SUPREME COURT OF INDIA

MADAN B.LOKUR, J. & N.V.RAMANA, J.

CIVIL APPEAL NO. 4914 OF 2016
(ARISING OUT OF S.L.P.(C) NO. 9997 OF 2016)

MEDICAL COUNCIL OF INDIA ……..Appellant

.Vrs.

KALINGA INSTITUTE OF MEDICAL SCIENCES (KIMS) & ORS. ……..Respondents

(A) MEDICAL EDUCATION – KIMS is a recognized medical college entitled to admit 100 students to MBBS course – Subsequently it sought permission to admit 50 additional students – MCI conducted inspection by three neutral eminent professors and found lot of deficiencies and recommended the Central Government to deny permission – Central Government vide letter Dt. 15.06.2015 informed KIMS not to admit students for the year 2015-16 – Such action challenged by KIMS in writ petition – High Court directed Central Government to grant provisional permission to KIMS to conduct the course for additional 50 students for 2015-16 – Central Govt. granted provisional permission subject to the result of the writ petition – Hence the Civil Appeal at the instance of MCI – When an expert body certifies that the facilities in a Medical College are inadequate, the Courts are not equipped to take a different view in the matter, except for very cogent jurisdictional reasons such as malafides of the Inspection Team, ex facie perversity in the inspection report and jurisdictional error on the part of the MCI – Under no circumstances the High Court should examine the report as an appellate body – There was no ground made at law for setting aside the report of the Inspection Team – In the other hand despite the letter Dt. 15.06.2015 issued by the Central Govt., KIMS admitted 50 additional students which was certainly not with a charitable motive – However, for the fault of KIMS, the students should not suffer nor should KIMS be scot free – Held, the impugned order passed by the High Court is set aside – KIMS must pay cost of Rs. 5 crores for playing with the future of its students – The amount will be deposited by KIMS in the Registry of this Court within six weeks from today which shall not be recovered in any manner from any student or adjusted against the fees or provision of facilities for students of any present or subsequent batches – KIMS is restrained from increasing students from 100 to 150 for MBBS Course for the academic year 2016-17 and 2017-2018. (Paras 26,29,32,33)

(B) MEDICAL EDUCATION – Health of the people of the Country will take a hit in the coming years due to inadequately educated doctors – Quality in medical education to be improved and while according permission to a medical college there must be proper inspection as required under the Medical Council of India Establishment of Medical College Regulations, 1999 – In course of hearing, this Court finds there is no fixed set or laid down procedure prepared by the MCI for conducting an inspection or assessment, rather every Inspection Team follow their own procedure for conducting an assessment – Held, the MCI should in Consultation with the Central Govt. prepare a standard operating procedure for conducting an inspection which shall be finalized within six weeks from today and should be accessible on the website of the MCI – However to introduce transparency and accountability in the Medical Colleges, the report or assessment of the Inspection Team should be put up on the website of the concerned Medical College and MCI, so that potential students are aware of what is likely to be in store for them – Similarly the decision of the Central Govt. on the report should be put up on the website of the concerned Medical College as also on the website of MCI. (Para 33)

Case Laws Referred to :-

1. (2013) 10 SCC 60 : Manohar Lal Sharma -V- Medical Council of India
2. 2016 (3) SCALE 184 : Rajiv Memorial Academic Welfare Society -V- Union of India

For Appellant : Mr. Gaurav Sharma
For Respondents : Mr. Shantanu Sagar

Date of Judgment: 06.05.16

JUDGMENT

MADAN B. LOKUR, J.

1. Leave granted.

2. This appeal is yet another chapter in the sordid saga of admissions to medical colleges. Undoubtedly, there is something rotten in the state of medical colleges. Unless the concerned Ministries in the Government of India take a far more proactive role in ensuring that medical colleges have all the necessary facilities, clinical materials, teaching faculty, staff, accommodation etc. the health of the people of our country will take a hit in the coming years due to inadequately educated doctors. Quality in medical education is equally important, if not more, than quantity.

3. The respondent Kalinga Institute of Medical Sciences (for short KIMS) is a recognized medical college. It is entitled to admit 100 students every year to the MBBS course.

4. For the academic year 2014-15, it was granted permission to admit an additional 50 students over and above the 100 students that was already its entitlement.

5. KIMS was desirous of granting admission to 100 plus 50 students for the academic year 2015-16. With a view to ensure that adequate facilities were available for the increased number of students, an inspection was required to be carried out by the Medical Council of India (for short 'the MCI') in accordance with the Medical Council of India Establishment of Medical College Regulations, 1999.

6. Consequently, an inspection was carried out on 27th and 28th January, 2015 by an Inspection Team of the MCI which revealed quite a sorry state of affairs. A large number of serious deficiencies were pointed out by the Inspection Team and communicated to the MCI. Thereafter, in a communication sent by the MCI to the Dean Principal of KIMS on 31st January, 2015 the deficiencies were indicated and KIMS was informed that a show cause notice was proposed to be issued for withdrawal of recognition of the courses run by it. Be that as it may, the MCI took a decision recommending to the Central Government through the Ministry of Health and Family Welfare (Department of Health and Family Welfare) to deny permission to KIMS to add 50 additional seats for the MBBS for the academic year 2015-16.

7. We enquired from learned counsel for the MCI the procedure for carrying out an inspection. Our attention was drawn by learned counsel to Page 'J' of the appeal paper book wherein it is stated (and not denied) that an inspection is conducted by a team of three neutral Professors. Of these, one is a coordinator and the other two are taken from an approved list of eminent medical Professors from reputed Government institutions only. Some of the institutions mentioned are the All India Institute of Medical Sciences, Post Graduate Institute, Chandigarh, Maulana Azad Medical College (Delhi), Safdarjung College (Delhi), Medical College (Kolkata), Madras Medical College (Chennai), Osmania Medical College (Hyderabad), Grant Medical College (Mumbai), G.S. Medical College (Mumbai), Bangalore Medical College (Bengaluru) etc. There is therefore no doubt that not only are the medical colleges highly reputed but it is also stated that the Professors from these colleges are eminent medical Professors randomly selected by computer software from a list of coordinators and inspectors.

8. Our attention was also drawn to the decision of this Court in ***Manohar Lal Sharma v. Medical Council of India: (2013)10 SCC 60*** wherein it was held that since the inspection is taken by "doctors of unquestionable integrity and reputation, who are experts in the field, there is no reason to discard the report of such an inspection." In the present appeal, there is no allegation made by KIMS of any *mala fides* of the Inspection Team or any perversity in the inspection report and hence there is no question of challenging the conclusions of a neutral, randomly selected Inspection Team in its assessment**.**

9. As mentioned above, the inspection report and the decision of the MCI were communicated to the Central Government. On a consideration of the material made available, the Central Government sent a communication dated 15th June, 2015 to the Dean Principal of KIMS directing the institute NOT to admit any students in the second batch of MBBS course against the increased intake from 100 to 150 seats for the academic year 2015-16. The text of the letter sent by the Central Government to the Dean Principal of KIMS on 15th June, 2015 reads as follows:

> "I am directed to refer to MCI letter (s) dated 01.04.2015 thereby recommending to the Central Government not to renew the permission for admission of 2nd batch of MBBS course against increased intake i.e. from 100-150 seats Kalinga Institute of Medical Sciences, Bhubaneswar for the academic year 2015-16 and to say that the Central Government has decided to accept the recommendations of MCI.
>
> 2. You are therefore directed NOT to admit any student in 2nd batch of MBBS course against increased intake i.e. from 100-150 seats for the academic year 2015-16. Admission in next batch of students against increased intake for the year 2016-17 will be made only after obtaining the Central Government Permission.
>
> 3. Any admission made in this regard will be treated as irregular and action will be initiated as per the provisions of IMC, Act, 1956 and Regulations made thereunder.
>
> 4. Further, the MCI has also informed to apply Clause 8(3)(1) (c) & (d) of Establishment of Medical College Regulation (amendment), 2010."

10. Feeling aggrieved by the adverse decision, KIMS preferred a writ petition in the High Court of Orissa being W.P. (C) No.15685 of 2015. The writ petition was taken up for consideration on 14th September, 2015 when the direction dated 15th June, 2015 passed by the Central Government was set aside on the ground that no hearing was given to KIMS before that order was passed. The High Court then directed KIMS to appear before the Secretary to the

Government of India in the Department of Health and Family Welfare or any other authorized officer on 18th September, 2015 with all documentary evidence. The said officer was directed to hear KIMS, consider the compliance reports of KIMS and the views of the MCI and then pass necessary orders.

11. In obedience to the order passed by the High Court a hearing was given to KIMS by a Hearing Committee. Thereafter, the Central Government passed an order on 24th September, 2015 which observed as follows:

> *"The college was earlier given hearing on 12.03.2015. The compliance submitted by the college is same as the last time. Though the college claims to have rectified the deficiencies, it can only be verified through physical assessment by MCI.*
>
> *The deficiencies are non-condonable. The documents alone submitted by the college do not sufficiently inspire confidence as to rectification of the deficiencies. Therefore, this Committee has considered the assessment report of the MCI assessors dated 27th and 28th January, 2015 and the compliance report submitted by the representatives of the college and decided that the Ministry may accept recommendation of MCI."*

12. On a consideration of the order passed by the High Court and the recommendations of the MCI, the Central Government decided not to renew the permission for admitting the second batch of MBBS students against the increased intake that is from 100 to 150 for the academic year 2015-16 at KIMS.

13. The writ petition was then taken up for consideration by the High Court on 25th September, 2015. The High Court considered the facts of the case and placed reliance on ***Rajiv Memorial Academic Welfare Society v. Union of India***: ***2016 (3) SCAE 184*** (which appeal was decided in the circumstances of the case and was not a general direction) and a decision of the Kerala High Court and directed, *inter alia*, that the Central Government shall grant provisional permission to KIMS to conduct the course for the additional 50 students in the academic year 2015-16. While giving this direction, the High Court noted that admission to the MBBS course was required to be completed by 30th September, 2015. The High Court made it clear that this interim order would be subject to further orders passed in the writ petition and it was also made clear that neither KIMS nor any of the students would claim any equity on the basis of the approval permission granted by virtue of the orders of the High Court.

14. Pursuant to the mandatory direction given by the High Court, the Ministry of Health and Family Welfare passed an order on 28th September, 2015 granting provisional permission to KIMS to conduct the MBBS course for the second batch against the increased intake from 100 to 150 MBBS seats for the

academic year 2015-16 subject to certain conditions. One of the conditions was to the effect that KIMS would make it clear to the students who are admitted that their admission is subject to the result of the writ petition. Consequent upon this decision, KIMS admitted 50 students to the MBBS course for the academic year 2015-16. These students are represented before us in this appeal and have been heard.

15. At this stage, it may be mentioned that against the interim order dated 25th September, 2015 passed by the High Court, the MCI preferred a petition in this Court which came up for consideration on 13th October, 2015. In that petition being SLP (C) No. 28312 of 2015, special leave to appeal was granted and the order passed by the High Court on 25th September, 2015 was stayed and status quo as on the date on which the impugned order was passed (25th September, 2015) was directed to be maintained.

16. Be that as it may, when the appeal filed by MCI came up for consideration on 4th November, 2015 it was directed that the High Court should endeavour to hear the pending writ petition expeditiously. It was also directed that the interim order earlier passed on 13th October, 2015 would continue till the High Court decided the writ petition.

17. When the writ petition was again taken up by the High Court, an amendment application was filed by KIMS and the amendment allowed. It is not necessary to go into the details of the amendment since that has no bearing in this appeal.

18. In any event, when the writ petition was taken up for expedited consideration by the High Court on 3rd December, 2015 it was noted that 50 students had already been admitted by KIMS pursuant to the directions given by High Court on 25th September, 2015 and the provisional permission granted by the Central Government on 28th September, 2015. The admission was of course subject to the outcome of the writ petition. The High Court then directed that necessary affidavits be filed and in the meanwhile MCI was directed to constitute a fresh Inspection Team to inspect KIMS and to check up the purported compliance claimed by KIMS of the deficiencies pointed out in the earlier inspection. It was further directed that the Directorate of Medical Education and Training, Government of Odisha would also participate in the inspection and the report be submitted on or before 23rd December, 2015.

19. Feeling aggrieved by the order passed by the High Court on 3rd December, 2015 requiring the Directorate of Medical Education and Training, Odisha to be a part of the Inspection Team, the MCI preferred a petition in this Court being SLP (C) No.34856 of 2015. Special leave was granted and by an order dated 16th December, 2015 it was made clear by this Court that the

Directorate of Medical Education and Training, Odisha shall not participate in the inspection.

20. There appears to have been some dispute in this Court (which was not resolved) with regard to the academic year for which the fresh inspection was required to be carried out. According to learned counsel for the MCI the inspection was to be carried out for 2016-17 while this was opposed by learned counsel appearing for KIMS. This Court however did not record anything in this regard one way or the other.

21. A fresh inspection was in fact carried out by MCI on 7th and 8th January, 2016 and the Inspection Team once again found a very large number of deficiencies in the facilities available at KIMS. The report of the Inspection Team and the consequent resolution of the MCI were communicated to the Central Government to the effect that the Central Government should not renew permission for admission of the 3rd batch of MBBS students against the increased intake from 100 to 150 seats for the academic year 2016-17.

22. Thereafter, the pending writ petition was taken up for hearing by the High Court on 17th February, 2016 and the impugned judgment and order delivered on 4th March, 2016.

23. A perusal of the decision of the High Court clearly indicates that it considered the latest report of the Inspection Team as if it was hearing an appeal against the report. In doing so, the High Court went into great details on issues relating to the number of teaching beds in the hospital, the limitations in the OPD Department, the number of units available in the subjects of General Medicine, Pediatrics etc., bed occupancy, number of Caesarean sections, discrepancy in data of major and minor operations, computerization in the institution, number of patients in the ICU, number of static X-ray machines, deficiency of examination halls, lecture theatres, library, students hostel, interns hostel, playground etc. etc. Surely, this was not within the domain of the High Court in exercise of its jurisdiction under Article 226 of the Constitution.

24. The High Court did not appreciate that the inspection was carried out by eminent Professors from reputed medical institutions who were experts in the field and the best persons to give an unbiased report on the facilities in KIMS. The High Court under Article 226 of the Constitution was certainly not tasked to minutely examine the contents of the inspection report and weigh them against the objections of KIMS in respect of each of its 18 items. In our opinion, the High Court plainly exceeded its jurisdiction in this regard in venturing into seriously disputed factual issues.

25. Learned counsels for KIMS and the students submitted that the High Court was left with no option but to critically examine the report of the

Inspection Team since it was factually erroneous and did not deserve to be relied on either for the increase in intake of seats for the academic year 2015-16 or the academic year 2016-17. We see no reason to accept the submission of learned counsels.

26. Medical education must be taken very seriously and when an expert body certifies that the facilities in a medical college are inadequate, the Courts are not equipped to take a different view in the matter except for very cogent jurisdictional reasons such as *mala fides* of the Inspection Team, *ex facie* perversity in the inspection report, jurisdictional error on the part of the MCI etc. Under no circumstance should the High Court examine the report as an appellate body – this is simply not the function of the High Court. In the present case there was no ground made out at law for setting aside the report of the Inspection Team.

27. The High Court was of opinion that the Inspection Team was required to conduct the inspection with reference to the academic year 2015-16 but the report pertains to the academic year 2016-2017. If that was so, the High Court could have passed an appropriate order in this regard rather than examine and scrutinize the inspection report prepared for the academic year 2016-17 which academic year was not at all the subject matter of consideration or discussion before it. Moreover, invalidation of the inspection report for the academic year 2016-17 would not automatically invalidate the inspection report for the academic year 2015-16. Unfortunately, the High Court spent its energy on adjudicating a non-issue.

28. It appears to us that both the MCI and the Central Government each having twice considered the inspection report submitted by neutral medical Professors, with the Central Government having given a personal hearing to KIMS on the second occasion (and perhaps on the first occasion as well) the matter ought to have been given a quietus by the High Court at least for the academic year 2015-16.

29. That apart, we are of opinion that the High Court ought to have been more circumspect in directing the admission of students by its order dated 25th September, 2015. There was no need for the High Court to rush into an area that the MCI feared to tread. Granting admission to students in an educational institution when there is a serious doubt whether admission should at all be granted is not a matter to be taken lightly. First of all the career of a student is involved – what would a student do if his admission is found to be illegal or is quashed? Is it not a huge waste of time for him or her? Is it enough to say that the student will not claim any equity in his or her favour ? Is it enough for student to be told that his or her admission is subject to the outcome of a pending

litigation? These are all questions that arise and for which there is no easy answer. Generally speaking, it is better to err on the side of caution and deny admission to a student rather than have the sword of Damocles hanging over him or her. There would at least be some certainty.

30. Whichever way the matter is looked at, we find no justification for the orders passed by the High Court particularly the order dated 25th September, 2015 and the order dated 4th March, 2016.

31. It was submitted by the learned counsel for the KIMS that the Central Government has decided to accept the decision of the High Court and it has in fact issued an order dated 26th April, 2016 virtually to this effect. We have gone through the order dated 26th April, 2016 and find that the permission granted to continue with the studies of the students for the academic year 2015-16 is subject to the orders passed by this Court in this appeal. Since we are allowing the appeal and setting aside the order passed by the High Court, the order dated 26th April, 2016 passed by the Central Government is of no consequence and does not come to the aid of KIMS or the students.

32. Learned counsel for KIMS and the students contended that unless this appeal is dismissed it will result in the students suffering a loss of two years of their studies. This may be so – but if such a situation has come to pass, KIMS is entirely to be blamed. KIMS was specifically told not to admit students by the Central Government in its letter dated 15th June, 2015. Despite this KIMS persisted in litigation to somehow or the other accommodate 50 additional students. This was certainly not with a charitable motive. As an institution that should have some responsibility towards the welfare of the students, it would have been far more appropriate for KIMS to have refrained from giving admission to 50 additional students rather than being instrumental in jeopardizing their career.

33. However, for the fault of KIMS, the students should not suffer nor should KIMS get away scot free. KIMS must pay for its inability to introspect and venture into adventurist litigation. Accordingly,we direct as follows:

> 1. The admission granted to the 50 students pursuant to the order of the High Court dated 25th September, 2015 and the provisional permission granted by the Central Government only on 28th September, 2015 shall not be disturbed. How the students will complete their course of studies without putting undue pressure on them is entirely for the MCI and KIMS and other concerned authorities to decide.
>
> 2. Costs of Rs. 5 crores are imposed on KIMS for playing with the future of its students and the mess that it has created for them. The

amount will be deposited by KIMS in the Registry of this Court within six weeks from today. The amount of Rs. 5 crores so deposited towards costs shall not be recovered in any manner from any student or adjusted against the fees or provision of facilities for students of any present or subsequent batches.

3. KIMS is restrained from increasing the intake of students from 100 students to 150 students for the MBBS course for the academic year 2016-17 and 2017-2018. The MCI and the Central Government shall enforce strict compliance of this direction.

4. The MCI or the Central Government will proceed to take action against KIMS (if deemed advisable) under Clause 8(3) of the Medical Council of India Establishment of Medical College Regulations, 1999 (as amended) as mentioned in the communication of 15th June, 2015 of the Central Government.

5. During the hearing of the appeal, we were informed that there is no fixed, set or laid down procedure prepared by the MCI for conducting an inspection or assessment as postulated by the Medical Council of India Establishment of Medical College Regulations, 1999. Rather than every Inspection Team following its own procedure for conducting an assessment, the MCI should in consultation with the Central Government prepare a Standard Operating Procedure for conducting an inspection as required by the Medical Council of India Establishment of Medical College Regulations, 1999. The Standard Operating Procedure should be finalized within a period of six weeks from today and should be accessible on the website of the MCI.

6. To introduce transparency and accountability in the medical colleges, the report or assessment of the Inspection Team should be put up on the website of the concerned medical college as also on the website of the MCI so that potential students are aware of what is likely to be in store for them. Similarly, the decision of the Central Government on the report should be put up on the website of the concerned medical college as also on the website of the MCI.

34. To ensure compliance of Directions 2 and 5 and for an update on Directions 4 and 6 list the appeal in the first week of July 2016.

35. The appeal is disposed of on the above terms.

Appeal is disposed of.

2016 (I) ILR - CUT- 1060

SUPREME COURT OF INDIA

ANIL R. DAVE, J., SHIVA KIRTI SINGH, J. & ADARSH KU. GOEL, J.

W.P.(C) NO. 261 OF 2016

SANKALP CHARITABLE TRUST & ANR. ……..Petitioners

.Vrs.

UNION OF INDIA & ORS. ……..Respondents

MEDICAL EDUCATION – National Eligibility-cum-Entrance Test (NEET) for admission to MBBS and BDS courses for the academic year 2016-17 – Single national level common entrance test conducted by MCI – All general Colleges, deemed Universities and Private Medical Colleges would be covered under the NEET – Phase I of NEET shall be held on 01.05.2016 and for left out students Phase II of NEET shall be held on 24.07.2016 and combined result of both the tests shall be declared on 17.08.2016 – The court has also clarified that notwithstanding any order passed by any Court earlier with regard to not holding NEET, this order shall operate.

For Petitioners : Mr. Amit Kumar
For Respondents : ….

Date of Order : 28.4. 2016

ORDER

ANIL R. DAVE, J.

The following prayer has been made in this petition :

> "a) Issue a Writ of Mandamus or any other writ, order or direciton in the nature of Mandamus directing the Respondents to conduct the National Eligibility cum Entrance Test (NEET) for admission to MBBS Course throughout the country for academic session 2016-17;
>
> (b) Issue or pass any writ, direction or order, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case."

When the matter was heard on 27th April, 2016, the following order was passed by this Court :

"Taken on board.

The learned counsel for the petitioner has assured this Court that he will remove the office objections by tomorrow. At his request, Respondent No.4 is deleted from the array of parties. All the three respondents are represented by their respective counsel and they have assured this Court that they are ready and willing to hold NEET examination for admission to MBBS and BDS courses for the academic year 2016-17.

As the counsel representing CBSE would like to take necessary instructions, hearing is adjourned for tomorrow. Proposed schedule of the examination to be held, shall be submitted in the Court tomorrow.
The learned counsel shall also see that a responsible officer of the CBSE, who can take on the spot decision, remains present in the Court.

List the matter tomorrow, i.e., 28th April, 2016 at 12.00 p.m."

The matter has been thereafter heard today. It has been submitted by the learned counsel appearing for all the respondents that it is proposed to hold the examination in pursuance of Notifications dated 21st December, 2010 issued by the Medical Council of India and the Dental Council of India ('DCI' for short).

As per the said Notifications, a common entrance test, i.e., National Eligibility cum Entrance Test (NEET) shall be held.

It was further submitted, *interalia*, as follows

"1. AIPMT 2016 to be held on 1st May,2016 shall be phase I of NEET.

2. Phase II of NEET for the left out candidates shall be held on 24th July, 2016 by
inviting applications with fee.

3. Combined result of both the Tests shall be declared on 17th August, 2016.

4. CBSE will provide All India Rank. Admitting Authorities will invite applications for Counselling and merit list shall be drawn based on All India Rank.

5. All associated with conduct of Exam including Central Govt., State Govt., institutions, Police etc. will extend all necessary support to CBSE and permit security measures like use of electronic and communication devices Jammers etc. for timely and fair conduct of the NEET.

6. Any difficulty with regard to implementation of orders of this Court the stake holders may approach this Hon'ble Court."

The learned counsel have also given the details with regard to the time when the result would be declared and counselling would take place.

In view of the submissions made on behalf of the respondents, we record that NEET shall be held as stated by the respondents. We further clarify that notwithstanding any order passed by any Court earlier with regard to not holding NEET, this order shall operate. Therefore, no further order is required to be passed at this stage.

It may be mentioned here that some learned counsel representing those who are not parties to this petition have made submissions that in view of the judgment passed in Christian Medical College, Vellore & Ors. Vs. Union of India & Ors., reported in (2014) 2 SCC 305, it would not be proper to hold NEET and this order should not affect pending matters.

We do not agree with the first submission for the reason that the said judgment has already been recalled on 11th April, 2016 and therefore, the Notifications dated 21st December, 2010 are in operation as on today.

It may however be clarified that by this order hearing of the petitions which are pending before this Court will not be affected. The petition be now listed in due course.

Writ petition disposed of.

2016 (I) ILR - CUT-1063

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

W.A. NO. 149 OF 2016

SMT. SAROJINI BARIK ……..Appellant

.Vrs.

ADDL. DISTRICT MAGISTRATE-CUM- APPELLATE AUTHORITY & ORS. ..……Respondents

ODISHA MISCELLANEOUS CERTIFICATES RULES, 1984 – RULE-3

Resident / Nativity certificate – Issuance of – It is inherent that one is to apply and obtain resident certificate in respect of only one place – Even if a person has two or more houses at different villages, he is not entitled to obtain different resident certificates for different villages but for one village where he normally resides – However he can apply for a fresh certificate from a different place, only after getting the earlier certificate cancelled.

In this case the appellant while receiving the second resident certificate did not disclose that he had already got a certificate from the very same authority, which amounts to misrepresentation or fraud on the authorities and such order can not be sustained in the eye of law – Held, the order of the Addl. District Magistrate is justified in law which has rightly been upheld by the learned single judge, hence the same does not call for any interference by this Court.

(Paras 6 to13)

For Appellant : M/s.Sameer Kumar Das, S.K. Mishra, P.K. Behera.

For Respondents : Mr.A.S. Nandy, B. Bal

Date of judgment : 04.05.2016

JUDGMENT

VINEET SARAN, C.J.

The petitioner is an Anganwadi Worker who was selected on the basis of a resident/nativity certificate issued by the Tahasildar on 27.11.2009 certifying that she is a resident of Dagara. Then as the petitioner, just about a month prior to the certificate dated 27.11.2009, had also been issued another Certificate bearing no. 2896 dated 16.10.2009 showing her to be the resident of Jamatkula, an enquiry was directed to be conducted by the Addl. District Magistrate, Balasore, who by his report dated 9.10.2012, held that the

certificate of resident for mouza Dagara was obtained by the appellant-petitioner by submitting false/fabricated documents and that the same needs to be cancelled. Challenging the said order, W.P.(C) No. 19878 of 2012 was filed by the petitioner. On dismissal of the writ petition by the learned Single Judge, this appeal has been filed.

2. The background of the case is that earlier the petitioner had applied for a job as Anganwadi Worker in respect of village Jamatkula for which she had obtained resident certificate on 16.10.2009. Thereafter, when advertisement for village Dagara-IV Centre was made, the petitioner applied for another resident certificate on 17.11.2009 for village Dagara, apparently without disclosing that she had already obtained a resident certificate for village Jamatkula, and the said certificate having been issued to the petitioner without even canceling the earlier certificate, the petitioner got appointment as Anganwadi Worker in respect of Dagara-IV Centre. The other applicant being respondent No.2, Smt. Sakuntala Das had also applied for engagement as Anganwadi Worker, but she was not selected and she challenged the appointment of the appellant by filing writ petition, bearing W.P.(C) No.22462 of 2013 which was also decided by the learned Single Judge.

3. Both the writ petitions bearing W.P.(C) No. 19878 of 2012 and W.P.(C) No. 22462 of 2013 have arisen out of one cause of action, which have been heard by learned Single Judge analogously, who delivered a common judgment on 26.02.2016 by which W.P.(C) No. 19878 of 2012 filed by Smt. Sarojini Barik has been dismissed and W.P.(C) No. 22462 of 2013 filed by Smt. Sakuntala Das has been allowed. Against the order passed by the learned Single Judge on 26.02.2016 in W.P.(C) No. 19878 of 2012, dismissing the writ petition, this intra Court appeal has been filed.

4. Realizing the difficulties of Revenue Officer at the time of issuance of certificates, Government after careful consideration, in supersession of all circulars and instructions issued earlier, has been pleased to frame“The Orissa Miscellaneous Certificates Rules, 1984”, which came into force with effect from 21st April, 1984. Under Rule-3, it has been specifically stated that Revenue Officer shall be competent to grant miscellaneous certificates of the following categories:-

(i) Identity Certificate (in Form No. II)

(ii) Resident/Nativity Certificate (in Form No. III)

(iii) Legal heir Certificate (in Form No. IV)

(iv) Income Certificate (in Form No. V)

(v) Solvency Certificate (in Form No. VI)

(vi) Other Certificates of miscellaneous nature.

A person desirous of obtaining a certificate as mentioned above, shall file before a Revenue Officer an application as specified under Rule-4 of the said Rules, and as per Rule-5 the Revenue Officer shall initiate a case record, scrutinize the documents furnished by the appellant, verify the relevant records, if any, in the office and wherever necessary, may himself inquire into the matter or call for a report of inquiry by a specified date from an officer subordinate in rank. As per Rule-6 of the said Rules, if on the basis of the documents, records, and the result of the inquiry, if any, the Revenue Officer is of the view that the certificate applied for may be granted, he shall pass necessary orders in the case record, and sign the appropriate certificate specifying the purpose solely for which it has been granted. The certificate shall be handed over to the applicant or his duly authorised agent on due acknowledgement of receipt. In the event, the Revenue Officer is of the view that the certificate applied for may not be granted, he shall pass necessary orders in the case record, briefly recording the reasons thereof. Rules-7 of the said Rules states that notwithstanding anything contained in these rules, if it is revealed on subsequent verification or otherwise that the certificate should not have been granted or the contents thereof require modification, the Revenue Officer or any officer superior to him in the Revenue Administrative hierarchy shall be competent to review the orders granting the said certificate, and after giving the person concerned an opportunity of making any representation which he may wish to make, pass such orders as he deems just and proper in the circumstances of the case. Similarly as per Rule-8 of the said Rules, any person aggrieved by an order passed by the Revenue Officer under Rule-6 may prefer an appeal before –

(a) the Sub-divisional Officer concerned if the order was passed by the Revenue Officer, below the rank of the Sub-divisional Officer.

(b) the Collector concerned if the order was passed by the Sub-divisional Officer or the Additional District Magistrate, and

(c) the Revenue Divisional Commissioner concerned if the order was passed by the Collector;

Provided that no appeal under these rules shall be entertained unless it is preferred within a period of three months from the date of the said order.

5. Heard Mr. Sameer Kumar Das, learned counsel for the appellant, Mr. B.P. Pradhan, learned Addl. Government Advocate for respondents Nos.1, 3 and 4 and Mr. A.S. Nandy, learned counsel for the private respondent no.2 and perused the record.

6. The facts as stated above are not in dispute. A person may be having two or more houses in different villages, but they would not be entitled to obtain different resident certificates for different villages. Resident/native certificate is to be obtained only for one village where the person normally resides. Although learned counsel for the appellant has vehemently argued, that since there is no bar in law for obtaining resident certificate from different villages where the person may be residing, but in our view since the certificate which is to be granted is a certificate of resident/nativity, the same can be issued only for one place. Even though the person may be having a residence in two or more places, he/she can only be a native of one village for which certificate is to be issued. Even otherwise, the facts of the present case clearly discloses, that the second certificate was issued for a particular purpose for obtaining a job and while applying for the same, there was no disclosure that the appellant/petitioner was already having a nativity certificate issued, which is about six weeks prior to the issuance of the certificate dated 27.11.2009. A person applying for a certificate of nativity is to be accepted only after disclosing all the relevant facts. It is inherent that one is to apply and obtain a nativity certificate for only one place. Merely because law does not bar for obtaining certificate for more than one place would not mean that the person would be entitled to obtain resident or nativity certificate for more than one place, as the law does not even permit obtaining nativity certificate of places more than one.

7. It appears that petitioner has not disclosed the fact that she has already got a resident/nativity certificate from the competent authority. While receiving the second resident/nativity certificate she has not disclosed the fact of having a resident/nativity certificate issued by the very same authority earlier. This amounts to misrepresentation or complete fraud on the authority for receiving the second resident/nativity certificate.

8. In **S.P. Chengalvaraya Naidu V. Jagannath,** AIR 1994 SC 853 : (1994) 1 SCC 1, the Apex Court held that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent Authority, such order cannot be sustained in the eyes of law. “Fraud avoids all judicial acts ecclesiastical or temporal.”

9. While considering the jurisdiction of this Court, the apex Court in **Andhra Pradesh State Financial Corporation v. GAR Re-Rolling Mills**, AIR 1994 SC 2151 : 1994 AIR SCW 1953 and **State of Maharashtra V. Prabhu,** (1994) 2 SCC 481 has observed that a writ Court, while exercising its equitable jurisdiction, should not act as to prevent preparation of a legal fraud as the Courts are obliged to do justice by promotion of good faith. "Equity is, also, known to prevent the law from the crafty evasions and sub-letties invented to evade law".

10. In **United India Insurance Co. Ltd. V. Rajendra Singh**, AIR 2000 SC 1165 : (2000) 3 SCC 581, the Apex Court observed that "Fraud and justice never dwell together" (*fraus et jus nunquam cohabitant*) and it is a pristine maxim which has never lost its temper over all these centuries.

11. The ratio laid down by the Supreme Court in various cases is, that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud, concealed material information or made misrepresentation, and in such circumstances, the Court should not perpetuate the fraud by entertaining the petitions on their behalf. This view has been re-affirmed time and again by the apex Court in various subsequent judgments.

12. We are clear in our view that once a person obtains a resident/nativity certificate, he can apply for a fresh certificate from different places only after getting the earlier certificate cancelled, which has not been done in the present case. The report of the Addl. District Magistrate in this regard is that subsequent certificate has been obtained after submitting false/fabricated documents, which cannot be faulted with.

13. Considering the factual matrix of the case in hand and the law laid down by the apex Court as mentioned supra, we are of the view, that the order of the Addl. District Magistrate is justified in law which has rightly been upheld by the learned Single Judge and, hence, the same does not call for any interference by this Court.

14. The writ appeal is dismissed accordingly.

Writ appeal dismissed.

2016 (I) ILR - CUT- 1068

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

W.P.(C) NO. 7146 OF 2016

AGASTI BEHERA & ORS. ……..Petitioners

.Vrs.

AUTHORISED OFFICER,ICICI BANK & ANR. ……..Opp.Parties.

BANKING LAW – Duty of the Banks – A customer normally does not have access to the various policies of the bank for charging different amounts, which may or may not be justified – Merely because computerized account of the petitioner is produced, without making him aware of the policy under which penal interest has been charged, the same is highly unreasonable – Held, the scheduled banks are expected to be fair to the customers.

In this case the petitioner availed housing loan from ICICI Bank – As he became a defaulter the account declared N.P.A. – Notice issued U/s 13(2) of the SARFAESI Act 2002 demanding Rs 11,70,492/- and there after the petitioner deposited Rs 6,22,000/- on two phases – Despite the same bank issued notice U/s 13 (4) of the above Act – Hence the writ petition – From the statement of account of the petitioner produced by the Bank, it is seen that after adjusting Rs 6,22,000/- an amount of Rs 11,16,317.33 is still shown as due to be paid by the petitioner – However from the 1st page of the account it is clear that 40 overdue installments are due to be paid which comes to Rs 5,90, 283/- plus future installments of Rs 1,50,386/- total comes to Rs 7,40,669/- - But the learned counsel for the Bank could not justify how petitioner is liable to Rs 11,16,317,33 except stating that additional penal interest has also been charged – Instead of producing any policy to justify charging of additional penal interest, the bank came forward to settle the loan account on payment of Rs 7,40 669/- and demanded Rs 22,163/- which the bank had deposited for providing police protection for taking physical possession of the mortgaged properties U/s 14 of the above Act – Held, since the bank has filed affidavit to settle the account of the petitioner on payment of R 7,40,669/- the same is allowed on a condition that no further additional charges would be taken from the petitioner – The bank is also not entitled to recover the amount deposited by it for police protection as the demand of the inflated amount has been held to be unreasonable.

For the petitioners : Mr. Debendra Ku.Sahu
& B.K.Behera.

For the opp.parties : Mr. Deepak Kumar

Date of hearing : 13.05.2016
Date of Judgment :13.05. 2016

JUDGMENT

VINEET SARAN, C.J.

Petitioner had taken a housing loan from the opposite party-Bank in the year 2006. Since there was default in payment of the regular installments, the account of the petitioner was declared as NPA, and proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 were initiated against the petitioner. On 30.6.2011, notice under Section 13(2) of the SARFAESI Act was issued demanding a sum of Rs. 11,70,492.00. Thereafter, the petitioner made two deposits, one of Rs.6.00 lakhs and another of Rs.22,000/-. However, then a notice under Section 13(4) of the SARFAESI Act has been issued on 11.04.2016, which is under challenge in this petition.

2. We have heard learned counsel for the petitioner as well as Mr. Deepak Kumar, learned counsel for the opposite party- ICICI Bank and perused the record. With consent of learned counsel for the parties, this petition is being disposed of at this stage.

