1997) CLT 335 : Susanta Kumar Kar v. Registrar (Judicial) Orissa High Court, Cuttack.

For Petitioner : Mr. P.K.Mishra-1, Mrs. P.Mishra.
For Opp. Party : Mrs.P. Mohanty, N.Mohanty & R.Mohanty

Date of hearing : 07.01.2016
Date of judgment: 21.01.2016

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is an applicant for recruitment of physically handicapped persons in Group-C category under the South Eastern Railway pursuant to advertisement issued in Annexure-2 dated 3.3.1997 has filed this

application seeking to quash the said notification in Annexure-2 dated 3.3.1997 and in the alternative declare the petitioner as qualified in the written test in Grade-C categories under the opposite parties and also allow him to appear in the viva-voce test conducted for ten posts for orthopedically handicapped persons.

2. The factual matrix of the case in hand is that petitioner being a Physically Handicapped person applied for the job pursuant to the advertisement issued in Annexure-2 dated 3.3.1997 under South Eastern Railway which was not accepted by the authorities. Consequentially, he approached this Court by filing OJC No. 5262 of 1997 seeking for a direction to the opposite parties to accept his application and allow him to sit in the examination scheduled to be held amongst the handicapped persons for the post reserved for physically handicapped persons. While entertaining the said writ application, this Court vide order dated 10.4.1997 relying upon the decision in ***Susanta Kumar Kar v. Registrar (Judicial) Orissa High Court, Cuttack*** reported in 83 (1997) CLT 335 directed the opposite party nos. 1 and 2 to accept the application of the petitioner directly for the post of Group-C and not to insist for sponsoring the name of the petitioner by the employment exchange. In compliance to the same, the petitioner submitted his application form directly before the opposite parties which was duly accepted by them on 11.04.1997 vide Annexure-A to the rejoinder affidavit filed by the petitioner. But in spite of such application being submitted, neither he has been called upon to appear in the written test conducted for recruitment to the post of physically handicapped persons in Group-C category against physically handicapped quota nor has he been permitted to appear the viva-voce test scheduled to be held on 14.11.1998 and 16.11.1998. Hence, this petition.

3. Mrs. P. Mishra, learned counsel for the petitioner strenuously urged that pursuant to the advertisement in Annexure-2 dated 3.3.1997 though the petitioner submitted his application, the same has not been duly accepted since the Puri Employment Exchange did not sponsor the name of the petitioner for the said purpose. Therefore, the petitioner approached this Court by filing OJC No. 5262 of 1997, which was disposed of vide order dated 10.4.1997 directing the opposite patties to accept the application and allow the petitioner to appear in the written test and viva voce test to be conducted pursuant to the advertisement so issued. Though the petitioner submitted his application directly as per the acknowledgement receipt vide

Annexure-A to the rejoinder filed by the petitioner, he has not been called upon to appear the test to be conducted by the authority, therefore he has approached this Court by filing the present writ application stating inter alia that the authorities have acted vindictively and malafidely. Hence, he seeks for quashing of the advertisement issued in Annexure-2 and further seeks for a direction to allow the petitioner to participate in the process of selection in consonance with the advertisement issued in Annexure-2. It is further urged that the petitioner being a physically handicapped person, he should be treated at par with other similarly situated persons those who have already been considered pursuant to such advertisement and non-consideration of the candidature amounts to arbitrary and unreasonable exercise of power by the authorities.

4. Mrs. P. Mohanty, learned counsel for the opposite parties refuted the allegation made against the opposite parties and urged that in the meantime the process of selection having been completed and persons those who have selected pursuant to advertisement in Annexure-2 having been given appointment, the writ application can not sustain in the eye of law and also she raises question of maintainability of the writ application stating that the General Manager, S.E. Railway, GRC, Calcutta, who is the necessary party and Head of Railway Administration, S.E. Zone has not been made as party to the proceeding. As cause of action comes under the exclusive jurisdiction of the Central Administrative Tribunal, this Court has no jurisdiction to entertain this application. It is further urged that without availing alternative remedy, the petitioner has approached this Court by filing the present writ application, therefore the writ application cannot sustain and accordingly she claims for dismissal of the same. It is stated that the application stated to have been submitted by the petitioner having not been received by the authorities in consonance with the order passed by this Court in the earlier writ application, the petitioner has not been called upon to appear in the interview. Accordingly, she seeks for dismissal of the writ application.

5. On the basis of the facts pleaded above, the admitted fact is that opposite parties have issued an advertisement vide Annexure-2 for recruitment of physically handicapped persons on different categories and pursuant to the said advertisement though the petitioner submitted application, the same has not been entertained. Therefore, the petitioner has approached this Court by filing writ application and this Court directed the opposite parties to accept his application and allow him to appear in the test along with others to adjudge his suitability for such appointment. Though the

petitioner submitted his application in compliance to the order passed by this Court which has been duly acknowledge by the authority vide Annexure-A to the rejoinder affidavit, he has not been called to appear the interview test. Thereby, the authorities have acted arbitrarily and unreasonably. The submission of application of the petitioner has been refuted by the opposite parties. Therefore, there is disputed question of fact whether the petitioner has submitted the application for consideration in compliance to order passed by this Court or not. In any case, even if the petitioner submitted an application, that ipso facto cannot give a right to allow him to appear in the examination. Merely on filing of an application, no right is created in favour of the petitioner so as to allow him to appear in the examination.

6. Mrs. P. Mohanty, learned counsel for the opposite parties disputed the document filed in Annexure-A to the rejoinder, wherein it is indicated that in compliance to earlier order passed by this Court, the petitioner submitted the application before the authority. But in the meantime, the selection process has been concluded and the persons, those who have been appointed have not been made party to the proceeding. Mrs. P. Mishra, learned counsel for the petitioner stated that to ascertain the address of the persons those who have been selected pursuant to Annexure-2, the petitioner has applied for the same by invoking the jurisdiction under Right to Information Act, but no information has been provided on the ground that records are not traceable. In course of hearing, learned counsel for the opposite parties insisted for production of the selection file and to that extent, a memo incorporating the letter of Dy. Railway Manager (P), Khurda dated 16.12.2015 address to the counsel for the opposite party has been filed, paragraph-4 of which reads as follows:

> "4. In obedience to the Hon'ble Court's order dated 29.9.2015, through search has been made in the Recruitment Section of this Office to find out the Records but the same could not be available at this distant date. During the period of 18 years, so many incumbents have been retired/transferred from the said section. At this distant date, the said file is not available. The opposite parties tenders unconditional apology for the inconvenience caused to the Hon'ble Court.

7. In that view of the matter, for non-production of selection process file before this Court for just and proper adjudication of the case in hand, adverse inference can be drawn against the opposite parties. To facilitate the opposite

parties to produce the records, several adjournments have been granted by this Court earlier, but Mrs. P. Mohanty, learned counsel for the opposite parties expressed her inability to produce the records because the records are not available. The above factual conduct of the opposite parties clearly creates a doubt on the fairness in conducting the interview by the opposite parties. Since the petitioner has filed the application form on 11.04.1997 which has been duly acknowledged by the Sr. Divisional Personnel Officer, S.E. Railway, Khurda Road vide Annexure-A to the rejoinder affidavit, this Court is of the considered view that the opposite parties should consider the case of the petitioner for selection to the post of Group-C under the physically handicapped category pursuant to advertisement in Annexure-2. Though it has been brought to the notice of the Court that in the meantime the process of selection has been over and some persons have already been appointed, but due to non-furnishing of the names of such candidates, the petitioner has not been able to make them party to the writ application. Therefore, this Court vide order dated 10.12.2014 called upon the counsel for the opposite parties to produce the names of those persons, but she has expressed her inability and stated that since the file is not traceable, she is not able to produce the same. So also the petitioner has not been provided with the information sought under the R.T.I. Act. Consequentially the petitioner is handicapped by not impleading the selected candidates as party to the proceeding and more so all edeavour has been taken on behalf of the petitioner to ascertain the name of the selected persons but he has not been cooperated by the opposite parties. While entertaining this application, this Court vide order dated 12.11.1998 in Misc. Case No. 14343 of 1998 passed interim order that any appointment made pursuant to the viva voce and written test shall be subject to result of the writ application. Since the petitioner has not been provided with the names of the selected candidates either under the Right to Information Act or through process of Court in compliance to order dated 10.12.2014, he could not be able to implead the selected candidates as parties to the writ application.

8. In that view of the matter, it appears that the opposite parties have not with a clean hand so far as recruitment to the post of physically handicapped persons in Group-C pursuant to advertisement in Annexure-2 is concerned. As the persons, those who have been selected pursuant to Annexure-2 following due procedure of selection have already rendered service for so many years, this Court is not proposing to quash the appointment of such candidates, rather it will suffice to say that the petitioner should be

considered for the post of Group-C, which has been advertised in Annexure-2 dated 3.3.1997.

9. In that view of the matter, let the opposite parties act on the form submitted by the petitioner, which is said to have been acknowledged vide Annexure-A to the rejoinder affidavit and consider his candidature for selection pursuant to the advertisement in Annexure-2 after subjecting him to written and viva voce test. The entire exercise shall be completed within a period of two months from the date of communication of this judgment.

10. With the above observation and direction, the writ petition stands disposed of. However, there would be no order to costs.

Writ petition disposed of.

2016 (I) ILR - CUT- 764

S. PUJAHARI, J.

CRLREV NO. 680 OF 2015

ALOK BISOI @ RAMDAS JEW ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

CRIMINAL PROCEDURE CODE, 1973 – S.169

Whether the I.O. can seek release of an accused forwarded to the Magistrate, when on investigation he found no material against him in the crime ? Held, yes.