3. From the statement of account of the petitioner produced by the Bank, it is seen that after adjusting the aforesaid deposit of Rs.6,22,000/- made by the petitioner, an amount of Rs.11,16,317.33 has still been shown as due to be paid by the petitioner. However, from the 1st page of the account, it is clear that 40 overdue installments (EMI) are due to be paid, which comes to Rs.5,90,283/- plus future installments due, amounting to Rs.1,50,386/-, the total of which comes to Rs.7,40,669/-, which is to be paid by the petitioner.

4. On being asked to justify the stand of the Bank in requiring the petitioner to pay a sum of Rs.11,16,317.33, even when the total amount including future installments comes to Rs.7,40,669/-, learned counsel for the opposite party-Bank could not justify the same except stating that additional penal interest has also been charged. No policy of the bank for charging additional penal interest has been placed before us. Learned counsel for the Bank was required to file an affidavit justifying the same, which has been filed today. Instead of justifying the chargingof penal interest, in paragraph-6 of the said affidavit, it has been stated that the Bank would be agreeable to settle the loan account of the petitioner on payment of Rs.7,40,669/-,

provided it is paid on or before 31.05.2016. They have also demanded Rs.22,163/-, which is said to have been deposited by the Bank for providing necessary police protection to take physical possession under Section 14 of the Act.

5. This Court takes note of the fact that instead of the liability of the payment of Rs.7,40,669/- (which includes future installments with interest), an amount of Rs.11,16,317.33 has been demanded from the petitioner. A customer normally does not have access to the various policies of the Bank for charging various amounts, which may or may not be justified. Merely because computerized account of the petitioner is produced, without making the customer aware of the policy under which penal interest has been charged, the same, in our view, is highly unreasonable. Once the Bank has been confronted with the facts and has been asked to produce the policy under which they are charging penal interest, instead of producing the same, they have filed an affidavit agreeing to settle the account on payment of a substantially lesser amount of Rs.7,40,669/-, which also includes future installments with interest.

6. Scheduled Banks are expected to be fair to the customers. Judicial notice can also be taken of the fact that many a times the Banks are resorting to unfair means for recovery of their dues by threatening the customers of dire consequence if the loan amount is not paid, which amounts may be highly unreasonable, as is clear from the facts of the present case.

7. Without going into the controversy and the legitimacy of the Bank charging penal interest, since the Bank has filed an affidavit agreeing to settle the account of the petitioner on payment of Rs.7,40,669/-, we allow the same on the condition that no further additional charges would be taken from the petitioner. Keeping in view that the loan period is yet not over, the petitioner shall pay such amount in two installments, the first one being Rs.4.00 lakhs, which shall be paid by the petitioner on or before 31.05.2016, and the balance amount of Rs.3,40,669/- shall be paid on or before 30.06.2016. The proceedings initiated against the petitioner under the SARFAESI Act shall initially remain suspended and in case the petitioner complies with the aforesaid directions, the proceedings against him shall then be dropped. However, it is made clear that if the petitioner does not comply with any of the conditions indicated hereinabove, the opposite party-Bank shall be at liberty to recover the entire amount of Rs.7,40,669/-plus future interest thereon from the petitioner, in accordance with law. In the facts of the case,

the Bank shall not be entitled to recover any amount deposited by them for police protection for taking physical possession of mortgaged property as the demand of the inflated amount has been held to be unreasonable. The writ petition stands allowed to the extent indicated above.

Writ petition allowed.

2016 (I) ILR - CUT- 1071

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

W.P.(C) NO. 4137 OF 2015

CHHABINDRA MUKHI .....Petitioner

.Vrs.

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

PUBLIC INTEREST LITIGATION – When to entertain – Redressal of public injury, enforcement of public duty, protection of social right and vindication of public interest must be the parameters for entertaining a P.I.L. – However it should not be invoked by a person or body of persons to further his or their personal causes or to satisfy his or their personal grudge – It is the bounden duty of the Court to see whether any legal injury is caused to a person or cluster of persons or an indeterminate class of persons by way of infringement of any constitutional or other legal right while delving into a P.I.L. – A person acting bonafide and having sufficient interest in the proceeding of public interest litigation, will alone have locus standi to approach the Court for violation of fundamental right and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration – It is only the rule of law which is to be vindicated – In the present case the petitioner has challenged the action of the authorities for demolishing panchayat Samiti building, declared unsafe, and the decision for construction of a new building in hot haste without bringing on record any particular lapses on the part of the authorities – Filing of petition without any valid ground is an abuse of the process of the court – This Court while dismissing, deprecated filing of such kind of writ petition.

(part 8 to12)

For Petitioner : M/s. Srinivas Mohanty along with
S. Routray, S.Banerjee,K.Patra.

For Opp.Parties: Mr. B.P. Pradhan, Addl. Govt. Adv.

Date of Judgment : 08.04.2016

JDUGMENT

VINEET SARAN, C.J.

This petition, in the nature of public interest litigation, has been filed by an advocate of Nimapara having more than 30 years of practice questioning the bonafide of demolition of the existing building of Panchayat Samiti of the block in question which has not been declared unsafe and construction of a new building in hot haste, involving huge financial investments, without following the procedure. It is also stated in the prayer that huge financial investment is being proposed to be done by way of tampering official records. Thereby to safeguard the interest of the public at large, this petition has been filed by the petitioner seeking interference of this Court.

2. Mr. S. Mohanty, learned counsel for the petitioner submitted that the speed at which sanction has been granted for construction of new building itself goes to show that there is some financial bungling. He placed reliance on the order sheet of the record to show that in December, 2014, a proposal was made by Block Development Officer for construction of Panchayat Samiti building and within two months, on 18.02.2015, financial sanction and approval has been given by the competent authority. He thus contends that the action of the opposite parties amounts to arbitrary and unreasonable action, aimed at swallowing unutilized Government money in the guise of colourable exercise of powers.

3. Mr. B.P. Pradhan, learned Addl. Govt. Advocate refuted such allegations with vehemence referring to the counter affidavit filed by the opposite parties.

4. Having heard learned counsel for the parties and after going through the records, it appears that merely because sanction and approval for construction of a new building has been done expeditiously, it cannot be said that there is some financial bungling. Although in the prayer it has been stated that there is tampering of official record, in the body of the petition, there is nothing stated in that regard. It is not disputed that the Collector is the final authority to approve the scheme and in the order sheet dated 18.02.2015 itself, it has been mentioned that the plan and estimate of the project for Rs.40,00,000/- has been technically sanctioned by the Addl. P.D.

(Technical), DRDA, Puri and administratively approved by the Collector-cum-Chief Executive Office, DRDA, Puri. As such, there is no procedural lacuna in the sanction and approval of the building.

5. In the counter affidavit, it has been stated that the Panchayat Samiti building has been damaged in the cyclone, "Phailin" 2013, because of which construction of new building was necessitated. Relevant paragraph-6 of the counter affidavit is reproduced below:

> *"6.That before giving reply to the averments of each paragraph, it is necessary to furnish the brief back ground of the case as under for just and effective adjudication of lis.*
>
> *(i) During PHAILIN, 2013, some portion/part of Block Office building, Nimapara was damaged. Government in P.R. Department, Odisha has sanctioned vide order No.20925 dated 15.12.2014 for an amount of Rs.40 lakhs towards construction of non-residential office building, Nimapara. Thereafter Panchayat Samiti meeting was held on 9.1.2015 and in the said meeting it was unanimously passed a resolution for construction of non-residential office building by demolishing some portion of the old building made of asbestos roof and badly damaged in the cyclone i.e., PHAILIN, 2013. It is relevant to mention here that plan and estimate of Rs.40 lakhs for construction of new building was technically sanctioned by the Addl. Project Director, DRDA, Puri on 16.01.2015. Subsequently it was administratively approved by the Collector, Puri on 18.02.2015. Construction of building work was started departmentally and it was entrusted to one Junior Engineer as per the resolution of Panchayat Samiti meeting dated 09.01.2015.*
>
> (ii) *Construction work is going on very smoothly and it will be completed very recently. After demolition of some portion of old building, all the materials collected, have been duly accounted for auction sale. After auction, Rs.81,150/- has been collected from the highest bidder and has deposited in the Government account. Construction work is being taken up as per the guidelines of Government in a transparent manner. In such view of the matter, the present writ petition filed by the petitioner does not merit consideration of the Hon'ble Court."*

Although copy of the counter affidavit was served on learned counsel for the petitioner on 8.12.2015, yet no rejoinder affidavit has been filed to controvert the said averments made in the counter affidavit.

6. From the aforesaid facts of the case and the averments made in the counter affidavit, we are satisfied that construction of the building was necessary, for which due sanction and approval was given by the appropriate authority, and that there is no case for interference by this Court.

7. In ***Malik Bros v. Narendra Dadhich,*** (1999) 6 SCC 552, the apex Court held as follows:-

> *"… a public interest litigation is usually entertained by a Court for the purpose of redressing public injury enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effect access to justice to the economically weaker class and meaningful realization of the fundamental rights. The direction and commands issued by the courts of law in a public interest are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be the bounden-duty of the Court not to entertain such petitions as otherwise a very purpose of innovation of public interest litigation will be frustrated. It is in fact a litigation in which a person is not aggrieved personally but brings an action on behalf of the downtrodden mass for the redressal of their grievance."*

8. In view of the law laid down by the Apex Court, in our considered opinion, on Public Interest Litigation (PIL), redressal of public injury, enforcement of public duty, protection of social rights and vindication of public interest must be the parameters for entertaining a PIL. The Court has a bounden duty to see whether any legal injury is caused to a person or a cluster of persons or an indeterminate class of persons by way of infringement of any Constitutional or other legal rights while delving into a PIL. The existence of any public interest as well as bona fide are the other vital areas to come under the Court's scrutiny. In absence of any legal injury or public interest or bona fide, a PIL is liable to be dismissed at the threshold. It is to be borne in mind that ultimately it is the rule of law that is to be vindicated. As such, there is a need for restrain on the part of the Public

Interest Litigants when they move courts. The Courts should also be cautious and selective in accepting PIL as well.

9. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be 'publicity interest litigation' or 'private interest litigation' or the latest trend 'paisa income litigation'. If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant or poke ones nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have locus standi and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration.

10. In ***Ashok Kumar Pandey v. State of West Bengal***, 2003 (9) Scale 741, the Apex Court held as follows:

> *"Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil and public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique consideration. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives often they are actuated by a desire to win notoriety or cheap popularity. The*

petitions of such busybodies deserves to be thrown out by rejection at the threshold and in appropriate cases with exemplary costs."

Laying down certain conditions on which the Court has to satisfy itself it was observed:

"The Court has to be satisfied about-
(a) the credentials of the applicant;
(b) the prime facie correctness or nature of the information given by him;

(c) the information being not vague and indefinite;

The information should show gravity and seriousness involved. Court has to strike a balance between two conflicting interest;

(i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and

(ii) *avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive action. In such case, however, the Court cannot afford to be liberal."*

The Apex Court, on the point of exercising restraint, held that it has to be very careful that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to be executive and legislature. The Court hardening its stand said:-

"The court has to act ruthlessly while dealing with imposters and busy-bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of pro bono public, though they have no interest of the public or even of their own to protect."

11. In ***T.N. Godavarman Thirumulpad v. Union of India***, (2006) 5 SCC 28, the Apex Court, relying upon the judgments of ***S.P. Gupta v. President of India,*** AIR 1982 SC 149 : 1981 Supp. SCC 87, ***Janata Dal v. H.S. Chowdhary***, AIR 1993 SC 892, after noticing that lakhs of rupees had been spent by the petitioner to prosecute the case, held as under:

"it has been repeatedly held by the Court that none has a right to approach the Court as a public interest litigant and that Court must be careful to see that the member of the public who approaches the Court in public interest, is acting bona fide and not for any personal

gain or private profit or political motivation or other oblique consideration.

…….. while the Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that courts should not allow their process to be abused by a mere busybody, or a meddlesome interloper or wayfarer of officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."

12. Applying the test as laid down by the Apex Court in the aforesaid judgments to the present context, it appears that the forum of public interest litigation is being misused and become hindrance for carrying out developmental activities in the villages, towns and cities. There is a procedure prescribed for carrying out the developmental activities, which in this case is construction new Panchayat Samiti building. Without bringing on record any particular lapses on the part of the authorities in raising the building, even though the appropriate authorities have accorded due sanction as well as approval to such construction, filing of the writ petition, without there being any valid grounds, can be said to be nothing but an abuse of the process of Court. We deprecate filing of such kind of petition. However, keeping in view the fact that the petitioner is an advocate, we dismiss the petition, without imposing any cost. The petition is accordingly dismissed.

Writ petition dismissed.

2016 (I) ILR - CUT- 1077

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

W.P.(C) NO. 12583 OF 2015

RED TECH SOLUTIONS INDIA PVT. LTD. & ANR. ……. Petitioners

.Vrs.

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

TENDER – Petitioners tender though lowest, the work was not awarded in their favour on the allegations that petitioners work and conduct in previous years were not good – Action

amounts to black listing the petitioners-contractors – Petitioners were neither informed about the case against them and the evidence in support thereof, nor given an opportunity to meet the case before an adverse decision is taken – Violation of principles of natural justice – Held, awarding contract in favour of the petitioners no longer survives as the work awarded in favour of O.P. No 3 has already been completed – However direction issued to opposite party-authority that in case, it takes a decision in future not to award the contract to the petitioners, the same shall be done only after issuing notice to the petitioners to show cause and also after giving opportunity of hearing and after passing a reasoned and speaking order. (Paras 7 to10)

For Petitioners : M/s. K.P. Mishra, S. Mohapatra, T.P. Tripathy, L.P. Dwivedy.
For opposite parties: Mr. B.P. Pradhan, Addl. Government Advo
M/s.S.R. Mulia, R.C. Moharana, M.Mulia, R.P.Nayak.

Date of Judgment : 11.05.2016

JUDGMENT

VINEET SARAN, C.J.

The petitioners have filed this petition to quash the work order issued in favour of the opposite party no.3-Neuron Forms Ltd. as per Request For Proposal (RPF) dated 23.04.2015 under Annexure-2.

2. The factual matrix of the case, in hand, is that the petitioner No.1 is a computer firm, established in the year 1997 in the name and style of "Computer Aid Private Limited" which was originally incorporated on 01.01.1997 under the Companies Act. But subsequently, the Board of Directors of Computer Aid Private Ltd. Company have decided to change the name of the computer firm from "Computer Aid" to "Red Tech Solutions". The said Company passed necessary Resolution under Section 21 of the Companies Act for change of name and the same was approved by the Registrar of Companies, Odisha on 01.12.2013. The petitioner No.2 is the Director of the Company, who has been duly authorized by the Board of Directors to file this writ petition and pursue the remedy under the law. The opposite party no.2 issued Request For Proposal (RFP) on 23.04.2015 under Annexure-2 for revision and preparation of Electoral Roll and Electoral Photo Identity Card for the district of Balasore. Initially, such work was done

through the Centralized Tender and the petitioner-Company successfully completed the work. But the opposite party no.1 subsequently decided to de-centralise the same and to issue Request For Proposal on district-wise basis. Accordingly, the petitioner-Company participated in the said Request For Proposal dated 23.04.2015 in the name and style " Red Tech. Solutions India Pvt. Ltd.". The bid contains two parts namely, the technical bid as well as financial bid. On opening of the technical bid, the petitioners have successfully qualified and in the price bid, when the same was opened, the petitioner no.1 is L1, which has been declared by the authorities. Being the L1, the petitioner is entitled to get the work order, but the work order was issued in favour of L2 i.e. opposite party no.3. Hence this petition.

3. Mr. K.P. Mishra, learned counsel for the petitioners submits that the tender of the petitioners, even though the lowest, was not considered by the opposite party no.2 merely on the allegation that work and conduct of the petitioners in the previous years were not good. The same cannot be a ground for refusal to award the contract in favour of the petitioners as it would be penal in nature, which action cannot be taken without issuing show cause notice to the petitioners after complying with the principle of natural justice.

4. Mr. B.P. Pradhan, learned Addl. Government Advocate for the State submits that in the meantime, the work order having been issued in favour of opposite party no.3, it has already executed the work and as such the writ petition has become infructuous and the same should be disposed of accordingly.

5. Mr. S.R. Mulia, Learned counsel for opposite party no.3 states that on the basis of the work allotted in favour of opposite party no.3, it has executed the work. Therefore, the writ petition merits no consideration and accordingly, the same should be dismissed.

6. We have heard learned counsel for the petitioners as well as learned Addl. Government Advocate appearing for the State and learned counsel for opposite party no.3 and perused the record.

7. Although the prayer made in this petition for awarding contract to the petitioners no longer survives as admittedly, the work contract has been awarded in favour of the opposite party no.3 and the same has already been completed by the said opposite party, the grievance of the petitioners still remains as on perusal of Annexure-C/2 to the counter affidavit, which is the minutes of the meeting of the tender committee, it is clear that the petitioners were the lowest tenderer, but the work was not awarded to it on certain

allegation that there was some complaint and adverse report against the petitioners.

8. In **Neelima Misra v. Harinder Kaur Paintal,** AIR 1990 SC 1402 : (1990) 2 SCC 746, the Apex Court held that an administrative order which involves civil consequences must be made consistently with the rule expressed in Latin maxim *Audi Alteram Parten.* It means that the decision maker should afford to a party to a dispute an opportunity to present his case, the person concerned must be informed of the case against him and theevidence in support thereof and must be given a fair opportunity to meet the case before an adverse decision is taken.

9. In view of law laid down by the Apex Court and applying the same to the present context admittedly, neither any show cause notice was issued to the petitioners, nor any opportunity of hearing was afforded to them before taking a decision that the contractor, even though he may be well qualified and lowest bidder, would not be awarded the contract because of his past record. This would amount to black listing the contractor without affording him any opportunity of hearing.

10. We dispose of the writ petition with the direction that in case the opposite party-authority takes a decision in future not to award the contract to the petitioners, the same shall be done only after issuing notice to the petitioners to show cause and also after giving opportunity of hearing and by passing a reasoned and speaking order.

11. With the aforesaid observations and directions, the writ petition is disposed of.

Writ petition disposed of.

2016 (I) ILR - CUT- 1080

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

W.P.(C) NO. 8911 OF 2015

SEIKH MOHAMMED WAZID .....Petitioner

.Vrs.

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

ODISHA MINOR MINERALS CONCESSION (AMENDMENT) RULES, 2014 – RULE 27-A

Lease of sand quarry – No quarry shall be granted unless there is submission of mining plan prepared by the recognized persons and duly approved by the authorized persons alongwith the environmental clearance from the Ministry of Forest and Environment, Government of India within the statutory period.

In this case, the competent authority recommended the name of the highest bidder for the lease – Second highest bidder filed appeal saying that the highest bidder did not submit the mining plan as well as the environmental clearance which is the mandate of Rule 27-A of the Rules – Appellate authority rejected the recommendation made in favour of the 1st highest bidder and directed the second highest bidder to deposit the earnest money in respect of the quarries – Hence the writ petition – Held, the authorities have applied their mind and have passed a speaking and reasoned order in consonance with the provisions of law – Impugned order does not warrant any interference by this Court. (Paras 6 to 12)

Case Laws Referred to :-

1 AIR 2003 SC 953 : Indian Charge Chrome Ltd. v. Union of India.
2. AIR 2003 SC 3078 : Secretary, Ministry of Chemicals & Fertilizers, Govt. of India, v. CIPLA Ltd.
3. (1992) 4 SCC 605= AIR 1993 SC 1407 : Krishna Swami v. Union of India
4. (1999) 1 SCC 45 : Vasant D. Bhavsar v. Bar Council of India
5. AIR 1990 SC 2205 : State of West Bengal v. Atul Krishna Shaw.

For Petitioner : M/s. Sidhartha Das, P.R.Singh, Y.S.P.Babu, A.M.Mohanty
For Opp. Parties : Mr. Bijaya Ku. Mohanty, R.Mohanty, S.S.Chhualsing, B.Muduli,P.Sahu, G.N.Sahu.

Date of Judgment: 19.4.2016

JUDGMENT

DR. B.R. SARANGI, J.

The highest bidder, Seikh Mohammed Wazid of Padampur filed this application challenging the order dated 24.04.2015 passed by the Sub-Collector, Padampur in Revenue Misc (Sairat Source) Appeal Case No. 3/2015 & 4/2015 by which the lease application recommended by the competent authority for approval has been rejected under Rule 26(10) of

Orissa Minor Minerals Concession (Amendment) Rules, 2014 (hereinafter referred to as "Rules, 2014") and the second highest bidder, Markardhwaj Patel has been called upon to deposit the earnest money with the Tahasildar, Padampur under Section 26(7) of the said Rules.

2. Mr.S.Das, learned counsel for the petitioner urged that without considering the objection filed in Revenue Misc (Sairat Source) Appeal Case No. 3/2015 & 4/2015 by the petitioner the authority rejected the petitioner's application for lease bid as per Rule 26(10) of Rules, 2014 vide order dated 24.04.2015 allowing the second highest bidder to deposit the earnest money for both the Kumunibahali sand bed A and B. It is further urged that the Sub-Collector could not have admitted the appeal of opposite party no.5 as the same was defective due to non-deposit of statutory deposits pursuant to Rule 64 (2) of the Rules, 2014 and more so, the appeal was barred by limitation and no application for condonation of delay was filed. Non-filing of solvency certificate cannot be construed to be a defect as per the Rules, 2014, thereby the authority has not applied his mind in proper perspective and therefore, he seeks for quashing of the order dated 24.4.2015.

3. Mr.P.K.Muduli, learned Addl.Standing Counsel for the State supported the order passed by the appellate authority and stated that there is no illegality or irregularity committed by the appellate authority in cancelling the recommendation of lease in favour of the highest bidder, the petitioner herein, as there is non-compliance of the statutory provisions contained in the Rules, 2014.

4. Mr.B.K.Mohanty, learned counsel appearing for opposite party no.5 urged that since the highest bidder has not satisfied the requirement of law as prescribed in the Rules, 2014, the authority has called upon the second highest bidder, the opposite party no.5 herein, who has satisfied the requirements, thereby the impugned order dated 24.4.2015 does not suffer from any illegality or irregularity warranting interference of this Court in exercise of its extraordinary jurisdiction.

5. Having heard learned counsel for the parties and after going through the records, it appears that the Tahasildar, Padampur in the district of Bargarh invited applications by issuing a public notice No.349 dated 5.02.2015 to lease out the quarries as per Rules, 2014 for a period of five years. The petitioner along with others applied for grant of lease in respect of Kumunibahali sand bed A under Khata No. 99, Plot No. 64(P), area Ac.24.00 dec. and Kumunibahali sand bed B under Khata No. 99, Plot No. 64(P) area

Ac.20.00 dec. The royalty was also determined in respect of the said sairat sources at the rate of Rs.28/- per cubic meter by the Tahasildar, Padampur. Five bidders participated in the bids. Accordingly, the bid was opened on 27.2.2015. It appears that the petitioner being the highest bidder in respect of the sairat source, the Tahasildar, Padampur passed the order as per the provisions contained in Rules, 2014 and recommended the case of the petitioner for approval of the competent authority vide order dated 10.3.2015. At this juncture, opposite party no.5, who is the second highest bidder, approached this Court by filing W.P.(C) No. 5352 of 2015 challenging the recommendation of the sand sairat for approval in favour of the petitioner, which has been withdrawn on 25.3.2015 with a liberty to approach the appellate authority. Consequentially, opposite party no.5 filed Revenue Misc (Sairat Source) Appeal Case No. 3/2015 & 4/2015 before the Sub-Collector, Padampur challenging the recommendation of the sairat sources for approval in favour of the petitioner, stating, inter alia, that the solvency certificate submitted by the petitioner is defective for non-production of mining plan and environmental clearance from the competent authority, which is the requirement of law as per Rules, 2014. The petitioner filed his objection before the appellate authority stating that in absence of any provision for determination of the solvency certificate, the appeal so preferred by the opposite party no.5 cannot sustain.

6. The appellate authority has taken into consideration the provisions contained in Rule 27 (A)Rules, 2014 which is quoted below:

> *"27-A.* ***Mining Plan as a pre-requisite to the grant of quarry lease****:- (1) No quarry lease shall be granted by the Competent Authority unless there is a mining plan prepared by the recognised persons and duly approved by the Authorised Officer for the development of the mineral deposits in the area concerned.*
>
> *(2) On receipt of the intimation from the Competent Authority for the precise area to be granted, the applicant shall submit application before the recognized person selected by the Authorized Officer for preparation of mining plan.*
>
> *(3) The recognized person shall prepare the mining plan in FORM-ZB within thirty days from the date of receipt of the application and submit the same to the Authorized Officer for approval.*
>
> *(4) The Authorized officer, after receipt of the mining plan from the recognized person, shall approve the same within thirty days from the*

date of receipt with modifications, if any, and submit the same to the competent Authority.

(5) The mining plan for quarry lease shall contain,_

(i) the plan of the quarry lease hold area showing the nature and extent of the mineral body, spot or spots where the mining operations are proposed to be carried out by the applicant;

(ii) details of mineral reserve of the area;

(iii) the extent of manual mining or mining by the use of machinery and mechanical devices on the precise area;

(iv) the plan of the precise area showing natural water courses, limits of reserves and other forest areas and density of trees, if any, assessment of impact of mining activities on forest, land surface, structures in the vicinity of the spot of mining, details of scheme of restoration of area by afforestation, if required, land reclamation and use of pollution control devices;

(v) annual programme and plan for excavation on the precise area from year to year for five years; and

(vi) a progressive mine closure plan.

(6) The selected lessee shall bear the cost for preparation of the mining plan.

(7) A holder of a quarry lease desirous of seeking modification in the approved mining plan for quarry lease as considered expedient in the interest of safe and scientific mining, conservation of minerals, or for the protection of the environment, shall apply to the Authorised Officer, setting forth the intended modifications and explaining the reasons for such modifications.

(8) The Authorized Officer may approve the modifications under sub-rule (7) within a period of thirty days from the date of receipt of the application.

(9) The modification of the mining plan for quarry lease shall remain valid for the remaining period of the quarry lease."

7. The aforementioned provisions mandate that no quarry lease shall be granted by the competent authority unless there is mining plan prepared by the recognized persons or duly approved by the authorized persons for the development of the mineral deposits in the area concerned and for the said

purpose on receipt of the intimation from the competent authority for the précise area to be granted, the applicant shall submit before the recognized persons selected by the authorized persons for preparation of the mining plan. The recognized person shall prepare the mining plan in Form ZB within thirty days from the date of receipt of the application and submit the same to the Authorized Officer for approval. The petitioner having not complied with the provisions under Rule 27(A) by submitting the mining plan and also the environmental clearance from the Ministry of Forest and Environment, Government of India within the statutory period of thirty days, he has defaulted in compliance of the said requirement.

8. For grant of quarry lease, the intending applicant has to file application in prescribed Form-J along with documents mentioned in clauses (i) and (vi) as per sub-rule (2) of Rule 26. Sub-rule 2 (v) of Rule 26 of the Rules, 2014 requires that a solvency certificate and a list of immovable properties from the Revenue Authority have to be accompanied with the application submitted by the applicant. As per sub-rule (10) of Rule 26 the application submitted in Form-J shall be summarily rejected if the rate of royalty quoted is less than the rate of royalty specified in Schedule-II and if the application is not accompanied with documents and particulars as specified in sub-rule (2) of Rule 26 of the Rules, 2014. As it appears, the requirement of clause (v) of sub-rule (2) of Rule 26 so far as furnishing of solvency certificate having not been complied by the petitioner, the same should have been rejected summarily. Therefore, when the second highest bidder preferred appeal before the appellate authority, the records of the Tahasildar were produced before him and on perusal of the same, it appears that there is non-compliance of the provisions contained in Rule 26(2)(v) read with Rule 27(A) of Rules, 2014. Consequently by assigning reasons, the lease-bid application submitted by the petitioner in respect of Kumunibahali sand bed A and Kumunibahali sand bed B has been rejected and direction has been given for calling upon the second highest bidder, namely, opposite party no.5 to deposit the earnest money with the Tahasildar in respect of the very same quarries under Rule 27(C) of the Rules, 2014 and to take action as per the said Rules in favour of the second highest bidder.

9. In ***State of West Bengal v. Atul Krishna Shaw*****,** AIR 1990 SC 2205, the Apex Court observed that giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review.

10. In ***Krishna Swami v. Union of India*****,** (1992) 4 SCC 605= AIR 1993 SC 1407, the Apex Court observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne-out from the record. The Court further observed that,

> *"reasons are the links between the material, the foundation for these erection and the actual conclusions. They would also administer how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusion reached. Least it may not be arbitrary, unfair and unjust, violate Article 14 or unfair procedure offending Article 21".*

11. In ***Vasant D. Bhavsar v. Bar Council of India***, (1999) 1 SCC 45, the Apex Court held that an authority must pass a speaking and reasoned order indicating the materials on which its conclusions are based. Similar view has also been reiterated in ***Indian Charge Chrome Ltd. v. Union of India*****,** AIR 2003 SC 953 and ***Secretary, Ministry of Chemicals & Fertilizers, Govt. of India, v. CIPLA Ltd.***, AIR 2003 SC 3078.

12. Applying the principles laid down by the Apex Court in the aforementioned judgments to the present context, it appears that the authorities having applied their mind have passed a speaking and reasoned order in consonance with the provisions of law. This Court is of the considered view that the impugned order dated 24.04.2015 does not warrant any interference by this Court. Accordingly, the writ petition is dismissed. No order as to costs.

Writ petition dismissed.

2016 (I) ILR - CUT-1086

VINOD PRASAD, J. & S.N.PRASAD, J.

CONTC NO. 232 OF 2016

SWARNALATA DEI ……..Petitioner

.Vrs.

RANJANA CHOPRA & ORS. ……Opp. Parties/contemnors

CONSTITUTION OF INDIA, 1950 – ART.215

Power of High Court to punish for Contempt under article 215 of the Constitution of India – No period of limitation prescribed under such article – However limitation provided U/s. 20 of the Contempt of Courts Act, 1971 will apply in contempt proceedings under article 215 of the Constitution of India i.e. within one year from the date on which the contempt is alleged to have been committed – Held, in the present case contempt petition having been filed after lapse of more than five years from the date it is alleged to have been committed, the same is liable to be dismissed on the ground of limitation.

(Paras12,13)

Case Laws Referred to :-

1. (1998) 7 SCC 379 : Dr. L.P.Mishra -V- State of U.P.
2. (2001) 7 SCC 549 : Pallav Seth -V- Custodian & Ors.

For Petitioner : M/s. Jaganath Patnaik, B.Mohanty, T.K.Pattanayak, S.Patnaik, B.S.Rayguru, A.Patnaik, M.S.Rizvi

For Opp. Parties : Government Advocate

Date of hearing : 22.02.2016
Date of judgment : 22.02.2016

JUDGMENT

S.N.PRASAD, J.

This application has been filed under Article 215 of the Constitution of India read with Section 12 of the Contempt of Courts Act, 1971 against opposite parties for violation of the order dated 22.07.2010 passed in W.P.(C) No.7476 of 2010 and further for flouting the orders dated 16.05.2011 and 12.05.2011 passed in Contempt case No.1847 of 2010 by this Court.

2. Brief facts lies in a narrow compass. The petitioner joined service on 02.01.1992 but her service was approved w.e.f. 06.03.1999. Being aggrieved, the petitioner approached this Court vide W.P.(C) No.3549 of 2004 which was disposed of on 09.07.2009 by directing opposite parties to take decision with regard to the approval of the past period of service i.e., since 02.01.1992 till 6.3.1999 and to take a decision within period of four months from the date of communication of the order.

3. When the order has not been complied with, a contempt case bearing CONTC No.200 of 2010 was filed and while the said contempt case was pending, the authorities have taken decision vide order dated 09.04.2010 for regularizing the claim of the petitioner. The said fact was brought to the

notice of this Court in the aforesaid Contempt case and thereafter the contempt application was disposed of with liberty to the petitioner to assail the order dated 09.04.2010 and accordingly the petitioner has preferred another writ petition being W.P.(C) No.7476 of 2010 which was disposed of vide order dated 20.07.2010.

4. This Court has quashed the order dated 9.4.2010 and held that the petitioner's date of appointment has to be 02.01.1992 and all the consequential benefits shall be granted to the petitioner within a period of three months from the date of communication of this order.

5. Opposite party-State has filed Review Petition No.234 of 2010 but the same was dismissed vide order dated 09.02.2011. When the order passed by this Court in W.P.(C) No.7476 of 2010 was not complied with another Contempt Petition No.1847 of 2010 was filed and ultimately the authorities have complied with the order by paying to the petitioner a sum of Rs.3.91 lakh and also regularising the services of the petitioner w.e.f. 02.01.1992. However, according to the petitioner all the consequential benefit has not been paid to her till today, hence this Contempt Petition has been filed on 15.02.2016 on the following grounds;

(i) Although, opposite parties have approved the appointment of the petitioner from 2.1.1992 but that has not been carried out in the Gradation list published by the opposite parties in the cadre of Trained Graduate Teachers which was approved by the Director, Secondary Education on 08.11.2011 wherein the date of appointment of the petitioner was mentioned as 01.07.1999 instead of 02.01.1992 and her Serial Number was 215 in the gradation list.

(ii) After approval of the appointment of the petitioner, her serial number ought to have been fixed at Serial No.6 just after one Nirmala Kumari Singh (Sl. No.5) and before Sarat Kumar Lanka (Sl.No.6).

(iii) Authorities have also promoted juniors to the petitioner to the post of Headmaster/Headmistress of aided High Schools.

(iv) Petitioner is also entitled to receive RACP on completion of 10/20/30 years of service as per Orissa Revised Scales of Pay Rules, 2008.

(v) The petitioner has not been regularised by updating the service book of the petitioner treating the date of appointment of the petitioner as 02.01.1992 as a result of which the petitioner is not getting the periodical increments and other service benefits till today.

6. Before passing any order on merit, two questions which is important to be considered arises in this case i.e.,

(i) As to whether this contempt petition is maintainable on the ground of limitation, and

(ii) Whether the scope of the order passed under its jurisdiction can be enhanced in a contempt jurisdiction of a High Court.

So far as point (i) is concerned, this application has been filed under Article 215 of the Constitution of India read with Section 12 of the Contempt of Courts Act 1971. Before answering the issue involved in this case, it would be relevant to quote the provision of Article 215 of the Constitution of India as well as Section 20 of the Contempt of Courts Act,1971, which is being reproduced:-

> **"Art. 215 of the Constitution of India**- *High Courts to be courts of record* – Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.
>
> **Section 20 of the Contempt of Courts Act** – *Limitation for actions for contempt* – No court shall initiate any proceeding of contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed."

Thus, it is evident on the one hand that the provision as contained in Article 215 of the Constitution of India does not explain regarding any period of limitation while on the other hand, period of limitation has been provided under Section 20 of the Contempt of Courts Act, 1971 whereby and hereunder, it has been provided that no court shall initiate any proceeding of contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed.

7. Question pertaining to invoking the jurisdiction as provided under Article 215 of the Constitution of India since without any period of limitation whereas Section 20 of the Contempt of Courts Act provides limitation of one year which shall be counted from the date on which the contempt is alleged to have been committed, hence what would be the position since on the one hand there is no limitation as provided under Article 215 of the Constitution of India which also conferred power upon the High Court to initiate contempt

of Courts proceeding while on the other hand, Section 20 of the Contempt of Courts Act 1971 provides period of limitation. This legal aspect has fell for consideration before the Hon'ble Supreme Court in the case of **Dr. L.P. Misra vrs. State of U.P.** *(1998) 7 SCC 379* wherein the contention was raised that while exercising powers under Article 215 of the Constitution of India for punishing the appellant for contempt of High Court the procedure contemplated by Section 14 of the Contempt of Court Act 1971 had not been followed. Hon'ble Supreme Court, dealing with said contention has observed in para-9,as follows:-

> ***"9.*** *After hearing learned counsel for the parties and after going through the materials placed on record, we are of the opinion that the Court while passing the impugned order had not followed the procedure prescribed by law. It is true that the High Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India but such a jurisdiction has to be exercised in accordance with the procedure prescribed by law. It is in these circumstances, the impugned order cannot be sustained."*

8. Hon'ble Supreme Court in another case wherein same issue fell for consideration viz: **Pallav Seth vrs. Custodian and others** *(2001) 7 SCC 549* wherein their lordships has been held in para-31 as under:-

> *"**31.** This Court has always frowned upon the grant or existence of absolute or unbridled power. Just as power or jurisdiction under Article 226 has to be exercised in accordance with law, if any, enacted by the legislature, it would stand to reason that the power under Article 129 and/or Article 215 should be exercised in consonance with the provisions of a validly enacted law. In case of apparent or likelihood of conflict the provisions should be construed harmoniously."*

There can be no doubt that both Hon'ble Supreme Court as well as High Courts are courts of record and the Constitution of India has given them the power to punish for contempt which cannot be abrogated and stultified but for the exercise of power under Article 129 and/or Article 215 can there be any legislation prescribing the manner and the extent to which such a that the power can be exercised?

9. The Hon'ble Apex Court has observed that this Court has always frowned upon grant or existence of absolute or unbridled power under

Article 226 which has to be exercised in accordance with law, if any, enacted by the legislature. It would thus stand to reason that the power under Article 129 and/or Article 215 should be exercised in consonance with the provisions of a validly enacted law. In case of apparent or likelihood conflict the provisions should be construed harmoniously.

10. As would be evident from the three Judges Bench judgement rendered by Hon'ble Supreme Court in the case of **Dr. L. P. Misra (supra)** wherein it has been observed that the procedure provided under the Contempt of Courts Act had to be followed even in exercise of the jurisdiction under Article 215 of the Constitution of India the controversy stands resolved.

11. Thus, after taking into consideration the ratio laid down in the case **Pallav Seth (supra)** it has therefore to be held that limitation provided under Section 20 applied in contempt proceedings arising out of Article 215 of the Constitution of India as well.

12. The admitted position in this case is that this contempt petition has been filed on 15.02.2016 for non-compliance of the order dated 20.07.2010 passed in W.P.(C) No.7476 of 2010 under Article 215 of the Constitution of India read with Section 12 of the Contempt of Courts Act 1971 as has already been stated hereinabove that the procedures provided by the Contempt of Courts Act had to be followed even in exercise of the jurisdiction under Article 215 of the Constitution of India as per the ratio laid by the Hon'ble Supreme Court in the case of Pallav Seth (supra). Hence in the light of the fact that this contempt petition has been filed on 15.02.2016 for non-compliance of the order passed by this Court dated 20.07.2010 hence the contempt petition is held to be not in consonance with the provisions as contained in Section 20 of the Contempt of Courts Act 1971 which prescribes the period of limitation of one year by making a specific provision that no court shall initiate any proceedings of contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed.

13. Admittedly, order alleged to have not been complied is dated 20.07.2010 wherein this Court has directed the authorities, while quashing the order impugned, to release all consequential benefits within a period of three months from the date of communication of that order. There is no dispute about the fact that the order passed in W.P.(C) No.7476 of 2010 has already been communicated and the same has also been complied with as would be evident from the statement made by the petitioner in the contempt

petition that sum of Rs.3.91 lakhs has been paid and the service of the petitioner has been regularised. Moreover, this contempt petition has been filed which is beyond the period of one year, hence barred by period of limitation as is provided under Section 20 of the Contempt of Courts Act. Although no specific date has been given in the contempt petition regarding the contempt alleged to have been committed but from the facts, it can be gathered that since monetary benefit has already been paid and the service of the petitioner has been regularised and thereafter this contempt petition has been filed after lapse of more than five years which itself suggests that it is barred by limitation.

In view of discussion made hereinabove, this contempt petition is devoid of merit and as such is dismissed on the ground of limitation.

14. So far as point (ii) is concerned, it is the case of the petitioner that after the order passed in W.P.(C) No.7476 of 2010, monetary benefit to the tune of Rs.3.91 lakhs has already been paid and thereafter her service has also been regularised but now she is aggrieved altogether for a different cause of action i.e., from publication of the gradation list, regarding her seniority, regarding her promotion and having juniors being granted the promotion ignoring her claim and regarding non-regularisation of her service.

15. It is settled that under the contempt of Courts jurisdiction, the Court is only to see regarding wilful non-compliance of the order passed by this Court. From the facts pleaded by the petitioner, it is evident that opposite party-State have substantially complied with the direction given by this Court as such there is no reason to entertain this contempt petition. Hence, the contempt petition is dismissed being devoid of merits. However, the petitioner is at liberty to move before the appropriate forum for redressal of her remaining grievances.

Contempt petition dismissed.

2016 (I) ILR - CUT- 1093

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

W.P.(C) NO. 12139 OF 2012

SUSAMA RATH ……..Petitioner

.Vrs.

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

(A) CONSTITUTION OF INDIA, 1950 – ART. 311

Civil post – Whether the husband of the petitioner who was working as P.T.S.-cum-Night watcher in a Government Homoeopathy Dispensary on payment of consolidated wages from time to time, was holding a civil post ? – Since the husband of the petitioner worked for nine years continuously, without any sort of break, it shows that he was appointed against a regular vacancy – Held, husband of the petitioner was holding a civil post. (Paras 13to15)

(B) ODISHA CIVIL SERVICE (REHABILITATION ASSISTANCE) RULES, 1990

Petitioner's husband died while serving as P.T.S.-cum-Night watcher in a Government Homoeopathy Dispensary – She applied to the Government for her appointment under compassionate grounds – Finding no relief she filed O.A. – Learned Tribunal turned down her claim on the ground that her husband was not holding a civil post – Hence the writ petition – The husband of the petitioner worked for nine years continuously without any break and as such he was holding a Civil Post and the Tribunal illegally rejected her claim – Held, the impugned order passed by the Tribunal is quashed – Direction issued to the opposite parties to appoint the petitioner on compassionate ground under the Rules on contractual basis in the post held by her husband or in any other Group-D Post. (Paras 12 to 16)

For Petitioner : M/s. R.N.Nayak & K.K.Sahoo
For Petitioners : Mr. B.Bhuyan Additional Govt.Advocate

Date of hearing : 08.04.2016
Date of Judgment: 21.04.2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge has been made to the inaction of the opposite parties for not considering the case of the petitioner under The Orissa Civil Service

(Rehabilitation Assistance) Rules, 1990 (hereinafter called "the Rules") and not making payment of arrear dues and death benefit of her late husband.

FACTS

2. The factual matrix leading to the case of the petitioner is that the husband of the petitioner was serving as P.T.S.-cum-Night Watcher in the Government Homoeopathy Dispensary, Paralakhemundi, in the district of Gajapati on temporary basis on payment of wage of Rs.930/- per month since 16.8.2000. While working as such the husband of the petitioner suffered from Cancer and admitted in the Acharya Harihara Regional Cancer Centre, Cuttack on 9.12.2009. Later he was referred to Tata Memorial Cancer Centre. After being little recovery he was discharged but on 6.2.2010 he died at Paralakhemundi.

3. It is the further case of the petitioner that after death of her late husband, petitioner obtained the Legal Heir Certificate and approached the opposite party No.1 for giving her employment under compassionate ground vide the Rules. The opposite party No.1 directed the Inspector of Homoeopathy, Berhampur to give the job to the petitioner. But the Inspector did not comply with the same. So, the petitioner has to approach the Orissa Administrative Tribunal stating that her husband was Government servant and as such she is entitled to get the benefit under the Rules, 1990. But the Tribunal rejected the claim of the petitioner stating that her husband was not holding the civil post for which she is not entitled to get any death benefits and also the petitioner is not entitled to get any employment on compassionate ground under the Rules. Challenging such order, the present writ petition has been filed by the petitioner.

SUBMISSIONS

4. Learned counsel for the petitioner submitted that the order of the Tribunal is illegal, improper and liable to be set aside inasmuch as the Tribunal has not considered the fact of the case properly. According to him The Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 states that a Government servant means a person who is a member of a service or who holds a civil post under the State and includes only such persons who are temporarily placed at the disposal of the Union Government or any other State Government or a local authority. He further stated that in the case of ***State of Assam and others v. Kanak Chandra Dutta***, reported in ***AIR 1967 SC 884***, a person in the employment of Government should be

deemed to hold a civil post. It is submitted on behalf of the petitioner that the learned Tribunal has erred in law by not considering the definition of civil post and the Tribunal ought to have held in the facts and circumstances of the case that the husband of the petitioner having served for nine years as P.T.S.-cum-Night Watcher was a regular employee holding the civil post. Learned Tribunal should have considered the case of the petitioner on compassionate ground because petitioner being widow of the late employee suffers from distress and financial crunch without having got any benefit under the Rules. Learned Tribunal should have directed the opposite parties to clear the arrear dues of the late husband of the petitioner and to allow the petitioner to join the job in place of her late husband when the opposite party No.1 has categorically directed the Inspector of Homoeopathy to engage the petitioner in the post held by her late husband. So, he submitted the petitioner's fundamental right under Article 14 has been grossly violated for which the impugned order of the Tribunal is liable to be set aside with further direction to allow the petitioner to get employment by the opposite parties and to disburse the arrear dues of her late husband as soon as possible.

5. Learned Additional Government Advocate appearing for the State Government submitted that the order of engagement of the husband of the petitioner clearly shows that her husband Binod Kumar Rath was engaged as P.T.S.-cum-Night Watcher temporarily without having substantive right over the post. He also submitted that since the petitioner's husband was a temporary employee he cannot be deemed to have held any civil post and as such the Tribunal was right of its perception to observe that the petitioner's husband was not holding any civil post and as such the reliefs claimed by the petitioner cannot be made available to the petitioner. He submitted that the petitioner's husband being a temporary employee engaged on daily payment basis, no right accrues to the concerned deceased employee to receive any death benefit and as such the compassionate ground under the Rules cannot be extended to the petitioner even if petitioner is unable to maintain her livelihood. He submitted to affirm the order of the Tribunal and dismiss the writ petition.

6. The point for consideration:-

(i) Whether the impugned order suffers from illegality and impropriety and is liable to be set aside.

DISCUSSIONS

POINT NO.(i) :

7. It is admitted fact that the husband of the petitioner was engaged as P.T.S.-cum-Night Watcher in the Government Homoeopathy Dispensary, Paralakhemundi, in the district of Gajapati on payment of wages of Rs.930/- per month. It is not disputed that Binod Kumar Rath, the husband of the petitioner was admitted in the Acharya Harihara Regional Cancer Centre, Cuttack on 9.12.2009 vide Annexure-4 and it is not disputed that he was treated in Tata Memorial Cancer Centre and being discharged from that place came to village and finally expired out of Caner on 6.2.2010. It is also admitted fact that the Tahasildar, Paralakhemundi has issued Legal Heir Certificate showing the present petitioner as widow wife and one Sibani Kumari Rath, daughter of late Binod Kumar Rath. It is also not disputed that the petitioner had applied to the Commissioner-cum-Secretary, Government of Odisha and Director of Health & Family Welfare Department, Bhubaneswar for appointing her at Paralakhemundi Homoeopathy Dispensary on compassionate ground under relevant rules.

8. The relevant portion of the impugned order is extracted below for better appreciation:

> "Considering the submissions made by the learned counsel for both the parties, I am of the considered view that since the applicant's husband was not a regular Govt. servant being appointed through regular selection process and was only engaged on a monthly wage of Rs.930/- per month, even though he was engaged as such for 8 to 9 years, he cannot be treated as a holder of civil post and as such I am not inclined to entertain the prayer as has been made by the applicant, relating to her appointment under the Rehabilitation Assistance Rules and also for payment of leave salary for Jan. and Feb. 2010".

From the aforesaid order it is clear that the learned Tribunal has not accepted the claim of the petitioner inasmuch as her husband was not a holder of the civil post being temporary employee. Now the question arises whether the petitioner's husband was holder of the civil post. In the case of ***State of Assam and others v. Kanak Chandra Dutta***, reported in ***AIR 1967 SC 884***, where Their Lordships observed the following paragraphs:-

> "(9) The question is whether a Mauzadar is a person holding a civil post under the State within Art.311 of the Constitution. There is no formal definition of "post" and "civil post". The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in

Art. 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State, See marginal note to Art. 311. In Art. 311, a member of a civil service of the Union or an all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding post under a State is a person serving or employed under the State, See the marginal notes to Arts.309, 310 and 311. The heading and the sub-heading of Part XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the state and a person said to be holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.

(10) In the context of Arts. 309, 310 and 311, a post denotes an office. A person who holds a civil post under a State holds "office" during the pleasure of the Governor of the State, except as expressly provided by the Constitution, See Art.310. A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post. Article 310 (2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post, and it emphasizes the idea of a post existing apart from the holder of the post. A post may be created before the appointment or simultaneously with it. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post under the State means a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of persons appointed to the post. (11) Judged in this light, a Mauzadar in the Assam Valley is the holder of a civil post under the State. The State has the power and the

> right to select and appoint a Mauzadar and the power to suspend and dismiss him. He is a subordinate public servant working under the supervision and control of the Deputy Commissioner. He receives by way of remuneration a commission on his collections and sometimes a salary. There is a relationship of master and servant between the State and him. He holds an office on the revenue side of the administration to which specific and onerous duties in collection with the affairs of the State are attached, an office which falls vacant on the death or removal of the incumbent and which is filled up by successive appointments. He is a responsible officer exercising delegated powers of Government. Mauzadars in the Assam Valley are appointed Revenue Officers and ex officio Assistant Settlement Officers. Originally, a Mauzadar may have been a revenue farmer and an independent contractor. But having regard to the existing system of his recruitment, employment and functions, he is a servant and a holder of a civil post under the State."

9. With due respect, it is revealed from the aforesaid decision that the Mauzadar who is engaged as a Revenue Contractor in Assam under Assam Land Revenue Manual is the holder of the civil post. Their Lordships have aptly observed that relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post. Also Their Lordships were pleased to observe that a post is a employment but every employment is not a post and the casual labourer is not a holder of the post. So, a post under the State means post under the administrative control of the State. Since the Mouzadar is a subordinate public servant working under the supervision and control of the Deputy Commissioner and receives remuneration a commission on his collections and sometimes a salary he is holder of a civil post under the State.

10. There is another decision of the Hon'ble Apex Court in the case of ***Dr. (Mrs.) Gurjeewan Garewal v. Dr. (Mrs.) Sumitra Dash and others***, reported in ***AIR 2004 SC 2530*** where Their Lordships observed as follows:-

> "13. In State of Assam v. Kanak Chandra it was also held that "a post is an employment but every employment is not a post." While dealing with the termination of an employee, another Constitution Bench of this Court looked into the applicability of Article 311 in S. L.

> Agarwal v. General Manager, Hindustan Steel Ltd. (1970) 1 SCC 177. Here this Court held that job in Hindustan Steel is not a 'civil post' so as to claim the protection of Article 311. Another issue noted by the Court in Hindustan Steel is nature of independent existence of Hindustan Steel Company. Considering this and other aspects it is ruled that Hindustan Steel Company is not a State of the purpose of Article 311.
>
> 14. Reverting back to the case in hand, Section 4 of The Post Graduate Institute of Medical Education & Research, Chandigarh Act, 1966 [PGIMER Act] says that PGIMER is a 'body corporate which is having a perpetual succession and a common seal with power.' This clearly provides that PIGMER is a separate entity in itself. Admittedly the employees of any authority which is a legal entity separate from the State, cannot claim to be holders of civil posts under the State in order to attract the protection of Article 311. There is also no master and servant relationship between the State and an employee of PGIMER, which is a separate legal entity in itself. It is a settled position that a person cannot be said to have a status of holding a 'civil post' under State merely because his salary is paid from the State fund or that the State exercises a certain amount of control over the post. The PGIMER Act might have 10 provided for some control over the institution but this doesn't mean that the same is a State for the purpose of Article 311. Therefore the employees of PGIMER cannot avail the protection of Article 311 since the same can be claimed only by the members of a civil service of the Union or of All India Service or of a civil service of a State or by persons who hold a civil post under the Union or a State. PGIMER cannot be treated as a 'State' for the purpose of Article 311 and the employees therein are not holding any 'civil post'. In result, the 1st Respondent is not holding a 'civil post' and she cannot claim the guard of Article 311".

11. With due respect, it is found that the said decision has followed the decision of ***AIR 1967 SC 884*** (supra) as to the principle underneath the definition of civil post. In the aforesaid decision Their Lordships did not accept the Post-Graduate Institute of Medical Education and Research (in short 'PGIMER'), Chandigarh as Government but accepted the same to be a body incorporate as per the definition in legislation relating to PGIMER and the doctor appointed therein cannot be said to have held the civil post in accordance with Article 311 of the Constitution.

12. From the aforesaid discussion, we are of the view that for determining a post to be civil post it must be considered that the said post is created by the State but not by any body corporate. It is also clear that whether that post is temporary or permanent is immaterial but certainly it cannot be a casual one. Moreover, it is clear from the aforesaid decisions of the Hon'ble Apex Court that the post whether civil post or not should be determined according to the concerned fact and circumstances of the case.

13. In the case in hand, the original appointment letter vide Annexure-1 speaks in following manner:-

> "Sri Binoda Kumar Rath an outsider is hereby engaged as P.T.S.-cum-Night Watcher of the Govt. Homeo Dispensary, Parlakhemundi, Dist. Gajapati on the payment of wages @ of Rs.930/- p.m. (Rupees nine hundred thirty) only as fixed up by Govt. from the date of his joining at Govt. Homeo Dispensary, Parlakhemundi.
>
> His engagement is purely temporary and may be terminated at any time without assigning any reason thereof".
>
> From the letter itself it is clear that the husband of the petitioner was engaged as P.T.S.-cum-Night Watcher on payment of consolidated wages of Rs.930/- per month as fixed by the Government from time to time and he was not a casual labourer although his service was temporary without defining the tenure. So, the engagement of the husband of the petitioner on monthly basis as fixed by Government from time to time without any sort of break between any period prima facie shows that he was appointed against regular vacancy. This observation finds support from Annexure-3 whereunder the Under Secretary to Government has written to the Director of the Indian Medicine Homoeopathy on 23.3.2009 to send the list of all the P.T.S.-cum-Night Watchmen for their selection for appointment to the post of Class-IV employees in the office. Had there been casual labourer or daily wager, the question of their appointment by selection to Class-IV Grade would not have come up. Moreover, it is admitted fact that the late husband of the petitioner worked for nine years uninterruptedly till his death. Had there been any decision taken by the Government to treat him as a casual labourer, he would not have been allowed to continue for eight to nine years continuously till his death on payment of regular wages per month.

14. Moreover, learned counsel for the petitioner also drew our attention to Annexure-9 whereunder on the application of petitioner the Director of Health & Family Welfare Department, Bhubaneswar asked the Inspector of Homoeopathy, Berhampur to consider the case of the petitioner as her husband was working as P.T.S.-cum-Night Watchman. So, from the above facts and discussion, we are of the considered view that petitioner was holder of the civil post on being paid remuneration by the State Government.

15. When the husband of the petitioner was a holder of the civil post receiving the remuneration, he was holder of a civil post under Article 310 read with 311 of the Constitution of India. Thus, the Tribunal fell in error by not understanding the factual aspect and illegally rejected the claim of the petitioner, we are of the considered view that the observation of the Tribunal being de hors to principles of law is liable to be set aside. Thus, the contention of the learned Additional Government Advocate is untenable wherein there is force with submission of the learned counsel for petitioner. Point for determination is answered accordingly.

CONCLUSION

16. When an employee is engaged for long nine years without being disrupted being holder of civil post, his wife has got legitimate right to claim to step into shoes of her late husband. Apart from this, according to Rehabilitation Assistance Rules, 1990, there is no reason to disqualify her when her husband was holding a civil post. So, the duty of the opposite party No.3 was to comply with the order of the opposite party No.2 mentioned in the representation of the petitioner. Be that as it may, we are of the view that because of the continuance of the petitioner for quite long nine years uninterruptedly, Annexure-1 does not give rise to array him as casual labourer and there is no bar for giving engagement to the petitioner who is the dependant family member of the late deceased employee, the petitioner is entitled to relief for engagement as Watchman in place of her late husband with the contractual salary or any other Group-D post as per the norms of the State Government. Further it is also the prayer of the petitioner to sanction the leave salary of her late husband and the death benefits. Since sufficient materials for pursuing such contention are not available and the period of his leave is not clear from the facts produced before the Court, we are unable to consider the availability of the leave salary to the husband of the petitioner. So, the impugned order dated 17.2.2011 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No.162 of 2011 is liable to be quashed to the extent as observed by us herein above and we do so accordingly.

We further direct that opposite parties shall appoint the petitioner on compassionate ground under the Rules on contractual basis in the post held by her late husband or in any other Group-D post within a period of three months and report compliance. The writ petition is disposed of accordingly.

Writ petition disposed of.

2016 (I) ILR - CUT- 1102

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

W.P.(C) NO. 20765 OF 2015

SATYANARAYAN GNM TRAINING COLLEGE ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp. Parties

EDUCATION – Petitioner-institution applied for opening of General Nursing & Midwifery (GNM) Course – State Government while issuing permission asked the petitioner to obtain approval of the Indian Nursing Council (INC) – INC refused permission to admit students during the year 2015-16 – Hence the writ petition – Duty of INC is to inspect institutes whether they maintain uniform standard in nursing and inform the State Government showing deficiencies of the institution – However State Government is to extend permanent recognition to the institution to run the course and conduct examination as per the standard prescribed by the INC – The role of INC being advisory issuance of the impugned letter asking the State Government to stop recognition to the petitioner-institution is illegal, hence quashed – Direction issued to O.P.Nos. 1, 3 to 6 to extend permanent recognition/approval to the petitioner-institution to run GNM Courses from the year 2015-16, admit students to appear examination and distribute certificates to pass out students.

(Paras13 to16)

Case Laws Referred to :-

1. AIR 1964 SC 1823 : R.Chitralekha & anr v. State of Mysore,& Ors.
2. 1999 (7) SCC 120 :Dr. Preeti Srivastava& Anr. v. State of M.P. & Ors.

For Petitioner : M/s. U.C.Pattanaik, S.D.Mishra, S.Pattnaik, M.R.Sahoo & S.M.Rehan.
M/s. P.C.Pradhan & D.N.Mishra.

For Opp. Parties : M/s. Sanjeev Ku. Dwivedy
& Santosh Ku. Dwivedy.

Date of hearing : 12.1.2016
Date of judgment : 10.2.2016

JUDGMENT

DR. D. P. CHOUDHURY, J.

The petitioner-institution assails the inaction of the opposite parties by not allowing its students for General Nursing and Midwifery (hereinafter called 'GNM') Course 2015-16.

Facts of the case :

2. The backdrop of the case of the petitioner is that the petitioner-institution applied to the State Government for grant of No Objection Certificate/Essential Certificate for opening the GNM courses. The O.P.-State Government granted Essential Certificate to the petitioner-institution vide Annexure-1. Thereafter the petitioner applied for the inspection of its institution by the O.P.No.2. Indian Nursing Council (hereinafter called INC) who made inspection and granted approval to the GNM course of the petitioner-institution and they also approved the course of studies for admission to the GNM course in accordance with the Indian Nursing Council Act, 1947 (for short 'the Act') vide Annexure-2. INC also published the name of the petitioner in its list of colleges to run GNM courses and permitted the petitioner-institution to admit its students for the academic year 2013-14 to the GNM course. It is alleged, inter alia, that on 21.7.2014 INC-O.P.No.2 published the name of different institutions including petitioner-institution to undertake GNM courses vide Annexure-6. It is submitted by the petitioner that the Director Medical Education and Training (DMET) had also requested the Chief District Medical Officer, Malkangiri to allow for the practical training of the students of petitioner-institution vide Annexure-10. Thereafter the CDMO, Malkangiri allowed the students of petitioner-institution to undergo field training for GNM courses. The Chairman of the Orissa Nurses and Midwives Council, Bhubaneswar also vide order dated 13.1.2015 (Annexure-13) directed the CDMO, Malkangiri to allow practical GNM field training of GNM students of the petitioner-institution. It is alleged that on 19.10.2015 O.P.No.2-INC informed the O.P.No.1-State Government that it did not allow the petitioner-institute to run GNM courses during the academic year 2015-16.

3. It is stated by the petitioner that INC has found some deficiencies pertaining to the teaching faculty, clinical facilities and other infrastructure with the petitioner-institution but the petitioner complied with the same and intimated the INC accordingly. In spite of such compliance, the students of the petitioner-institution were not allowed to participate in the counseling for admission in the GNM course for the year 2015-16. It is the claim of the petitioner that since there is no deficiency of the petitioner-institution for running GNM courses, such action of INC is illegal, bad in law and against all cannons of justice, fair play and equity. Hence the petitioner files this writ petition for quashing the impugned letter dated 19.10.2015 (Annexure-17) and to direct the O.Ps. to grant permanent recognition to the petitioner-institution within a stipulated time. Further it is prayed by the petitioner to grant permanent recognition/affiliation within a fixed period to the petitioner-institution to run GNM course.

4. The contesting opposite party no.2 filed counter affidavit stating that the writ petition is not maintainable in law being misconceived. It is further stated that the writ petition is premature because the petitioner had submitted the rectification of deficiency report dated 27.10.2015 which was received in the office of the contesting opposite party no.2 on 29.10.2015. It is the case of the contesting opposite party that after the reply of the petitioner is received, the petitioner was supposed to seek for re-inspection so that the contesting opposite party could have taken necessary steps to conduct re-inspection. Thereafter the report thereof could have been submitted to the Executive Committee of the INC to take decision thereon. It is further case of this opposite party that the INC being created under the Act, to regularize the nursing provision in the whole of India, had prescribed uniform standard in the matter of nursing training. For prescribing the uniform standard, INC has issued detailed guidelines for opening nursing institutions in the country. According to such guideline, any person desirous of opening nursing institute in the country, has to first obtain essential certificate from the State Government concerned and thereafter it has to submit the detailed proposal including the availability of teaching, clinical and infrastructure facility. For ensuring all these facilities, the periodic inspection is conducted by the inspection authority of INC. If the institution does not possess any of the facilities, then permission is not issued further to continue the courses. As the petitioner-institution has failed to rectify the above deficiencies on inspection, it is not permitted to continue GNM courses. It is prayed to dismiss the writ petition.

SUBMISSIONS

5. It is submitted by learned counsel for the petitioner that the petitioner-institution having required essential certificate/approval of the State Government, has obeyed the guidelines issued by it. As such the petitioner-institution applied to the O.P.No.2 for inspection of the institution during the year 2012-13 and the students of the GNM course were admitted for the academic year 2013-14.The students were also allowed to receive the practical training in the District Headquarter Hospital at Malkangiri but for no reason INC did not permit the petitioner-institution to continue the GNM course for 2014-15. It is further contended by the learned counsel for the petitioner that when the State Government has approved and issued essential certificate to the petitioner, there is nothing for the INC to sit over the matter for extending permission to the students of the petitioner-institution to appear in the examination in GNM courses for the year 2015-16. When the subject-matter of nursing is covered by Entry 25 of List III of VIIth Schedule of Constitution, INC being Advisory Body, as held in the recent judgment of this Court in W.P.(C) No. 2670 of 2012,disposed of on 29.01.2016, does not carry any sort of mandatory role to deny approval/recognition to the petitioner-institution to run GNM courses.

6. It is submitted that the petitioner-institution should be extended permanent recognition to run GNM course. It is further submitted that the letter dated 19.10.2015 (Annexure-17) which was issued by O.P. No.2 is illegal, unjust and the same should be set aside because the defects pointed out by the INC are not correct and the report of the petitioner-institution vide Annexurre-18 should be accepted by the opposite parties. On the other hand learned counsel for the petitioner submitted that the letter dated 19.10.2015 (Annexure-17) is issued without any authority and without complying with the provisions of law, for which the same has to be quashed.

7. Learned counsel for the O.P. No.2 submitted that the writ petition is not maintainable and the permission by the INC is not granted to the petitioner-institution to run GNM courses because it has no such teaching facility and infrastructure. He further submitted that the INC being the creature of the Act, the central statute, the State law being subject to the central legislation, the central legislation becomes supreme. According to him, the statutory requirement under the Act having not been fulfilled, O.P. No.2 rightly issued letter indicating grant of no recognition to the petitioner-institution to run GNM courses. He further submitted that in spite of letter, petitioner did not deposit the re-inspection fee for which vide letter dated

19.10.2015 (Annexure-17), O.P. No.2 did not proceed for re-inspection to the petitioner-institution and directed not to allow students of the petitioner-institution, to continue GNM courses. He submitted to dismiss the writ petition.

Points for discussion :

8. The points for consideration are :

I. Whether the letter dated 19.10.2015 issued by the INC-O.P. No.2 is liable to be quashed ?

II. Whether the permanent recognition of the petitioner-institution can be granted by the O.P.No.2-INC ?

Point No.I

9. It is not disputed that the petitioner-institution has applied for opening of GNM course in the year 2008-09 and in fact vide Annexure-1 the State Government issued one essential certificate in favour of the petitioner-institution for opening of GNM course from the year 2008-09 with conditions that it has to obtain approval of the INC and affiliation of State Council before admission of students during the year 2008-09. The contesting O.P.No.2 also did not deny about approval of INC to conduct the GNM course by the petitioner-institution with the intake of 30 seats. It is also not disputed that the petitioner-institution admitted students in the institution for the academic years 2012-13, 2013-14 and 2014-15 and gave practical training in the district headquarters hospital, Malkangiri during the year 2012-13, 2013-14 and 2014-15 and its name has been published by the INC to have got recognition to run GNM course. But it is revealed from Annexures-13 to 15 that the petitioner-institution was only granted provisional recognition for GNM courses for the session 2014-15 and for earlier years. On the other hand it is not disputed that the petitioner-institution has got approval of the INC, State Nursing and Midwifery Council and State Nursing and Midwives Examination Board to admit students and conduct their examination for GNM course purportedly for giving training in GNM courses for the said years.

10. Letter of INC-O.P. no.2 under Annexure-17, impugned herein, shows that the INC has conveyed the State Health & Family Welfare Department and the Registrar, Orissa Nursing & Midwives Council about its refusal to petitioner-institution to admit students during the year 2015-16 in the following manner :

"F.No. 18-24/5432-INC Date 19 Oct 2015

Name of the Institution : Satyanarayan Gnm Training College
At-Sambayaguda, PO-Malkangiri,
Malkangiri-764045, Orissa
Programme : GNM
School Code : 2402055
Date of Inspection : 10-11/09/2015

Deficiencies :

1. Teaching Faculty Inadequate :-

(a) Mrs. Rismarani Dash and Mrs. Sebotileelabilug was on Maternity Leave. Please give the evidence with regard to the medical maternity leave.

(b) Only 3(three) faculty were shown during last inspection and now it is shown that many faculty are recruited in the year 2014-15.

2. Clinical Facilities Inadequate:-

(a) Government District Head Quarter's Hospital is already affiliated to many nursing institutions.

(b) The facilities provided to the students during the psychiatric clinical experience shall be submitted.

3. The institution has rented building. However, in the last inspection report it was shown that institution proposed to shift the building to another building. Please submit the explanation that it along with documentary proof by a registered evaluator/surveyor with regard to the status of the building.

Sd/-
SECRETARY"

With regard to the deficiencies, the petitioner-institution wrote compliance letter to the INC clarifying all the deficiencies vide Annexure-18.

11. From the deficiencies as pointed above, it appears that the inspection team of INC found no adequate teaching and clinical facility, the institution is found running in a rented building and has no documentary proof as to the status of the building. It is revealed from Annexure-18 that prior to this inspection, there was inspection of the INC to the petitioner-institution and such fact is also confirmed by the letter dated 23.11.2012 by the INC vide Annexure-2. Only due to satisfaction on the inspection, the name of the petitioner-institution was got listed in the website of the INC vide

Annexures- 2 to 7 for the years 2012-13, 2013-14 and 2014-15. If there was no deficiency with regard to the faculty members, clinical establishment and infrastructure when it was started, it is not understood as to how in the present, INC found such deficiencies resulting refusal of permanent recognition to the petitioner-institution. Moreover, on going through the inspection report, it appears that the teaching faculty was found to be three in earlier inspection but now many faculty were recruited during the year 2014-15. It is not understood as to how the inadequate faculty members are there when good number of faculty members are available on inspection in earlier inspection. Moreover, the inspection team has desired to see the evidence with regard to the medical, maternity leave of two faculty members. Now the question arises whether the INC is required to call for the evidence of such nature. So far as clinical facility is concerned, it appears from the inspection note that the headquarter hospital has been already affiliated to many nursing institutions including present petitioner-institution as per the documents filed by the petitioner but not disputed by the contesting opposite party. So the clinical facilities cannot be said to inadequate. Apart from this, about the lack of residential building of the petitioner-institution, there is nothing from inspection report as to what the deficiencies are there in the present building. Thus the purported inspection report is found to be cryptic and not adequate enough to refuse recognition. As per submission of learned counsel for the petitioner, the deficiency pointed out by the petitioner have been clarified by Annexure-18. When the petitioner-institution has submitted explanation showing the presence of 12 nos. of teaching staff and petitioner-institution imparting practical training to its students in the District Headquarter Hospital, Malkangiri and also with permission to impart training to the students at Seven Heels Hospital, Vishakhapatnam and Neuro Psychiatric Clinic at Raipur, it sufficiently complies. The fact that the petitioner-institution was continuing in rented building and being shifted to a larger building adjacent to the previous building, the question of change of address becomes irrelevant and as such the petitioner-institution has no fault. When the explanation given by the petitioner-institution is found to be satisfactory on the inspection report, INC ought to have examined the explanation instead of going for re-inspection. Further the question arises whether INC is competent to make re-inspection for granting permanent recognition to the petitioner-institution under law.

12. This Court in W.P.(C) No. 2670 of 2012 disposed of on 29.1.2016 observed as under :

"36. It is admitted fact that subject of Nursing Education being the subject of education under Entry 25 of concurrent list and at the same time the expression "co-ordination" used in entry 66 of List I-Union List of the VIIth Schedule to the Constitution, it does not mean they overlap each other. It means harmonization of two with a view to forge a uniform pattern for concerted action according to a certain design, scheme or plan of the development. In this regard reliance can be placed upon the decision in ***Dr. Preeti Srivastava and another v. State of M.P. and others*** reported in **1999 (7) SCC 120**.

> "Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also coordination of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any Union legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I. Secondly, while considering the cases on the subject it is also necessary to remember that from 1977, education, including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254. It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List III. Norms of admission can have a direct impact on the standards of education. Of course, there can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications in addition to those prescribed under Entry 66 of List I. This would be consistent with promoting higher standards for admission to the higher educational

courses. But any lowering of the norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education....."[p-154].

37. It is also reported in ***R. Chitralekha and another v. State of Mysore, and others***, reported in **AIR 1964 SC 1823** where Their Lordships observed :

Does the judgment mean that it has to be ascertained in each case whether the impact of the State law providing for such standards is so great on Entry 66 of List I as to abridge appreciably the central field? Or, does it not follow from the judgment that if a State Legislature has made a law prescribing a different, even higher, percentage of marks or prescribing marks for extra curricular activities, it would be directly encroaching on the field covered by Entry 66 of List I ? The majority judgment after saying what has been quoted above proceeds thus:

"Though the powers of the Union and the State are in the exclusive lists, a degree of overlapping is inevitable. It is not possible to lay down any general test which would afford a solution for every question which might arise on this head. On the one head, it is certainly within the province of the State Legislature to prescribe syllabi and courses of study and of course to indicate the medium or media of instruction. On the other hand, it is also within the power of the Union to legislate in respect of media of instruction so as to ensure coordination and determination of standards, that is, to ensure maintenance or improvement of standards. The fact that the Union has not legislated, or refrained from legislating to the full extent of its powers does not invest the State with the power to legislate in respect of a matter assigned by the Constitution to the Union. It does not, however, follow that even within the permitted relative fields there might not be legislative provisions in enactments made each in pursuance of separate exclusive and distinct powers which may conflict. Then would arise the question of repugnancy and paramountcy which may have to be resolved on the application of the 'doctrine of pith and substance' of the impugned enactment… the validity of State Legislation would depend upon whether it prejudicially affects coordination and determination of standards, but

not upon the existence of some definite Union legislation directed to achieve that purpose." (p.716).

38. Not only this but also in Civil Appeal (civil) 1626-1628 of 2004 (State of Tamil Nadu and another v. Bratheep (Minor) and others) disposed of on 16.3.2004, the Hon'ble Apex Court has also followed the decision of Dr. Preeti Srivastava (supra) and Their Lordships observed as under :

Entry 25 of List III and Entry 66 of List I have to be read together and it cannot be read in such a manner as to from an exclusivity in the matter of admission but if certain prescription of standards have been made pursuant to Entry 66 of List I, then those standards will prevail over the standards fixed by the State in exercise of powers under Entry 25 of List III insofar as they adversely affect the standards-laid down by the Union of India or any other authority functioning under it. Therefore, what is to be seen in the present case is whether the prescription of the standards made by the State Government is in any way adverse to, or lower than, the standards fixed by the AICTE. It is no doubt true that the AICTE prescribed two modes of admission - One is merely dependent on the qualifying examination and the other dependent upon the marks obtained at the Common Entrance Test. The appellant in the present case prescribed the qualification of having secured certain percentage of marks in the related subjects which is higher than the minimum in the qualifying examination in order to be eligible for admission. If higher minimum is prescribed by the State Government than what had been prescribed by the AICTE, can it be said that it is in any manner adverse to the standards fixed by the AICTE or reduces the standard fixed by it? In our opinion, it does not. On the other hand, if we proceed on the basis that the norms fixed by the AICTE would allow admission only on the basis of the marks obtained in the qualifying examination the additional test made applicable is the common entrance test by the State Government.