Duty of the I.O is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring the real unvarnished truth – In this case petitioner was arrested and remanded to judicial custody in a murder case – In course of investigation I.O. found no evidence against him and filed a petition U/s. 169 Cr.P.C. to discharge him – Application rejected by the Magistrate on the ground that there was no explicit provision in the code and section 169 applies only when the accused is detained by the police without being forwarded to the Magistrate – Hence the revision – The Magistrate while remanding the accused-petitioner to custody beyond the initial period of fifteen days under proviso (a) to section

167(2) Cr.P.C. has neither considered the report of the I.O. that the accused-petitioner forwarded to him earlier is not the real perpetrator of the crime but some other persons who have been subsequently arrested and forwarded to custody, nor assigned any reason of his satisfaction for further detention of the petitioner – Held, Remand cannot be extended time and again as a matter of course – There is implicit provision in Cr.P.C. empowering the Magistrate to entertain such prayer of the I.O. and to exercise his jurisdiction to release the accused – Impugned order is set aside – Direction issued for release of the petitioner on his executing a bond.

Case Laws Referred to :-

1. AIR 1968 SC 117 : Abhinandan Jha & Ors. -V- Dinesh Mishra
2. 1992 Supp (1) SCC 222 : State of Bihar & Anr. -V- P.P.Sharma, IAS & Anr.

For Appellant : M/s. Satya Ranjan Mulia
For Respondent : Addl.Govt. Advocate

Date of Order : 24.12.2015

ORDER

S. PUJAHARI, J.

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

2. This criminal revision is directed against an order dated 21.09.2015 passed by the learned J.M.F.C., Salipur on a petition of the Investigating Officer to discharge the petitioner who was forwarded in G.R. Case No. 622 of 2015 corresponding to Salipur P.S. Case No. 160 of 2015.

3. Facts relevant for disposal of this criminal revision are as follows:-

A report was lodged against the present petitioner in the aforesaid case by the father of the deceased-Ashok Kumar Patra indicating the petitioner to have committed the murder of his son along with his two relations inside the Ashram of the petitioner. On receipt of the aforesaid report, police registered the aforesaid case and conducted investigation and basing on the statement of the informant and other materials, arrested the petitioner and forwarded him to the Court. The Court, thereafter, remanded the petitioner in exercise of power under Section 167 of the Code of Criminal Procedure (for short "Cr.P.C) when the investigation of the case was in progress. However, during the course of investigation, as the Investigating

Officer found that the petitioner was not the real perpetrator of the crime, but some other persons were involved, some of them were apprehended and forwarded to the Court and a petition was filed under

Section 169 of Cr.P.C. to discharge the petitioner. The Learned J.M.F.C., Salipur, however, refused to discharge the petitioner as there is no explicit provision in such circumstances to discharge an accused who is said to have been remanded to custody pending completion of the investigation. The same has been assailed in this criminal revision to be unjust and improper inasmuch as in view of the subsequent development and also the application of the Investigating Officer that the petitioner was innocent and wrongly forwarded, the learned J.M.F.C., Salipur ought to have discharged the petitioner.

4. During course of argument, it is contended by the learned counsel for the petitioner that notwithstanding absence of any explicit provision in the Cr.P.C. empowering the Magistrate to discharge an accused during pendency of the investigation, a person who has been taken to custody, can be released on his own bond, or on bail, or under the special order of a Magistrate, as provided under Section 59 of Cr.P.C. Section 167 of Cr.P.C., also by necessary implication empowers the Magistrate to discharge an accused, against whom during the course of investigation, police finds no sufficient material.

5. Learned counsel for the State, however, defends the order of the Magistrate to be just and proper.

6. A bare perusal of Chapter-XII of the Cr.P.C. would show that police on receipt of a report of a cognizable offence has to register a case and conduct investigation and during course of investigation, if he finds ground to believe the information to be credible and if it appears to him that the investigation cannot be completed within twenty-four hours, pending completion of the investigation, he shall forward the accused, if in his custody upon arrest, to the Magistrate who is empowered under Section 167 of Cr.P.C. to authorize detention of the accused in custody beyond twenty-four hours. The Magistrate to whom an accused person is forwarded may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a

Magistrate having such jurisdiction, provided that the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody for a total period exceeding one hundred and twenty days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and sixty days, where the investigation relates to any other offence.

7. Section 167 of Cr.P.C. apparently contemplates that the investigation will be completed within fifteen days in all and the final form under Section 173 of the Code will be sent to the Court by then. That is why a time limit of fifteen days has been prescribed by sub-section(2) of Section 167 of Cr.P.C. as a rule, and it is only by a proviso it has been incorporated that the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, with the riders of one hundred and twenty days or sixty days, as the case may be, if he is satisfied that adequate grounds exists for extending detention of the accused beyond fifteen days. To put in other words, as the proviso stipulates, satisfaction of the Magistrate regarding existence of adequate grounds for extending the detention of the accused in custody, is the pre-condition for authorizing detention of the accused in custody beyond fifteen days. But, sub-section (2) of Section 167 does neither contemplate nor stipulate any such pre-condition for the Magistrate to authorize detention of the accused in custody for the initial term of fifteen days.

8. The next question is, what would be the source of satisfaction of the Magistrate regarding existence of adequate grounds for authorizing detention of the accused in custody beyond fifteen days. This being a stage preceding the stage of initiation of the proceeding under Chapter-XIV of the Code, and the matter being still within the exclusive domain of the Investigating Officer, the Magistrate can have no other source than the report or materials, if any, coming from the side of the Investigating Officer for his being satisfied as to whether or not there are adequate grounds to authorize further detention of the accused in custody. At this stage, as it appears from the scheme contained in Chapter-XII of the Code, there is no scope for the Magistrate to hold any enquiry independent of the case diary and other papers/materials, if any, to be made available by the Investigating Officer, to consider the question of extension of remand of the accused beyond the initial term of fifteen days.

9. In the case ***Abhinandan Jha and others vrs. Dinesh Mishra,*** reported in AIR 1968 Supreme Court 117, the Hon'ble Apex Court while analyzing the provisions in the old Code in relation to the power of police to investigate and the scope of Magistrate to exercise jurisdiction vis-à-vis the opinion / report of the police upon investigation, held as follow:-

> "17. Xxxx xxxxxxxx xxxxxx
>
> The entire scheme of Chapter XIV clearly indicates that the formation of the opinion, as to whether or not there is a case to place the accused for trial, is that of the Officer-in-charge of the police station and that opinion determines whether the report is to be under section 170, being a 'charge-sheet', or under section 169, 'a' final report'. It is no doubt open to the Magistrate, as we have already pointed out, to accept or disagree with the opinion of the police and, if he disagrees, he is entitled to adopt any one of the courses indicated by us. But he cannot direct the police to submit a charge-sheet, because the submission of the report depends upon the opinion formed by the police, and not on the opinion of the Magistrate. The Magistrate cannot compel the police to form a particular opinion, on the investigation, and to submit a report, according to such opinion. That will be really encroaching on the sphere of the police and compelling the police to form an opinion so as to accord with the decision of the magistrate and send a report either under S. 169, or under section 170, depending upon the nature of the decision. Such a function has been left to the police under the Code.
>
> Xxxxxx xxxxxxxx xxxxxxxxxx
>
> 19. The question can also be considered from another point of view. Supposing the police send a report, viz., a charge-sheet, under Section 170 of the Code. As we have already pointed out the Magistrate is not bound to accept that report, when he considers the matter judicially. But can he differ from the police and call upon them to submit a final report, under section 169? In our opinion, the Magistrate has no such power. If he has no such power, in law, it also follows that the Magistrate has no power to direct the police to submit a charge-sheet, when the police have submitted a final report that no case is made out for sending the accused for trial. The functions of the Magistracy and the police are entirely different, and though, in the

circumstances mentioned earlier, the Magistrate may or may not accept the report, and take suitable action, according to law, he cannot certainly infringe (sin. Impinge?) upon the jurisdiction of the police, by compelling them to change their opinion, as to accord with his view".

10. In the case of ***State of Bihar and another vrs. P.P. Sharma, IAS and another***, reported in 1992 Supp (1) SCC 222, the Hon'ble Apex Court while referring to a number of authorities including ***Abhinandan Jha*** (supra), further observed as follows:-

"40. xxxxx xxxxxx xxxxxxx

Taking cognizance of the offence is co-terminus with the power of the police to investigate in the crime. Until then there is no power to the Magistrate except on a private complaint in a cognizable/non-cognizable offence to direct the police to investigate into the offence. The Magistrate is not empowered to interfere with the investigation by the police. In *Emperor v. Khawaja Nazir Ahmad* the Judicial Committee of the Privy Council held that "the function of the judiciary and the police are complementary, not overlapping" and "the court's functions begin when a charge is preferred before it, and not until then". In *Jamuna Chaudhary v. State of Bihar* this Court held: (SCCp 780, para 11)

"The duty of the Investigating Officer is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth."

Xxxxxxx xxxxxxxxx xxxxxxxx

46. The Code demarcates the field of investigation exclusively to the executive to be vigilant over law and order. Police officer has statutory power and right as a part (sic) to investigate the cognizable offence suspected to have been committed by an accused and bring the offender to book. In respect thereof he needs no authority from a Magistrate or a court except to the extent indicated in sub-section (3) of Section 156, the superintendence sparingly over the investigation and the matters incidental thereto, like enlarging the accused on bail or to secure his presence for further investigation; to record judicial confession under Section 164 of the Code or to conduct identification

parade of the accused or the articles of crime or recording dying declaration under Section 32 of the Evidence Act.

47 xxxxxxxx xxxxxxxxxx xxxxxxxxx

Often crimes are committed in secrecy with dexterity and at high places. The investigating officer may have to obtain information from sources disclosed or undisclosed and there is no set procedure to conduct investigation to connect every step in the chain of prosecution case by collecting the evidence except to the extent expressly prohibited by the Code or the Evidence Act or the Constitution. In view of the arduous task involved in the investigation he has been given free liberty to collect the necessary evidence in any manner he feels expedient, on the facts and in given circumstances. His/her primary focus is on the solution of the crime by intensive investigation. It is his duty to ferret out the truth.