39. With due respect to the aforesaid authorities, we are of the considered view that the education being in the concurrent list, the Nursing education can be considered in the entry 25 of the said List and at the same time, coordination and determination of standard in institution for higher education for research and scientific education enters under entry 66 of List I. In fact after going through the Act and

Act, 1938 read with Rules, 1958, we are of the considered view that the Central Government in order to maintain uniform standard of Nursing education, has to only decide the qualification and for that purpose can inspect any institution and can devolve any sort of examination, curriculum and State being the authority of education has to apply the same by enacting the provision of law keeping the standard as advised by the Act so that uniformity can be maintained throughout the country. The State Government cannot make out any sort of standard of curriculum or attending of examination or any sort of manner of training below the standards prescribed by the Act. After discussion in the aforesaid paras, we are of the considered view that there is no conflict between the two legislations inasmuch as it is clear that the Act explicitly declares power of INC so far as declaration of qualification concerned but the recognition of institution, holding of examination, inspection and manner of training are all prescribed by the Act, 1938 read with Rules, 1958. The guidelines in the statutory provisions as discussed above. Hence it is the State Government to extend permanent recognition to the petitioner-institution for imparting training in ANM courses but not the INC. Point No.I is answered accordingly.

XX XX XX XX

42. In view of aforesaid analysis and the decision of the Hon'ble Apex Court, we are of the considered view that the petitioner-institution is entitled to receive permanent recognition to run ANM courses from 2006-07. It is revealed from the petition and the counter of the contesting opposite parties that the inspection by State authority and INC has already been made, the petitioner has already been allowed to carry on the training of the students in 2007-08 after obtaining approval w.e.f. 2006-07 as per Annexure-3 but the students are not allowed to appear in the examination. Since the decision in Writ Appeal No.40 of 2011 is not applicable to the facts of the case and finding that INC has no role except advisory one, the students of the petitioner-institution should be allowed to appear in the examination held by Orissa Nursing and Midwifery Board and in the event of passing of the same, they should be awarded certificates in ANM courses without being influenced by the guidelines of the Central or State Governments already issued illegally, as held in the aforesaid para within a period of two months from today. So far as

> declaration of institution of O.Ps.6-21 cannot be declared void as they have got recognition of the State Government bereft of approval of INC. We, therefore, direct O.Ps. to extend permanent recognition/affiliation to the petitioner-institution w.e.f. 2006-07 to run ANM Training Courses, allow students of petitioner-institution to appear examination and on passing out, issue certificates as per uniform standard prescribed by the INC."

13. This Court has taken above view purportedly following the decisions of the Hon'ble Apex Court. In the above case, the same question arises whether permanent recognition of ANM courses started by the petitioner in that case, can be extended by INC or State Government and it has been clearly mentioned that the State Government is to extend permanent recognition to the petitioner-institution to run the course and conduct examination through the competent authority as per the standard prescribed by the INC because INC is the body under the Act which has only advisory role. It is, therefore, found that the letter vide Annexure-17 of the INC to the Secretary to the State Government in Health & Family Welfare Department and the Registrar, Orissa Nursing and Midwives Council, is not legal, rather it is an encroachment to the power of the State Government and at the same time the letter dated 19.10.2015 vide Annexure-17 being not in consonance with law and the facts, cannot transgress the State Act, namely Orissa Nurses and Midwives Registration Act, 1938 and Orissa Nurses and Midwives Examination Board Rules, 1958 on the subject which have been well discussed in the above judgment of this Court.

14. Taking the above discussion into consideration, we are of the considered view that the letter dated 19.10.2011 (Annexure-17) issued by the INC to the State Government denying the permission to start GNM course by the petitioner, is wholly illegal and improper for which cannot be sustained in law. Point no.I is answered accordingly.

Point No.II

15. It is already discussed in the aforesaid para that INC is a creature of the Act and entire provisions thereunder only stated that in order to maintain the uniform standard of nursing, INC can inspect any institution and give the copy thereof to the State Government showing the deficiencies of the concerned institution being in the role of Advisory, but cannot ask the State Government to stop recognition. INC can advise the State Government to ask the institution for removal of defects. Apparently when there is no

detailed inspection report and the INC has started to throw squabble to the petitioner-institution which is beyond the purview of the statute, such direction by Annexure-17 being held illegal as per the above paragraph, the State Government is the competent authority to extend permanent recognition, of course, with the standard prescribed by the INC. At any rate, INC is not competent to extend permanent recognition to the petitioner-institution. Point No.II is answered accordingly.

CONCLUSION

16. In the long run, we are of the view that the impugned letter dated 19.10.2015 being illegal, unjust is liable to be quashed and at the same time petitioner is entitled to get the permanent recognition. We, therefore, direct O.Ps.1, 3 to 6 to extend permanent recognition/approval to petitioner-institution to run GNM courses from the year 2015-16, admit students to appear examination and distribute certificates to pass out students under the uniform standard prescribed by INC.The writ petition is disposed of accordingly.

Writ petition disposed of.

2016 (I) ILR - CUT- 1114

S. PANDA, J. & K. R. MOHAPATRA,J.

W.P.(C) NO. 17665 & 17666 OF 2008

SMT. SUKANTI NAIK ……..Petitioner

.Vrs.

REVENUE DIVISIONAL COMMISSIONER & ORS. ……..Opp. Parties

O.G.L.S. ACT, 1962 – S. 7-A (1)

Lease granted for construction of hotel building – Lack of proper proclamation – objection raised by local people – Revision by RDC – Land by nature was "Jalachar"/ "Sagar" in kissam – Land was not reserved for any specific purpose – So initiation of proceeding by the collector for dereservation of the land to "Ghasapadia" without following the provisions of law as contained U/s 3 (i) (a) of the Act is illegal – This Court also took note of the sensitive issues like protection of water bodies and keeping the town free from water logging – Held, there is no error in the impugned order passed by RDC, calling for interference by this Court. (para 10 to 15)

For Petitioner : M/s. Ramakanta Mohanty, D.K. Mohanty, A.P. Bose, S.N. Biswal, N.Das, S. Mohanty, S.K.Mohanty, S.Mohanty

For Opp.Parties: Additional Government Advocate.

Date of hearing : 04.05.2016
Date of Judgment:18.05.2016

JUDGMENT

S. PANDA, J.

The self same petitioner in both the writ petitions assails the order dated 27.09.2008 passed by the Revenue Divisional Commissioner, opposite party no.1 in O.G.L.S. No. 13/02 and O.G.L.S.R.C. No. 24/07 wherein the lease granted in favour of the petitioner over Plot No. 1528/5999, Khata No. 1456 measuring an area of Ac.0.500 dec under Bhawanipatna Municipality was set aside.

2. The brief facts as delineated by the petitioner in these writ petitions while challenging the impugned order as stated above, tend to reveal thus:-

The petitioner, who claims to be proprietress of hotel, M/s. Hotel Khusi, made an application on 01.01.2001 to the Tahasildar, Kalahandi for grant of lease of a Government land over Plot No.1528/5999, Khata No. 1556 measuring an area of Ac.0.500 dec under Bhawanipatna Municipality for the purpose of construction of a Hotel-cum-Lodge. Accordingly the Tahasildar, Kalahandi-opposite party no.3 registered Lease Case No.2/01 and directed the Amin to cause an inquiry. After causing an inquiry the Amin submitted a report stating that the said plot was not reserved for any purpose and also free from encumbrances. After receipt of the Amin's Report, opposite party no.3 vide notice under Annxure-2 issued proclamation inviting public objection and also forwarded the copy of the same to the Sub-Collector, Bhawanipata, E.O., Bhawanipatna Municipality, B.D.O., Sadar for wide circulation and also affixed the same in the Notice Board. During that time, the petitioner also moved to the District Industries Centre (DIC), Kalahandi (Bhawanipatna) for registration of her project as a Small Scale Tourism related Industrial activity and the General Manager DIC, Kalahandi vide letter dated 04.01.2001 requested the Tahasildar to allot the Government land to the petitioner at a concessional rate of premium as per I.P.R. Government of Orissa.

However, after the proclamation period was over, opposite party no.3 visited the spot personally and examined the spot to find out as to whether the said land was free from encroachment and encumbrances and as to whether there were any mines or mineral and or any trees standing over the said plot. Being satisfied that the said plot is suitable for small scale tourism related industrial activity like Hotel-cum-Lodge, opposite party no.3 transmitted the lease case record to the Sub-Collector for onward transmission to the Collector, Kalahandi. After receipt of the Lease Case Record No. 2/01, the Sub-Collector examined the same and on being agreed with the findings of the Tahasildar, recommended the case to the Collector, Kalahandi for sanction of lease of government land in favour of the petitioner. Ultimately, the Collector after going through the recommendation of the Sub-Collector and the report of the Tahasildar and by applying Rule-II (Item-3 of Schedule-II) of the O.G.L.S. Rules, 1983 and G.O. No.42563/Rev dated 24.09.1996 of Revenue & Excise Department, Orissa, vide order dated 24.11.2001 accorded the sanction for lease of Government Land in question in favour of the petitioner for construction of Hotel-cum-Lodge under Industrial purposes with certain conditions.

3. The lease was granted for a period of 99 years and the petitioner was directed to pay the premium. After the order of the Collector dated 24.11.2001 was passed, lease deed was executed between the Government and the petitioner on 21.12.2001.

After the lease was granted in favour of the petitioner, the land in question was demarcated by the office of opposite party No.3 on the application of the petitioner and the R.O.R. was corrected in the name of the petitioner and accordingly the petitioner paid the rent. The petitioner also obtained a license for three years for construction of a hotel building from the Special Planning Authority, Bhawanipatna on 02.02.2002 and obtained permission from Bhawanipatna Municipality on 05.02.2002 for construction of Hotel Building within a period of one year. Apart from that, the petitioner also got approval of her hotel project in the name of M/s Hotel Khusi from the Government of Orissa, Department of Tourism & Culture on 04.07.2002.

4. According to the petitioner, while she was running her hotel peacefully, on the basis of complaints made by some enemical persons, the Collector called for the case records from Tahasil Office, Kalahandi and by invoking Section-7A (1) of the Orissa Government Land Settlement Act, 1962 initiated a revision case bearing OGLS Revision Case No. 13 of 2002

for cancellation of order No. 1980 dated 24.11.2001 on the following grounds:-

a) The lessee has violated the terms & conditions of the lease.

b) Demarcation of the site has not been made accurately & properly.

c) The face of the building has been proposed to be made towards the bus stand, which should have been made towards other side.

d) The proclamation has not been published according to rules. The persons of whom signature has been obtained as witness on the body of the proclamation actually do not exist and there has been only paper work instead of clamping of the proclamation in the locality.

5. The petitioner while raising the question of delay in filing the OGLS Revision Case, objected the grounds which were taken in the Revision Application. However, opposite party no.1 vide order dated 30.01.2004 allowed OGLSRC No. 13/2002, quashed the order dated 24.11.2001, whereby the lease was sanctioned in favour of the petitioner and directed the Tahaslidar, Kalahandi to restore the classification of suit land to "Jalachara" Kissam.

6. The petitioner challenged such order passed by the Revenue Divisional Commissioner dated 30.01.2004, before this Court in W.P.(C) No.2024 of 2004 and this Court after hearing the parties at length vide judgment dated 22.08.2007 quashed the impugnd order dated 30.01.2004 passed in OGLSRC No. 13 of 2002 and remanded the matter to opposite party no.1 for fresh disposal of the OGLSRC in the light of the direction/observation made in the order.

After remand of the matter from this Court, the revision case was registered as OGLSRC No. 24 of 2007 and opposite party no.1 clubbed OGLSRC No. 24 of 2007 along with OGLSRC No. 13 of 2002 and passed a common order on 27.09.2008 by declaring the de-reservation made by the Collector, Kalahandi on 25.11.1997 as illegal and setting aside order No.1980 dated 24.11.2001 of the Collector, Kalahandi passed in Lease Case No. 2 of 2001, wherein the lease was granted in favour of the petitioner.

7. The aforesaid order dated 27.09.2008 passed by opposite party no.1 has been assailed in the present writ applications on the following grounds:-

1. Proclamation has been properly made, which is evident from Annexure-2 while inviting objections from the public for leasing out the land in question and affixing the notice in the notice board.

2. The complainants of the so called complains basing on which the OGLS Revision Case was initiated have sworn in affidavits stating therein that they have no grievance against the petitioner for such establishment.

3. Though the revision was to be preferred within a period of 90 days, in this case the same was preferred 238 days after, which should not be entertained on the ground of delay since the same is hit by the limitation as provided under Section 7 (A) (1) of the OGLS Act.

4. The Revisional Authority lost sight of the finding of this Hon'ble Court with regard to re-consideration of the aspect since the character of the land has been changed in as much as construction has been made over the land with the permission of the appropriate authority with the running of hotel over the suit land.

5. Since the Collector has been authorized vide notification dated 29.01.1974 to de-reserve Government Land for settlement purpose and since the Collector inviting public objections recorded the suit land as 'Ghaspadia' kissam, the finding of the Revisional Authority in faulting with Collector's Action for de-reservation from 'Jalachar' kissam to 'Ghasapadia', is wrong.

6. Opposite party no.1 was wrong in clubbing the income of the petitioner with her husband for the purpose of determining the lease in question when the petitioner is a separate entity and paying her income tax separately and also has a separate Pan account.

8. A counter affidavit has been filed by opposite parties 1 to 3 through the Tahasildar, Bhwanipatna disputing the submissions made by the petitioner in the writ petition as well as the grounds of challenge taken therein.

9. The opposite parties have denied the existence of a hotel in the suit land and submitted that the land in question was originally 'Sagar' kissam and the same has been wrongly changed to 'Ghaspadia' in De-Reservation Case No. 1/97 by the then Collector, Kalahandi without following the express provisions of law as contained in Section-3 (1)(a) of the OGLS Act, read with sub Rules-1, 2 and 3 of Rule-3 of OGLS Rules. It has also been averred that with the deviation of principles, the classification of the land has been changed under de-reservation proceedings of O.L.R. Act, which could have been undertaken in tune of principle enumerated in the Orissa Survey and Settlement Act, 1958. Further the fact of water logging and outflow of water

during rainy season and the passing of flood water into the town during rainy season has not been taken into consideration while de-reservation was made.

It has also been averred in the counter that the petitioner got the lease on misrepresentation of the fact by mentioning in column 9(b) of the lease application that the occupation of her family members was business, whereas her husband was a State Government servant and then was working as a Sr. Clerk under the control of Collector, Kalahandi. Since the petitioner is a married Hindu women, the plea of separate entity cannot be accepted. So far as construction of hotel and running of the same, the same has been denied and it has been stated that construction up to base level has been made.

With regard to delay in filing the revision case, the opposite parties citing a decision of the Hon'ble Apex Court in the case of ***State of Haryana-Vrs-Chandramani and others reported in AIR 1996 SC 1623*** and invoking the provision of Sub-Section (1) of Section-7A contended that opposite party no.1 can admit an application filed beyond the period of 90 days, if he is satisfied that the applicant had sufficient cause for not making the application within that period. So far as general proclamation is concerned, it has been stated that the same has not been published in the Notice Board of the Tahasil Office since the proclamation notice itself does not indicate any such fact of publication of the same in the notice board and the said proclamation notice does not carry any number of the Process Register.

10. For non inclusion of the land in the Master Plan of Bhawanipatna town as well as not reserving the land for any other purpose, it has been countered that since the kissam of the land was 'Sagar' which has been wrongly changed to "Ghaspadia" the suit land was not included under the Master Plan nor reserved for any purpose. So far as issuance of permission and approval from District Industries Centre and Department of Tourism and Culture, it has been averred that whether a peace of land is leasable or not, does not go by the principle of the said departments.

11. In the counter it has been contended that considering all such facts, the Revenue Divisional Authority has held that since the de-reservation of land is illegal, the lease has been infructuous and law do not support for any construction on a land which have legal encumbrances. The contentions of the opposite parties 1 to 3 is that there is no wrong in the order of opposite party no.1 dated 27.09.2008 in setting aside the lease granted in favour of the petitioner on 24.11.2001.

12. This Court heard the submissions made by learned counsel for the petitioner and learned Additional Government Advocate and went through the records thoroughly.

The main issue involved in these cases relates to a piece of land which originally by its nature was 'Jalachar'/'Sagar' in kissam and subsequently de-reserved to 'Ghaspadia' which was absolutely uncalled for. Now a days, when the Courts are giving importance for protection of natural resources like water bodies and excess rain water discharge passages, the initiation of a proceeding for de-reservation of a land, which has not been reserved for any specific purposes as detailed under Section 3 (1) (a) of the O.G.L.S. Act found to be an erroneous one and when steps have been taken by the self same authority to rectify such a mistake, the Courts should be restrained itself from interfering in the matter.

13. This Court also went through the vital objection such as water logging of the area, out flow of water during rainy season and passing of flood water from the town during rainy season which has not been taken into consideration while the kissam of the land was changed and it was leased out for construction of a building, by which not only the fundamental right of the people at large was affected but also the government failed in its duty in protecting the said land for the specific purpose for interest of public at large.

14. The all other grounds which have been raised by the petitioner with regard to delay in filing the revision application, the authority of the Collector in making de-reservation of a land and granting lease in favour of the petitioner, the petitioner is a separate entity and not to be clubbed with her husband, etc. although taken into consideration by this Court, however this Court does not find any error on the impugned order, which deals with aforementioned vital and sensitive issues like protection of water bodies and keeping the town free from water logging, to be interfered with.

15. Off late when a move was made by the Collector basing on the objections raised by the locality, which have been positively dealt with by the Revenue Divisional Commissioner, opposite party no.1 in the present impugned order, this Court is not inclined to interfere with the impugned order. In view of the observations made above, both the writ petitions stand dismissed.

Writ petition dismissed.

2016 (I) ILR - CUT- 1121

S. PANDA, J. & K. R. MOHAPATRA,J.

W.P.(C) NO. 6498 OF 2000

DIVISIONAL MANAGER, OFDC. LTD., DHENKANAL(COMMERCIAL) DIVISION, DHENKANAL .....Petitioner

.Vrs.

RANJIT KUMAR MOHANTY & ANR. .....Opposite Parties

(A) INDUSTRIAL DISPUTES ACT, 1947 – S.25-F

Retrenchment – Payment of retrenchment benefit is a mandatory pre-condition – However, where there is bonafide endeavour on the part of the employer to pay retrenchment benefits along with the order of retrenchment but the workman avoids acceptance of the same with a view to invalidate the order of retrenchment, it can be treated as sufficient compliance of section 25-F of the Act.

In this case it is stated by the employer that when the work man refused to accept retrenchment notice along with retrenchment benefits offered to him, the same was sent through a peon and when it was not accepted, the same was again sent by registered post and money order but no witness was examined in support of the same even, the peon who stated to have offered the order of retrenchment and compensation amount was not examined and so far as the letter sent by registered post or compensation amount sent by money order are of no consequence since those are subsequent to the date of termination of the workman – Held, retrenchment of the workman is not legal and justified. (paras 6,7,8)

(B) **INDUSTRIAL DISPUTES ACT, 1947 – S.11-A**

Grant of relief by Labour Court – Where termination of an employee was declared illegal, order of reinstatement is not automatic in all circumstances, as it depends upon the given facts and circumstances of each case – Held, exercise of discretionary power U/s 11-A must be sound, fair, just, and reasonable but not arbitrary.

In this case though the workman alleged that some of his juniors have been retained in service he failed to prove the same – In the other hand he was a daily wage labourer and worked for two years and few months in two phases and the unit in which he was working has already been closed – Moreover, in view of the ban imposed on felling of trees the corporation has closed down several Saw Mills and inorder to right-size the strength of the employees, it has floated different schemes like VRS/CRS for regular employees and retrenchment of daily wage workmen – In the above circumstances, direction by the Tribunal for reinstatement of the workman (O.P. No 1) will create burden on the corporation, inviting further litigations which will be neither beneficial for the management nor for the workman – Learned Labour Court while exercising power U/s 11-A of the Act did not delve into the above facts – Held, direction issued to the petitioner to pay Rs 2,00 lakh as compensation to the workman in lieu of reinstatement. (Paras 8 to13)

For Petitioner : Mr. S.K.Pattnaik, Sr. Advocate
M/s. U.C.Mohanty

For Petitioners : M/s. Satyabadi Das, R.N.Acharya,
& Satyabrata Mohanty

Date of judgment: 26.04.2016

JUDGMENT

K.R. MOHAPATRA, J.

The award dated 12.04.1999 passed by the Presiding Officer, Labour Court, Bhubaneswar in I.D. Case No.421 of 1995 is under challenge in this writ petition. The petitioner (first party- Management before the Tribunal) assails the award, wherein the learned Labour Court while holding the action of the Management (petitioner herein) in terminating the services of the workman (opposite party No.1 herein) to be not legal and justified, directed for his reinstatement in service with continuity and all service benefit, but without back wages.

2. The opposite party No.1 was initially engaged by the petitioner on 03.12.1987 on daily wage basis and subsequently terminated with effect from 15.06.1989. He raised dispute before the District Labour Officer, Dhenkanal and by virtue of a tripartite settlement dated 07.01.1992, the opposite party

No.1 was reinstated on 23.01.1992 with continuity in service, but without back wages. Subsequently, he was engaged in Choudwar Saw Mill, a unit under the Orissa Forest Development Corporation Limited, Dhenkanal (Commercial) Division (for short, 'the Corporation'). However, he was again terminated on 31.12.1993. Thus, he raised dispute before the District Labour Officer, Dhenkanal and on failure of conciliation, the matter was referred to the Labour Court on the following terms of reference.

> "Whether the action of the management i.e., Divisional Manager (C), O.F.D.C. Ltd., Dhenkanal by terminating the services of Sri Ranjit Kumar Mohanty, Ex-Daily rated employee with effect from 31.12.93 is legal and/or justified? If not what relief Sri Mohanty is entitled to?"

3. The petitioner filed its written statement contending *inter alia* that the workman was engaged purely on temporary daily wage basis. Due to reduction of workload and other administrative inconveniences, the Management had to close down the Choudwar Saw Mill and thereby all daily wage labourers including the opposite party No.1 were terminated. Accordingly, the opposite party No.1 was offered retrenchment compensation vide letter No.5494 dated 31.12.1993, but he did not turn up to receive the same. Thereafter, the amount was sent through money order, but opposite party No.1 refused to accept the same. Thus, the petitioner contended that since the retrenchment was effected observing all formalities, the reference is not maintainable and should be answered against opposite party No.1 (workman).

4. Opposite party No.1 (workman) filed his written statement contending that he was initially engaged by the petitioner on 03.12.1987 and his services was terminated with effect from 15.06.1989. He raised dispute before the Labour Commissioner. During conciliation, a tripartite settlement was arrived and the opposite party No.1 was reinstated with all service benefits, but without any back wages. On his reinstatement, he requested the Management for regularization of his service on a number of occasions, but it was not paid any heed. Subsequently, the Management illegally terminated him with effect from 31.12.1993 without complying with provisions of Section 25F (a) and (b) of the Industrial Disputes Act, 1947 (for short, 'the Act'). Thus, he raised a dispute before the District Labour Officer, Dhenkanal. On failure of conciliation, a reference has been made by the appropriate Government for adjudication. Hence, he prayed for answering the reference in his favour and to reinstate him in service with full back wages.

5. In order to substantiate their respective case, the petitioner as Management examined two witnesses, whereas the opposite party-workman only examined himself to prove his case. Learned Labour Court considering the rival contentions of the parties and taking into consideration the materials and evidence available on record came to a conclusion that the termination of the workman (opposite party No.1 herein) with effect from 31.12.1993 is not legal and justified. Thus, he directed for reinstatement of the opposite party No.1 with continuity along with all service benefits, but without any back wage vide award dated 12.04.1999 under Annexure-16. The said award is under challenge in this writ petition.

6. Mr.S.K.Pattnaik, learned Senior Advocate appearing on behalf of the petitioner strenuously urged that the impugned award was passed on a misconception of law and fact. Learned Labour Court disbelieved the solitary evidence of MW-1 to the effect that retrenchment compensation was offered to the workman and he refused to accept the same, on the plea that it was not corroborated by any other witness. Further, there is ample evidence on record to come to a conclusion that the workman was engaged on daily wage basis and due to remarkable reduction of workload and ban order imposed by the Government of Odisha on felling of trees, Saw Mills were closed. Thus, the Management had no other option but to terminate the services of the labourers engaged on daily wage basis and adjust regular employees at other Divisions of the Corporation. Learned Labour Court taking note of the same has refused back wages to the workman. Applying the said principles, learned Labour Court should not have directed to reinstate the workman as it is an unnecessary burden on the Corporation. He further contended that on closure of the Saw Mill at Choudwar, the workman was offered with retrenchment notice along with a sum of Rs.1,125/- on 31.12.1993, but the workman refused to accept the same for which on 01.01.1994, the Management sent the amount along with the notice to the workman through a Peon, but he refused to accept the same. Thus, on 04.01.1994, the notice of retrenchment along with voucher of the compensation amount sent to the workman by registered post, which returned back due to refusal of the workman and subsequently, according to the instruction of the Divisional Manager, Dhenkanal of the Corporation, the compensation amount was sent to the workman by money order on 01.03.1994, but the same also returned back. The retrenchment notice was marked as Ext.A, the registered postal cover was marked as Ext.A/1, letter No.83 dated 29.01.1994 was marked as Ext.B and all other documents were marked without objection. The Management also proved the

letter regarding closure of Saw Mill at Choudwar as Ext.E and the list of retrenched daily wage employees was proved as Ext.H. Thus, Mr.Patnaik referring to the aforesaid documents submitted that the Management has made all endeavour to pay the retrenchment compensation before retrenchment of the workman, but due to his non-cooperation and refusal, the same could not be served on him. He also relied upon a decision of this Court in the case of ***Shyam Sundar Rout Vs. Orissa State Road Transport Corporation***, reported in 69(1990) CLT 357 and submitted that *bona fide* endeavour on the part of the employer to pay compensation amount and one month's salary in lieu of notice along with retrenchment order should be treated as due compliance of Section 25F, where a workman avoids acceptance of compensation with a view to invalidate the order of retrenchment. Though learned Labour Court has taken note of the same, but without applying its judicial mind came to an erroneous conclusion that there is neither any specific material in pleading nor there is any document to show that the notice and compensation amount was offered to the workman on 31.12.1993. Learned Labour Court committed material irregularity in coming to the conclusion that the Management has not adduced any corroborative evidence regarding offer of retrenchment compensation. Thus, the impugned award is not sustainable in the eye of law and hence the same is liable to be set aside.

7. Mr.Satyabrata Mohanty, learned counsel for opposite party No.1 (workman) refuting the contentions of Mr.Pattnaik, learned Senior Advocate submitted that there is no evidence available on record to come to a conclusion that the order of retrenchment along with compensation was offered to the workman on 31.12.1993. Exhibit-A, i.e., retrenchment notice does not bear any endorsement either of the concerned Officer of the Management or the person who allegedly offered the notice to the workman to the effect that the workman had refused to accept the said notice. Further, the retrenchment compensation was not computed properly. Previously, pursuant to a tripartite settlement, the workman was reinstated with continuity and all service benefits. Thus, the retrenchment compensation ought to have been computed taking into consideration the service of the workman for the previous years. Taking all these illegalities and irregularities into consideration, learned Labour Court has rightly set aside the order of termination and directed for his reinstatement. Further, taking into consideration the closure of the unit, namely, Saw Mill at Choudwar and reduction of workload of the Corporation, the Labour Court has not awarded

any back wages, though it has been categorically held that the workman is entitled for continuity with all service benefits. The impugned award is a reasonable one and needs no interference in exercise of power under Articles 226 and 227 of the Constitution of India.

8. Taking into consideration the rival contentions of the parties, it is apparent that Ext.A does not bear any endorsement with regard to refusal of the workman to receive the retrenchment compensation. No witness has been examined in support of the same except MW-1. The petitioner didn't even examine the Peon, who stated to have offered the order of retrenchment along with compensation to the opposite party No.1. Further, subsequent letters sent through registered post and compensation sent by money order are of no consequence since those are subsequent to the date of termination of the workman. Learned Labour Court has taken into consideration both the oral as well as documentary evidence available on record. Giving due weightage to the pleadings, contentions raised by the parties as well as materials available on record, he came to a conclusion that the retrenchment of the workman is not legal and justified. There appears no apparent error on the face of record nor is there any material irregularity or infraction of law committed by learned Labour Court in arriving at such a conclusion, which would warrant interference by this Court. This Court in exercise of jurisdiction under Article 227 of the Constitution should not re-appreciate the evidence as an appellate Court. Thus, the impugned award needs no interference on this score.

It is further contented by Mr.Pattnaik, learned Senior Advocate that the petitioner hardly worked for two years and few months in two phases. He was engaged on daily wage basis. Due to substantial reduction of workload and to minimize the loss of the Corporation, the Saw Mill at Choudwar was closed and thus all daily wage workers including the opposite party No.1 were retrenched. The order of reinstatement of the workman at such a juncture would be prejudicial to the Corporation. The same will also not be beneficial for the workman as he cannot be employed continuously due to substantial reduction of workload and there is every likelihood of unnecessary litigations. Thus, compensation in lieu of reinstatement would be appropriate in the case at hand. Learned Labour Court while granting the relief has not exercised its jurisdiction properly conferred under Section 11-A of the Act. Granting of relief is the discretion of the Court, which must be sound, fair, just and reasonable. There should not be any arbitrariness in exercising the power conferred under Section 11-A of the Act.

Mr.Mohanty, learned counsel for opposite party No.1, on the other hand, refuting such contention contended that after reduction of workload of the Corporation, 42 surplus Field Assistants being junior to the opposite party No.1, were transferred to other Divisions but the services of opposite party No.1 was dispensed with. Thus, compensation in lieu of reinstatement is not appropriate in this case and the opposite party No.1 should be reinstated in service as directed by learned Labour Court.

9. Scrutiny of the case record reveals that the opposite party No.1 had made an allegation to the effect that some of the workmen who were junior to the opposite party No.1 have been retained and transferred by the Management. A copy of the list of such workmen was supplied to the learned counsel for the petitioner. Pursuant to the direction of this Court on 25.02.2015, an affidavit was filed by the petitioner on 24.03.2015 stating that the list of the workmen submitted by the opposite party No.1 along with letter dated 22.01.2008, in which surplus Field Assistants of Bhubaneswar Commercial Zone were transferred to other Divisions and adjusted accordingly, are the regular Field Assistants of the Corporation, whereas opposite party No.1 was engaged as a daily wage labourer. Moreover, all the 42 Field Assistants were engaged in the Corporation prior to 31.03.1986, which is much before the initial engagement of the opposite party No.1 on 03.12.1987. Thus, the claim of Mr.Mohanty, learned counsel for opposite party No.1 does not appear to be correct. Admittedly, the unit, namely, Saw Mill at Choudwar of the Corporation has been closed since 1993 and there can be no quarrel to the fact that the Corporation in order to right-size the strength of the workmen to minimize the loss had floated Schemes like Voluntary Retirement /Compulsory Retirement for regular employees and termination of the daily wage workers was resorted to wherever their services was felt not necessary. In such circumstances, direction for reinstatement of the opposite party No.1 will certainly create burden on the Corporation as well as lead to further complicacy and further litigations which is not beneficial either for the Management or for the workman. Learned Court below while exercising its power under Section 11-A of the Act, didn't delve into this material aspect of the case. Certainly, exercise of power under Section 11-A of the Act, while granting relief to a workman, is discretionary, which must be sound, fair, just and reasonable. There is no straight jacket formula to grant relief by the Labour Court or Tribunal in exercise of power under Section 11-A of the Act. The Court/Tribunal should grant relief taking into consideration the facts and circumstances of each case, in order to meet

the ends of justice. Hon'ble Supreme Court in the case of ***Hindustan Tin Works Pvt. Ltd vs Empkoyees Of Hindustan Tin Works Pvt. Ltd.,*** reported in (1979) 2 SCC 80 held as under:-

> "11. In the very nature of things there cannot be a strait-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular."

10. In the past, the Courts have laid down law to the effect that where the termination of an employee was declared to be illegal, the consequential relief of reinstatement with full back wages was being granted. However, in recent days, there has been shift in the legal position and in a long line of cases, Hon'ble Supreme Court has consistently taken view that the relief by way of reinstatement is not automatic and may be wholly inappropriate in a given fact situation, even though termination of an employee is in violation of the prescribed procedure. Compensation in lieu of reinstatement in those cases has been held to meet the ends of justice. In the case of ***Jagbir Singh vs. Haryana State Agriculture Marketing Board and another***, reported in (2009) 15 SCC 327, Hon'ble Supreme Court relying on its earlier decision in *Mahboob Deepak v. Nagar Panchayat*, held as under:-

> "7. It is true that earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of

> an employee is in contravention to the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.
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> xx xx xx
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> 15. It would be, thus, seen that by catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee."

11. Mr.Mohanty, on the other hand, strongly relied upon the decisions in the case of ***Tapash Kumar Paul Vs.BSNL and another,*** reported in AIR 2015 SC 357 and also the case of ***Gauri Shanker Vs. State of Rajasthan***, reported in 2015 (145) FLR 671, wherein, the Hon'ble supreme Court has held that the High Court in exercise of supervisory jurisdiction should not have modified the award by directing payment of compensation in lieu of reinstatement. Mr.Mohanty also relied upon some other case laws, such as 99 (1990) CLT 357; 1985 Lab.IC 1733; 2010 (1) SCC (L & S) 1146; AIR 2010 SC 683 AND (2015) 4 SCC 458. In all these cases, the Hon'ble Supreme Court held that when the termination, dismissal or discharge etc. of a workman is set aside, the workman is entitled to be restored to the position just before the order of termination, dismissal or discharge etc., as the case may be, was passed.

There can be no denial to the principle, as aforesaid, laid down by the Hon'ble Supreme Court. But, it is not automatic and reinstatement, in all circumstances, is not possible and practicable to be granted. It depends upon the given fact and circumstance of each case.

12. In view of the discussions made above, and taking into consideration the facts and circumstances of the case at hand, we find force in the submission of Mr.Pattnaik, learned Senior Advocate to the effect that compensation in lieu of reinstatement would be just and proper in the facts and circumstances of the case.

There is also long line of decisions of the Hon'ble Supreme Court supporting this view. Mr.Pattnaik, learned Senior Advocate for the petitioner relied upon the following decisions in support of his contentions:

(i) AIR 2010 SC 2140
(ii) JT 2013 (2) SC 231
(iii) AIR 2009 SC 3004

This Court in a decision in the case of ***Dayanidhi Sahu Vs. The Presiding Officer, Labour Court, Sambalpur and others***, reported in 2013 (II) OLR 235 has also taken a similar view. In paragraph-8, of the said *Dayanidhi Sahoo's case (supra)*, it is held as follows:-

> "8. The apex Court in the case of **Asst. Engineer, Rajasthan Dev. Corp. and Anr. v. Gitam Singh** reported in 2013 LLR 225 has held that when the termination of a workman is held illegal. It can be said without any fear of contradiction that the Supreme Court has not held as an absolute proposition that in case of wrongful dismissal, the dismissed employee is entitled to reinstatement in all situations. It has always been the view of the Court that there could be circumstance (s) in a case which may make it inexpedient to order reinstatement. Hence, the normal rule that the dismissed workman is entitled to reinstatement in cases of wrongful dismissal has been held to be not without exception. The principles as relevant for granting relief of reinstatement when termination of workman is held to be illegal. Before exercising his judicial discretion, the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute. Now there is no such principle that for an illegal termination of service, the normal rule is reinstatement with back-wages, and instead the Labour Court can award compensation. The apex Court further held that the compensation, in lieu of reinstatement, should have been proper to a daily wager who has completed merely 240 days' service hence the Single Judge as well as the Division Bench of the High Court also erred in not considering that the reinstatement with back-wages is no longer a rule without exceptions. While granting a relief of reinstatement to a workman whose termination is held to be illegal i.e. violative of Section 25F of the Industrial Disputes Act, 1947, the Labour Court has to keep in view all relevant factors, including the mode and manner of

appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute." (*emphasis supplied*)

13. Thus, this Court is of the view that the view that compensation in lieu of reinstatement would be appropriate in the facts and circumstances of the case. As it is borne out from record, opposite party No.1 had practically worked for two years and few months in two phases between 1987 and 1993. He was a daily wage labourer. The unit in which he was working has already been closed. In view of the ban imposed on felling of trees the Corporation has closed down several Saw Mills and Commercial units for reduction of workload. Further, in order to right-size the strength of the employees, it has floated different Schemes like VRS/CRS for regular employees and also in some cases termination of the daily wage workers was resorted to retrench the casual / daily wage workmen, wherever their services was felt not necessary. Taking into consideration the facts and circumstances of the case, compensation to the tune of Rs.2.00 lakh in lieu of reinstatement would be just and proper. Accordingly, it is directed that the petitioner shall pay a sum of Rs.2.00 lakh (rupees two lakh) only to the opposite party No.1-workman within a period of six months from today in lieu of reinstatement.

14. Accordingly, the writ petition is allowed with the aforesaid direction modifying the impugned award to the extent indicated above.

Writ petition allowed.

2016 (I) ILR - CUT- 1131

S. C. PARIJA, J.

M.A.C.A. NO. 329 OF 2004

HARAPRIYA NAYAK & ORS. .....Claimants/Appellants

.Vrs.

SMT. URMILA SENAPATI @ACHARYA & ORS. .....Opp. Parties/Respondents

MOTOR VEHICLES ACT, 1988 – S.146

Motor accident – Offending vehicle has valid insurance policy – Owner of the vehicle died much prior to the date of accident – Since policy issued against a dead person learned Tribunal absolved the

Insurance Company and fixed the liability on the legal heirs of the deceased owner – Hence this appeal – It is the vehicle which is required to be insured but not the person or the owner of the vehicle – Moreover the Act is a beneficial piece of social legislation, providing compulsory insurance of motor vehicles against third party risk – Held, the impugned award is set aside – Since the Insurance Company has accepted premium for the insurance of the vehicle, the company is held liable to pay the awarded compensation.

Case Law Relied on :-

1. 1995 ACJ 292 : Nani Bai & Ors. -V- Ishaque Khan & Ors.

Case Law Referred to :-

1. AIR 1991 ALLAHABAD 48 : The Oriental Fire & General Insurance Co. Ltd. -V- Smt. Shakuntala Devi

For Appellants : M/s. Biswajit Mohanty
For Respondents : M/s. P.K.Nayak-1

Date of Order : 04.4.2016

ORDER

S. C. PARIJA, J.

Heard learned counsel for the parties.

This appeal by the claimants-appellants is directed against the judgment/award dated 24.3.2004, passed by the learned 3rd Motor Accident Claims Tribunal, Puri, in MAC No.190/974 of 1989/88, awarding an amount of Rs.2,70,300/- as compensation along with interest @ 9% per annum from the date of filing of the claim application i.e. 28.10.1988, till realization and while absolving the insurer of its liability to pay the awarded compensation amount, directing the legal heirs of the deceased owner of the offending vehicle i.e. respondent nos.1 and 2, to pay the same.

Learned counsel for the claimants-appellants submits that as the offending vehicle (truck) bearing no.ORP/5540 was covered under a valid policy of insurance at the time of accident, learned Tribunal erred in absolving the insurer of its liability under the policy and saddling the entire liability on the legal heirs of the deceased owner. It is submitted that as the Insurance Company, through its agent, had issued the insurance policy, after accepting premium in respect of the offending vehicle in the name of the deceased owner, it was not open for the insurer to avoid its liability on the plea that the policy had been issued in respect of a dead person. In this

regard, learned counsel for the claimants has relied upon a Division Bench decision of Madhya Pradesh High Court in ***Nani Bai and others v. Ishaque Khan and others,*** 1995 ACJ 292, where in a similar case, the Hon'ble Court, while referring to Section 146 of the Motor Vehicles Act, 1988, has held that the Insurance Company is liable to pay the compensation to the legal heirs of the deceased.

Learned counsel for the claimants-appellants further submits that as the insurance policy has been issued in respect of the offending vehicle, covering the risk of third party, the insurer cannot be allowed to avoid its liability towards such third party, on the plea that the policy had been issued in respect of a dead person. Accordingly, it is submitted that the Insurance Company is liable to pay the awarded compensation amount and it may recover the amount from the legal heirs of the deceased owner for any misrepresentation and/or suppression of material facts.

Learned counsel for the Insurance Company-respondent no.3, while supporting the impugned award submits that as there was clear evidence available on record to show that the owner of the offending truck Brajabandhu Senapati had died in the year 1982 and subsequent insurance policies were being obtained in the name of the deceased on a misrepresentation and/or suppression of material facts, learned Tribunal was fully justified in absolving the insurer of its liability and saddling the entire liability on the legal heirs of the deceased owner of the offending vehicle. It is further submitted that merely because a policy has been issued in respect of the offending vehicle, in the name of the deceased owner, the same cannot bind the insurer, especially when its liability is only to indemnify the owner of the vehicle, which he may incur from out of the use of the vehicle. It is submitted that in the present case, as the owner had died since 1982 and suppressing the said fact and by practicing fraud, the legal heirs of the deceased owner have been obtaining successive insurance policies in the name of the dead person, learned Tribunal was fully justified in absolving the insurer of its liability. In this regard, he has relied upon a Division Bench decision of Allahabad High Court in ***The Oriental Fire and General Insurance Co. Ltd., v. Smt. Shakuntala Devi,*** AIR 1991 ALLAHABAD 48, wherein it has been held that the liability for payment of any sum by the insurer arises only when the insured incurs any liability in respect of an accident arising out of the use of the vehicle. By his death arising out of the use of his own insured vehicle, the insured has not incurred any liability to

pay any damages or compensation to any person. Consequently, no question of payment of damages or compensation to the insured arises.

It is further submitted that even otherwise, the assessment of the compensation amount is not just and proper, as there was no credible evidence on record with regard to the actual income of the deceased. It is further submitted that the award of interest @9% per annum is highly excessive.

On a perusal of the impugned award, it is seen that the learned Tribunal has taken into consideration the fact that the owner of the offending truck Brajabandhu Senapati had died in the year 1982, as has been disclosed by his legal heirs. Inspite of the death of the owner, insurance policies were being obtained in respect of the offending vehicle in the name of the deceased Brajabandhu Senapati. Considering the fact that a policy of insurance is a contract between the insurer and the insured, under which, the insurer agrees and undertakes to indemnify the insured against any liability incurred by him, learned Tribunal has held that the policy issued in the name of the deceased Brajabandhu Senapati cannot be taken to be a valid policy and therefore, the insurer cannot be held liable to pay the awarded compensation amount. Learned Tribunal has further held that the policy having been obtained by misrepresentation and practice of fraud, no liability can be fastened on the insurer on the basis of such a policy. Accordingly, learned Tribunal has saddled the entire liability on the legal heirs of the deceased owner of the offending vehicle.

From the facts detailed above, it is evident that the owner of the vehicle Brajabandhu Senapati had died in the year 1982, as has been disclosed by his legal heirs. It is further revealed that inspite of death of the owner of the offending vehicle, successive insurance policies were being issued by the Insurance Company in the name of the deceased owner of the offending vehicle. In a similar case in *Nani Bai* (supra), where the owner of the vehicle had died much earlier to the date of accident and the Insurance Company had all along been accepting the premium and issuing insurance policy in respect of the said vehicle, the Hon'ble Court has held that having accepted the premium for the insurance of the vehicle, the insurer cannot be allowed to say that it is not liable to pay compensation to the persons, who have been injured or who died in the accident. The relevant findings of the Hon'ble High Court is as under:

> "We are not persuaded to uphold this argument though the Tribunal was. There is nothing in the policy issued in the name of Kartar Singh stating that it is purely personal to him. On the other hand, on plain reading of the condition of the policy it is clear that the coverage is that of the motor bus and not the insured. Section 94 of the Motor Vehicles Act insists for the compulsory insurance against the third party risk and prohibits user of vehicle in a public place unless there is a policy of insurance. The words "unless there is in force in relation to the use of the vehicle of that person...a policy of insurance" go to show that it is the vehicle that is required to be insured and not the person or the owner of the vehicle and in such a situation the insurance company cannot escape its liability. xxx"

Accordingly, the Hon'ble Court has proceeded to hold that despite the fact that the owner of the vehicle was dead at the time of accident and the premium was paid by his legal heirs, the Insurance Company is liable to pay compensation to the legal heirs of the deceased and if they are aggrieved by the concealment of fact or misrepresentation or fraud, if any, they may seek recovery of the amount from the legal heirs in appropriate proceeding.

As regard the decision relied upon by the learned counsel for the Insurance Company in *Smt. Shakuntala Devi* (supra), the same has no application to the facts of the present case, inasmuch as, in the said case the insured, who was the owner of the vehicle, had himself died in the accident and therefore, the Hon'ble Court had held that in such a case the deceased owner has not incurred any liability to pay any damage or compensation to any person. The insured-owner of the vehicle cannot raise a claim for compensation against himself. Moreover, in the said case the insurance policy issued in respect of the vehicle did not cover the risk of the insured-owner.

The provisions of the chapter XI of the Motor Vehicles Act, 1988, is a beneficial piece of social legislation, providing for compulsory insurance of motor vehicles against third party risk. As there is no dispute in the present case that the offending truck was covered under a valid policy of insurance, which the Insurance Company had issued on receipt of premium, it cannot avoid its liability to pay the compensation amount, merely because the policy has been issued in the name of a dead person.

For the reasons as aforestated, the findings of the learned Tribunal absolving the Insurance Company of its liability cannot be sustained and the same is accordingly set aside. Instead, the Insurance Company-respondent

no.3 is held liable to pay the awarded compensation amount with liberty to realize the same from the legal heirs of the deceased owner for alleged fraud and/or misrepresentation, if recoverable, in accordance with law.

Coming to the quantum of compensation amount awarded and the basis on which the same is arrived at, I feel, the interest of justice would be best served, if the awarded compensation amount of Rs.2,70,300/- is modified and reduced to Rs.2,50,000/-(rupees Two Lakhs Fifty Thousand), which is payable to the claimants. Further, the award of interest @ 9% per annum is also not proper and justified and therefore, the same is modified and reduced to @6% per annum. Accordingly, the claimants are entitled to the modified compensation amount of Rs.2,50,000/- along with interest @6% per annum from the date of filing of the claim application.

The impugned award is modified to the above extent.

The Insurance Company-respondent no.3 is directed to deposit the modified compensation amount of Rs.2,50,000/-along with interest @ 6% per annum from the date of filing of the claim application with the learned Tribunal within six weeks hence. On deposit of the amount, the same shall be disbursed to the claimants proportionately, as per the direction of the learned Tribunal given in the impugned award. MACA is accordingly disposed of.

Appeal disposed of.

2016 (I) ILR - CUT- 1136

C. R. DASH, J.

W.P.(C) NO. 2760 OF 2013

SAMSER KHAN & ANR. ……..Petitioners

.Vrs.

THE COMMANDANT, 202 BN, COBRA, CRPF, SUNABEDA, KORAPUT & ORS. ……..Opp. Parties

SERVICE LAW – Death of employee in CRPF – Parents, brothers and sisters and wife are claimants for the "death-cum-retirement" benefits – Whether such benefit is an estate of the deceased so that it would devolve on the legal heirs of the deceased according to their

personal law ? Held, No – Only O.P.No.4 (widow of the deceased) is entitled to such benefit under article 366(17) of the Constitution of India, 1950 and Rules 50(6), 51, 54(14) of the CCS Pension Rules, 1972 – Direction issued to O.P.Nos. 1 & 2 to release the above benefit in favour of O.P.No.4 – However, this Court while deciding this case legally in favour of O.P.No.4 felt pity for the old parents of the deceased and asked O.P.No.4, without any direction, that she may part with 10 percent of the total death-cum-retirement benefits of the deceased in favour of the petitioners-parents; if so advised by her morality and conscience. (Paras 13 to 22)

Case Laws Referred to :-

1. AIR 1971 SC 140 : Deoki Nandan Prasad v. State of Bihar
2. AIR 1983 SC 130 : D.S. Nakara and others v. Union of India
3. AIR 1984 SC 346 : Smt. Sarbati Devi and another v. Smt. Usha Devi

For Petitioners : M/s. Bibekananda Bhuyan, Smt.S.Patra, C.R.Swain

For Opp. Parties : M/s. S.D.Das, A.S.G.I.
M/s. B.N.Udgata, P.Behera,
M/s. Bidhayak Patnaik, S.K.Swain, B.Rath,
M/s. S.A.Nayeem, Md.Abid.

Date of Judgment : 27.04.2016

JUDGMENT

C.R. DASH, J.

Samser Khan (petitioner no.1) and Mamtaz Begum (petitioner no.2) are father and mother respectively of late Wasim Hossain Khan. Opposite party nos.5 to 8, who are brought on record through intervention, are the brothers and sister of aforesaid late Wasim Hossain Khan. Ruksana Khatoon (opposite party no.4) is the widow of late Wasim Hossain Khan. The petitioners, who are parents of late Wasim Hossain Khan, have filed this writ petition for payment of legitimate dues from the retirement-cum-death benefits of their deceased son in favour of them.

2. Wasim Hossain Khan was working as a Constable/GD under the Commandant, 202 BN, COBRA CRPF, Sunabeda, district Koraput in the State of Odisha. On 07.07.2012, his marriage was solemnised with Ruksana Khatoon-O.P. No.4 as per the Muslim Rites and Customs. On 30.11.2012, Wasim Hossain Khan expired at the age of 25 years. After his death, a sum of Rs.10,000/- (Rupees ten thousand) in cash was immediately given to his

widow (O.P. No.4) as financial assistance from the Unit Welfare Fund. After performance of the funeral rites, O.P. No.4 went to her parents' house and it is alleged that she terminated her pregnancy with intention to remarry severing all her contact/relationship with her in-laws. A further sum of Rs.30,000/- (Rupees thirty thousand) was paid to the O.P. No.4, (widow of Wasim Hussain Khan) and she is also getting monthly family pension by interim order of this Court. As the O.P. No.4-widow of Wasim Hussan Khan is trying to take away all the service benefits of the deceased son of the petitioners including unpaid salary, gratuity, GIS, Risk Fund etc., which is asserted to be the estate of the deceased thereby debarring the petitioners and other legal heirs of the deceased, though she (O.P. No.4) has limited interest over the same, the present writ application has been filed.

3. In course of hearing, the petitioners have conceded that Ruksana Khatoon (O.P. No.4) being the widow of the deceased Wasim Hossain Khan, is entitled for the monthly family pension as per the Pension Rules either till her remarriage or till her death, whichever is earlier.

4. Learned counsel for the petitioner does not dispute the aforesaid legal position, which entitles O.P. No.4 to family pension under the relevant Rules. But so far as the death-cum-retirement benefits including gratuity, risk fund, unpaid salary etc. is concerned, it is claimed by the petitioners that the same being the estate of the deceased Wasim Hossain Khan, the same is to devolve on the legal heirs according to the principle of Succession / inheritance in accordance with the Mohammedan Law. To substantiate his contention, learned counsel for the petitioners relies on the principles of Mohammedan Law and some legal propositions propounded by different High Courts, which shall be discussed at the appropriate stage.

5. Learned counsel for the O.P. No.4, on the other hand, submits that the pension including death-cum-retirement benefits being a statutory benefit under the relevant Service Rules and Pension Rules, the Mohammedan Personal Law is not applicable to the present case, and according to the relevant Rules, neither the petitioners nor the Opp. Parties 5 to 8 are to be treated as family members of deceased Wasim Hossain Khan. It is further submitted that petitioner No.1, father of the deceased Wasim Hossain Khan being himself a retired employee and he having been in receipt of pension, is not entitled to further benefits admissible to his deceased son. Learned counsel for the O.P. No.4 relies on different provisions of the Constitution of India and a host of decisions to substantiate his contention, which shall be discussed at the appropriate stage.

6. From the submissions advanced by learned counsel for the parties, the following questions emerge for consideration in the present case.

(i) Whether the death-cum-retirement benefits of deceased Wasim Hossain Khan excluding the family pension is an estate of the deceased ?

(ii) Whether the petitioners and Opp. Parties 5 to 8 are the legal heirs of the deceased and they are entitled to the benefit claimed besides the widow of Wasim Hossain Khan?

(iii) Whether the Mohammedan Personal Law is applicable to the facts of the present case?

7. The first question that craves indulgence of this Court is whether the Death-cum-Retirement Benefits ('DCRB' for short) on death of Wasim Hossain Khan excluding the family pension is an Estate of the aforesaid deceased.

Merriam Webster's Dictionary (Web Edition) defines "Estate" as ……

: All the things that a person owns.
: The things left by someone who has died.
: A large peace of land with a large house on it.

Coming to the legal meaning of the Estate, I am not delving deep into the matter to find out the difference between the real and personal estate, estate and effects and other type of estate like "istimrari estate", "joint individual estate", "parent estate", etc. With the advancement of time, the law has changed and the property that a person owns or has legal interest in, is often used to describe the property after the person's death as estate. From the aforesaid discussion, it is clear that both the movable and immovable property of a person comes within the ambit of estate after his death. The only exception is that either the person during his life time should have owned the property or he should have an interest in the property. The death-cum-retirement benefit, if seen in a wider sense, is the sum-total of the amount, which the person is entitled to receive on his retirement on superannuation, if he is alive, or it is receivable by the legal heirs or persons entitled under the relevant Statute on the death of the person.

8. Here, we are concerned with the death-cum-retirement benefit of a person, who has died young leaving his widow and who was a service holder under the Central Reserve Police Force. The antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension

can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in the case of **Deoki Nandan Prasad v. State of Bihar**, ***AIR 1971 SC 1409***. The said decision has been approved by a later Constitution Bench decision in the case of **D.S. Nakara and others v. Union of India**, ***AIR 1983 SC 130*** wherein the Hon'ble Supreme Court in para- 20 of the Judgment has held thus :-

> *"20. The antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar, 1971 (Supp) SCR 634 : (AIR 1971 SC 1409) wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab v. Iqbal Singh, (1976) 3 SCR 360 : (AIR 1976 SC 667)."*

From the aforesaid decision, it is clear that pension is admissible as a statutory right under the relevant rules.

9. The Central Reserve Police Force Act, 1949 was enacted under the Government of India Act, 1935. It was a valid law, when the Constitution of India came into force and the President of India was competent to continue the aforesaid Statute as a valid law under Article- 372 (1) of the Constitution of India. In exercise of the powers conferred in Section- 18 of the Central Reserve Police Force Act, 1949, the Central Government has enacted the Central Reserve Police Force Rules, 1955. Rule- 42 (a) & (b) provides that pension and gratuity for service in the force shall be regulated according to the provisions contained in the Civil Service Regulation as may be amended from time to time. So far as Civil Service of the Union is concerned, Central Civil Services Pension Rules, 1972 ("CCS Pension Rules" for short) is the relevant rule governing the field. Rule- 54 (14) of the CCS Pension Rules provides thus :-

"54 (14)

(a) x x x x x x

(b) Family in relation to a Govt. servant means-

(i) Wife in the case of a male Govt. Servant, or husband in the case of a female Govt. Servant.

x x x x x x x"

We are not concerned with the Rules so far as children are concerned, as the deceased died issueless. From the aforesaid Rule, it is clear that neither the petitioners nor the Opp. Parties 5 to 8 come within the definition of 'family' in Rule- 54 (14) of the CCS Pension Rules. As held by this Court in the case of D.S. Nakara (supra), the pension is to be governed by the relevant rules and that is a statutory right.

10. In view of such fact, it has been rightly conceded by the learned counsel for the petitioners that neither the petitioners nor the Opp. Parties 5 to 8 claim any family pension in their favour along with O.P. No.4 (widow of the deceased). But they claim that death-cum-retirement benefit being the estate of the deceased, the same is to devolve on the legal heir of the deceased according to the Law of Succession governing the parties, i.e., the Mohammaden Law.

11. At this juncture, it is worthwhile to find out, what pension means. Article- 366 (17) of the Constitution of India defines pension as follows:-

"Pension means a pension, whether contributory or any kind whatsoever payable to or in respect of any person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of return, with or without interest thereon or any other addition thereto, of subscription to a Provident Fund."

The aforesaid definition of pension in the Constitution of India embraces all including gratuity, Provident Fund etc. as claimed by the petitioners to their share according to their personal law as death-cum-retirement benefit. So, when pension includes all the amount including gratuity, Provident Fund and other sum payable by way of return, the pension cannot be artificially classified as pension simplicitor and the death-cum-retirement benefit for the purpose of devolution on the legal heirs according to the personal law.

12. Family pension, which was initially introduced under a scheme in 1964, is nothing but extension of the benefit of pension to the dependent family of the deceased as quantified and specified in the scheme to save the

family from penury and destitution. Now, family pension is a part of C.C.S. Pension Rules. There is no difference between pension and family pension except the following distinction.

Pension is received by the person himself in service on his retirement (voluntary or on superannuation) if he has served for the minimum period that entitles him to receive pension. Family pension is received by the dependant family members as prescribed in the relevant Rules on death of the service holder, who was serving in a pensionable post.

In view of such facts, the benefits, which are included in "Pension" under Article- 366 (17) of the Constitution of India cannot be detached or separated from "family pension" on any rational basis. Therefore, no artificial distinction can also be made between "family pension" and "Death-cum-Retirement Benefit" to give one benefit to Opp. Party No.4 (widow of the deceased) and another benefit to the petitioners and others including Opp. Party No.4 on the basis of the personal law governing the parties. Opp. Party No.4, the widow of the deceased being the only surviving family member as per C.C.S. Pension Rules, she is entitled to receive family pension and also the Death-cum-Retirement Benefits admissible to the deceased.

13. To reinforce my above discussion, I feel inclined to rely on Rule- 50 (6) and 51 of the C.C.S. Pension Rule.

Rule- 50 – Retirement/Death Gratuity

xxx xxx xxx

"(6) For the purposes of this rule and Rules 51, 52 and 53, 'family', in relation to a Government servant, means –

(i) wife or wives including judicially separated wife or wives in the case of a male Government servant,

(ii) husband, including judicially separated husband in the case of a female Government servant,

(iii) sons including stepsons and adopted sons,

(iv) unmarried daughters including stepdaughters and adopted daughters,

(v) widowed daughters including stepdaughters and adopted daughters,

(vi) father, including adoptive parents in the case of individuals whose personal law permits adoption.

(vii) mother, including adoptive parents in the case of individuals whose personal law permits adoption.

(viii) brothers below the age of eighteen years including stepbrothers,

(ix) unmarried sisters and widowed sisters including stepsisters,

(x) married daughters, and

(xi) children of a pre-deceased son."

Rule- 51 provides thus :-

"51. Persons to whom gratuity is payable

(a) The gratuity payable under Rule 50 shall be paid to the person or persons on whom the right to receive the gratuity is conferred by means of a nomination under Rule 53 ;

(b) If there is no such nomination or if the nomination made does not subsist, the gratuity shall be paid in the manner indicated below –

(i) if there are one or more surviving members of the family as in Clauses (i), (ii), (iii) and (iv) of sub-rule (6) of Rule 50, to all such members in equal shares ;

(ii) if there are no such surviving members of the family as in sub-clause (i) above, but there are one or more members as in Clauses (v), (vi), (vii), (viii), (ix), (x) and (xi) of sub-rule (6) of Rule 50, to all such members in equal shares.

(1) If a Government servant dies after retirement without receiving the gratuity admissible under sub-rule (1) of Rule 50, the gratuity shall be disbursed to the family in the manner indicated in sub-rule (1).

(2) The right of a female member of the family, or that of a brother, of a Government servant who dies while in service or after retirement, to receive the share of gratuity shall not be affected if the female member marries or re-marries, or the brother attains the age of eighteen years, after the death of the Government servant and before receiving her or his share of the gratuity.

(3) Where gratuity is granted under Rule 50 to a minor member of the family of the deceased Government servant, it shall be payable to the guardian on behalf of the minor."

14. None of the parties has submitted as to whether deceased Wasim Hossain Khan had made any nomination in favour of anybody. Opp. Party No.4, widow of the deceased is the only surviving member, as stipulated in Rule- 51 (b) (i). If there is any surviving member U/S. 15 (1) (b) (i), no surviving member of the family specified in Section 15 (1) (b) (ii) is entitled to receive any gratuity. In view of such provisions in the C.C.S. Pension Rule also, the petitioners, who are the parents of the deceased, are not entitled to receive any gratuity in accordance with the C.C.S. Pension Rules.

15. Learned counsel for the petitioners has relied on the decision of the Hon'ble Kolkata High Court in the case of **Parash Chandra Ghosh v. The State of West Bengal & Others**, ***WPST 79 of 2014*** disposed of on 28.04.2014, to substantiate his contention that the death-cum-retirement benefit of a deceased person is the estate of the deceased and it is to devolve on all the legal heirs according to the Law of Succession governing the parties. In the aforesaid case, the Hon'ble High Court of Kolkata was dealing with the death-cum-retirement benefit rules framed by the West Bengal Government. In that rule, the definition of family varies for the purpose of death gratuity and for the family pension. In that case, the deceased had nominated his nephew as a nominee and ruling on the role of a nominee, the Hon'ble Kolkata High Court had ruled that gratuity is not a bounty but a property of the deceased employee. It enures to the estate of the deceased. Therefore, when an employee dies, the gratuity must devolve on his legal heirs under the Law of Succession. The aforesaid case is distinguishable because the Hon'ble Kolkata High Court has only decided on the role of the nominee so far as the death-cum-retirement benefit of a deceased employee is concerned.

16. Learned counsel for the petitioners also relies on a decision of the Hon'ble Madhya Pradesh High Court in the case of **Smt. Oliya Begum (dead) Abdul Rauf v. Abdul Rashid** (Civil Revision No.386 of 2010 disposed of on 03.04.2012). In that case, one Abida Sultan, who was an employee of Madhya Pradesh Laghu Udyog Nigam Limited died. Three months before her death, her husband had given her divorce (Talaq). On the question of issuance of Succession Certificate by the competent court, Hon'ble Madhya Pradesh High Court held that the husband having given Talaq, the father and sisters of the deceased are entitled to the benefits according to the Mohammedan Personal Law. That case has also no application to the fact of the present case. Learned counsel for the petitioner relies on yet another case of Hon'ble Jammu & Kashmir High Court in the

case of **Abdul Gani Rasti and others v. Muneera Banoo and another**, ***AIR 2006 J K 87***. In the aforesaid case also, issuance of Succession Certificate was questioned before the Hon'ble High Court and the Hon'ble High Court remanded the matter to the Principal District Judge, Srinagar for a de novo trial, as if he is deciding an inter-pleader suit on the reference of the department concerned and further direction was issued to the Principal District Judge to decide the issue in accordance with the rules and regulations governing the matter. The aforesaid decision has, therefore, no application to the facts of the present case.

17. Learned counsel for the petitioners relies on the case of Smt. **Sarbati Devi and another v. Smt. Usha Devi**, ***AIR 1984 SC 346,*** to substantiate his contention. But the aforesaid case also relates to issue of entitlement of a nominee under the Insurance Act to receive the insured amount and it can be gainfully said that the insured amount under a Life Insurance is quite different from the death-cum-retirement benefit. So far as the death-cum-retirement benefit is concerned, it is no doubt a right to property recognized as a legal right under the Statute governing the field. Whoever is entitled to receive the death-cum-retirement benefit as a member of the family in the Statute governing the field, is to receive the same, if he is there. Article- 366 (17) has clearly defined pension and amount of pension, which includes gratuity, Provident Fund and other returns etc. cannot be termed as 'estate' for devolution according to the Personal Law governing the parties. In view of such position of law, I am constrained to hold that the death-cum-retirement benefit of the deceased Wasim Hossain Khan is not an estate of the deceased to be governed by the Personal Law applicable to the parties.

18. In view of such discussion, Question No.(iii) formulated (supra) is also answered accordingly and it is held that Mohammedan Personal Law is not applicable to the facts of the present case and the parties are to be governed by the Central Reserve Police Force Act, 1949, Central Reserve Police Force Rules, 1955 and the CCS Pension Rules, 1972.

19. In view of such position of law, the petitioners and Opp. Parties 5 to 8 are not entitled to any benefit or share from the death-cum-retirement benefit of deceased Wasim Hossain Khan. O.P. No.4 (widow of the deceased) is only entitled to such benefit, as she has the statutory and legal right to receive the benefits under the provisions of the Constitution and the CCS Pension Rules.

20. Before parting with the order, I am constrained to say that the petitioners being the old parents of the deceased, they had some hope to the effect that their deceased son shall look after them financially in their old age. Taking into consideration such facts, Ruksana Khatoon (O.P. No.4), if so advised by her morality, conscience and counsel, may part with 10 per centum of total death-cum-retirement benefit of the deceased Wasim Hossain Khan, received by her, in favour of the petitioners. I make it clear that, this is, however, not a direction, and the O.P. No.4 is bound by her conscience, morality and advice of the counsel to do so.

21. In view of the discussions (supra), Question No.(ii) formulated (supra) has no relevance, as the discussion thereon would be mere academic in nature.

22. The interim order dated 16.10.2014 passed in Misc. Case No.3276 of 2014 so far as the arrear and current family pension to be paid to Ruksana Khatoon (Opp. Party No.4) is concerned, is made absolute. Opp. Parties 1 & 2 are directed to release the death-cum-retirement benefit of the deceased Wasim Hossain Khan in favour of the Opp. Party No.4 within two months from the date of production of a certified copy of this Judgment.

23. The writ application is accordingly disposed of.

Writ petition disposed of.

2016 (I) ILR - CUT- 1146

C. R. DASH, J.

W.P.(C) NO. 27703 OF 2013

GOPAL CHANDRA SETHI .....Petitioner

.Vrs.

THE EXECUTIVE ENGINEER, BALASORE ELECTRICAL DIVISION & ORS. .....Opp. Parties

SERVICE LAW – Petitioner claimed 3rd ACP after completion of 30 years service as Clerk-B – Screening Committee constituted by the controlling department rejected his claim as he has not passed Departmental Accounts Examination and as such was not found fit for promotion to Clerk-A – Hence the writ petition – ACP is granted to

compensate an employee for stagnation in a particular post for a number of years – Passing of Departmental Accounts Examination may be a necessary condition for promotion which depends on availability of posts but passing of the said examination can not be considered to be a pre-condition for grant of ACP – If a person is otherwise found eligible and suitable for promotion for a blemishless service career to his credit, he is to be granted ACP by the Screening Committee, even if, he has not passed the Departmental Accounts Examination – Opposite Parties, in their Counter affidavit have not shown that the petitioner is otherwise disqualified for promotion except the fact that he has not passed the Department Accounts Examination – Held, the impugned decision of the Screening Committee is quashed – Direction issued to the opposite parties to disburse all the benefits of 3rd ACP to the petitioner. (Paras 9 to12)

For Petitioner : M/s. Gautam Mukherji, A.C.Panda, A.S.Biswal, S.D.Ray, R.Priyadarsini
For Opp. Parties : M/s. Ramanath Acharya, Basudev Barik, P.M.Rao.

Date of Judgment : 27.04.2016

JUDGMENT

C.R. DASH, J.

The petitioner in this writ application has claimed 3rd Assured Career Progression ('ACP' for short) on completion of 30 years of his service in the same grade.

2. The petitioner on completion of 35 years of service, retired on superannuation. He had made a representation for consideration of his case for grant of 3rd ACP. The Opp. Party- Company, however, vide Office Order No.6314, dated 24.04.2009 rejected the claim of the petitioner for 3rd ACP.

3. The petitioner joined in the erstwhile Orissa State Electricity Board ('OSEB' for short) as a Meter Reader/ Clerk-B on 21.04.1976. Subsequently, he continued in service under the NESCO. It is an admitted fact that, after completion of 15 years of service, the petitioner availed 1st ACP with effect from 21.04.1991. He also availed 2nd ACP on completion of 25 years of service w.e.f. 21.04.2001. In view of tripartite settlement of the Opp. Party-Company with different labour unions as per Annexure- 1, the petitioner was entitled to 3rd ACP on completion of 30 years of service. However, on completion of 30 years of service, petitioner was not granted 3rd ACP and,

vide decision of the Opp. Party- Company dated 24.04.2009, such benefit of 3rd ACP of the petitioner has been disallowed.

4. A counter affidavit has been filed on behalf of the Opp. Party-Company. Relying on Annexure- A/1 (Annexure- 1 to the writ petition) relating to the paragraph dealing with Assured Career Progression, it is averred in the counter affidavit that the benefit of 3rd ACP has to be given only after screening of each and every case by the Screening Committee to be constituted by the Controlling Departments, and all norms of promotion have to be taken into consideration for allowing ACP in different stages. It is further averred that, for promotion from Clerk-B to Clerk-A, passing of Departmental Accounts Examination is a necessary pre-condition, and the petitioner having not passed Departmental Accounts Examination and he having not been found suitable and fit for promotion to Clerk-A, no 3rd ACP has been allowed in his favour.

5. Mr. Mukherji, learned counsel for the petitioner has relied on the case of ***Aswin Kumar Das vs. The Executive Engineer, Balasore Electrical Division and another*** disposed of on 30.01.2013 to substantiate his contention that, in a similar case of the same Electrical Division of the NESCO, the Hon'ble Court relying on Clause-11 of the Office Order dated 15.03.1983 of the Orissa State Electricity Board regarding promotion to the higher post, has quashed the decision of the Opp. Party- Company for not granting 3rd ACP to the petitioner therein, and the present case is covered by the decision of this Court in the aforesaid case.

6. Mr. Acharya, learned counsel for the Opp. Parties submits that the petitioner having not passed the Departmental Accounts Examination, is not eligible for promotion to higher grade and, when he is not eligible for promotion to the higher grade, question of granting him 3rd ACP does not arise, as in each and every stage of the ACP, each and every case is to be scrutinized by the Scrutiny Committee to see that whether the conditions for promotion are fulfilled. Learned counsel for the Opp. Party- Company further submits that this Court in the case of Aswin Kumar Das (supra) has wrongly interpreted the law.

7. Decision of this Court in the case of **Aswin Kumar Das** (supra) has not been assailed before the Division Bench or in the Apex Court. It has become final. At this stage, it is misconceived to submit for the Opp. Party-Company that the law in the aforesaid decision has been wrongly interpreted. In the case of Aswin Kumar Das (supra), the petitioner therein joined as a

Meter Reader / Clerk-B under the erstwhile Orissa State Electricity Board on 26.05.1973 as a regular employee. After completion of 15 years of continuous service, he availed 1st ACP with effect from 26.05.1988 and on completion of 25 years of service in the said post, he availed 2nd ACP with effect from 26.05.1998. During the service tenure of the petitioner, there was change in management. At first, Gridco took over OSEB and thereafter NESCO was created. The petitioner Aswin Kumar Das retired from service on superannuation on 31.08.2008 while serving under the NESCO the Opp. Party-Company. In the year 2007, the Opp. Party-Company promoted the petitioner temporarily to the post of Clerk-A under the regular establishment. The petitioner however refused to take promotion, as he was getting higher scale of pay as Clerk-B. The petitioner Aswin Kumar Das had also not passed the Departmental Accounts Examination and his promotion to Clerk-A was temporary without prejudice to the claim of others subject to condition that the petitioner shall be reverted to his former post as soon as a qualified Accounts training passed Clerk-B is available for promotion, if in the meantime, the petitioner does not pass the Departmental Accounts Examination. The petitioner-Aswin Kumar Das however did not avail the promotion and preferred to continue as Clerk-B. On completion of 30 years of his service, he claimed 3rd ACP, which was refused, and in the writ application this Court, on interpretation of Paragraph- 12 of Annexure- 1 to the present writ application and Clause- 11 of the Office Order dated 15.03.1983 of the OSEB, quashed the decision of the Opp. Party-Company and directed the Opp. Parties to disburse the benefit of 3rd ACP to the petitioner with effect from 01.04.2005 with all subsequent Pensionary benefits.

8. So far as the present case is concerned, the only ground taken by the Opp. Party-Company in the counter affidavit is that the petitioner had not passed the Departmental Accounts Examination, which was a pre-condition for promotion to the next higher grade, i.e., Clerk-A.

9. Paragraph- 12 of Annexure- 1, which deals with Assured Career Progression reads as follows :-

"12. ***ASSURED CAREER PROGRESSION (ACP) :***

This will be applicable to all the Non-Executive Employees/Workers up-to Supervisory-B w.e.f. 01.04.2005 in three stages i.e. 1st ACP on completion of 15 years, 2nd ACP after 25 years and 3rd ACP after 30 years of service, if they continue in one post/grade. The benefit of ACP will be given

only after screening of each and every case by the Screening Committee to be constituted by the Controlling Departments and all norms of promotion shall be taken into consideration for allowing ACP in different stages. The financial benefit to the extent of 3% of the Basic Pay plus Grade Pay will be added on availing ACP in different stages and next increment will accrue one year after. If the Employee/Worker has already availed both 1st and 2nd stage of Time Bound Advancement (TBA) scale under the existing provisions, he/she will not be again entitled to the ACP in the revised pay. However, the 3rd ACP after completion of 30 years of service shall be applicable as stated above."