Xxxxxxx xxxxxxx xxxxxxxxxx

48. From this perspective, the function of the judiciary in the course of investigation by the police should be complementary and full freedom should be accorded to the investigator to collect the evidence connecting the chain of events leading to the discovery of the truth, vis., the proof of the commission of the crime. Often individual liberty of a witness or an accused person are involved and inconvenience is inescapable and unavoidable. The investigating officer would conduct in-depth investigation to discover truth while keeping in view the individual liberty with due observance of law. At the same time he has a duty to enforce criminal law as an integral process. No criminal justice system deserves respect if its wheels are turned by ignorance. It is never his business to fabricate the evidence to connect the suspect with the commission of the crime. Trustworthiness of the police is the primary insurance. Reputation for investigative competence and individual honesty of the investigator are necessary to enthuse public confidence. Total support of the public also is necessary."

11. It is thus crystallized that Magistrate cannot thrust his own opinion on the police as regards the manner or result of investigation. Until the stage of initiation of the proceeding as provided under Chapter-XIV of the Code reckons, the Magistrate has little role or no role to play in the course of action which remains within the province of the police.

12. Now, in the context of the question raised before this Court, a reference may again be made to Section 169 of the Code. This Section applies to an eventuality where the accused is arrested or detained by police without being forwarded to the Magistrate and upon investigation, there appears to police no sufficient evidence or reasonable ground of suspicion to justify forwarding of the accused to the Magistrate. In such a case, the Officer-in-charge of the Police Station shall release the accused on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial. The bond so required to be executed by the accused is for the contingencies that the Magistrate may not agree with the police report that is ultimately filed before him under Section 173 and may consider the evidence to be sufficient to put the said released accused on trial. On the face of this explicit provision, it would be bereft of any logic to say the police cannot seek release of the accused who has been forwarded to the Magistrate, but on investigation no sufficient evidence could surface suggesting his involvement in the crime. In my view, such an interpretation would defeat the very purpose of Section 169 of Cr.P.C.

13. Addressing to the issue from a different angle, when in view of the proviso (a) to Section 167 (2) of Cr.P.C. detention of the accused in custody beyond the initial period of fifteen days is dependent upon the existence of sufficient grounds for so doing to the satisfaction of the Magistrate, what remains with the Magistrate to attain that satisfaction in the wake of the Investigating Officer reporting to him that as per the evidence collected, the accused earlier forwarded to him is not the real perpetrator of the crime, but some other persons who have been subsequently arrested and forwarded to the Magistrate. Remand order being a judicial one, the Magistrate has to apply his mind judiciously to the contents of the remand report and other materials, if any, made available to him by the Investigating Officer, and the order should reflect his application of mind and the extension of remand in consequence thereof. It being not an empty formality, remand cannot be extended time and again as a course of routine.

14. Vide the impugned order, the learned J.M.F.C., Salipur declined to accept the prayer of the Investigating Officer for discharge (release) of the accused-petitioner, impliedly on the ground of absence of any explicit provision in the Cr.P.C. to entertain such a prayer. But, nothing is borne out from the impugned order as to what is the basis of his attaining satisfaction

regarding existence of adequate grounds to authorize further detention of the accused-petitioner in custody which has already extended for more than the initial remand period of fifteen days. For the discussion made herein before with reference to the settled principle of law, it is to be held that there is implicit provision in the Cr.P.C. empowering the Magistrate to entertain such a prayer of the Investigating Officer and exercise his jurisdiction to release the accused-petitioner.

15. I would, therefore, allow this criminal revision, set-aside the impugned order of the learned J.M.F.C., Salipur and direct release of the petitioner in the aforesaid case on his executing a bond of Rs.50,000.00 (rupees fifty thousand) with one surety for the like(rupees fifty thousand) with one surety for the like amount, to appear before the learned J.M.F.C., Salipur, if the facts and circumstances so warrant in future, inasmuch as it is not legally impermissible to proceed against such an accused in future depending upon collection or existence of incriminating evidence, if any, against him. Issue urgent certified copy as per rules.

Revision allowed.

2016 (I) ILR - CUT- 772

BISWANATH RATH, J.

C.M.P. NO. 1539 OF 2014

Sk. SADIK .....Petitioner

.Vrs.

MIR ABDUL KALAM & ORS. .....Opp. Parties

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

Pendency of Final Decree proceeding – A third party filed application under Order 1, Rule 10 read with Order 22 Rule 10(1) C.P.C to be made a party – Ground is, he purchased a part of the disputed property from O.P. No. 30 vide registered sale deed – Application rejected – Hence this petition – No allotment of portion of suit land in favour of either of the parties so the right claimed by the third party through his vendor can only be guided by the outcome in the proceeding – Moreover the third party purchased the suit land during

continuance of the status quo order – Held, application by third party is not maintainable – There is no illegality in the impugned Order calling for interference by this Court.

For Petitioner : M/s. Samir Kr. Mishra, J.Pradha, D.K.Pradhan, P.Prusty & P.P.Mohanty

For Opp. Parties: M/s. A.Rath, M.Panda & V. Jena

Date of Hearing : 10.11.2015
Date of Judgment: 17.11.2015

JUDGMENT

BISWANATH RATH, J.

This Civil Miscellaneous petition is at the instance of third party/petitioner challenging an order dated 18.09.2014 in C. S. No. 4/85 of 1971/1968-1 (final decree) passed by Civil Judge (Senior Division), Balasore rejecting an application under Order 1, Rule 10 read with Order 22 Rule 10(1) of the Civil Procedure Code filed by the petitioner.

2. Short recitals involved in the case is that the opposite Party Nos. 4 to 22 as plaintiffs instituted C. S. No. 4/85 of 1971/1968-1 pending now in final decree proceeding in the court of Civil Judge (Senior Division), Balasore impleading rest of the opposite parties as defendants praying therein for partition of suit schedule properties and for other consequential reliefs. The suit was decreed vide judgment and decree dated 08.09.1975 and 16.09.1975 respectively. In appeal, this Court vide judgment dated 24.6.1993 in RFA No. 195 of 1975 modified the judgment and the judgment and decree is now pending in final decree proceeding.

3. During pendency of the Final Decree Proceeding, the present petitioner claiming that he has purchased a part of the disputed property from one Abdul Rahat-Opp.Party. No. 30 by registered sale deed No.325 dated 21.04.2009 and it is on this basis the petitioner wanted to be a party in the Final Decree proceeding in order to protect his property by filing an application under Order 1, Rule 10 CPC read with under Order 22 Rule 10 (1) of the Civil Procedure Code. Contesting the said application, the present Opp.Party Nos. 1 to 3 filing objection inter-alia contended therein that since the present petitioner purchased the land in violation of the order of statusquo continuing in the matter, the so called purchase is illegal for the reasons that his vendor had no right to sale the property at that point of time as the disputed property was under an order of statusquo.

4. After hearing the parties, the trial court rejected the application by its order dated 18.09.2014. The order of rejection by the trial court is impugned herein in this Civil Miscellaneous Petition, an application under Article 227 of the Constitution of India.

5. Mr. Mishra, learned counsel for the petitioner and Mr. Rath, learned counsel appearing for Opp.Party Nos. 1 to 3 while making their submissions repeated their respective submissions already made in the court below. In view of the recording of the submissions in the lower court proceeding, this Court is not inclined to record the same to avoid repetition of the submissions of the respective parties.

6. There is no denial to the fact that the suit between the Opp.Parties has been concluded by a judgment of this Court in RFA No. 195 of 1975 and it is this judgment has been put to Final Decree proceeding. The petitioner filed an application under Order 1, Rule 10 read with Order 22, Rule 10 (1) of the Civil Procedure Code in the Final Decree proceeding itself. It is apparent from the case record that the present petitioner is claiming right through Mir Abdul Rahat (Opp.Party. No.30) who was defendant No.11 in the trial court below. The matter is pending at the stage of Final Decree proceeding and there is no allotment of portion of suit land in favour of either parties to the suit as yet. In absence of allotment of the suit property in favour of respective parties, it is too early to claim on the part of a third party purchaser that he has any right over any particular part of the property except claiming a right of property through a Registered sale deed, fate of which is to be guided by the ultimate outcome in the Final Decree Proceeding. Law is fairly well settled that the right of a third party has to flow through his vendor and such right can be more clear after the final allotment of the properties in favour of the respective parties and the fate of this vendor is to be guided by the ultimate judgment passed by this Court in RFA No. 195 of 1975. Appearance of a third party at this stage of the matter, no case for improving his case any further and his fate is already shield by the final out come in the R.F.A.No.195 of 1975 which has become final in the meanwhile.

7. Under the circumstances, this Court is of the view that no application under Order 1, Rule 10 read with Order 22 Rule 10(1) of the Civil Procedure Code is maintainable during pendency of Final Decree proceeding. As such, this Court does not find any illegality or impropriety in the impugned order in exercise of its power under Article 227 of the Constitution of India.

8. The Civil Miscellaneous Petition has no merit and thus stands dismissed. However, there is no order as to cost.

Petitions dismissed.

2016 (I) ILR - CUT-775

BISWANATH RATH, J.

W.P. (C) NO. 7059 OF 2013

M/S.MILLION DEVELOPE .....Petitioner

.Vrs.

M/S.FROST INTERNATIO .....Opp. Party

CIVIL PROCEDURE CODE,1908 – S.115

Revision against order rejecting application under order 7, Rule- 11 C.P.C. – Scope of revision as the order is appealable – Whenever the revisional Court finds illegality or jurisdictional error by the Court below, it has jurisdiction U/s 115 C.P.C to consider the legality and sustainability of the order but it would be appropriate for the said authority to remit the matter back directing the Court below for fresh consideration by correctly assessing the facts and provisions of law – Held, the revisional authority having exceeded its jurisdiction in passing the impugned order, the same is setaside – Direction issued to the revisional authority to take a decision afresh as per law.