A cursory reading of the aforesaid paragraph makes it clear that, benefit of ACP has to be given only after screening of each and every case by the Screening Committee to be constituted by the Controlling Departments, and all norms of promotion shall have to be taken into consideration for allowing ACP in different stages. Grant of ACP is a different thing and promotion is a different thing. ACP is granted to compensate an employee for stagnation in a particular post for a number of years. Promotion is dependent on availability of posts and fulfillment of conditions and eligibility for promotion. Passing of Departmental Accounts Examination may be a necessary condition for promotion, which depends on availability of posts. But passing of Departmental Accounts Examination cannot be considered to be a pre-condition for grant of ACP. The Screening Committee has to see only suitability of the person to be promoted otherwise irrespective of the facts whether he has passed Departmental Accounts Examination or not. If a person is otherwise eligible for promotion for a blemishless service career to his credit, he is to be granted 3rd ACP, no matters whether he has passed Departmental Accounts Examination. There is nothing in the counter affidavit to show that the petitioner is disqualified for promotion otherwise. The only ground taken in the counter affidavit to disallow 3rd ACP is that, he has not passed Departmental Accounts Examination. Such a ground in view of my discussions supra is not sustainable in the eye of law.

10. Annexure-1 to the writ petition became operative with effect from 01.04.2005. The 3rd ACP was due to the petitioner on completion of 30 years of service on 21.04.2006. Petitioner's case is covered by Annexure-1, as he retired after 01.04.2005 and his 3rd ACP became also due after 01.04.2005.

11. This Court in the case of Aswin Kumar Das (supra) has taken a correct view of the matter and has allowed the benefit of 3rd ACP to the

petitioner therein. The present case is squarely covered by the decision of this Court in the case of **Aswin Kumar Das** (supra).

12. In view of the above reasons, this Court, while quashing the decision of the Screening Committee vide Office Order No.6314, dated 24.04.2009, directs the Opp. Parties to disburse all the benefits of 3rd ACP and subsequent pensionary benefits to the petitioner with effect from 21.04.2006 within a period of three months from the date of receipt of a certified copy of this Judgment.

13. The writ application is accordingly allowed.

Writ petition allowed.

2016 (I) ILR - CUT- 1151

DR. A.K. RATH, J.

W.P.(C) NO. 8434 OF 2007

SANKAR PRADHAN ……..Petitioner

.Vrs.

PREMANANDA PRADHAN (DEAD) & ORS. ……Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-41, R-27(1)(b)

Additional evidence – Documents entrusted to the advocate could not be produced before the trial Court being misplaced in his office – Those documents could be traced during pendency of the appeal – Application to admit additional evidence – Application rejected – Hence the writ petition – Section 107 (1)(d) C.P.C enables the appellate Court to admit additional evidence, whereas Order 41 Rule 27. C.P.C furnishes grounds on which additional evidence may be taken – The above ground being genuine the lower appellate Court failed to exercise its discretionary power in a judicious manner – Held, the impugned order is quashed – Direction issued to the appellate Court to Consider the application at the time of hearing the appeal.

(Paras 6 to 9)

Case Laws Referred to :-

1. AIR 1931 Privy Council 143 : Persotim Thakur -V- Lal Mohar Thakur & Ors.
2. AIR 1962 Orissa 9 : Banchhanidhi Behera -V- Ananta Upadhaya & Ors.

3. 53 (1982) CLT 552 : State Bank of India -V- M/s. Ashok Stores & Ors.

For Petitioner : Mr. Alok Kumar Mohanty
For Opp. Parties : None

Date of Hearing :19.08. 2015
Date of Judgment : 26.08.2015

JUDGMENT

DR. A.K.RATH, J.

Aggrieved by and dissatisfied with the order dated 9.5.2001 passed by the learned Civil Judge (Sr.Division), Athagarh in Title Appeal No.6 of 1996, the petitioner has filed this petition under Article 227 of the Constitution of India. By the said order, the learned appellate court dismissed the application filed by the petitioner under Order 41 Rule 27 (1)(b) of C.P.C. to adduce additional evidence.

2. The petitioner as plaintiff filed a suit, for declaration of right, title and interest claming to be the adopted son of late Baja Pradhan, confirmation of possession in the alternative for recovery of possession and for permanent injunction against the defendants restraining them not to interfere with the peaceful possession of the suit property, in the Court of the learned Civil Judge (Jr.Division), Athagarh, which was registered as T.S.No.3 of 1994. Pursuant to issuance of summons, defendants 1 to 6, 8 and 9 filed their written statement denying the assertions made in the plaint. The said suit was dismissed. Challenging the judgment and decree passed in the suit, the petitioner filed an appeal before the learned Civil Judge (Sr.Division), Athgrah, which is registered as Title Appeal No.6 of 1996. An application under Order 41 Rule 27(1)(b) of C.P.C. was filed for acceptance of certain documents, such as, transfer certificate of the plaintiff from Kakhadi M.E. School of the year 1994, loan pass book of Mancheswar Service Co-operative Society, demand notice of Kakhadi Society for different years, voter lists for the year 1970, 1988, 1993 and 1995 and certified copies of the order sheets of the Mutation Case Nos.1, 2 and 3 of the year 1994 as additional evidence.

3. The case of the petitioner is that he had entrusted his advocate with the several documents, but those documents were misplaced and, as such, they were not produced in the trial court. During pendency of the appeal, his advocate was able to trace out the said documents. An objection to the said petition was filed by the opposite parties. The learned lower appellate court

came to hold that while answering the issue no.6 the learned trial court scrutinized the records of rights and held that the mutation case was filed after institution of the suit, entries made in the primary school register were taken note of and in the school admission register, the petitioner is described as the son of Kunja Rout and not the son of late Baja Pradhan. Further, the other documents, as referred in the petition, are not required for better appreciation of the memorandum of appeal. Having held so, the learned lower appellate court rejected the petition.

4. Heard Mr.A.Mohanty, learned counsel for the petitioner. None appears for the opposite parties.

5. Order 41 Rule 27 of C.P.C. deals with production of additional evidence in the appellant court. Sub Rule 1 of Rule 27 of Order 41, which is the hub of the issue, is quoted hereunder:-

> "**27. Production of additional evidence in Appellate Court**.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documental, in the Appellate Court. But if-
>
> (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
>
> (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or
>
> (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,
>
> The Appellate Court may allow such evidence or document to be produced, or witness to be examined."

6. Section 107 (1) (d) C.P.C. enables the appellate court to admit additional evidence, whereas Order 41 Rule 27 C.P.C. furnishes grounds on which additional evidence may be taken. It confers discretionary power on the appellate court to allow additional evidence in appeal. The said power is circumscribed by limitations prescribed in Clauses (a), (aa) or (b) of Rule 27(1) of C.P.C.

7. In ***Persotim Thakur Vrs. Lal Mohar Thakur and others,*** AIR 1931 Privy Council 143, it is held that under Cl.(1) (b) of Rule 27 it is only where

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

8. Keeping in view the enunciation of law laid down by the Privy Council in Persotim Thakur (supra), this Court has examined the case. Hearing of the appeal has not yet commenced. The appellate court is yet to examine the pleadings of the parties and evidence of both oral as well as documentary to adjudge the requirement of provisions of clause (b). Application for adducing additional evidence can only be considered at the time of hearing of the appeal. The learned lower appellate court has not exercised its discretionary power in a judicial manner.

9. In view of the same, the order dated 9.5.2001 passed by the learned Civil Judge (Sr.Division), Athagarh in Title Appeal No.6 of 1996 is quashed. The appellate court is directed to consider the application of the petitioner for adducing the additional evidence at the time of hearing of the appeal. The appellate court is further directed to conclude the hearing of the appeal within three months. The petition is allowed.

Writ petition allowed.

2016 (I) ILR - CUT- 1155

DR. A.K. RATH, J.

W.P.(C) NO. 760 OF 2005

SANKARSAN MOHAPATRA (DEAD) .....Petitioner

.Vrs.

SMT. SAILABALA MISHRA .....Opp. Party

CIVIL PROCEDURE CODE, 1908 – O-3, R-1 & 2

Whether a power of attorney holder in exercise of power granted by the instrument can depose for the principal for the acts done by the principal ? Held, No – If the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he can not depose for the principal for the acts done by the principal. (Paras 7, 8)

Case Laws Referred to :-

1. AIR 2005 SC 439 : Janki Vashdeo Bhojwani & Anr. -V- Indusind Bank Ltd. & Ors.

For Petitioner : Mr. S.S.Mohanty, Adv. for
Mr. S.K.Padhi, Sr. Advocate

For Opp. Party : None

Date of Hearing : 01.9.2015
Date of Judgment : 04.9.2015

JUDGMENT

DR.A.K.RATH, J.

The instant petition under Article 227 of the Constitution of India is to laciniate the order dated 4.4.2003 passed by the learned Civil Judge (Junior Division), Boudh in Title Suit No.7 of 1999, whereby and whereunder, the learned court below accepted the special power of attorney executed by the defendant in favour of the husband to prosecute the suit.

2. The petitioner as plaintiff has filed a suit for declaration of right, title and interest and for conformation of possession in the court of the learned Civil Judge (Junior Division), Boudh, which is registered as Title Suit No.7 of 1999. During pendency of the said suit, the defendant-opposite party filed a special power-of-attorney executed by her in favour of the husband to adduce evidence. She filed a petition in the court below to accept the same and allow her husband to adduce evidence on her behalf, since she is sick and unable to attend the court. The petitioner objected to the same.

3. By order dated 4.4.2003, the trial court accepted the power of attorney and held that the power of attorney holder can look after the case and adduce evidence on behalf of the party. The petitioner has unsuccessfully challenged the same before the learned Additional District Judge, Boudh in Civil Revision No.1 of 2003. The learned Additional District Judge, Boudh dismissed the revision holding that the revision is not maintainable.

4. Heard Mr.S.S.Mohanty, learned Advocate on behalf of Mr.S.K.Padhi, learned Sr.Advocate for the petitioner. None appears for the opposite party in spite of valid service of notice.

5. Rules 1 and 2 of Order III CPC, which are hub of the issues, are quoted hereunder:-

Order-III

"1. Appearances, etc., may be in person, by recognized agent or by pleader.- Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader [appearing, applying or acting, as the case may be,] on his behalf :

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

2. Recognized agents.- The recognized agents of parties by whom such appearances, applications and acts may be made of done are-

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agents is expressly authorized to make and do such appearances, applications and acts."

6. The question does arise as to whether a power of attorney holder in exercise of power granted by the instrument can depose for the principal for the acts done by the principal ?

7. The subject of dispute is no more res integra. The apex Court in the case of ***Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others,*** AIR 2005 SC 439, in paragraph-13 held as follows:-

> "13. Order III, Rules 1 and 2, CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2, CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined." (emphasis laid).

8. In view of the authoritative pronouncement of the apex Court in the case of Janki Vashdeo Bhojwani (supra), the learned trial court fell into patent error of law in holding that the power of attorney holder can adduce evidence on behalf of the party. But then the power of attorney holder may depose for the principal in respect of such acts, if he has done some acts pursuant to power of attorney.

9. In the wake of the aforesaid, the order dated 4.4.2003 passed by the learned Civil Judge (Jr. Division), Boudh in Title Suit No.7 of 1999 is quashed. Accordingly, the petition is allowed. There shall be no order as to costs.

Writ petition allowed.

2016 (I) ILR - CUT- 1158

DR. A.K. RATH, J.

O.J.C. NO. 11431 OF 2000

NRUSINGHA @ NARASINGHA PANDA .....Petitioner

.Vrs.

SRI NATH PALKA & ORS. .....Opp. Parties

ODISHA SCHEDULED AREAS TRANSFER OF IMMOVABLE PROPERTY (BY SCHEDULED TRIBES) RULES, 1959 – RULE 7(4)

Competent authority granted permission under Regulation 2 of 1956 to O.P.No. 1 (a member of Scheduled Tribe) to transfer his land in favour of the Petitioner – Order set aside by the Collector being illegal due to non-compliance of Rule 7 (4) of the Rules – Hence the writ petition – Permission was granted by the competent authority without serving public notice on the village on which the land in question situated, inviting objections within a period of 15 days from the date of service of notice as required under Sub-Rule (4) of Rule 7 of the Rules 1959, which is mandatory in nature – So permission having been granted without mentioning the purpose and before completion of fifteen days, i.e., in undue haste has suffered from the vice of arbitrariness – Held, there being no illegality or perversity in the impugned order, this Court is not inclined to interfere with the same.

(Paras 5 to12)

For Petitioner : Mr. Budhiram Das
For O.P.1 : None
For O.P. 2 & 3 : Mr. B.P.Tripathy, A.G.A.

Date of hearing : 11.03.2016
Date of judgment: 22.03.2016

JUDGMENT

DR. A.K.RATH, J

This writ application challenges the order dated 11.3.1999 passed by the Collector, Rayagada, opposite party no.3, in OSATIP Review Case No.115 of 1998 whereby and whereunder opposite party no.3 set aside the order dated 27.4.1994 of the competent authority passed in OSATIP Case No.41 of 1994 granting permission in favour of the opposite party no.1 to alienate the land as null and void and directed the Sub-Collector, Gunupur to restore the case land in favour of the opposite party no.1.

2. Shorn of unnecessary details, the short facts of the case are that the land measuring an area of Ac.1.00 dec. appertaining to Khata No.4/9, Plot No.4/105 of Mouza-Badapendrakhal originally belongs to opposite party no.1 along with others. Opposite party no.1 belongs to Scheduled Tribe community. To press his legal necessity, he intended to sale the land to the petitioner and applied to the competent authority under the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulations, 1956 (Regulation 2 of 1956), which was registered as OSATIP Case No.41 of 1994. The competent authority accorded permission. Thereafter, opposite party no.1 transferred the land to the petitioner by means of registered sale deed dated 27.4.1994. After sale, the petitioner mutated the land in his favour. He used to pay rent to the Government. While the matter stood thus, the Collector, Rayagada, opposite party no.3, initiated review case bearing OSATIP Review Case No.115 of 1998 under Section 3A(1) of Regulation 2 of 1956. By order dated 11.3.1999, opposite party no.3 set aside the order dated 27.4.1994 of the competent authority passed in OSATIP Case No.41 of 1994 granting permission in favour of the opposite party no.1 to alienate the land and directed the Sub-Collector, Gunupur to restore the case land in favour of the opposite party no.1. With this factual scenario, this writ application has been filed.

3. Heard Mr. Budhiram Das, learned counsel for the petitioner and Mr. B.P. Tripathy, learned Addl. Government Advocate for the State. None appears for the opposite party no.1.

4. Mr. Das, learned counsel for the petitioner, submitted that the opposite party no.1 was the owner of the land in question. To press his legal necessity, he intended to alienate the land in favour of the petitioner. Thereafter, he applied for permission to the competent authority for alienation of the land. After permission was accorded, he sold the land to the petitioner by means of registered sale deed dated 27.4.1994 for a valid consideration. Thereafter, the petitioner filed an application for mutation. The competent authority after causing enquiry recorded the land in his favour. The petitioner used to pay rent to the Government. In the OSATIP Review Case, no opportunity of hearing was provided to the petitioner to cross-examine the opposite party no.1. The finding of the Collector, Rayagada, opposite party no.3, that the petitioner as a landless person is perverse inasmuch as the opposite party no.1 is the owner of six acres of land.

5. Pursuant to issuance of notice, a counter affidavit has been filed by the opposite parties 2 and 3. It is stated that the petitioner is a non-Scheduled Tribe person. He had purchased the land of Ac.1.00 vide Plot No.4/105 under Khata No.4/9 in Mouza-Badapendrakhal in Bisam Cuttack Tahasil from opposite party no.1 who belongs to Scheduled Tribe community. Opposite party no.1 filed an application before the Tahasildar, Bissam Cuttack, opposite party no.2, seeking permission to sale the land to the petitioner. Opposite party no.2 without resorting to the legal procedure prescribed under Regulation 2 of 1956 granted permission. During the year 1991-92 to 1995-1996, a large extent of land belonging to the SC/ST had been alienated in a clandestine manner which became a sensitive issue in the tahasil of Bissam Cuttack. Consequently, the R.D.C., Southern Division, Berhampur caused an enquiry in the matter and submitted his report to the Government in the Revenue Department. The report unravelled the serious commission/omission and involvement of the authorities in Bissam Cuttack tahasil for which necessary proposal was made by the Government, whereafter necessary amended provision was introduced in Regulation 2 of 1956. As per the amended provisions embodied in Section 3(3-A)(i) of Regulation 2 of 1956, the Collector has been empowered to review the permission granted by the concerned Tahasildar after causing necessary enquiry. It is further stated that the notice had been issued to the vendor and vendee. Their statements were recorded in the proceeding. The petitioner had been provided ample opportunity to cross-examine the opposite party no.1, but he neither availed such opportunity nor cross-examined the opposite party no.1. In the process of enquiry, it was revealed that serious illegalities were committed by the competent authority in issuing necessary permission in OSATIP Case No.41 of 1994. It is further stated that the opposite party no.1 belongs to Scheduled Tribe community and applied for permission under Section 3(i) of Regulation 2 of 1956 on 13.4.1994 to sell the land of Ac.1.00 to the petitioner who is a non-S.T person. The R.I reported that the opposite party no.1 applied seeking permission to sell the land to meet the marriage expenses of his son. On the other hand, the concerned authorities vide order dated 27.4.1994 while granting permission did not discuss the exact purpose for which the permission was granted. It is further stated that the sale transaction had been made hastily on the very day when permission was accorded, which indicates that the petitioner was working in tandem with the competent authority who granted permission surreptitiously without following the due procedure of law. It is further stated that though the then Tahasildar invited objection which was published on 14.4.1994, the permission was granted on 27.4.1994

i.e. before completion of one month time stipulated for receiving objection. Further, though the report of the R.I indicates that the opposite party no.1 was having two acres of land, but after disposal of the said one acre of land, opposite party no.1 is now found to be a landless person.

6. Admittedly the permission was accorded before completion of 15 days of notice. The question does arise as to whether the same is a valid permission ?

7. Sub-Rule (4) of Rule 7 of the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Rules 1959 (hereinafter referred to as "Rules, 1959") provides the manner of conducting enquiry by the Sub-Collector. The same is quoted below:

> "**7. Manner of conducting Enquiry by the Sub-Collector**
>
> xxx xxx xxx
>
> (4) The Sub-Collector may also serve a public notice on the village in which the land is situated, inviting their comments and views, if any, on the information within a period of 15 days from the date of service of notice. The notice shall be served in the manner prescribed in the Code of Civil Procedure."

8. Rules, 1959 prescribe for issuance of notice inviting objections. The provision is mandatory in nature. The same has been blissfully overlooked by the competent authority while granting permission to the opposite party no.1 to alienate the land. Opposite party no.1 belongs to Scheduled Tribe community. Regulation 2 of 1956 has been enacted to control and check transfer of immovable property in the schedule areas of the State of Orissa by Schedule Tribes. One acre of land was sold for a paltry amount of Rs.12,000/-.

9. On a conspectus of the order of the opposite party no.3, it transpires that the competent authority has granted permission without mentioning the purpose for which the land was to be sold. Opposite party no.1 was having two acres of land after alienation of one acre of land in favour of the petitioner. Notice was issued by the competent authority on 14.4.1994 inviting objection. The permission was accorded on 27.4.1994, i.e., before completion of fifteen days of time. On the same day, the sale deed was executed. Opposite party no.3 came to the conclusion that the competent authority has not examined the case in its proper perspective and granted permission.

10. The Supreme Court in Zenit Mataplast Private Ltd. V. State of Maharashtra & others, (2009) 10 SCC 388 held that anything done in undue haste can also be termed as arbitrary and cannot be condoned in law. The action/order of the State or its instrumentality would stand vitiated, if it lacks bona fide as it would only be case of colourable exercise of power.

11. In view of the discussions made in the preceding paragraphs, a conclusion is irresistible that the order of the competent authority in according permission to opposite party no.1 to alienate the land suffers from the vice of arbitrariness.

12. There being no illegality or perversity in the impugned order, this Court is not inclined to interfere with the same. Accordingly, the petition is dismissed. No costs.

Writ petition dismissed.

2016 (I) ILR - CUT- 1162

DR. A.K.RATH, J.

W.P.(C) NO. 5022 OF 2013

RITANJALI GIRI @ PAUL .....Petitioner

.Vrs.

STATE OF ODISHA (SCHOOL & M.E. DEPTT.) & ORS. .....Opp. Parties

SERVICE LAW – Rehabilitation Assistance Scheme – Whether the benefit of the Scheme applies to the family members of an aided educational institution which is receiving Block Grant ? Held, yes.

(Paras 6 to 9)

For Petitioner : Mr. Gopinath Sethi
For Opp. Parties : Mr. Mrityunjay Bisoi
(Standing Counsel School & ME Dept.)

Date of Hearing : 04.05.2016
Date of Judgment : 11.05.2016

JUDGMENT

DR. A.K. RATH, J.

This petition challenges the order dated 13.07.2012 passed by the District Education Officer, Balasore, opposite party no.4, whereby and whereunder the claim of the petitioner for appointment under the Rehabilitation Assistance Scheme was rejected.

2. The short facts of the case are that Manoj Kumar Paul, husband of the petitioner, was appointed as an Assistant Teacher on 01.01.2008 in Krushna Bhanu High School (hereinafter referred as "School"). He joined in the said post on 02.01.2008. He discharged his duty with the utmost satisfaction of the authorities. His post was duly approved by the Circle Inspector of Schools, Balasore Circle, Balasore. He received grant-in-aid (Block Grant) w.e.f.01.04.2008. While the matter stood thus, he passed away from the mortal world. After his untimely death, his family members received a serious setback, since he was the sole bread-earner of his family. Thereafter, the petitioner filed an application on 25.06.2012 before the opposite party no.4 for being appointed under the Rehabilitation Assistance Scheme (hereinafter referred as "Scheme"). By order dated 13.07.2012, the opposite party no.4 rejected the application of the petitioner holding inter alia that the Scheme is not available with the legal heirs of teachers/employees of Block Grant High Schools.

3. Pursuant to issuance of notice, counter affidavit has been filed by the opposite party no.4. It is stated that the School in question is a Block Grant High School. The petitioner is not entitled for appointment under Rehabilitation Assistance Rule, 1990. The service condition of the employee of Block Grant High School has not been finalized by the Government. It is further stated that the Finance Department in its letter dated 02.02.2000 imposed restriction of filling up the vacancies in the aided educational institutions for which the benefits of the Scheme was not extended to the member of the families of the employees of fully aided educational institutions. Recently, the Finance Department have agreed to fill up the base level vacancies in the educational institutions by extending the Scheme in fit cases by Resolution dated 26.04.2011. Thereafter, the Government of Orissa in School and Mass Education Department have issued clarification on

21.06.2011 stating therein that all pending applications under the Scheme of aided educational institutions (Fully Aided under direct control of Government due to death of invalid on or after 24.09.1990) shall be scrutinized by the existing screening committee for consideration of appointment under the Scheme. The School where the husband of the petitioner was serving does not come within the meaning of fully aided educational institutions.

4. Heard Mr. G. Sethi, learned counsel for the petitioner and Mr. M. Bisoi, learned Standing Counsel for the School and Mass Education Department.

5. In course of hearing, Mr. Bisoi, learned Standing Counsel for the School and Mass Education Department produced the Scheme issued by the Government of Orissa in G.A. Department on 14.10.1998. On a cursory perusal of the said Scheme, it is evident that the Government of Orissa have decided that the benefit of the Scheme shall be extended to the family members of non-Government Primary School Teachers, Teaching and non-Teaching staff of aided educational institutions under the Education Department, the work charged employees of the State Government and the employees of the Public Sector Undertakings under the State Government. It further postulates that the provision laid down in the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 as amended from time to time shall *mutatis mutandis* be applicable to the families of the employees of the above categories w.e.f.24.09.1990.

6. The sole question that hinges for consideration is as to whether the benefit of the Scheme applies to the family members of an aided educational institution, which is receiving Block Grant ?

7. Section 3(b) of the Orissa Education Act, 1969 defines the Aided Educational Institutions, which is quoted hereunder:

> "**3(b) Aided Educational Institutions** means private educational institution which is eligible to, and is receiving grant-in-aid from the State Government, and includes an educational institution which has been notified by the State Government to receive grant-in-aid."

8. On a bare perusal of the aforesaid provision, it is abundantly clear that private educational institution which is eligible to, and is receiving grant-in-aid from the State Government, and includes an educational institution which has been notified by the State Government to receive grant-in-aid is an aided

educational institution. The Act does not make any distinction between the full Grant School or Block Grant School. Moreover, the private educational institution which has been notified by the State Government to receive grant-in-aid is also an aided educational institution.

9. The application of the petitioner was rejected by the opposite party no.4 on untenable and unsupportable ground. In view of the above discussion, this Court has no option but to quash the order dated 13.07.2012 passed by the District Education Officer, Balasore, opposite party no.4. The matter is remitted back to the opposite party no.4. The opposite party no.4 is directed to consider the application of the petitioner within a period of three months from the date of production of a certified copy of this order. The writ petition is allowed. No costs.

Writ petition allowed.

2016 (I) ILR - CUT-1165

DR. B.R. SARANGI, J.

W.P.(C) NO. 2686 OF 2015

SANJAY KUMAR DAS & ORS. ……..Petitioners

.Vrs.

STATE OF ORISSA & ORS. ……Opp. Parties

ODISHA LAW OFFICERS (AMENDMENT) RULES, 2012

Revision of retainer fees/daily fees of Government Pleaders, Public Prosecutors, Special Public Prosecutors w.e.f. 01.09.2012 – Petitioners work as Special / Asst. Public Prosecutors (Vigilance) in different Courts in the State are deprived of the above revision – While considering their representation Government vide Order Dt. 30.12.2014 enhanced their fees prospectively w.e.f. 21.10.2014 but not w.e.f. 01.09.2012 – Hence the writ petition – Since the petitioners discharge similar nature of work like their counter parts, the action of the Government in not extending the revised fees to the petitioners w.e.f. 01.09.2012 amounts to discrimination and violative of Article 14 of the Constitution of India – Moreover the impugned order does not contain any reason as to why the revision of fees shall not be extended to the petitioners retrospectively except the fact that Finance Department has agreed for revision of fees prospectively – Government can not restrict

operation of statutory rules by executive instruction – Held, impugned order Dt. 30.12.2014 is quashed – The petitioners are entitled to revised fees at par with their counter parts from the date of Odisha Law Officers (Amendment) Rules 2012 came into force, i.e. 01.09.2012 instead of 21.10.2014. (Paras 22, 23)

Case Laws Referred to :-

1. AIR 2010 Orissa 79 : Dr. Ipsita Mishra & Ors v. state of Orissa & Ors.
2. AIR 2013 SC 1226 : Rajasthan State Industrial Development and Investment Corporation v. Subhash Sindhi co-operative Housing Society Jaipur & Ors.
3. (2003) 1 SCC 506 : AIR 2003 SC 269 : Subhash Ramkumar Bind v. State of Maharashtra.
4. AIR 1991 SC 772 : State of Madhya Pradesh v. G.S. Dal Flour Mill
5. (1994) 1 SCC 359 : Palghat Zilla Thandan Sam,udhaya Samrakshna Samiti v. State of Kerala,
6. AIR 1952 SC 123 : Kathi Raning Rawat v. State of Saurashtra.
7. AIR 1990 SC 820 : Video Electronics Pvt. Ltd v. State of Punjab.
8. AIR 2011 SC 1989: Narmada Bachao Andolan (III) v. State of Madhya Pradesh.
9. (2000) 4 SCC 221 : Gayatri Devi Pansari v. State of Orissa
10. (2005) 2 SCC 575: Southern Agrifurane Industries Ltd v. Commercial Tax Officer & Ors.
11. (2009) 12 SCC 735 : Collector of Customs (Preventive) v. Malwa Industries Ltd.
12. (1998) 7 SCC 81 : State of Maharastra v. Vijay Vasantrao Deshpande
13. AIR 1978 SC 851 : Mohinder Singh Gill and another v. The chief Election Commissioner, New Delhi & Ors.
14. (2008) 4 SCC 144 : Bhikhubhai Vithlabhai Patel and others v. State of Gujarat & Anr.

For Petitioners : M/s. Dr. A.K.Mohapatra (Sr. Advocate) A.K.Mohapatra, B.Panda, S.P.Mangaraj, T.Dash, A.K.Barik, S.Nath & S.K.Barik

For Opp. Parties : Mr. B.Senapati, Addl. Govt.Adv. Mr. S.Das, Sr. Standing Counsel

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Date of hearing : 22.02.2016
Date of judgment : 03.03.2016

JUDGMENT

DR. B.R.SARANGI, J.

The petitioners, who are working as Special Public Prosecutors/Addl. Special Public Prosecutors/Assistant Public Prosecutors (Vigilance) in different courts in the State of Odisha have filed this application to quash the order dated 30.12.2014 issued by the Government of Orissa, Law Department revising the fees prospectively with effect from 21.10.2014 and not retrospectively with effect from 01.09.2012 as has been extended to other Public Prosecutors of the State pursuant to amendment made to the Orissa Law Officers Rules 1971 with effect from 01.09.2012 by virtue of Orissa Law Officers (Amendment) Rules 2012 vide notification dated 31.08.2012 under Annexure-1.

2. The factual matrix of the case in hand is that the petitioners are the Law Officers of the State of Orissa discharging their duties in the capacity of Special Public Prosecutors/Addl. Special Public Prosecutors/Assistant Public Prosecutors (Vigilance) in different courts assigned to them. Their engagements are regulated by the Orissa Law Officers Rules 1971 and the same was amended by virtue of Orissa Law Officers (Amendment) Rules 2012 notified on 31.08.2012 which came into force on 01.09.2012. The Government of Orissa made a revision of retainer fees and daily fees of the Government Pleaders, Public Prosecutors, Special Public Prosecutors whereas the petitioners, who have been engaged in different Vigilance Courts in the State have been deprived of getting the benefit of revised fees from that date. Therefore, they represented to the authority claiming the equal treatment with that of the Government Pleaders, Public Prosecutors and Special Public Prosecutors and also revision of fees with effect from 01.09.2012 pursuant to notification issued under annexure-1 dated 31.08.2012 by virtue of Orissa Law Officers (Amendment) Rules, 2012.

The representation so filed was duly forwarded to the Law Department on 03.04.2013. Since there was delay in consideration of such grievance, the petitioners filed another representation to the Director-cum-Additional D.G. Police (Vigilance) on 31.01.2014 with a request for taking necessary steps for enhancement of their fees w.e.f. 01.09.2012 at par with their counterparts Government Pleaders, Special Public Prosecutors, Public Prosecutors, Addl. Special Public Prosecutors etc. On consideration of the same, the Government of Orissa, Law Department by order dated 21.10.2014 vide Annexure-5 passed the order in concurrence with the Finance Department vide UOR No.126/GS-II dated 28.04.2014 to revise the fees of Special Public Prosecutors/Addl. Special Public Prosecutors/Asst. Public Prosecutors of Vigilance Department with prospective effect from

21.10.2014. Accordingly, the petitioners have been extended the revised fee structure with effect from 21.10.2014. The petitioners being aggrieved by the said order again made representation to the Director Vigilance-cum-special Secretary to Government G.A. (Vigilance) Department, Orissa objecting to the extention of revision of fees prospectively with effect from 21.10.2014.

It is stated that when the similarly situated persons have been extended the benefit from 01.09.2012, there is no valid and justifiable reason to extend the said benefit to the petitioners with effect from 21.10.2014. The Government of Orissa, Law Department passed the order on 30.12.2014 in Annexure-7 reiterating the facts that there is no justification to revise the fees of Special Public Prosecutors/Addl. Special Public Prosecutors/Asst. Public Prosecutors (vigilance) retrospectively as Finance Department has agreed for revision of fees with prospective effect. Hence this case.

3. Dr. A.K. Mohapatra, learned Senior Counsel appearing for the petitioners strenuously urged that in view of the definition of 'Public Prosecutor' mentioned in Rule-3(a) of the Orissa Law Officers Rules, 1971 read with pre-amended Section-492 of Cr.P.C. 1898 now under the amended Section 24 of the Cr.P.C. 1973 if the benefit of revision of fees have been extended to the Government Pleaders/Public Prosecutors/Additional Special Public Prosecutors/Asst. Public Prosecutors with effect from 01.09.2012, there is no valid justifiable reason for not extending such benefit to the petitioners from the date the same has been extended to their counterparts i.e. from 01.09.2012. Admittedly, the Government has extended the benefits to the petitioners with effect from 21.10.2014. Vide Annexure-7 dated 30.12.2014 while considering the claim of the petitioners, the Government of Orissa, Law Department has not assigned any reason why the petitioners shall not be extended the benefits from the date their counterparts have been extended such benefit i.e.01.09.2012, but only indicated that Finance Department has agreed for revision of fees with prospective effect. Shri Mohapatra has contended that non-ascribing any reason for not extending the benefits retrospectively with effect from 01.09.2012 is violative of Article 14 and 16 of the Constitution of India. It is further urged that by such action of the authority equals have been treated as unequals which is not permissible under the law. To substantiate his contentions he has relied upon ***Dr. Ipsita Mishra & Ors v. state of Orissa & Ors***, AIR 2010 Orissa 79 and ***Rajasthan State Industrial Development and Investment Corporation v. Subhash Sindhi co-operative Housing Society Jaipur & Ors***, AIR 2013 SC 1226.

4. Mr. B. Senapati, learned Additional Government Advocate relying upon the counter affidavit filed by opposite parties submitted that Special Public Prosecutors/Addl. Special Public Prosecutors of G.A. (Vigilance) Department are getting daily fees of Rs.1,000/- whereas Public Prosecutors and Addl. Public Prosecutors are getting daily fees of Rs.800/-. Therefore, the Special Public Prosecutors/Addl. Public Prosecutors/Asst. Public Prosecutors of G.A. (Vigilance) Department are standing on a higher pedestal than that of other Law Officers. It is further urged that the petitioners are covered under Section 24 of Cr.P.C. and the petitioners having received higher fees they cannot be equated with that of the Law Officers mentioned in Orissa Law Officers Rules 1971. Therefore, the order under Annexure-5 dated 21.10.2014 issued by the Government of Orissa, Law Department enhancing the Retainer Fees/Daily Fees of the petitioners with prospective effect pursuant to Annexure-7 dated 30.12.2014 is justified.

5. Mr. S. Das, learned counsel for the Vigilance Department submitted that the petitioners are discharging their duties and responsibilities assigned to them. Since the Special Public Prosecutors, Additional Special Public Prosecutors and Asst. Public Prosecutors under the Vigilance Department are the Law Officers of the State and their engagement is under the Orissa Law Officers Rules 1971, their claim for extension of benefits at par with their counterparts by way of revision has already been recommended by this Department to the Government for consideration.

6. On the basis of the facts pleaded above, it is to be considered

(i) whether the petitioners, who are discharging their duties as Special Public Prosecutors/Addl. Special Public Prosecutors/Public Prosecutors/Asst. Public Prosecutors of G.A. (Vigilance) Department can be treated at par with their counter parts with the State Government Public Prosecutors/Addl. Public Prosecutors/Special Public Prosecutors as defined under Section 24 of the Cr.P.C. read with provisions contained in Orissa Law Officers Rules 1971 and amended from time to time.

(ii) whether the revised fee structure applicable to the counterparts pursuant to Orissa Law Officers Amendment Rules 2012 giving effect from 01.09.2012 is admissible to them or not.

7. The Orissa Law Officers' Amendment Rules 1971 under Rule-3(a) define "Public Prosecutor" to mean as follows:

"3(a). Public Prosecutor-"Public Prosecutor" means any person appointed under Sub-section (1) of Section 492 of the Code of Criminal Procedure, 1898 (Act 5 of 1898)".

The mentioned made about Sub-section-1 of Section 492 of Cr.P.C., 1898 after amendment of Cr.P.C. 1973, the same has been incorporated as Section-24 of the Act. Section 24 of Cr.P.C. 1973 reads as follows:

"24. Public Prosecutors-(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district, or local area.

(3)For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under subsection (4).

(6) Notwithstanding anything contained in Sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

> Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under Sub-section(4)".