For Petitioner : Mr. Banshidhar Baug
For Opp. Party : M/s Digambar Mishra

Date of Order : 19. 01. 2016

ORDER

BISWANATH RATH, J.

Heard learned counsel appearing on behalf of the respective parties.

This matter was listed on 12.01.2016 on the request of learned counsel for the opposite parties, the matter was adjourned to 14.01.2016 and consequently, the matter was listed on 14.01.2016 and on the said date, during course of submission, learned counsel for the opposite parties took adjournment to go through the decision reported in **Vol. 96 (2003) CLT 323** for appropriate response to the Court and the matter was therefore adjourned

to today. Today, at the start of hearing, learned counsel for opposite parties also prayed for adjournment.

In view of the repeated adjournment, this Court is not inclined to grant any further adjournment and the matter is decided only on merit.

In assailing the impugned order passed by the Revisional Authority, learned counsel for the petitioner contended that in a matter for consideration of an application under Order 7 Rule 11 of C.P.C. on merit, the Revisional Court has a limited jurisdiction to consider the illegality involved in the impugned order and in the event, it feels that there is material in considering the application under Order 7 Rule 11 in a particular manner, it has no other option than to remit the matter back to the trial Court for taking up the application under Order 7 Rule 11 for passing a fresh order. In referring to a decision as reported in **2004 (9) SC 512** learned counsel for the petitioner further submitted that in view of the settled position of law by the Hon'ble Apex Court, the order passed in an application under Order 7 Rule 11 of C.P.C. refusing to reject a plaint gave rise a scope for filing an appeal by the party aggrieved.

Therefore, it is contended that the order passed by the trial Court is appealable and there is no scope for the opposite parties for moving a revision. Further in citing a decision of this Court as reported in **Vol.96 (2003) CLT 323,** learned counsel for the petitioner contended that even assuming the position of law settled by this Court that a Revision is maintainable but the position settled in the decision cited (supra), the Revisional Court cannot itself allow the application under Order 7 Rule 11 of C.P.C. except in the event, it is of the opinion that there remains any merit in the application to remit the matter back to the original Court for considering the matter afresh.

Learned counsel for the opposite parties on the other hand, contended that in view of the reasons assigned by the Revisional Authority, there is no infirmity or impropriety in the impugned order leaving no scope for this Court for interfering in the order passed by the Revisional Authority.

Further in referring to the Orissa amendment of the Section 115 of C.P.C., learned counsel for the opposite parties contended that in view of the amendment brought in the year 2010 and the suit being of the year 2009, the Revision was very much maintainable.

Heard.

Considering the submissions made by the respective parties and on perusal of the decision as reported in **2004 (9) SC 512,** this Court finds the observations of the Apex Court that in view of the provision available at that point of time and further considering the fact that refusal of rejection of a plaint is in a nature of a preliminary judgment, hence appealable. Looking to the amended provision contained in C.P.C. in the year 2010 in respect of the Section 115 of C.P.C. and since the decision referred to hereinabove, being of the year 2004, the same is not applicable to the present case and this Court finds that the revision at the instance of the opposite parties was very much maintainable.

Be that as it may, now this Court is required to consider the scope of the Revisional Authority in view of the decision rendered by this Court in **Vol.96 (2003) CLT 323,** this Court in similar situation considering the case involved therein in paragraph 7 has come to hold as follows :

> "**7.** Since an order passed in rejecting the claim under Order 7 Rule 11 of the Code for lack of cause of action amounts to a decree, therefore, such an order is appealable. But where an application under Order 7 Rule 11 is rejected that is not appealable. Under such circumstances, whenever the Court finds illegality or jurisdictional error committed by the Court below in rejecting application under Order 7 Rule 11 of the Code, then the revisional court has the jurisdiction under Section 115 to consider the legality and sustainability of such orders because it has the effect of leading to a consequence for disposal of the suit. In the event a revision is entertained, then in appropriate case the revisional court may pass appropriate order directing the court below to correctly assess the fact by following the provisions of law, but since the effect of rejection of a plaint under Order 7, Rule 11(a) has the force of a decree, the revisional court should not pass an order rejecting a plaint while exercising jurisdiction under Section 115. The above view gains support from the ratio in the case of *Purusottam Das and sons Vrs. S. B. I,* Vol. 33(1991) OJC 228 (Civil)."

Looking to the settled position of law already given by this Court as referred to hereinabove, this Court finds force in the submission of learned counsel for the petitioner to the extent that the Revisional Authority has a limited role in the matter of hearing on rejection of an application under Order 7 Rule 11 of C.P.C. and in the event, it feels that there is some substance in considering the application under Order 7 Rule 11 of C.P.C.,

then the Revisional Authority is to remit the matter back to the Original Authority for fresh consideration of the matter.

Considering the submissions made by the respective parties and looking to the settled position by this Court in a decision as reported (supra), this Court is of the view that the Revisional Court while considering the revision has exceeded its jurisdiction and therefore, while interfering in the revisional order, this Court sets-aside the same and directs the Revisional Authority to take a decision thereon afresh taking into consideration the observation of this Court as well as the decision reported in **Vol.96 (2003) CLT 323.** Revisional Court is directed to take up the Revision and dispose the same afresh and a fresh order be passed without being influenced with the observations already made in the impugned order.

In view of disposal of the writ petition, interim order passed earlier stands vacated and all the pending Misc. Cases arising out of this petition stand dismissed accordingly.

Writ petition disposed of.

2016 (I) ILR - CUT-778

S. N. PRASAD, J.

W.P.(C) NO. 6686 OF 2003

G.B. OF LAXMI NARAYAN MOHAVIDYALAYA .....Petitioner

.Vrs.

REGIONAL PROVIDENT FUND COMMISSIONER & ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART.226

Writ petition is pending for long thirteen years – Plea of alternative remedy raised – Whether the writ petition will be held to be not maintainable ? Notice being issued and interim orders having been passed it would not be proper at this stage to ask the petitioner to go for further litigation with question of limitation – Moreover there is no straight jacket formula, rather it is a self imposed restriction – Held, it would not be proper for this court to summarily reject the writ petition on the ground of availability of alternative remedy rather it would be appropriate to decide the lis on merit. (Paras 11,12,13)

Case Law Referred to :-

1. AIR 1971 SC 33 : Hirday Narain -V- Income Tax Officer, Bareilly
2. (2004) 13 SCC 665 : Durga Enterprises (P) Ltd. & Anr. -V- Principal Secretary, Government of U.P. & Ors.

For Petitioner : M/s. A.K.Mohanty (A), R.K.Behera

For Opp.Parties : M/s. P.K.Khuntia (for O.P.No.1)
M/s. D.K.Biswal, B.R.Biswal, S.Samal
S.K.Paikray & M/s. S.S.Mohanty(fo rO.P.No.2)

Date of hearing :15.3.2016
Date of judgement :15.3.2016

JUDGMENT

S.N. PRASAD, J.

The petitioner being aggrieved with the order dated 20.02.2003 (Annexure-3) and demand notice dated 2.7.2003 (Annexure-6) is before this Court by this writ petition.

2. Facts of the case as has been pleaded by the petitioner in this writ petition is that it is a College in the name of Laxmi Narayan Mohavidyalaya, Balasore in the district of Balasore, an aided College w.e.f. 1.6.1984 and established in the year 1976. This college is an aided College within the meaning of Section 10(b) of the Orissa Education Act and Rules framed thereunder. According to the petitioner in view of the

provision as contained in Section 17 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred as the "Act 1952") the provision of the Act will not be applicable, but such an establishment where other Provident Fund Schemes are applicable which is no less favourable than that of the benefits payable under the Act 1952, since the employees of the petitioner's College are covered under the Orissa Aided Educational Institutions, the G.P.F. Rules, 1983, is applicable and as such the provisions of the Act, 1952 will not be applicable to the petitioner's College and as such the College in question will be said to be exempted from the provisions of Section 16 of the Act 1952 but the opposite parties illegally and arbitrarily included the petitioner's college under the purview of the Act 1952 and thereafter imposed heavy liability upon it by making assessment under Section 7-A, imposed damage under Section 14-B of the Act 1952.

3. The sole contention raised is that since the employees of the College in question is covered under various provisions of G.P.F., C.P.F. and

Pensions Scheme, hence the provision of the Act 1952 will not be application and as such the order passed by the authorities is contrary to the statutory provisions as contained in the Act 1952.

4. The petitioner has filed a review under Section 7-B of the Act 1952 questioning the illegality and propriety of the order passed by the authority under Section 7-A of the Act 1952 but even the authorities have not reviewed the said order and affirm the views already taken while passing the order under Section 7-A of the Act 1952, hence this writ petition has been filed.

5. This Court has issued notice on 6.8.2003 and an interim order has been passed to the effect that not to take any coercive action against the petitioner but no counter affidavit has been filed, however learned counsel for the opposite parties has argued the case on the basis of material available on record and has submitted that this writ petition is not maintainable on the ground of availability of alternative remedy of appeal as provided under the Act 1952.

6. He has further submitted that the petitioner cannot be permitted to challenge the applicability of the Act after passing of the order under Section 7-A of the Act 1952 as because the Act has been made applicable with respect to the petitioner w.e.f. 6.3.1982 and no such objection has ever been raised regarding the applicability of the Act 1952 rather the petitioner has also been provided with a specific Code No.OR/5958 and as such the submission of the learned counsel for the petitioner is that provision of the Act 1952 is not applicable is without any foundation.