8. Admittedly, the petitioners are Public Prosecutors/Addl. Public Prosecutors/Special Public Prosecutors/Asst. Public Prosecutors engaged by the Home Department of the Government of Orissa and their duties are assigned accordingly. To eradicate corruption, a special department was constituted which is known as Vigilance Department and the petitioners are being engaged for effective adjudication of the Vigilance cases instituted by the Government of Orissa. But, the fact remains that they are discharging their duties and responsibilities of the Special Public Prosecutors, Addl. Special Public Prosecutors, Asst. Public Prosecutors at par with their counterparts in the State Government who have been engaged to conduct the criminal cases before the various courts of the State. Once the nature of work is same and similar, save and except to expedite the vigilance cases and to cause immediate attention it cannot be said that their works are different from that of their counterparts engaged by the State Government. There is no dispute with regard to discharge of their duty at par with their counterparts in the State Government. Rather it is the admitted fact that they are "Public Prosecutors" within the meaning of Section-24 of the Cr.P.C. and are discharging the similar nature of duties. Hence this Court is of the considered view that the petitioners are "Public Prosecutors" within the meaning of Section 24 of Cr.P.C. 1973 read with Rule 3(a) of the Orissa Law Officers Rules 1971.

9. Coming to issue no.ii, it is the admitted fact that the State Government has framed a Rule called the Orissa Law Officers Rules 1971 which has undergone an amendment under the Orissa Law Officers (Amendment) Rules 2012 vide notification dated 31.08.2012 giving effect from 01.09.2012 vide Annexure-1. By virtue of such amendment the fee structure has been revised in respect of the Public Prosecutors/Addl. Public Prosecutors/Special Public Prosecutors/Asst. Public Prosecutors of the State who have been engaged in different districts. Though the petitioners are discharging the similar nature of work as their counterparts in the State Government, they have been discriminated for which they approached the State Authorities. In consideration of their grievance, the Government revised the fee structure of the petitioners with effect from 21.10.2014

prospectively vide Annexure-7 dated 30.12.2014 but not retrospectively with effect from 01.09.2012 from which date their counterparts have been extended the said benefit. Thereby the petitioners are aggrieved by such action of the authority on the ground that similarly situated persons having been extended the revision of fee structure with effect from 01.09.2012, there is no justifiable reason not to extend such benefit to them from the date their counterparts have been extended the benefit. Therefore, they made grievance before the State Authorities so that the benefit should be extended to them with effect from 01.09.2012 from the date their counterparts have been extended ther benefit. The claim of the petitioners has been rejected vide Annexure-7 dated 30.12.2014 on the ground that there is no justification to revise the fees of Special Public Prosecutors/Addl. Special Public Prosecutors/Asst. Public Prosecutors (Vigilance) retrospectively as Finance Department has agreed for revision of fees with prospective effect.

It appears that Annexure-7 does not contain any reason save and except that the Finance Department has agreed for revision of fees with prospective effect but that itself cannot be considered as sufficient reason for not extending the benefit to the petitioners from 01.09.2012 as has been extended to the counterparts of the petitioners pursuant to amendment of Orissa Law Officers (Amendment) Rules, 2012 vide Annexure-1.

10. In ***State of Madhya Pradesh v. Municipal Corporation, Indore***, AIR 1987 SC 1983 : 1987 Supp. SCC 748, the apex Court held that the Government cannot restrict the operation of statutory rules by issuing executive instruction. The executive instruction may supplement but not supplant the statutory rules. In ***Palghat Zilla Thandan Sam,udhaya Samrakshna Samiti v. State of Kerala,*** (1994) 1 SCC 359, the apex Court held that the Government order cannot have the effect of modifying any Statute. In ***State of Madhya Pradesh v. G.S. Dal Flour Mill,*** AIR 1991 SC 772, the apex Court further held that an executive instruction cannot go against the statutory provision so as to whittle down the effect of such provision.

11. In ***Subhash Ramkumar Bind v. State of Maharashtra, (2003) 1 SCC 506*** : AIR 2003 SC 269, the apex Court held that the administrative instructions are not intended to supplement or supersede the Act or statutory Rules and cannot take away the right vested in a person governed by the Act. The notification of which statute requires to be issued has a statutory force and not otherwise.

12. On perusal of Annexure-7 dated 30.12.2014, it appears that no reason has been assigned why the petitioners shall not be extended the benefit at par with their counterparts with effect from 01.09.2012. It is only indicated that Finance Department has agreed for revision of fees with prospective effect. The reason is contrary to the amended provisions of the Orissa Law Officers (Amendment) Rules 2012. Since the petitioners are discharging their duties at par with their counterparts, they cannot be discriminated in any manner whatsoever.

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

14. The apex Court in ***Narmada Bachao Andolan (III) v. State of Madhya Pradesh***, AIR 2011 SC 1989 has explained the phrase "discrimination" observing unequals cannot claim equality.

15. In ***Rajasthan State Industrial Development and Investment Corporation*** (supra), the apex Court has taken similar view while examining the scope of discrimination. This Court has also in ***Dr. Ipsita Mishra & Ors*** (supra) held that equals cannot be treated as unequals.

Applying the said principles to the present case, it appears that the petitioners are discharging the similar nature of work like to their counterparts. The action of the State Government in not extending the revised fees to the petitioners at par with their counterparts with effect from 01.09.2012 amounts to 'discrimination' and violative of Article 14 of the Constitution of India.

16. In ***Gayatri Devi Pansari v. State of Orissa***, (2000) 4 SCC 221, the apex Court held that the order of Government should be construed keeping in view the purpose, substance as well as the object underlying the same, more with a view to promote the same rather than stifle it.

17. In ***Southern Agrifurane Industries Ltd v. Commercial Tax Officer and others,*** (2005) 2 SCC 575, the apex Court held that notification is to be incorporated taking into account the relevance of the background in which it

was issued. Similarly, ***Collector of Customs (Preventive) v. Malwa Industries Ltd***, (2009) 12 SCC 735, the apex Court held that a notification like any other provision of a Statute must be construed having regard to the purpose and object it seeks to achieve. For the aforementioned purpose, the statutory scheme in terms whereof such a notification has been issued should also be taken into consideration and it is a well settled principle of law that where literal meaning leads to an anomaly and absurdity, it should be avoided.

18. In ***State of Maharastra v. Vijay Vasantrao Deshpande***, (1998) 7 SCC 81, the apex Court held that in case of lack of clarity administrative instruction/ circulars/orders/letters should be interpreted by taking into consideration their object and intention of the government. But, Annexure-7 has not indicated such reasons thereby it has been issued contrary to the amended Rules 2012 in Annexure-1 thereby the purpose of the amended provisions has given go by so far as it relates to the petitioners are concerned.

19. The basis for non-extending the benefit to the petitioners from the date the same has been extended to their counterparts w.e.f. 01.09.2012 as has been indicated in the counter affidavit is that the petitioners have been paid the higher revised fees than that of their counterparts and therefore, they have been extended prospectively cannot be taken into consideration as the same is contrary to the provisions of law.

20. In ***Mohinder Singh Gill and another v. The chief Election Commissioner, New Delhi & others,*** AIR 1978 SC 851, the apex Court in paragraph-8 held as follows:

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16) (at P.18)
>
> "Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently8 given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public

> authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself".
>
> Orders are not like old wine becoming better as they grow older".

21. Similar view has also been taken by the apex Court in ***Bhikhubhai Vithlabhai Patel and others v. State of Gujarat and another***, (2008) 4 SCC 144.

22. Considering the law laid down by the apex Court as mentioned above, the reasons ascribed by way of counter affidavit for denying the benefits to the petitioners from the date such benefit has been extended to their counterparts cannot be supplemented if the order issued under Annexure-7 dated 30.12.2014 does not say so. The law is well settled as discussed above that Government Notifications, Circulars and administrative instructions or orders are issued to supplement the purpose of the Statute not to supplant the same. The order impugned does not indicate any reason why the revision of fees shall not be extended to the petitioners retrospectively. It is well settled principle of law as laid down by the apex Court that the order must be assigned with reasons and in absence of that the order under Annexure-7 dated 30.12.2014 cannot be sustained. More so, by issuing Annexure-7 the purpose of amended Orissa Law Officers Rules 2012 is frustrated so far as it relates to the petitioners.

23. Considering from all angles, this Court is of the considered view that Annexure-7 dated 30.12.2014 cannot sustain. Accordingly, the same is quashed. The petitioners are to be extended the revised fees at par with their counterparts from the date of amendment of Odisha Law Officers' Rules, 2012 i.e. 01.09.2012 instead of 21.10.2014 pursuant to notification issued under Annexure-5 dated 21.10.2014. As such the benefit of differential pay for the period from 01.09.2012 to 20.10.2014 shall be extended to the petitioners after adjusting all the amount already paid at par with their counterparts in consonance with the Orissa Law Officers (Amendment) Rules 2012 as expeditiously as possible preferably within a period of four months from the date of communication of this judgment. Accordingly, the writ petition is allowed. No order to cost.

Writ petition allowed.

2016 (I) ILR - CUT- 1176

DR. B.R.SARANGI, J.

W.P.(C) NO. 19248 OF 2010

DIBAKAR BEHERA ……..Petitioner

.Vrs.

UNION OF INDIA & ORS. …….Opp. Parties

Disciplinary proceeding – Petitioner was a constable in CISF – Allegation of receipt of Rs. 395/- as illegal gratification – Enquiry officer recommended for stoppage of three increments but the Disciplinary authority enhanced the punishment to removal from service – Order confirmed by the appellate authority as well as revisional authority – Hence the writ petition – No eye witness to the alleged recovery of Rs. 395/- from the petitioner during duty hour – Punishment of removal from service is grossly disproportionate and shocks the conscience – It is also violative of his right to livelihood as enshrined under Article 21 of the constitution of India – Authorities while imposing major punishment should consider the gravity of the misconduct – Held, impugned orders quashed – Punishment of removal from service be substituted by an order of stoppage of three increments – However the petitioner is not entitled to get any back wages from the date of removal from service till the date of joining. (Page 18,19,20)

Case Laws Referred to :-

1. (2000) 7 SCC 640 : Navinchandra N.Majithia v. State of Maharashtra & Ors.
2. (2001) 2 SCC 386 : Om Kumar and others v. Union of India.
3. (2003) 8 SCC 9 : Dev Singh v. Punjab Tourism Development Corporation Ltd. & anr.
4. 2011(I) ILR- CUT-398 : Chandrama Bhusan Sarangi v. Union of India and Ors.
5. (1987) 4 SCC 611 : Ranjit Thakur v. Union of India.
6. (1983) 2 SCC 442 : Bhagat Ram v. State of H.P.
7. (2000) 3 SCC 450 : U.P. SRTC v. Mahesh Kumar.
8. AIR 1999 SC 1552 : U.P. State Road Transport Corporation & Ors. v. A.K. Parul
9. 2015(II) ILR-CUT-113 : Susanta Dalai v. Union of India & Ors.
10. 2012(II) ILR-CUT-632 : Nirakar Sahoo v. Neelachal Gramya Bank & anr.

11. AIR 1997 SC 3387 : Union of India and others v. G. Ganayutham.

For Petitioner : M/s.P.K.Kar, D.K.Rath & S.C.Tripat
For Opp.Parties : Mr. A.K.Bose, Assistant Solicitor of India

Date of hearing : 05.10.2015
Date of judgment: 16.10.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who was working as a Constable under the Central Industrial Security Force (C.I.S.F.), has filed this application assailing the order dated 26.06.2009 passed by the Disciplinary Authority imposing on him major penalty of removal from service, vide Annexure-10 and confirmation thereof in appeal by the appellate authority vide order dated 22.09.2009, Annexure-11 and the revisional order dated 24.08.2010, vide Annexure-12.

2. The epitome of the facts is that the petitioner by following due process of selection was appointed as a Constable under the C.I.S.F on 28.4.2003 under the Commandant, Central Industrial Security Force, Rourkela Steel Plant, Rourkela. After completion of the training, he was posted to Bankot Press M.P. on 1.3.2004 under Dewases district and thereafter, he was transferred to JNPT SHEVA, district-Rayagarh, Mumbai. On 18.6.2006 his duty was fixed at Central Gate out Morcha of the C.I.S.F. Unit in B.Shift (i.e. from 13.00 hrs. to 21.00 hrs.) and while he was discharging his duties at the Central Gate out Morcha at about 1900 hours, the Inspector/ Exe. Came nearer to the Gate (out Morcha) and directed the petitioner to go out and when he went out, the Inspector Reddy entered into the Morcha and thereafter suddenly came out and went to the control room to his post and resumed his duties. Thereafter, the petitioner came. After 15 minutes, the Inspector S.L.Reddy again came to the out Morcha followed by Sub-Inspector, C.S.Negi and constable, namely, Bilash Patil. The Inspector S.L.Reddy showed some currency notes to the Sub-Inspector, C.S.Negi from his own hand and alleged that he got the said currency notes from the Morcha of the petitioner and went away. The Inspector directed the petitioner to hand-over his rifle to constable, S.K.Sharma and detained him in the control room and took his signature in a paper without giving him any scope to read the contents. On the allegation of receipt of illegal gratification, seizure list of currency notes amounting to Rs.395/- was

prepared by the Inspector S.L.Reddy though the same was never recovered from the custody of the petitioner. After preparing the said report about the illegal gratification, the Inspector S.L.Reddy submitted the same to opposite party no.4. On receipt of the same, opposite party no.4 issued show cause notice to the petitioner on 26.7.2008 directing him to file his reply to the allegations made against him on 18.7.2008 within ten days of receipt of the notice. The petitioner after receipt of the same made an application on 30.7.2008 requesting the opposite party no.4 to supply him certain documents so as to enable him to prepare his reply to the show cause. After receiving such application on 30.7.2008, the Deputy Commandant attached to the office of opposite party no.4 vide his letter No. 2159 dated 4.8.2008 supplied the photo copies of the documents as prayed for by the petitioner and on receipt of such documents, the petitioner submitted his reply to the show cause denying the allegations made against him. Opposite party no.4 having not been satisfied with the show cause given by the petitioner, initiated departmental proceeding against the petitioner. During enquiry, the Inspector S.L.Reddy, Sub-Inspector/ Exe. C.S.Negi and Constable, Bilash Patil were examined by the Enquiry Officer. As per the statement made by P.Ws.2 and 3 followed by the deposition of the petitioner, no allegation, as alleged in the charge, has been clearly proved because both P.Ws.2 and 3 have deposed that they have never seen the petitioner with the seized money amounting to Rs.395/- nor did they have seen the money lying under the waste sheet, rather both of them have seen the money in the hand of the Inspector S.L.Reddy, who had narrated them a story that he seized the same from underside of the waste sheet after having seen the petitioner hunting something. Though the petitioner has made sincere effort to prove him innocent, the Enquiry Officer submitted his report to opposite party no.4 on 1.11.2008 against the petitioner. By letter dated 18.11.2008 the Enquiry Officer supplied such enquiry report to the petitioner with a direction that if the petitioner has got any objection on the report, he may file the same within a period of 15 days of receipt of the letter. On receipt of the letter from opposite party no.4 vide Annexure-6, the petitioner submitted his explanation stating therein that he is an innocent, duty abiding soldier, but he has been falsely entangled in the departmental proceeding and prayed to withdraw the charge by keeping in mind his future as well as the future of his family. But the opposite party no.4 did not accept the plea of the petitioner and imposed the punishment of withholding of increment for a period of one year, which will have the effect of postponing his future increments vide order no. 188 dated 17.1.2009 vide Annexure- 7. The

petitioner being a lower cadre employee, finding no other alternative, was compelled to accept the punishment. But all on a sudden, the opposite party no.3 issued an order on 28.5.2009 directing him to show cause within 15 days as to why he would not be imposed the penalty of removal from service instead of withholding of increment for the proven act of misconduct. The petitioner submitted his reply on 11.6.2009 stating, inter alia, that none of the witnesses except Inspector S.L.Reddy has seen the seizure of Rs.395/- from his custody so also he was never searched before the witnesses in connection with the said alleged amount of Rs.395/-. But he has been falsely implicated on the said charges and also prayed to exonerate him from the charge as the punishment imposed is very harsh. But without considering the same, opposite party no.3 passed the order on 26.6.2009 awarding major penalty of removal from service from the date of receipt of the order by confirming the proposed penalty as made in the show cause notice vide Annexure-8 and also by enhancing the proposed punishment suggested by the enquiry officer. Against the order of major penalty imposed by opposite party no.3, the petitioner preferred an appeal before opposite party no.2, who rejected the same on 26.2.2009 vide Annexure-11. Thereafter, the petitioner also preferred a revision, but the revisional authority without considering the facts in proper prospective, confirmed the order passed by the disciplinary authority as well as the appellate authority vide Annexure-12 dated 24.8.2010. Hence, this petition.

3. Mr. P.K.Kar, learned counsel for the petitioner stated that the Enquiry Officer being the fact finding authority on consideration of the relevant materials placed before it when imposed penalty of stoppage of three increments, the disciplinary authority should not have enhanced the same to a major penalty like removal from service. He further submitted that the petitioner had no way out but to accept the punishment even though an amount of Rs.395/- has not been recovered from his custody and no eye witness is there in the said recovery save and except the Inspector S.L.Reddy. According to the learned counsel for the petitioner, the disciplinary authority without considering the fact in proper perspective enhanced the punishment to major penalty of removal from service, which has been made confirmed in appeal and revision, which is contrary to the provisions of law. To substantiate his contention, he has relied upon **Navinchandra N.Majithia v. State of Maharashtra and others**, (2000) 7 SCC 640, **Om Kumar and others v. Union of India**, (2001) 2 SCC 386, **Dev Singh v. Punjab Tourism Development Corporation Ltd. and**

another, (2003) 8 SCC 9, and **Chandrama Bhusan Sarangi v. Union of India and others,** 2011(I) ILR- CUT-398.

4. Mr.A.K.Bose, learned Assistant Solicitor General for the Union of India per contra stated that there is no procedural lapses in any manner while imposing the major penalty of removal from service against the petitioner and as such the proceeding has been concluded by following due procedure as envisaged under the C.I.S.F. Act, 1968 read with the C.I.S.F. Rules, 2001. He further submitted that the allegation made that the punishment is shockingly disproportionate to the charges levelled against the petitioner, the same has to be considered taking into the factual matrix of each case and no straight jacket formula can be formulated in such a condition. He further submitted that since the petitioner was in possession of more than Rs.20/- when he was detailed in duty, recovery of Rs.395/- from his possession by the Inspector S.L.Reddy, the disciplinary authority is justified in imposing the major penalty of removal from service, which has been confirmed in appeal as well as in revision and therefore, this Court should not interfere with the impugned orders.

5. On the facts pleaded above, a preliminary question was put by this Court to the learned counsel for the petitioner as to whether there is any procedural lapse in conducting the disciplinary proceeding, who fairly states that there is no procedural lapse on the part of the authority in conducting the enquiry. He, therefore, confined his argument to the imposition of major penalty like removal from service, which is disproportionate to the charges levelled against the petitioner on the allegation of recovery of an amount of Rs.395/- by the Inspector though there was no eye witness to such occurrence. Therefore, he stated that the disciplinary authority without considering the facts in proper prospective enhanced the punishment from stoppage of three increments to a major penalty of removal from service, which has been confirmed by appellate authority as well as the revisional authority, which is absolutely disproportionate to the charges levelled against the petitioner.

6. Reliance is placed by the learned counsel for the petitioner on **Om Kumar and others (supra)** wherein the apex Court has considered the well settled principle of "doctrine of proportionality". By 'proportionality' the apex Court meant that the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the

case may be. Under the principle, the Court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve. The doctrine of proportionality, which has been followed in various countries, have taken note by the apex Court in the said judgment.

7. In **Dev Singh (supra)** the delinquent officer, who was working as Senior Assistant, was dismissed from service on the allegation of misplacement of file and the apex Court held that the punishment of dismissal for mere misplacement of a file without any ulterior motive is too harsh a punishment, which is totally disproportionate to the misconduct alleged and the same certainly shocks the Court's judicial conscience. In the said judgment relying upon the judgments in **Ranjit Thakur v. Union of India,** (1987) 4 SCC 611, **Bhagat Ram v. State of H.P.**, (1983) 2 SCC 442 and **U.P. SRTC v. Mahesh Kumar** (2000) 3 SCC 450, the apex Court held that the petitioner having unblemished career of 20 years, imposition of maximum punishment of dismissal from service for mere misplacement of file without any ulterior motive, is too harsh and disproportionate to the misconduct alleged and the same shocks the conscience of the apex Court. The apex Court therefore, having considered the basis on which the punishment of dismissal was imposed on the delinquent officer, in order to avoid the prolonged litigation modified the punishment to withholding of one increment including stoppage at the efficiency bar in substitution of the punishment of dismissal awarded by the disciplinary authority and further directed that the officer will not be entitled to any back wages for the period of suspension, but he will be entitled to the subsistence allowance payable up to the date of dismissal order.

8. In **Shri Bhagwan Lal Arya (supra)**, the apex Court held that ordinarily the Court would have set aside the punishment and sent the matter back to the disciplinary authority for passing the order of punishment afresh in accordance with law and consistently with the principles laid down in the judgment. However, that would further lengthen the life of litigation. In view of the time already lost, it is deemed proper to set aside the punishment of removal from service and instead directed the appellant, Bhawanan Lal Arya to be reinstated in service subject to the condition that the period for which the petitioner was absent from duty and the period calculated up to the date

on which he reported back to duty, shall not be counted as a period spent on duty and he shall not be entitled to any service benefits for the said period.

9. In **Chandrama Bhusan Sarangi (supra)**, this Court taking into consideration the "doctrine of proportionality" set aside the order of punishment imposed by the disciplinary authority as confirmed by the appellate authority and revisional authority and directed the authorities to reinstate the petitioner in the said case in service, with further direction that he would not be entitled to any back wages from the date of his removal till the reinstatement in service and that on reinstatement, the disciplinary authority shall consider imposition of any adequate minor punishment on him.

10. In **Nirakar Sahoo v. Neelachal Gramya Bank and another,** 2012(II) ILR-CUT-632, this Court set aside the order of dismissal from service and directed for stoppage of three increments without cumulative effect and further directed that he will be entitled to 30% of the salary for the period he has not worked.

11. In **Susanta Dalai v. Union of India and others,** 2015(II) ILR-CUT-113, this Court has already held that the disciplinary authority and on appeal, the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. It is further held that the Courts while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the Court, it would appropriately mould the relief either directing the disciplinary/ appellate authority to reconsider the penalty imposed or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof. It is a settled principles of law that scanning of evidence is beyond the purview of the writ Court unless the same is perverse. The High Court under Article 227 of the Constitution of India does not sit as an appellate authority.

12. In ***U.P. State Road Transport Corporation and others v. A.K. Parul,*** AIR 1999 SC 1552, the apex Court in paragraph-3 held as follows:-

> "3. ……. This Court consistently has taken the view that while exercising judicial review the Courts shall not normally

> interfere with the punishment imposed by the authorities and this will be more so when the Court finds the charges were proved. The interference with the punishment on the facts of this case cannot be sustained. In ***State Bank of India v. Samarendra Kishore Endow*** (1994) 2 SCC 537 : (1994 AIR SCW 1465), this Court held that imposition of proper punishment is within the discretion and judgment of the disciplinary authority. It may be open to the appellate authority to interfere with it, but not to the High Court or to the Administrative Tribunal for the reasons that the jurisdiction of the Tribunal is similar to the powers of the High Court under Article 226."

13. In view of the decisions referred to above, there is no iota of doubt that while exercising power of judicial review under Article 226 of the Constitution, this Court shall not normally interfere with the punishment imposed by the authority nor shall interfere with the quantum of punishment imposed by the authority. It is within the domain of the authority to interfere with such quantum of punishment in a court or tribunal.

14. The scope of judicial review in the matter of imposition of penalty as a result of disciplinary proceeding is very limited. This Court can interfere with the punishment only if it finds the same to be shockingly disproportionate to the charges proved. In such a case, the Court is to remit the matter back to the disciplinary authority for reconsideration of punishment. Of course in appropriate cases, in order to avoid delay the Court can itself impose lesser punishment. (See: AIR 2007 SC 2954: ***You One Maharia-JV through You One Engineering and Construction Company Ltd. and another v. National Highways Authority of India***).

15. The question of interference with the quantum of punishment has been considered by the Supreme Court in catena of judgments, and it was held that if the punishment awarded is disproportionate to the charge of misconduct, it would be arbitrary and thus, would violate the mandate of Article 14 of the Constitution (See- ***Bhagat Ram v. State of Himachal Pradesh & others***, AIR 1983 SC 454, ***Ranjit Thakur v. Union of India and others***, AIR 1987 SC 2386=(1987) 4 SCC 611, ***Union of India and others v. Giriraj Sharma***, AIR 1994 SC 215, ***B.C. Chaturvedi v. Union of India and others***, AIR 1996 SC 484.

16. In the case of ***Ranjit Thakur*** (supra), the Apex Court observed as under:-

> "But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect, which is otherwise, within the exclusive province of the Court Martial, if the decision of the Court even as to sentence is an out ranges defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review."

17. In the case of ***Union of India and others v. G. Ganayutham***, AIR 1997 SC 3387, the Supreme Court considered the entire law on the subject and observed:

> "In such association, unless the Court/Tribunal opines in its secondary role, that the administrator was, on the material before him, irrational according to Wednesbury or CCSU then, the matter has to be remitted back to the appropriate authority for reconsideration. It is only in very rare cases as pointed out in B.C. Chaturvedi's case that the Court might, to shorten litigation think of substituting its own view as to the quantum of punishment in the place of the punishment awarded by the competent authority.

18. What is the appropriate quantum of punishment to be awarded to a delinquent is a matter that primarily rests at the discretion of the disciplinary authority. An authority sitting in appeal over any such order of punishment is by all means entitled to examine the issue regarding the quantum of punishment inasmuch as it is entitled to examine whether the charges have been satisfactorily proved. But when any such order is challenged before a Service Tribunal or the High Court the exercise of discretion by the competent authority in determining and awarding punishment is generally respected except where the same is found to be so outrageously disproportionate to the charge of misconduct and the Court considers it to be arbitrary and wholly unreasonable. The superior Courts and the Tribunal invoke the doctrine of proportionality which has been gradually accepted as one of the facets of judicial review. Where punishment is excessive or disproportionate to the offence so as to shock the conscience of the Court and is unacceptable even then Courts should be slow and generally reluctant to interfere with the quantum of punishment. The law on the subject is well settled by a series of decisions rendered by this Court as well as the Apex

Court. This Court in Panchanath Samal v. Union of India, reported in **2015(I) ILR-CTC-782 = 2015 (Supp-I) OLR, 1022** has considered the same in the above line.

19. Coming to the case in hand, the punishment of removal from service for the kind of misconduct proved against the petitioner appears to be grossly disproportionate. For recovery of the alleged currency note of Rs.395/- without any eye witness to the same, during the duty hour, removal from service is grossly disproportionate and shocking to the conscience. The petitioner being a young person and the entire family is depending upon him, imposition of major penalty like removal from service would disturb his entire family set-up, which would violates the right to livelihood as enshrined under Article 21 of the Constitution of India. In any case, for the allegation made against the petitioner, imposition of harsh punishment of removal from service being grossly disproportionate and shocks the conscience. Taking into consideration the totality of the circumstances, this Court is of the considered view that the punishment of removal from service should be substituted by an order for stoppage of three increments as proposed by the Enquiry Officer.

20. For the foregoing reasons, the impugned orders dated 26.06.2009, 22.09.2009 and 24.08.2010 in Annexures-10, 11 and 12 respectively are quashed. The order of punishment of removal from service be substituted by an order of stoppage of three increments, but the petitioner is not entitled to get any back wages for the period from the date of removal from service till the date of joining as he had not discharged his duty for the said period.

21. With the above observation and direction, the writ petition stands disposed of.

Writ petition disposed of.

2016 (I) ILR - CUT-1186

DR. B.R.SARANGI, J

O.J.C NO.3706 OF 2000

DEBENDRA RAM ……..Petitioner

.Vrs.

FOOD CORPORATION OF INDIA ……... Opp. Party

SERVICE LAW – Petitioner was engaged as an Ancillary Worker under F.C.I. – Petitioner was ill and after he was found fit he submitted joining report which was not accepted – As the petitioner was not allowed to join or resume duty, it amounts to termination from service – Violation of the provisions of Industrial disputes Act and principles of natural Justice – Held, non- acceptance of the joining report of the petitioner by the authority is arbitrary unreasonable and contrary to the provisions of Industrial Disputes Act, and violative of the principles of natural justice – Held, petitioner is deemed to be continuing in service with effect from his date of joining i.e. 22.11.99 and is entitled to get all consequential benefits admissible in accordance with law.

(Para 10)

Case Laws Rreffered to :-

1. (1994) 1 OLR 480 : Pradeep Kumar Mohanty -V- State of Orissa Ors..
2. AIR 1989 Orissa 15 : M/s. Indulal Nautamlal & Co. -V- Collector, Central Excise & Customs, BBSR.
3. AIR 1958 SC 86 : State of U.P.-V- Mohammad Nooh

For petitioner : M/s. S.K. Dash,S.K.Mishra,B.Mohapatra, M/s. A. Dhalasamanta.

For Opp. Parties : M/s. S.K.Nayak-1, Sr.Counsel, A.K.Baral, D.Nayak, S.K.Nayak-6,M.S.Sahoo, B.K.Sahoo,& M.C.Swain

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Date of hearing : 27.02.2015
Date of judgment: 27.02.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner files this application seeking for a direction to opposite party no.3 to accept his joining report dated 26.06.1999 in view of the direction given by the opposite party no.2 dated 11.11.1999 and allow him to discharge duty and also grant all consequential service benefits as due and admissible in accordance with law.

2. The short fact of the case in hand is that the petitioner was engaged as an Ancillary Worker under F.C.I., F.S. Depot, Dhenkanal, pursuant to which he joined on 06.07.1992. Accordingly, an Identity Card was issued in his favour by the District Manager of the Corporation registering him as Ancillary Worker having registration No. 182 vide Annexure-1. The petitioner was also enrolled as a member of a registered trade union as per Annexures-2 to 4. As he was critically ill, he was advised complete bed rest and medical certificate in support of such illness has been produced vide Annexure-5. After he was found fit, a joining report was submitted on 10.6.1999 before the opposite party no.3 vide Annexure-3. The said joining report has not been accepted, therefore he approached the opposite party no.2 by filing representation vide Annexure-7. On consideration of the same, opposite party no.2 vide letter dated 11.11.1999 in Annexure-8 directed the petitioner to resume duty. It is also indicated in the said letter that in case he fails to join, he would be faced with disciplinary proceeding. On receipt of such letter when the petitioner rushed to join on 22.11.1999, his joining was refused by opposite party no.3, who advised him to meet opposite party no.2 at Cuttack. Therefore, the petitioner submitted his joining report on 26.11.1999 by registered post with A.D., but no action has been taken by the authorities till date. Hence, this application.

3. Mr. S.K. Dash, learned counsel for the petitioner states that as the petitioner was not allowed to join or resume duty, it amounts to termination of service, which is in gross violation of the provisions under the Industrial Dispute Act as well as the principles of natural justice. Therefore, he seeks for a direction to opposite party no.3 to accept the joining report of the petitioner in view of the order passed by opposite party no.2 vide Annexure-8 and grant him all consequential service benefits admissible in accordance with law.

4. Pursuant to notice issued by this Court on 25.08.2000, Mr. S.K. Nayak-1, learned Senior Counsel and associates have entered appearance for opposite party nos. 1 to 3 by filing Vakalatnama on 23.11.2000. But no counter affidavit has been filed till date nor has the contention raised by the petitioner been rebutted in any manner in order to dislodge the claim made by the petitioner.

5. Considering the contention raised by learned counsel for the parties and after going through the records, since no materials has been placed before this Court by the opposite parties and since there is no rebuttal contention raised by the opposite parties, applying the principles of doctrine

of non-traverse, this Court proceeded with the mater on the basis of the materials available.

6. The sole contention raised by Mr. S.K. Dash, learned counsel for the petitioner is that the petitioner was not allowed to discharge duty pursuant to joining report dated 22.11.1999 filed before the opposite party no.3 and thereafter the same was submitted by registered post with A.D. on 26.11.1999. Non-acceptance of joining report, amounts to termination of service and for termination of service, mandatory provisions under the Industrial Dispute Act are required to be followed. The same having not been followed, termination itself is void *ab-initio*.

7. Relying on the ratio decided in ***Pradeep Kumar Mohanty v. State of Orissa and others***, 1994 (I) OLR 480, learned counsel for the petitioner contended that the mandatory provisions under Industrial Dispute Act having not been followed, the petitioner continues to be in service till he attains the age of superannuation or till his dismissal or retrenchment or termination from service, as the case may be, by following due procedure of law. Since the opposite parties have not refuted the contention raised by learned counsel for the petitioner, deemed to have admitted that the so called non-acceptance of joining report is as good as termination of services violating the principles of natural justice.

8. In paragraph-11 of ***M/s Indulal Nautamlal & Co. v. Collector, Central Excise & Customs, Bhubaneswar***, AIR 1989 Orissa 15, this Court held as follows:-

> "11. Mr. A.B. Mishra, the learned Standing Counsel of the Central Government however strenuously urged that the petitioner having not exhausted the statutory remedies available to it under the Act by way of appeal and revision, should be kept out of the Court and that it is not entitled to any relief. The submission is wholly devoid of merit. It was specifically urged by the petitioner in the writ petition that the order imposing penalty was in violation of natural justice as no notice under Section 74 had been issued. The allegation made are taken to be admitted by the opposite party on the principle of no-traverse since the statement has not been challenged. It thus remains a fact that the imposition of penalty under Section 74 on the petitioner was without compliance with the principles of natural justice. It is well settled that the two well recognized exceptions to the requirement of exhaustion of the statutory remedies before the

extraordinary jurisdiction of the High Court is invoked, are (1) where the order impugned is passed without jurisdiction and (2) where the order is passed in violation of natural justice.

9. In ***State of U.P. v. Mohammad Nooh***, AIR 1958 SC 86, it was observed as follows:

> "If an inferior Court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior Court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the Court or tribunal of first instance, even if an appeal to another inferior Court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what a ex facie was a nullity for reasons aforementioned……."
>
> The decision war re-affirmed in AIR 1961 SC 1506, A.V. Venkateswaran v. Ramchand Sobhraj Wadhwani and AIR 1969 SC 556, Baburam Prakash Chandra v. Antarim Zila Parished now Zila Parished, Muzaffarnagar. It must be held that the principle is now firmly entrenched in our Constitutional Jurisprudence and admits of no exception. Even AIR 1983 SC 603, Titaghur Paper Mills Co. Ltd v. State of Orissa with Pinaki Sengupta v. State of Orissa relied upon AIR 1958 SC 86 and has in no way departed from the same. It was merely a decision where an assessment was challenged not on the ground of violation of natural justice or lack of jurisdiction, but on purely procedural irregularities and grounds touching upon the merits of assessment. AIR 1985 SC 330, Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd., the other citation relied upon by the learned Standing Counsel is also wholly inapplicable. The case arose out of an interim order of stay and it is in that context but the Supreme Court observed that where a fiscal statute is involved, the Court must have a good and sufficient reason to by-pass the alternative remedy provided by the statute. The observations were made by taking judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other so as to

paralyse the collection of revenue. The decision would have no application where a final order of adjudication is challenged as being violative of natural justice or as being without jurisdiction."

10. In view of the aforesaid facts and circumstances, this Court is of the considered opinion that non-acceptance of the joining report of the petitioner by the authority is arbitrary, unreasonable and contrary to provisions of Industrial Disputes Act as well as violation of principles of natural justice. Consequentially, the petitioner is deemed to be continuing in service with effect from his date of joining i.e. 22.11.1999 and is entitled to get all consequential benefits admissible in accordance with law.

11. Accordingly, the writ application is allowed. However, there is no order to costs.

Writ application allowed.

2016 (I) ILR - CUT-1190

D.DASH, J.

RSA. NO. 256 OF 2004

MANABHANJAN PATRO (DEAD) & ORS. ……..Appellants

.Vrs.

NILARATHA @ NILARATNA PATRO & ORS. ..……Respondents

CIVIL PROCEDURE CODE,1908 – S.96 (2)

Appeal against exparte decree – Scope – It is open to a defendant to prefer an appeal U/s 96 (2) of the code against an exparte decree but he has to satisfy the Court from record that there is error, defect or irregularity in the order proceeding exparte and if he succeeds, the exparte decree can be setaside and the case can be remitted for retrial but in such appeal the defendant can not be allowed to show that he was prevented by sufficient cause from appearing at the hearing and for that purpose he must have recourse to the provision under Order 9, Rule 13 C.P.C. – Moreover, when specific provision is available under the code, the same cannot be ignored and extraordinary power of a Court cannot be invoked to grant the relief.