It has been submitted that the order passed under Section 7-A (Annexure-3) does not warrant any interference as because the said order has been passed on the basis of admission of the petitioner regarding the default from 3/82 to 3/2000 and it is settled that when any order is being passed on the basis of admission of the party, the party will be ceased to challenge the same.

Accordingly, it has been submitted that Annexure-6, which is a demand notice in consequence of the order passed by Annexure-3 also does not warrant any interference. He has further submitted that the Act is very well applicable to the College in question since the College has been brought under the purview of Section 1(3) of the Act 1952 by virtue of Government notification published in the official gazette notification on 6.3.1982 by which the Colleges whether affiliated or not to a University has been brought under the purview of the Act 1952, hence the arguments advanced on behalf

of the learned counsel for the petitioner regarding non-applicability of the Act is absolutely frivolous. Moreover, the said Gazette Notification dated 6.3.1982 has not been challenged by the petitioner.

7. Heard learned counsel for the parties and perused the documents on record.

8. Before going into the merit of the case of the petitioner, it would be necessary to adjudicate the issue regarding availability of the alternative remedy of appeal as provided under Section 7-I of the Act 1951, a ground which has been taken by the learned counsel representing the opposite parties.

9. There is no denial about the fact that there is provision of appeal as provided under Section 7-I of the Act 1952 which is being reproduced herein below:-

> *"**7-I**. **Appeals to Tribunal** – (1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4) of Section 1, or Section 3, or sub-section (1) of Section 7-A, or Section 7B or Section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.*
>
> *(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."*

10. This writ petition has been filed on 7.7.2003, notice has been issued on 6.8.2003 with an interim order which is being reproduced herein below:

> *"W.P.(C) No.6686 of 2003*
>
> *Heard.*
>
> *Issue notice on the question of admission indicating therein that he matter may be disposed of at the stage of admission.*
>
> *Requisites by registered post shall also be filed by 8.8.2003. The notice shall be made returnable within four weeks.*
> *List this case after service of notice.*
> *Misc. Case No.6445 of 2003*
> *Heard.*
> *Issue notice as above.*

Accept one set of process fee.

In the interim, we direct opposite parties 1 and 2 not to take any coercive action against the petitioner for a period of eight weeks.

Urgent certified copy be granted, on proper application."

11. There is no denial in the settled proposition of law that if there is any alternative remedy of appeal available under the statute, the High Court sitting under Article 226 of the Constitution of India should not interfere since the same will amount to snatching of power of the appellate authority but however, there is no straight jacket formula rather it is self-imposed restrictions.

12. This writ petition is pending since 7.7.2003 and as such about 13 years the matter is pending before this Court and if after lapse of about 13 years, this writ petition will be held to be not maintainable on the ground of availability of alternative remedy of appeal that too after notice being issued and in interim order has been passed, it would not be proper for this Court to do at this stage. In this regard reference may be made to the judgement of the Hon'ble Supreme Court in the case of **Hirday Narain vrs. Income-tax Officer, Bareilly** reported in *AIR 1971 SC 33* wherein their lordships has been pleased to hold which is being quoted herein below:-

> *"we are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on merit."*

Further in the case of **Durga Enterprises (P) Ltd. and another vrs. Principal Secretary, Government of U.P. and others** reported in *(2004) 13 SCC 665* wherein their lordships has been pleased to hold that the writ petition was pending for a long period of thirteen years and summarily dismissed on the ground that there is remedy of civil suit by the High Court and should not have dismissed without deciding the writ petition on merit.

13. This Court has passed an interim order to the effect that not to take any coercive steps and as such ratio laid down by the Hon'ble Supreme Court as referred hereinabove is applicable with the facts and circumstances of this case, hence after the matter being pending for last 13 years with an interim order it would not be proper for this Court in summarily rejecting the writ petition on the ground of availability of alternative remedy otherwise question of limitation will arise and also in order to avoid further litigation, it

would be appropriate to decide the matter on merit. In view of this, instead of seeking alternative remedy of appeal before the Tribunal, the writ petition is being decided on merit.

So far as the merit of the case is concerned, ground taken by the petitioner in challenging the order passed under Section 7A of the Act 1952 is regarding; (i) non-applicability of the Act 1952 and (ii) employees of the college in question since covered under the various provisions of a statute giving them the benefit of G.P.F. and other pensionary benefits, hence the College in question will be said to be under the purview of the provisions of Section 16(1)(b) of the Act 1952 but these aspects of the matter has not been touched by the authorities while adjudicating the issue under Section 7A of the Act 1952.

Further the contention of the petitioner is that review has also been filed under Section 7B of the Act 1952 but even thereafter no consideration has been given regarding the contention of the petitioner.

14. In order to examine this submission, it would be necessary to go through the order passed under Section 7A of the Act, 1952 which is impugned in this writ petition.

From its perusal, it is evident that the establishment has been brought under purview of the Act 1952 in view of the notification of the Government of India notified in the Gazette notification dated 6.3.1982 which is being quoted herein below:-

> *"**6th March 1982 (167 to 172)***
> *167. Any University*
> *168. Any College, whether or not affiliated to a University.*
> *169. Any School, whether or not recognised or aided by the Central or a State Government.*
> *170. Any scientific institution.*
> *171. Any institution in which research in respect of any matter is carried out.*
> *172. Any other institution in which the activity of imparting knowledge or training is systematically carried on."*

15. After applicability of the Act in the college in question a Code number has also been supplied being Code No. OR/5958, the petitioner has not pleaded anywhere in the writ petition or even before the authority adjudicating the matter under Section 7A or 7B of the Act, 1952 that any

objection has ever been raised regarding applicability of the Act 1952 rather it is for the first time this point is being raised before this Court that too under its writ jurisdiction and as such this point cannot be entertained after lapse of about 21 years from the date of applicability of the Act.

16. Moreover, the petitioner has admitted the default as would be evident from the order passed under Section 7A of the Act 1952, relevant part of the order showing the admission on the part of the petitioner is being quoted herein below:-

> **"The establishment admits the default from 3/82 to 3/2000 and stated that they are paying PF dues regularly from 3/2000 onwards. As such, I do not find any justification for prolonging the proceedings and proceed with the finalisation of present 7A proceeding on the basis of facts available on record.**
>
> **AND WHEREAS the establishment has admitted the default in payment of Provident Fund dues for the present 7A inquiry period and have countersigned & confirmed the dues payable statement on 31.10.2002 & 10.2.2003."**

It is on the basis of admission on the part of the petitioner, the authorities has passed an order under Section 7A of the Act 1952 putting the liability for depositing the amount for the period from 3/82 to 10/2002 and also the interest under Section 7Q and damage under Section 14-B of the Act.

17. The contention of the petitioner is that various pension schemes is applicable to the employees of the petitioner hence the Act itself is not applicable does not deserve any consideration after the Act having been made applicable having not been objected by the petitioner and after the admission regarding the default for not remitting the insurance due for the period from 3/82 to 10/2002.

18. On examination of the order passed under Section 7A when the amount has been determined under Section 7A in consequence thereof, the authorities have also calculated the interest as per the provision made under Section 7Q which provides that

> *"the employer shall be liable to pay simple interest @ 12% per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment.*

Provided that higher rate of interest specified shall not exceed the lending rate of interest charged by any scheduled Bank".

From perusal of the order passed under Section 7Q, it is evident that the interest has been calculated in consonance with the provision as contained in 7Q of the Act 1952.

19. So far as other part of the order which pertains to damage as provided under Section 14-B which provides the power to recover damages is being quoted herein below for ready reference:-

> *"**14.B. Power to recover damages**.- Where an employer makes default in the payment of any contribution to the Fund, the Pension Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-section (2) of Section 15 of in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under Section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme."*

20. On perusal of the order, it is evident that even the calculation of the damage having been done by the authorities under Section 14-B is in consonance with the statute and there is no dispute in the fact that the Act, 1952 is a welfare legislation to support the beneficiaries who are to be benefited by the Act, 1952. If any Act has been promulgated for the welfare of the employee who are not being supported by any scheme like the pension scheme or the insurance scheme, the statutory provision has to be followed and for that purpose the Act, 1952 has been promulgated giving the authorities ample power to implement it. The provision of Section 7A has been made for deciding the applicability of the dues of the employee to be deposited by the employer. The employer who used not to deposit the amount and to restrain these activities and attitude the provision of section 14B has been inserted by way of Act 37 of 1953 w.e.f. 12.12.1953 providing power to the authorities to make recovery in case of default of making any delay in contribution of the fund. The scope of Section 14B has further been stated in the case of **Employees' State Insurance Corporation vrs. H.M.T. Ltd. and another** reported in *(2008) 3 SCC 35* wherein at paragraph-19 after

placing reliance upon the judgment rendered in the case of **Hindustan Times Ltd. vrs. Union of India** reported in (1998) 2 SCC 242 has been pleased to hold at para 29 as follows:-

> *"**Para.29**. From the aforesaid decision, the following principles can be summarized:-*
>
> *The authority under Section 14B has to apply his mind to the facts of the case and the reply to the show-cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power cut, financial problems relating to other indebtedness or the delay in realization of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under Section 14B. "*

Thus, the law is settled that the power of authority under Section 14B is very wide, that is only for the purpose that there may not be any restriction in implementation of the statutory provision.

21. Here in this case, since it is the admission on the part of the petitioner that even after coverage of the Act 1952, dues has not been remitted for the period from 3/82 to 10/2002 and they have said that they were paying PF dues regularly from 3/2000 onwards and considering this aspect of the matter, the authorities have passed an order under Section 7A of the Act 1952 and the moment the establishment in ;question has committed default in remitting the amount, consequence will be by way of an order passed under Section 7Q of the Act 1952 which has been done in the instant case.

22. So far as the contention of the learned counsel for the petitioner is that the competent authority has not appreciated the facts which has been raised before it in an application filed under Section 7B of the Act 1952.

Before answering this, it would be appropriate to refer the provision of Section 7B which is being reproduced herein below:-

> ***"7B. Review of orders passed under Section 7A**.- (1) Any person aggrieved by an order made under sub-section (1) of Section 7A, but*

from which no appeal has been preferred under this Act, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or would not produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the Officer who passed the order.

Provided that such officer may also on his own motion review his order if he is satisfied that it is necessary so to do on any such ground.

(2) Every application for review under sub-section (1) shall be filed in such form and manner and within such time as may be specified in the Scheme.

(3) Where it appears to the officer receiving an application for review that there is no sufficient ground for a review, he shall reject the application.

(4) Where the officer is of opinion that the application for review should be granted, he shall grant the same:

Provided that,-

(a) No such application shall be granted without previous notice to all the parties before him to enable them to appear and be heard in support of the order in respect of which a review is applied for, and

(b) No such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not produced by him when the order was made, without proof of such allegation.

(5) No appeal shall lie against the order of the officer rejecting an application for review, but an appeal under this Act shall lie against an order passed under review as if the order passed under review were the original order passed by him under Section 7A."

23. From perusal of the provision as contained in Section 7B, it is evident that the power of review has been conferred to a person aggrieved with an order passed under sub-section (1) of Section 7A against which no appeal has

been preferred under this Act and who from discovery of new matter or evidence, after the exercise of due diligence was not within his knowledge or could not be produced by him when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order.

24. From perusal of the order passed under Section 7B, the authorities while disclosing the entire things have passed the order stating therein that the Act, 1952 is applicable to all the educational institutions by virtue of Government of India's Notification S.O. 986 dated 19.2.1982 to deposit the dues from 1.3.1982 and the college in question has rightly been covered w.e.f. 6.3.1982 and accordingly, Enforcement Officer has forwarded survey/investigation report duly signed and sealed by the Principal which implies that Act is rightly applicable which is within the knowledge which is also accepted by the College by depositing P.F. and allied dues from 3/2000 onwards hence the Act is very well established.

It has been clarified that the Act is applicable from the date of coverage/notification which is suo moto.

For answering this issue, the authorities have taken the help of the judgement rendered in the various cases and thereafter rejected the case of the petitioner.

The authorities have also taken note regarding calculation of dues and found that there is no illegality in the same.

It has been stated that the order has been passed under Section 7A after providing sufficient opportunity to the establishment and as such no occasion was found to review the order.

25. From perusal of the order impugned, it transpires that the authorities has come to the conclusion that no such ground is available for review of the order and accordingly rejected. Hence, there is no infirmity in the same.

In view of foregoing reasons, in my considered view there is no infirmity in the order dated 20.02.2003 passed under Section 7A and in consequence thereof, there is no infirmity in the demand notice dated 2.7.2003 (Annexure-6). Accordingly, this writ petition is dismissed.

Writ petition dismissed.

2016 (I) ILR - CUT-789

K.R. MOHAPATRA, J.

FAO. NO. 181 OF 2015

PADMINI PANDA & ANR. ……..Appellants

.Vrs.

SMT. PRAMILA SAMANTARAY & ORS. ……..Respondents

ODISHA CIVIL COURTS ACT, 1984 – S.16 (As amended in 2014)

Appeal U/s 104 C.P.C filed before this Court against an order passed by Civil Judge (Senior Division) in a suit – Provision does not provide any forum to prefer appeal – Forum can only be determind U/s 16 of the Civil Courts Act, 1984 – Amendment of Section 16 w.e.f. 05.03.2015 fixing the forum on the District Judge – Suit out of which the appeal arises was filed prior to such date – Maintainability of the appeal before this Court questioned – The forum available on the date of presentation of the appeal would be the forum to which the appeal would lie – The provision being procedural is retrospective in nature – Held, appeal having been filed after 05.03.2015 is not maintainable before this Court – Direction issued to the Registry to return the brief to the appellants for Presentation before the District Judge having jurisdicction. (Para 14,15,16)

Case Laws Referred to :-

1. AIR 1958 SC 915 : Anant Gopal Sheorey –v- The State of Bombay
2. (1994) 4 SCC 602 : H.V. Thakur –v- State of Maharasthra
3. 2003 (Supp.) OLR 337 : Special Land Acquisition Officer, Talcher –v- Tankadhar Manabhoai & Ors.
4. AIR 2007 Orissa 146 : Ramesh Chandra Das Vs. Kishore Chandra Das & Ors.
5. .2015 (II) ILR-CUT 621 : Mideast Integrated Steel Ltd. & Ors. Vs. Industrial Promotion and Investment Corporation of Orissa Ltd.
6. AIR 2015 SC 2041 : Karnail Kaur & Ors Vs. State of Punjab & Ors.
7. 1995 SC 1012 : K.S. Paripoornan vs State of Kerala
8. AIR 2001 SC 2472 : Shyam Sunder & Ors.vs Ram Kumar and Anr.
9. AIR 1964 SC 907 : Ittavira Mathai –v- Varkey Varkey & Anr.
10. AIR 1976 SC 237 : New India Insurance Co. Ltd. –v- Smt. Shanti Mishra
11. (2014) 5 SCC 219 : Himachal Pradesh State Electricity Regulatory Commission & Anr. Vs. Himachal Pradesh State Electricity Board.

12. (1994) 1 SCC 257 : Commissioner of Income Tax, Orissa –v- Dhadi Sahu.
13. AIR 1999 SC 3609 : Maharaja Chintamani Saran Nath Sahahdeo Vs. State of Bihar & Ors.
14. Kunnappadi Kalliani Vs.: Lekharaj 1996 (2) KLJ 106
15. 2003 (3) KLJ 888 : Sasi @ Sasikumar & Ors. Vs. Soudamini & Ors.

Case Laws Relied on :-

1. AIR 1957 SC 540 : Garikapatti Veeraya vs N. Subbiah Choudhury
2. 60 (1985) CLT 360 : Duryodhan Samal –v- Smt. Uma Dei & Ors.

For Appellants : M/s. Gautam Misra, D.K. Patra & A. Dash

For Respondents : None
Miss S. Mishra,
Addl. Standing Counsel for State

Date of Judgment: 29.01.2016

JUDGMENT

K.R. MOHAPATRA, J.

In this appeal, Stamp Reporter has pointed out the defects regarding maintainability of the appeal in view of the Odisha Civil Courts (Amendment) Act, 2014 (for short 'the Amending Act, 2014'), which came into force with effect from 5th March 2015. Thus, this appeal was listed for consideration on the question of maintainability in view of the amendment of Section 16 of the Orissa Civil Courts Act, 1984 (for short 'the Act, 1984') by virtue of the Amending Act, 2014 which became effective from 5th March, 2015.

2. In order to appreciate the issue involved regarding maintainability of the appeal, it requires a cursory glance of the pre-amended provision of Section 16 of the Orissa Civil Courts Act, 1984 and the amendment, which was brought in Section 16 by virtue of the Amending Act, 2014.

> "16. (1) Save as otherwise provided by any enactment for the time being in force,
>
> (a) an appeal from a decree or order of a District Judge or Additional District Judge shall lie to the High Court;
>
> (b) an appeal shall not lie to the High Court from a decree or order of an Additional District Judge in any case, in which if the same had

been made by the District Judge and appeal would not lie to the High Court.

(2) Save as aforesaid, an appeal from the decree or order of a [Substituted vide Orissa Gazette Ext. No. 1647/21.12.1993-Notfn.No.16063-Legis./ 10.12.1993.][Civil Judge (Senior Division)] shall lie-

(a) to a District Judge, where the value of the original suit in which or in any proceeding arising out of which the decree or order was made, did not exceed [Substituted vide Orissa Gazette Ext., No. 1518/24.9.2010][five lakh rupees]; and

(b) to the High Court, in any other case.

(3) Save as aforesaid, an appeal from the decree or order of a Civil Judge, (Junior Division) shall lie to the District Judge.

(4) Where the function of receiving any appeals which lie to the District Judge under Sub-section (2) or Sub-section (3) has been assigned to an Additional District Judge, the appeals may be preferred in the Court of such Additional District Judge.

(5) The High Court may, by notification, direct that any or all appeals referred to in Sub-section (3) shall be preferred in the Court of any 1[Civil Judge (Senior Division)] mentioned in the notification, and the appeals shall thereupon, be preferred accordingly."

The following amendment has been brought in to Section 16 by virtue of the Amending Act, 2014.

"2. In the Odisha Civil Courts Act, 1984, in section 16,--

(i) For sub-section (2) including the explanation thereto, following sub-section shall be substituted, namely:-

"(2) Save as aforesaid, an appeal from the decree or order of a Civil Judge (Senior Division) and Civil Judge (Junior Division) shall lie to the District Judge,"

(ii) Sub-section (3) shall be omitted;

(iii) In sub-section (4), the words, figure and bracket" or sub-section (3)" shall be omitted; and

(iv) For sub-section (5), following sub-section shall be substituted, namely:--

> "(5) The High Court may, by notification, direct that any or all appeals from the decree or order or a Civil Judge (Junior Division) referred to in sub-section (2) shall be preferred in the Court of any Civil Judge (Senior Division) mentioned in the notification, and the appeals shall thereupon, be preferred accordingly."

Clause (2) of Section 1 of the Amending Act, 2014 provides that:

> "It shall come into force on such date as the State Government may, by notification, appoint in this behalf."

Such notification of the Government of Odisha in the Department of law has been made on 20th February, 2015 fixing the date of appointment as 5.3.2015.

Section 16(2)(a) of the Act, 1984 [as amended by the Civil Courts (Amendment) Act, 2010] provided that an appeal from an original decree or order would lie to the District Judge where the value of the original suit did not exceed Rs.5.00 lakh. In all other cases, the appeals are being preferred to the High Court as provided under Section 16(2)(b) of the Act. In the recent amendment, i.e., Odisha Civil Courts (Amendment) Act, 2014, sub-section (2) of Section 16 including the explanation thereto, was substituted and it is provided that an appeal from a decree or order of the learned Civil Judge (Senior Division) and Civil Judge (Junior Division) shall lie to the District Judge.

In view of the above, sub-section (3) of Section 16 was omitted by virtue of the amending Act and sub-sections (4) and (5) were modified accordingly. In other words, the Amending Act, 2014 brought in the amendment by which an appeal from the original decree or order passed by the learned Civil Judge would lie to the District Judge irrespective of the valuation of the suit and no appeal there from would lie to the High Court. Thus, it has to be seen as to whether the amending provision of Section 16 of the Odisha Civil Courts (Amendment) Act, 2014 is retrospective in nature or not. In other words, the question of law arises in this case for consideration by this Court is whether the amendment made is applicable to the pending suits or it has only a prospective effect and will be applicable to the suit which would be filed after the notification of the amending Act made effective, i.e. with effect from 5.3.2015.

3. The substantive law, which creates and defines right, is always prospective in nature unless the legislation by express enactment or necessary

intendment makes it retrospective. On the other hand, a procedural law basically provides the procedure to enforce the substantive right created under the law and is retrospective in nature. As held in the case of ***Anant Gopal Sheorey –v- The State of Bombay***, reported in AIR 1958 SC 915, the Hon'ble Supreme Court at paragraph-4 held as follows:

> "4. The question that arises for decision is whether to a pending prosecution the provisions of the amended Code have become applicable. There is no controversy on the general principles applicable to the case. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. See Maxwell on Interpretation of Statutes on p. 225; The Colonial Sugar Refining Co. Ltd. v. Irving (1). In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective."

4. Thus, the change in the procedural law operates retrospectively unlike the law relating to vested right, i.e., substantive law. In another decision in the case of ***H.V. Thakur –v- State of Maharasthra***, reported in (1994) 4 SCC 602, the Hon'ble Supreme Court held as follows:

> "26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:
>
> (i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

Thus, the substantive law is always prospective in nature unless it is made retrospective by express enactment or necessary intendment and an amendment in the procedural law is applied retrospectively.

5. Mr. Goutam Mishra, learned counsel for the appellants submitting on the question of maintainability of the appeal advanced an argument that on the date of institution of the suit, all forums of appeal got crystallized. Thus, the amendment in the Odisha Civil Courts (Amendment) Act, 2014 cannot be made retrospective as there is no express enactment or necessary intendment in the Act to that effect. Since the appeal arises out of a suit, which is filed prior to the date of appointment, i.e., 5.3.2015, the Amending Act is not applicable to this appeal and hence, this appeal is maintainable in the eye of law before this Court. In support of his contention, he relied upon the decision in the case of ***Garikapatti Veeraya vs N. Subbiah Choudhury***, reported in AIR 1957 SC 540 in which the Hon'ble Supreme Court at paragraphs-4 and 23 held as under:

"4. As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded, On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by

express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure ? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

xxx xxx xxx

23. From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved, to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

He also placed reliance on the decision in the case of ***The Special Land Acquisition Officer, Talcher –v- Tankadhar Manabhoai and others***, reported in 2003 (Supp.) OLR 337, which cannot be held to be a good law in

view of the Division Bench decision of this Court in the case of ***Ramesh Chandra Das Vs. Kishore Chandra Das and others***, reported in AIR 2007 Orissa 146 and also in view of the discussion made in paragraphs 5 and 6 of the decision in the case of ***Mideast Integrated Steel Ltd. and others Vs. Industrial Promotion and Investment Corporation of Orissa Ltd***., reported in 2015 (II) ILR-CUT 621

> "5. Learned Senior Counsel also pointed out from the Three Judge Bench judgment of the Apex Court in *Dayaram vs. Sudhir Batham & ors*., (2012) 1 SCC 333 that in the facts of that case, even as the original petition was under Article 226 of the Constitution, it was clearly observed that right to file a writ appeal under the Adhiniyam (State Act) was a vested right to any person filing a writ petition. That right could be taken away only by an express amendment to the Act or by repeal of that Act, or by necessary intendment, that is, where a clear inference could be drawn from some legislation that the legislature intended to take away the said right. The right of appeal to a Division Bench, made available to a party to a writ petition, either under a statute or Letters Patent, cannot be taken away by a judicial order. The power under Article 142 is not intended to be exercised, when such exercise will directly conflict with the express provisions of a statute. However, in the 624 INDIAN LAW REPORTS, CUTTACK SERIES [2015] same judgment, it is repeatedly observed, on the basis of previous judgment of the Apex Court, that such a right of appeal could not be taken away except by express enactment or necessary implication and the vested right of appeal could be taken away by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise. The earlier observation of this Court could only be read in the context of facts of that case and the ratio of the judgment appears to be that vested right of appeal could be taken away by a subsequent enactment.
>
> 6. In view of the ratio of the above later judgments, the law laid down in *Special Land Acquisition Officer, Talcher & Ors., v. Tankadhar Mana Bhoi & Ors.,* 2003 (Supp) OLR 337 is no longer good law and stands overruled by necessary implication. In that view of the matter, the present appeal is not maintainable and dismissed as such."

6. On being confronted with the judgment of a Division Bench of this Court in the case of ***Duryodhan Samal –v- Smt. Uma Dei and others***,

reported in 60 (1985) CLT 360, Mr. Mishra replied that there was a specific finding of the Hon'ble Division Bench of this Court that amendment of Section 16(2) of Orissa Civil Courts Act of 1984 was retrospective in operation. In support of his argument, he brought attention of this Court to paragraph-15 of the said judgment, which reads as follows:

> "15. In our view, the aforesaid principle of law is equally applicable to the situation before us. In this case, the suit was instituted evidently years before the Act came into force on 1.1.1985. On the date presentation of the appeal, the forum of filing of appeal, the valuation of which is less than Rs. 20,000/-, had been changed by virtue of section 16(2) of the Act. The vested right of appeal which accrued to the litigant on the date of institution of the suit had not been taken away, but merely the forum was changed from the High Court to the Court of the District Judge. Since a litigant can have no vested right to pursue his remedy in a particular forum, in this case for lodgement of his appeal and change of forum is merely a change of procedural law, it would operate retrospectively unless a different intention is expressed or can be inferred by necessary intendment. The expression 'the original suit in which or any proceeding out of which the decree or order was made' occurring in sub-section (2) of section 16 of the Act clearly shows that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the cause of action for the suit arose or when the suit was actually filed. It would, therefore, be logical to conclude that irrespective of the date of filing of the suit and irrespective of the date of the judgment passed in such suit, the forum available for preferring an appeal on the date of presentation of the appeal would be the forum where an appeal should be filed and not the forum which existed on the date of institution of the suit. The conclusion does not conflict with the well-established principle that the right of appeal which existed on the date of the institution of the suit is a vested right of the litigant and is preserved to the parties to the suit till the rest of the career of the suit including the stage of appeal and second appeal which are mere continuation of the suit all connected by an intrinsic unity and are regarded as one legal proceeding in the language of their Lordships in the case reported in G. Veeraya –v- M. Subiah Choudhry and others (supra)."
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> (*emphasis supplied*)

7. Distinguishing the present nature of the dispute from the case of *Duryodhan Samal (supra)*, Mr. Mishra submitted that the recent amendment in the Odisha Civil Courts (Amendment) Act, 2014 was brought in force vide S.R.O. No. 61/2015 with effect from 5.3.2015 which would clearly indicate that the said Act is not retrospective in operation and there is absolutely no element of retrospectivity expressly provided or necessarily implied or intended in the amending provision, if the entire Amending Act, 2014 is read as a whole. Thus, there can be no quarrel over the fact that the Amending Act, 2014 is prospective in nature. Accordingly, this appeal is maintainable in the eye of law and the defect as pointed out by the S.R. on the question of maintainability of the appeal is to be ignored.

Since the controversy involved in the interpretation of the Odisha Civil Courts (Amendment) Act, 2014, this Court directed the State Government to make submission on interpretation of the provisions of the Amending Act, 2014 introducing amendment to Section 16 of the Act, 1984 and its applicability to the present appeal. This Court also sought for assistance of the Bar on the issue involved.

8. Miss S. Mishra, learned Addl. Standing Counsel for the State drawing attention of this Court to the provisions of the Amending Act, 2014 as well as the Act, 1984, made her elaborate submission on the question of maintainability and applicability of the Amending Act, 2014 to the present appeal. She relying upon the decision in the case of *Duryodhan Samal (supra)* strenuously urged that law is no more *res integra* on this issue, as similar question of law and fact was involved and decided in the said decision. This Court taking note of the leading decision of the Hon'ble Supreme Court in *G. Veeraya's case (supra*) has opined that the amendment to Section 16(2)(a) of the Act, 1984 is retrospective in nature. Moreover, the said decision has a binding effect. She further contended that unlike Section 100 of the C.P.C., which provides appeal to the High Court from the appellate decree, Section 96 CPC, which provides appeal from the original decree and Section 104 CPC, which provides appeal from the orders, do not provide any forum in the Code to which the appeal would lie. It is only determined as per Section 16 of the Act, 1984. The same is determined as per the provisions of Section 16 of the Odisha Civil Courts Act being amended from time to time.

9. This Court is thankful to Mr.A.R.Dash, learned counsel for his able assistance on the issue. While supporting the contentions raised by Miss

Mishra, learned Additional Standing Counsel, he relied upon the decision in the case of ***Karnail Kaur and others Vs. State of Punjab and others***, reported in AIR 2015 SC 2041, in which Ho'ble Supreme Court taking into consideration the ratio decided in *Garikapatti Veeraya (supra),* ***Shyam Sunder and Others vs Ram Kumar and another***, reported in AIR 2001 SC 2472 and ***K.S. Paripoornan vs State of Kerala***, reported in 1995 SC 1012 held that a statute which affects the substantive right is presumed to be prospective in operation unless made retrospective either expressly or by necessary intendment, whereas a statute which merely affects the procedure, unless such construction is textually impossible, is presumed to be retrospective in its application.

10. Undoubtedly, Sections 96, 100 and 104 of the C.P.C. are substantive provisions which confers right to prefer an appeal either from the original decree or appellate decree or from the orders. Sections 96 and 104, CPC, do not provide any forum of appeal. The forum is being determined as per the valuation of the suit as provided under the Act, 1984 being amended from time to time. By virtue of the amendment brought to Section 16 by the Amending Act of 2014, forums for all appeals either under Section 96 or 104 of the C.P.C. are to be presented before the District Judge irrespective of the valuation of the suit, whereas the provisions under Sections 96 and 104 of the C.P.C. are substantive provision for appeal, the Civil Courts Act provides a procedure to invoke such substantive right created under the said provisions. Thus, the provisions laid down in the Civil Courts Act, more particularly Section 16 of the Act, are mainly procedural in nature. It neither curtails any right of appeals nor creates new liabilities for the appellants.

11. Similar question with regard to maintainability of the appeal was raised in the case of *Duryodhan Samal (supra)* in view of the provisions contained in Section 16 (2) of the Orissa Civil Courts (Amendment) Act, 1984. While considering the implication of the aforesaid amendment, the Hon'ble Division Bench of this Court taking note of the ratio decided in the case of *Garikapatti Veeraya (supra)* in detail along with several other leading cases, at paragraph-12 held as follows:

> "12. The principle that the right of appeal against the decision of an inferior court to a superior court is a substantive right which commences from the date of institution of the suit and subsists throughout the rest of the career of the lis, stands established by a large number of other decisions of various Courts of this country

> including those already referred to and we do not think it necessary to notice all those cases in view of the authoritative and well discussed judgments to which specific reference has already been made.
>
> The argument that the right of appeal to the superior court carries with it the right of lodgement of the appeal to a particular court or forum, in our opinion, is devoid of any merit."

12. Amongst other, this Court in *Duryodhan Samal's case (supra)* also taken into consideration the decisions of the Hon'ble Supreme Court the case of ***Ittavira Mathai –v- Varkey Varkey And Another*****,** reported in AIR 1964 SC 907 and in the case of ***New India Insurance Co. Ltd. –v- Smt. Shanti Mishra***, reported in AIR 1976 SC 237, categorically held in paragraph-15 (quoted hereinabove) that irrespective of the date of filing of the suit and the date of judgment of the suit, the forum available on the date of presentation of the appeal would be the forum to which the appeal would lie.

13. Mr. Mishra, learned counsel for the appellant in course of his argument also relied upon the decision in the case of ***Himachal Pradesh State Electricity Regulatory Commission and another Vs. Himachal Pradesh State Electricity Board***, reported in (2014) 5 SCC 219 and verily relied upon at paragraphs-22 and 23 of the said judgment which reads as follows:

> 22. On a proper understanding of the authority in Garikapati Veeraya (supra), which relied upon the Privy Council decision, three basic principles, namely,
>
> (i) the forum of appeal available to a suitor in a pending action of an appeal to a superior tribunal which belongs to him as of right is a very different thing from regulating procedure;
>
> (ii) that it is an integral part of the right when the action was initiated at the time of the institution of action; and
>
> (iii) that if the Court to which an appeal lies is altogether abolished without any forum constituted in its place for the disposal of pending matters or for lodgment of the appeals, vested right perishes, are established.
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> 23. It is worth noting that in Garikapati Veeraya (supra), the Constitution Bench ruled that as the Federal Court had been abolished, the Supreme Court was entitled to hear the appeal under Article 135 of the Constitution, and no appeal lay under Article

> 133. The other principle that has been culled out is that the transfer of an appeal to another forum amounts to interference with existing rights which is contrary to well known general principles that statutes are not to be held retrospective unless a clear intention to that effect is manifested."

In the aforesaid decision, the Hon'ble Supreme Court has examined the effect of provisions of Sections 110 and 111 of the Electricity Act, 2003, which came into force at a juncture, when appeals under Section 27 of Electricity Regulatory Commission Act, 1998 were pending before the High Court. Earlier, the order passed by the Commission was subject to challenge in appeal before the High Court under Section 27 of the Electricity Regulatory Commission Act, 1998. During pendency of the appeal, the Electricity Act, 2003 was enacted. Chapter-XI of 2003 Act deals with Appellate Tribunals under the said Act. Section 110 of the said Act relates to establishment of an Appellate Tribunal and Section 111 of the said Act provides that an appeal would lie to the Appellate Tribunal constituted under Section 110 from an order made by the appropriate Commission under the Act.

He also pressed into service the decision in the case of ***Commissioner of Income Tax, Orissa –v- Dhadi Sahu***, reported in (1994) 1 SCC 257, para-18 and 21 of the said decision, which are relevant for discussion in the case at hand are quoted below:-

> "18. It may be stated at the outset that the general principle is that a law which brings about a change in the forum does not affect pending actions unless intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for change-over of proceedings, from the court or the tribunal where they are pending to the court or the tribunal which under the new law gets jurisdiction to try them.
>
> Xx xx xx

21. It is also true that no litigant has any vested right in the matter of procedural law but where the question is of change of forum it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated in the tribunal or the court of first instance and unless the legislature has by express words or

by necessary implication clearly so indicated, that vested right will continue in spite of the change of jurisdiction of the different tribunals or forums."

In the aforesaid decision, the Hon'ble Supreme Court dealt with the effect of amendment brought to Section 274(2) of the Income Tax Act, 1961 during pendency of the reference to impose penalty under Section 271 of the Income Tax Act as well as the power of the Income Tax Officer under Section 274(2) of the Income Tax Act. Before amendment of the said provision, the expression "the minimum penalty exceeds a sum of Rs.1000/-" was substituted by "the amount of income (as determined by the Income Tax Officer on the date of assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of Rs. 25,000/-". Moreover, on a close reading of the ratio decided in the case of ***Maharaja Chintamani Saran Nath Sahahdeo Vs. State of Bihar and others***, reported in AIR 1999 SC 3609, relied upon by Mr. Mishra, it emanates that the Hon'ble Supreme Court has relied upon the principles decided in the case of *H.V. Thakur (supra)*, which discussed the scope and ambit of an Amending Act and its retrospective operation, and the same are set out hereinabove supra.

14. In view of the rival contentions of the parties and the case laws referred to above, it has to be seen as to whether the amendment brought in by virtue of the Amending Act, 2014 merely changes the forum which is a part of procedural law or it has changed the substantive right of the litigant which is already vested in him on the date of institution of the suit. There can be no dispute that a case law has to be read as a whole in the context of the facts and point of law involved in it to find out the ratio decided therein. It may not be always correct to apply the principles decided in a case law by reading one or two paragraphs or a portion of it. In all the aforesaid case laws relied upon by Mr. Mishra, be it the case of *Garikapatti Veeraya (supra)* and *Dhadi Sahu (supra)* or the case of *Himachal Pradesh State Electricity Regulatory Commission (supra)*, the forum is provided in the provision of appeal itself. In other words, the forum of appeal is named in the provision of appeal itself, but in the case at hand, neither Section 96 nor Section 104 C.P.C. provides 'a forum of appeal'. The forum of appeal is only determined as per the valuation of the suit which is governed under the provisions of the Civil Courts Act. Thus, when a substantive provision of appeal does not name or provide a forum to which such appeal would lie, the law relating to determination of forum becomes procedural keeping the substantive right of appeal unaffected. As discussed in the aforesaid decisions, the right of appeal

against the decision of an inferior court to a superior court is a substantive right which commences from the date of institution of the suit and subsists throughout the rest of the career of the lis. However, a litigant cannot have any vested right to pursue his remedy in a particular forum (in this case lodgment of appeal) unless the forum itself is provided or named in the provision of appeal of the statute under which the original proceeding is instituted. By virtue of amendment of Section 16 (2) of the Amending Act, 2014, a right of appeal is not taken away which is a substantive right. No new right or liability is created by such amendment. By virtue of the amendment, only the forum has been changed, which cannot be said to be affecting his substantive right in any manner as the provision of appeal under Section 96 or 104 C.P.C. does not provide or name a forum to prefer an appeal. Thus, the same becomes procedural and accordingly, retrospective in nature. The appellant is also in no way prejudiced in pursuing the appeal before the District Judge.

15. Mr. Mishra also relied upon several decisions of the Kerala High Court in the case of ***Kunnappadi Kalliani Vs. Lekharaj***, reported in 1996 (2) KLJ 106 and ***Sasi @ Sasikumar & others Vs. Soudamini & others,*** reported in 2003 (3) KLJ 888, which give a contrary view. The said decisions have only persuasive value. On the other hand, the decision in the case of *Duryodhan Samal (supra)* is squarely applicable to the case at hand as the question of fact and law involved in the said case is similar to the case at hand and the same is binding being a decision rendered by a Division Bench of this Court which has been passed taking into consideration the decision of the Hon'ble Supreme Court in the case of *Garikapatti Veeraya (supra)* and several other decisions of the Hon'ble Supreme Court. The said decision holds the field till date.

16. In that view of the matter, I hold that this appeal being filed after 5.3.2015, i.e., the date on which the Odisha Civil Courts (Amendment) Act, 2014 came into force, is not maintainable before this Court. Registry is directed to return the brief to the appellants to be presented before the District Judge having jurisdiction to entertain the same on filing of attested photocopy of the same. It is made clear that delay in filing the appeal may be considered liberally taking into consideration the period of pendency of the appeal before this Court.

Appeal disposed of.