(Para 6,7,8)

Case Laws Referred to :-

1. (2007) 7 SCC 220 : Lal Devi and another v. Vaneeta Jain & Ors.
2. AIR 1988 P&H 176 :Smt. Maya Devi & others V. Mehria Gram Dall Mill, Hissar & Ors.
3. AIR 2005 SC 626 : Bhanu Kumar Jain vrs. Archana Kumar & Anr.
4. AIR 1928 Calcutta 812 : Jananedra Mohan Bhadhury and another vrs. Prafulla Nanda Goswami & Ors.
5. AIR 1981 Karnataka 35 : Gangadhar Bhat v. Srikant & anr.
6. AIR 1977 M.P. 182 : Nagar Palika Nigam Gwalior vrs. Motilal Munnalal

For Appellant : M/s. S.P.Mishra,S.Dash,S.Nanda,P.Sahu,
M/s. S.Nanda, B.S.Panigrahi B.Mohanty,
S.K.Sahoo, S.K.Sahoo ,S.K.Mohanty,
J.Mohapatra,

For Respondent : M/s. P.V.Ramdas, P.V.Balakrishna
M/s. Brajaraj Prusty, C.S.Patra.

Date of hearing : 23. 02.2016
Date of judgment:03.03. 2016

JUDGMENT

D.DASH, J.

1. This appeal has been directed against the judgment and decree passed by the learned Additional District Judge, Boudh in RFA No. 11 of 2002 refusing to interfere with the judgment and decree passed by the learned Civil Judge (Sr.Divn.), Boudh in T.S. No. 64 of 2000.

2. The respondent as the plaintiff had filed the suit for partition of the properties described in schedule A and B of the plaint. The appellants herein before this Court were the defendant nos. 1 and 2 in the trial court whereas the respondent nos. 2 and 3 are the son and brother of the plaintiff and the defendant nos. 1 and 2. It may be stated here that appellant no. 1 died during pendency of this appeal and his legal representative had prayed to be substituted but he also having died before the order of substitution, now the appeal is being pursued by the legal representatives of deceased appellant no. 2 being substituted on account of death of appellant no.2. Similarly, the respondent no. 3 having died, her name has been expunged as dead.

3. Plaintiff's case is that one Ananda Patra had four sons namely, Sachitananda, Nilaratna, Manasbhanjan and Chitaranjan. Sachitananda during the lifetime of his father had separated himself from his father and brothers and had relinquished his interest over 'A' schedule land in favour of

his father and brother. Ananda died in the year 1950 and these three sons i.e. the plaintiff, defendant nos. 1 and 2 succeeded to the property described in schedule 'A' of the plaint. It was also so mutated in their names. While living jointly they acquired agricultural land measuring Ac. 6.550 decimals as described in schedule 'B' of the plaint. It is stated that all the lands were/are in joint possession of the plaintiff, defendant nos. 1 and 2. The plaintiff being a Govt. servant was remaining outside and on his return to the native place on his superannuation in the year 1998, he expressed his desire for partition of schedule 'A' and 'B' land and claimed his share for being separated and allotted. This having been turned down by the defendants, the suit with the prayer for a preliminary decree for partition of schedule 'A' and 'B' land amongst himself, defendant nos. 1 and 2 by metes and bounds has been filed with further prayer of deputation of Civil Court Commissioner to make separate allotment of properties in accordance with preliminary decree for the final decree to be passed. The defendants 1 and 2 being summoned entered their appearance on 27.4.2001 and thereafter seeking several adjournments which were favourably granted, finally filed their written statement on 19.4.2002. Defendant nos. 3 and 4 however did not file their written statement. The defendant nos. 1 and 2 in their written statement admitted the relationship between the parties and so also the fact that the properties described in schedule 'A' and 'B' of the plaint for liable to be partitioned as prayed for in the plaint. Para-10 of the written statement runs as under:-

> "10. That the division of the joint family properties made by the Bhadraloks on 20.10.99, reduced to writing, unanimously was agreed upon by the parties and on that basis, the Hon'ble court may be pleased to make a division of the suit 'A' & 'B' properties among the parties."

Having filed the above written statement, they also went for amendment of the written statement for insertion of a para describing the joint family expenditure which was allowed. Again they had made a prayer for amendment of the written statement incorporating a counter claim under Order 8 Rule 6-A of the Code of Civil Procedure advancing a claim of Rs.1,00,932/- on the plaintiff for the expenses met towards the schooling of the plaintiff and for his up bring after death of father. This petition for amendment stood rejected by order dated 30.7.2002 as it was found not necessary for determination of the real controversy between the parties. A revision being carried, the order was not interfered with. The suit thereafter

proceeded and it stood decreed preliminary on contest against defendant nos. 3 and 4 and ex parte against defendant nos. 1 and 2.

The defendant nos. 1 and 2 instead of moving the trial court by filing an application under Order 9 Rule 13 of the Code of Civil Procedure straight way challenged the ex parte decree by filing an appeal under Sect ion 96(2) of the Code. The lower appellate court having dismissed the said appeal, the move is before this Court by carrying an appeal under Section 100 of the Code. This appeal has been admitted on the following substantial questions of law:-

"Whether the first appellate court was right to come to the conclusion that when a remedy under Order 9 rule 13 of the Code of Civil Procedure against the ex parte decree was available to the appellants, the remedy by way of appeal under Section 96 (2) of the Code of Civil Procedure was not available to the appellants?"

4. Mr. S.P.Misra, learned Senior Counsel for the appellants submits that the view taken by the lower appellate court that since the appellants have not availed the remedy by filing an application under Order 9 Rule 13 of the Code to set aside the ex parte decree and when has approached the appellate court directly seeking the same relief, it is not permissible in the eye of law, is untenable. According to him, in an appeal under Section 96 (2) of the Code, the appellant can very well urge in showing that the trial court ought not to have gone for ex parte hearing and decide the suit ex parte against the appellant as there was sufficient cause for the appellant to remain absent on the date of hearing which ought to have been accepted by giving further opportunity.

In this connection he has referred to paragraph 8 of the judgment of the lower appellate court.

5. Learned counsel for the respondent no.1 submits that here actually the substantial question of law which has been formulated for the purpose of admission of this appeal finding that the same arises in the case for being answered does not survive for consideration and decision at all and otherwise also the appeal is liable to be dismissed as there surfaces no ground to interfere with the preliminary decree for partition passed by the trial court which has been discussed by the lower appellate court in finally arriving at a conclusion that there remains no merit in the appeal. According to him, in view of the written statement where the appellants admitted the relationship and conceded to the prayer of the plaintiff as regards partition of schedule

'A' and 'B' properties, the trial court had no other option but to decree the suit preliminary and it even ought to have been done resorting to the provision of Order 12 Rule 6 of the Code. However, instead of doing so when the court has gone to frame issue with regard to the quantification of share among the parties over the suit land and has answered the same, in fact the appellants have got nothing to be aggrieved by that very preliminary decree which in no way has affected their interest over the properties as well as their entitlement to the share as per law leaving it to be finally worked out in course of the final decree proceeding viewing the convenience of the parties and taking into consideration all other equitable factors.

6. On going through the judgment of the lower appellate court, it is seen that although a view has been taken that the appellants having not availed the remedy available under Order 9 Rule 13 of the Code, the ground can be entertained in an appeal under Section 96 (2) of the Code that the ex parte proceeding was wrongly taken against them which resulted in passing of the ex parte decree, but then the lower appellate court has also dealt on the merit of the case.

In the case of ***Nagar Palika Nigam Gwalior vrs. Motilal Munnalal***, AIR 1977 M.P. 182, a similar situation was involved. Relying on an earlier observation of a Division Bench in the case of ***Ramlal v. Rewa Coal Fields Ltd***., reported in 1966 M.P.L.J.507 the Bench gave the following observation :-

> "It may be pointed out that no application was filed by the Corporation under Order 9 Rule 13 for setting aside the ex parte decree and only an appeal has been preferred against it. There appears to be a conflict of opinion among various High Courts as to the power of the Appellate Court to question the propriety of the ex parte order itself and to remand the case for re-trial. However, we have a Bench decision of our own Court reported in 1966 MPLJ 507, (**Ramlal v. Rewa Coal Fields Ltd**.) wherein it has been held that an error, defect or irregularity which has affected the decision of the case may be challenged in appeal against the decree whether ex parte or otherwise. The appeal against the ex parte decree under Sec. 96(2) of the Code of Civil Procedure cannot be converted into proceedings for setting aside the decree with the concomitant duty of affording to the parties an opportunity of adducing evidence for and against any ground that may be raised in support thereof under O.9, Rule 13, C.P.C. Nor can such an appeal be converted into an appeal under

> Order,43Rule 1(d), CPC. The reason is that when a particular remedy is provided for setting aside an ex parte decree and there is, by way of appeal, another special remedy against an order refusing to set it aside, these remedies and none other must be followed. xxx xxx.
>
> In our opinion, it is open to a defendant, who has filed an appeal against an ex parte decree under S. 96(2) of the Code, to show from the record as it stands that there is in the order proceeding ex parte against him, any error, defect or irregularity which has affected the decision of the case. If he succeeds in so doing, the ex parte decree will be set aside and the case will be remitted for retrial. But in the appeal against the ex parte decree he cannot be allowed to show that he was prevented by any sufficient cause from appearing at the hearing. For that purpose, he must have recourse to the special procedure under O.9, R.13 of the Code for setting aside the said decree."

In the case of ***Smt. Maya Devi & others V. Mehria Gram Dall Mill, Hissar and others***, AIR 1988 P&H 176, the Punjab and Haryana High Court also took a similar view. In the case of ***Bhanu Kumar Jain vrs. Archana Kumar and another***; AIR 2005 SC 626 though the situation was not exactly similar, yet examining the legal position the apex Court observed as follows :

> "The dichotomy can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the Trial Court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under S. 96 (2) of the Code on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the Court can also be a possible plea in such an appeal."

In the case of ***Jananedra Mohan Bhadhury and another vrs. Prafulla Nanda Goswami and others***; AIR 1928 Calcutta 812, the question was the propriety of the order refusing an adjournment made by the defendant and thereafter the proceeding with the suit ex parte. There learned single judge observed that in a case in which an ex parte decree has been passed and the aggrieved party has not availed of the remedy by way of an application under Order 9, Rule 13, C.P.C., he is not precluded from raising

the question of propriety of the refusal to adjourn his case, in the appeal which he prefers from the ex parte decree itself. It was also observed by learned single judge that the Court is legally competent to pass an order of remand under the provisions of Section 151, C.P.C. In the case of ***Gangadhar Bhat v. Srikant & another***; AIR 1981 Karnataka 35, also the question was the propriety of the refusal of adjournment and passing of the ex parte order. In that case learned single judge took a similar view as taken by the learned single judge of the Calcutta High Court. In the case of ***Lal Devi and another v. Vaneeta Jain & others***; (2007) 7 SCC 220, the propriety of the order of the High Court in not interfering with the order of learned District Judge passed on a petition under Order 9 Rule 13, C.P.C. which was not pressed. The legal question and issues involved in that case was somewhat different.

A cumulative reading of the above noted judgments makes it clear that it is open to a defendant who has filed an appeal against an ex parte decree under Section 96(2) of the Code to show from record as it stands that there is in the order proceeding ex parte against him any error, defect or irregularity which has affected the decision of the case. If he succeeds in doing so the ex parte decree can be set aside and the case can be remitted for retrial, but in such an appeal against ex parte decree, the defendant cannot be allowed to show that he was prevented by sufficient cause from appearing at the hearing. For that purpose he must have recourse to provision under Order 9 Rule 13, C.P.C. for the simple reason that in deciding whether notice had been served on the defendant or the defendants were prevented by sufficient cause from appearing on the date of hearing evidence on factual aspects are to be led by the parties and such evidence are to be perused. Moreover, when specific provision is available under the Code, the same cannot be ignored and extraordinary power of a Court cannot be invoked to grant the relief. Therefore, in an appeal under Section 96, C.P.C. against an ex parte judgment and decree the Appellate Court is not permitted to examine the sufficiency of the cause of non-appearance of the defendants on the date of hearing. The Appellate Court can however examine the correctness of ex parte judgment on the basis of the materials available on record and also if there was any error, defect, or irregularity which affected the decision of the suit.

7. Now adverting to the case in hand it is seen that the lower appellate court has thus rightly gone to examine the correctness of the judgment and preliminary decree on their own merit not finding any error, defect or

irregularity so as to affect the decision. In clear and categorical term upon perusal of the pleadings as already stated it has been held that even if the appellants would have contested the suit and led evidence the preliminary decree as has been passed would have been the obvious outcome, since they could not have led any evidence travelling beyond their pleadings and had it also been so done, the trial court would not have looked into it on the ground of having no foundation in the pleading and rather contrary to it. It is further seen that although the trial court has refused the amendment of the written statement for insertion of a counter claim, the same in fact does not have any bearance on the result of the suit in granting the reliefs as prayed for by the plaintiff. Moreover, rejection of amendment of the written statement for insertion of a counter claim even if is said to have been so ordered without being alive to the settled position of law that itself does not preclude those defendants from filing a separate suit for said relief within the period of limitation as provided for the purpose and it cannot be said that as the defendants accepted the said order of refusal of entertainment of counter claim, that stands as a bar for the subsequent suit claiming the relief. The defendant in a suit even where counter claim is permissible to be advanced does not do so, that does not either preclude him from filing a suit later for the same relief nor stand as constructive res judicata. Essentially the insertion of the provision relating to the counter claim has to be concerning the same subject matter and within the pecuniary jurisdiction of the court where the lis is pending and the consideration also remains that the same can be conveniently decided so as to either grant or refuse the reliefs advanced in the counter-claim instead of driving the party to a separate suit. In the present case in a suit for partition filed by the plaintiff, the defendants had sought to introduce the counter claim for recovery of money from the plaintiff stating those to have been spent after the plaintiff for the purpose of his education and thus the same is liable to be paid by the plaintiff, when the admitted relationship is that the defendant nos. 1 and 2 are none other than the brothers of the plaintiff.

8. For the aforesaid discussion and reason, this Court accepts the submission of the learned counsel for the respondent that the substantial question of law as framed for the purpose of admission of the appeal accordingly does not survive for consideration and for being answered as its answer even being rendered in favour of the appellants, that would not be a ground to interfere with the preliminary decree for partition passed by the trial court as confirmed by the lower appellate court as it is wholly

defensible on merit even accepting the entire pleading of the appellants in their written statement.

9. In the result, the appeal stands dismissed. No order as to cost.

Appeal dismissed.

2016 (I) ILR - CUT- 1198

BISWANATH RATH, J.

M.A.T.A. NO. 76 OF 2009

SARAT CHANDRA MOHAPATRA .....Appellant

.Vrs.

AMRUTA PRABHA MAHAPATRA .....Respondent

CIVIL PROCEDURE CODE,1908 – S.11

Resjudicata – Compromise decree in earlier suit – When respondent was a minor her mother entered into a compromise with the appellant and received maintenance not only for herself but also the maintenance and marriage expenses of the minor – Both had also agreed to forfeit all their claim over the joint family property of the appellant – Held, fresh suit filed by the respondent for compensation is not maintainable being hit under the principles of resjudicata.

(Para 16)

Case Laws Referred to :-

1. AIR 1988 SC 400 : Gurupreet Singh-vrs-Chaturbhuj Goel
2. AIR 1993 SC-1139 : Banwarilal -vrs- Smt.Chando Devi
3. (1992) -OJD- 428 (Civil) : Madhab Naiik -vrs-Dhaneswar Panda & Others

For Appellant : M/s. D.Mohapatra, M.Mohapatra, G.R.Mohapatra & S.P.Nath

For Respondent : M/s. B.Jalli, S.Satpathy & J.P.Tripathy

Date of Hearing : 27.01.2016
Date of Judgment: 08.02.2016

JUDGMENT

BISWANATH RATH,J.

This matrimonial appeal has been filed against the judgment dated 30.6.2008 passed by the Civil Judge (Senior Division), Aska in Civil Suit No.26 of 2004.

2. Short background involved in the case is that the respondent (plaintiff in the court below) claiming to be the daughter of the appellant (defendant in the court below) filed the suit bearing Civil Suit No.26 of 2004 claiming therein monthly alimony of Rs.1, 500/- per month from the month of July, 2002 till completion of her education or till her marriage and a sum of Rs.2, 50,000/- towards her marriage expenses from the appellant. The respondent claimed to be the only daughter of appellant having born on 2.3.1988 out of the wedlock of the appellant and Smt. Namita Mohapatra (mother of the respondent). It is in view of difference and dissension between her mother and father, the appellant drove away the mother of the respondent from the house of the appellant. The appellant did not take care either of his wife or his daughter (respondent) not even provided anything for their maintenance. It is at this stage, the appellant filed a suit bearing C.S.No.71 of 1988 under Section 13 of the Hindu Marriage Act for divorce against the respondent's mother. The suit C.S.No.71 of 1988 was decreed by dissolution of their marriage and a sum of Rs.50, 000/- was awarded as permanent alimony for both the respondent and her mother. It is averred that though the mother of the Respondent received the aforesaid sum from the appellant following the decree but in course of time, the mother-Smt. Namita Mohapatra spent the entire amount for the education and maintenance for herself as well as for the respondent, as a result of which the respondent was compelled to depend upon her maternal grand mother and the respondent is still under her guardianship. After the respondent completed her High School examination, the maternal grandmother became unable to provide money for her college education and for her maintenance constraining the respondent to write a letter to the father-appellant for providing her financial assistance. The respondent alleged that the appellant is a man of sufficient means having movable and immovable properties. He used to get Rs.2, 500/- per month as house rent from one of his buildings at Aska town, he also earns Rs.15, 000/- per month out of his business and he has also income from agricultural sources of more than Rs.10, 000/- per annum. The respondent having already reached the marriageable age, finding the father has an obligation to meet her marriage expenses, the respondent required a sum of Rs.2, 50,000/- towards her marriage expenses. Thus, the respondent was constrained to file the suit bearing C.S.No.26 of 2004 making the claim as indicated hereinabove.

3. The appellant as defendant in C.S.No.26 of 2004 filed written statement though claiming the respondent not to be his daughter but took a

plea that when he and his wife were staying separately in the year 1988, his wife Smt. Namita Mohapatra along with her minor daughter, namely Bunu filed a suit bearing C.S.No.32 of 1988 for passing an order of restitution of conjugal right and for granting compensation in their favour. Thereafter, the appellant filed C.S.No.71 of 1988 for obtaining a decree of divorce. Considering the cases involved between the parties, the parties i.e. wife, husband and daughter being parties to C.S.No.71 of 1988 as well as O.S.No.32 of 1988, they all arrived at a compromise having terms and conditions that the appellant is to return some house hold articles of his wife and also to pay a sum of Rs.14, 000/- towards the cost of the deficit articles. Further, the appellant is to pay a sum of Rs.50, 000/- by way of a Bank Draft towards permanent alimony for the wife and minor daughter-Bunu and another Bank Draft of Rs.20,000/- was also made in favour of Namita Mohapatra for separate residence of herself as well as Bunu and further a Demand Draft of Rs.20,000/- towards marriage expenses of the child. The compromise decree further contained that the amount of Rs.20,000/- to be paid in favour of the respondent shall not be utilized for 16 years which shall be kept in fixed deposit for 16 years and the whole amount shall be utilized in the marriage of Bunu. The compromise decree also contained a term that by virtue of such compromise, the mother of the respondent and the respondent herself will forfeit their entire future claim against the appellant with closer of all litigations pending between them.

4. The appellant claimed that he had fully complied with all the terms and conditions of the compromise and in view of such compromise, neither the mother nor the daughter-present respondent can have any future claim. Consequently the respondent is also debarred from bringing the present suit bearing Civil Suit No.26 of 2004.

5. Considering the rival contentions of the parties, the trial court framed the following issues for determination of the suit.

"**Issues in C.S.No.26 of 2004:**

1. Whether the suit is not maintainable being hit under the principle of resjudicate?
2. Whether the plaintiff has cause of action to file the suit?
3. Whether the plaintiff is entitled to get monthly alimony, her educational expenses and marriage expenses and if so, to what amount?
4. Whether the plaintiff is the daughter of the defendant?
5. Whether the suit is bad for non-joinder of necessary party like Namita Mohapatra?

6. To what relief/reliefs the plaintiff is entitled to?"

6. The trial court took up all the issues together and partly allowing the suit, passed the following order:

> "The plaintiff's suit is decreed in part on contest against the defendant, with cost. The defendant is hereby directed to pay Rs.1, 500/- (Rupees one thousand five hundred) per month to the plaintiff towards her maintenance including her educational expenses from the date of filing of the suit till her marriage. Further, the defendant is directed to pay a lump sum of Rs.2, 50,000/- (Rupees Two lakhs and fifty thousand) to the plaintiff towards her marriage expenses. The arrear maintenance dues and the aforesaid sum of Rs.2,50,000/- shall be paid to the plaintiff by the defendant within three months hence, failing which the plaintiff is at liberty to file execution case for realization of her arrear maintenance dues and marriage expenses through process of court.
>
> Pleader's fess assessed at contested scale."

7. In assailing the aforesaid order, the defendant as appellant contended that the trial court failed to appreciate the compromise decree entered in C.S.No.71 of 1988 involving the interest of the present respondent-the daughter of the present appellant. The trial court also failed to appreciate the scope of Order 23, Rule 1, C.P.C and erred in law by not dismissing the suit as not maintainable. The trial court also failed to appreciate the fact that by virtue of earlier compromise, the interest of the respondent was well protected by not only granting maintenance of Rs.50,000/- for both mother and daughter but also granting a sum of Rs.20,000/- towards the minor daughter-Bunu with further undertaking to keep the said amount in Fixed Deposit scheme at least for sixteen years and that no permission shall be granted for spending the said amount before the marriage of the respondent-daughter. The appellant also contended that the suit at the instance of the respondent was clearly hit by the principle of res-judicata and the trial court has miserably failed to appreciate this legal aspect involved in the matter.

8. Mr. Jalli, learned counsel appearing for the respondent on the other hand contended that the respondent was a minor when the husband and wife were fighting litigations. She was also never a party to any of the litigation and therefore there is no question of principle of res-judicata applying to the present case. The trial court has taken the decision in its proper prospective and there is no illegality in the impugned order.

9. Under the above facts and circumstances, the moot question that emerges for consideration is as to whether the present suit C.S.No.26 of 2004 is hit by principle of res-judicata for the reason of compromise between the parties in O.S.No.71 of 1988, thereby closing the C.S.No.32 of 1988 accordingly ? and As to whether the respondent is estopped from claiming any further compensation from her father ?

10. Before proceeding to decide anything else in view of admitted position of initiation of two suits by the present appellant and his wife and present respondent, it is first to be seen the substance of the compromise between the parties in O.S.No.71 of 1988 and the development in C.S.No.32 of 1988.There is no dispute between the parties that the husband (present appellant) filed O.S.No.71 of 1988 to obtain a decree of divorce against the wife (mother of the respondent) and this suit was disposed of on compromise. It is relevant to note here that at the same time, the mother of the respondent along with the present respondent had also one suit bearing O.S. No.32 of 1988 as against the present appellant praying therein for several reliefs including prayer for restitution of conjugal right.

11. On perusal of the plaint vide O.S.No.71 of 1988, this Court finds that the suit was filed at the instance of the present appellant (Sarat Chandra Mohapatra) with the following Cause Title and Prayer:

"**Cause Title:**

Sarat Chandra Mohapatra,
Son of Chandra Sekhar Mohapatra,
aged 30 years, Business man of Utkal Cinema Road,
P.O./P.S.-Aska, District-Ganjam. … … Plaintiff

-Versus-

Namita Palo, Daughter of Antarjyami Palo,
aged 21 years, dependant, of Villagbe/Post-Pitala,
P.s.-Aska, At present Utkal Cinema Road,
At/ P.O./P.S.-Aska, District-Ganjam; … … Defendant

Prayer

"The plaintiff, therefore, prays that the Hon'ble court may be pleased to pass a decree in his favour and against the defendant.

(i) for divorce and dissolution of marriage, if any, between the parties.
(ii) that he is not bound to either maintain the respondent and much less her child; and

(iii) for any other relief or reliefs as the court deems proper under the circumstances."

Similarly looking to the plaint in O.S.No.32 of 1988, this Court finds the following Cause Title and Prayer.

"Cause Title

1. Smt.Namita Mohapatra, wife of Sarat Chandra Mohapatra, aged 21 years, household duties, residing at Utkal Cinema Road, At./P.S.-Aska in the district of Ganjam;

2. Bunu, D/O- Sarat Chandra Mohapatra, aged about one month, represented by her mother guardian-plaintiff no.1

…. … Plaintiffs

-versus-

1. Sri Sarat Chandra Mohapatra, aged 30 years, residing at Utkal Cinema Road, At./P.S.-Aska in the district of Ganjam;

3. Chandraskhar Mohapatra, Son of Late Bansidhar Mohapatra, aged 60 years, residing at Badakharuda, At/P.O.-K.S.Nagar, At present Utkal Cinnema Road;

4. Bijaya Kumar Mohapatra, Son of Chandrasekhar Mohapatra, aged 40 years, residing At- *(not legible)*.

5. Harihar Mohapatra, Son of Chandrasekhar Mohapatra, aged 25 years, residing –do-

6. Promodo Mohapatra,Wife of Chandrasekhar Mohapatra, aged 50 years, household duty, residing at –do-

… … Defendants

Prayer

"The plaintiffs therefore pray that the Hon'ble court may be pleased to pass a decree in their favour as against the defendants directing:

(i) For restitution of the conjugal rights the first plaintiff with the first defendant by way of a decree of restitution of conjugal rights.

(ii) To direct the defendants to pay a sum of Rs.700/- per month towards the maintenance of the plaintiffs subject to their right to claim more in future according to the necessity.

(iii) To direct the defendants to provide a separate residence to the plaintiffs either at Aska or at Pitalo or at Pakidi or at Gudiali till they are taken to the house of the defendant No.1 by the later.

(iv) To direct for recovery of 'B' schedule property.

(v) To keep the suit properties as charge for the maintenance of the plaintiffs pendentilite and future;

(vi) Grant costs of the suit

(vii) And to grant any other relief or reliefs as the Hon'ble court may deem proper in the facts and circumstances of the case"

12. Similarly on perusal of Ext.A-the Compromise petition filed in C.S.No.71 of 1988, this Court finds the petition contains the following:

"**Ext.A in C.S.NO.71/1988**

"**IN THE COURT OF THE SUBORDINATE JUDGE, ASKA**
O.S.NO.71 OF 1988

Sarat Chandra Mohapatra …. Plaintiff.
-Vrs.-
Namita Palo ….. Defendant

Compromise petition under order 23 Rule 1 C.P.C. and Section 151 of C.P.C. filed by both the parties.

Most Respectfully Sheweth.

1. That the parties to the suit have compromised their difference at the intervention of gentlemen of the locality and the terms and conditions are as follows:

It is hereby made clear that the defendant is the legally wedded wife of the plaintiff. That the marriage between the parties is to be dissolved and the parties have agreed for a decree of divorce on the following terms.

(a) That the plaintiff returns back the golden ornaments to the defendant in Court which he had received at the time of the marriage e.g. –

(i) One ring with red stone, weighing about T.o.5.3.
(ii) Khasu necklace with 20 nos. of Khasu weighing T.3.0.0
(iii) One sorisia mali weighing about T. 1.2.0
(iv) One gold ring with white stone, weighing about T.0.6.3.
(v) One gold ring with blue stone, weighing about T.0.5.0.
(vi) Two gold rings fitted with red stones weighing

about T.0.4.2 & T 0.5.0.

(vii) Gold Rulis (two numbers) weighing about T.1.12.0.

(viii) A pair of gold ear rings weighing about T.0.1.2.

(b) The wooden furniture, steel Almirah, Sofa-cum-Bed and the utensils as per list, will be returned to the defendant under a proper receipt in presence of gentlemen, immediately after return of the parties from court,

(c) As decided by the gentlemen, the plaintiff paid Rs.14, 000/- (Rupees fourteen thousand only) by cash in court today towards the price of deficit gold under full settlement.

(d) As a consideration for dissolution of marriage and divorce, the plaintiff has paid to the defendant today in court a sum of Rs.50,000/- (Rupees fifty thousand only) in shape of Demand Draft bearing No.OL/A14/64716 dt.19.09.88 towards her life maintenance and the minor child, Rs.20,000/- (Rupees twenty thousand only) for their separate residence vide Demand Draft No.0L/A14/614717 dt.19.09.88 and Rs. 20,000/- (Rupees twenty thousand only) for the marriage expenses of the child vide Demand Draft .0L/A14/614718 dt.19.09.88 when she comes of marriageable age. The amount of Rs.20,000/- (Rupees twenty thousand only) under OL/A14/614718 will be deposited under a fixed deposit scheme jointly in the name of the defendant and the child with a condition to be payable to either or survivor, with the mother (defendant) as her guardian for a period of 16 years from today and the defendant will not deplete amount nor its interest in any way because that amount will be solely utilized for the marriage of the child when she comes of marriageable age. The defendant or her minor child forfeits their entire claim over the joint family properties, if any, from this day.

(e) The defendant agreed before the gentlemen that she shall meticulously follow the terms and conditions as laid down above and in case of breach of conditions, she will have no right to demand anything in future from the plaintiff on any of the aforesaid accounts.

(f) The defendant will withdraw the suit O.S.32/88 today on the file of Subordinate Judge, Aska as not pressed.

(g) It is agreed that the copy of this compromise petition along with the court order will be given at Aska Police Station for information and a proper entry.

The parties pray, that the suit be decreed as per the terms of this compromise.

Sd/- Namita Mohapatra
Defendant

For minor child, being
Represented by mother guardian
(defdt.)
Sd/- Namita Mohapatra,
Defendant.
Sd/- S.K.Panda, Sd/- Illegible.
Advocate for Defendants

Sd/- Sarat Ch.Mohapatra
21.9.88
Plaintiff.
Sd/-A.K.B.G.Tilak
21.9.88
Adv. for plaintiff.

Witnesses:
1.Sd./-Surendra Chandra Patra
2.Sd/- Laxman Padhi.
3.Sd/- G.Panda.
4. Sd/- … Achari
5.Sd/-Illegible"

13. The certified copy of compromise petition as available at Ext. A clearly demonstrates the signatures of Smt. Namita Mohapatra for herself as well as for her minor child-Bunu, the present respondent and also the husband, the present appellant. Looking to the conditions indicated in Clause-C and D of the compromise petition, it is apparent that the compromise not only covered the case of the mother of the respondent but also covers the case of the present respondent being represented through her mother guardian. Further as per Clause-F of the compromise petition, the mother of the present respondent categorically agreed for withdrawing the suit bearing C.S.No.32 of 1988 that was pending on the file of Civil Judge (Senior Division), Aska. As per the terms and conditions in Clause-D of the compromise, the mother of the respondent received a sum of Rs.50, 000/- in the year 1988 itself towards her life maintenance as well as the maintenance of minor child. Besides above, the mother of the respondent also received a sum of Rs.20,000/-for their separate residence and a further sum of Rs.20,000/- towards marriage expenses of minor child with a further guarantee to keep the said amount in Fixed Deposit jointly in the names of mother- Smt. Namita Mohapatra and respondent at least for sixteen years from the date of receipt and encashable only after the minor attending the age of marriage and to be solely utilized for marriage of the present respondent .Both parties were also agreed with a further condition that the mother and her minor child shall forfeit their all claim over the joint family property of

the present appellant along with an undertaking therein to withdraw the C.S.No.32 of 1988 specifically in view of the compromise.

14. As appears, following the agreement between the parties in the aforesaid compromise, the mother of the respondent withdrew the suit O.S.No.32 of 1988 involving the present respondent as defendant No.2 therein and the memo withdrawing the suit as appearing at Ext. E to the present suit contains the following:

"In view of the compromise in O.S.No.71 of 1988 filed in court, the plaintiff does not press the suit which may be dismissed"

From the reading of Exits. A, C, D and E, it clearly appears that the attempt of compromise in O.S.No.71 of 1988 as well as the attempt in O.S.No.32 of 1988 are not only simultaneous attempt to close both the proceedings on the basis of compromise but are also clear indication of compromise held between the parties including the present respondent particularly. Keeping in view the compromise in O.S.No.71 of 1988, both the proceedings are also disposed of by the same court on the same date may be one after another. It is in these circumstances and particularly keeping in view the involvement of parties in both the suits and recording of the specific terms in Clause- C, D, E and F of the compromise petition, there is no doubt that all the disputes involving the parties including the respondent are settled in one stroke by virtue of the compromise entered into in the O.S.No.71 of 1988 and are closed for all times to come by virtue of withdrawal of O.S. No.32 of 1988 particularly indicating the reasons therein. The case of the present respondent having been covered and taken care of by the mother-guardian in the concluded suits, the respondent is not only estopped to bring any other suit claiming compensation against father but the present suit is also hit by principle of res-judicata. Accordingly both the questions framed here in above in paragraph-9 are answered in affirmative.

15. Law as laid down in the case of ***Gurupreet Singh-vrs-Chaturbhuj Goel*** as reported in ***AIR 1988 SC 400***, mandates that the compromise must be in writing and signed by the parties and there must be a completed agreement between them. Looking to the factual back ground in the present case, it is observed that the compromise entered into between the parties in C.S.No.71 of 1988 is a complete compromise and following the above principle of law, the compromise can not be subject matter in a subsequent suit. Further in the event, one of the party to the compromise if not satisfied with the compromise, then procedure laid down by proviso to Order 23,Rule

3,C.P.C for setting aside the decree must be followed. In view of the Appex Court judgment in the case of ***Banwarilal –vrs- Smt.Chando*** Devi as report3ed in ***AIR 1993 SC-1139***, a party challenging compromise can file appeal or can file petition under proviso 9 to Rule 3 of Order 23, CPC quashing the validity of compromise and under the circumstances no fresh suit was maintainable. Further looking to the prayer involved in the suit at hand, the respondent even did not challenge the compromise decree involving herself. It is also further observed that the position of Order 23 pre-amendment and post amendment, there is a great difference and in view of introduction of Order 23, Rule 3A, C.P.C with effect from 01.02.1977, there is clear bar of any further suit challenging a compromise decree. The decision relied on by the trial court vide ***AIR 1967 SC-591*** has no application after the amendment of the order 23, C.P.C on 01.02.1977 and there has been wrong application of this decision to the present case by the trial court. This proposition that a compromise decree can not be also a subject in a subsequent suit, has also been settled by this Court in the case between ***Madhab Naiik -vrs-Dhaneswar Panda & Others*** as reported in ***34 (1992) - OJD- 428 (Civil)*** and following the decision as reported in ***AIR 1993 -SC-1139,*** the party has the only remedy of Appeal. Consequently the subsequent suit was also otherwise bad in law.

16. Now coming back to the decision of the trial court on Issue No.1 as discussed in paragraph-8 of the impugned judgment, this Court finds that the decision vide AIR 1967-SC-591 is pre amendment of Order 23 of C.P.C. This legal position has been totally changed after the amendment in the year 1977 and there is improper reading and application of the decision rendered in AIR 1967-SC-591 by the trial court. In view of the findings of this Court on the question of res-judicata and for introduction of Order 23, Rule 3A, C.P.C in the year 1977, this Court holds the finding of the trial court on Issue No.1 is bad in law and the same is hereby reversed.

Since this Court holds the suit C.S.No.26 of 2004 at the instance of the respondent, is hit under the principle of res-judicata and further the respondent is estopped from bringing a fresh suit involving her compensation in view of the compromise decree in an earlier suit i.e. O.S.71 of 1988 involving herself and her mother, the suit was not maintainable in the eye of law all other issues became irrelevant and thus there is no need for entering into other issues involved in the suit in C.S.No.26 of 2004. The M.A.T.A. is therefore allowed. However, there is no order as to cost.

Appeal allowed.

2016 (I) ILR - CUT- 1209

BISWANATH RATH, J.

W.P.(C). NO.1836 OF 2009

PRAFULLA KUMAR SWAIN ……..Petitioner

.Vrs.

KALANDI KANDI & ORS. ……..Opp. Parties

O.C.H & P.F.L. ACT, 1972 – S. 4 (4)

Suit for permanent injuction simplicitor – Whether the suit will abate during the pendency of the proceeding under the Odisha Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 ? – Held, No.

For petitioner : M/s. Bramhananda Tripathy,K.Gaya, & S.C.Sahoo.

For opp. Parties : Mr. S.K.Pattnaik,U.C.Mohanty,P.K.Pattnaik, D.Pattnaik & S.R.Pattnaik.

Date of Hearing : 02.11.2015
Date of Judgment: 02.11.2015

JUDGMENT

BISWANATH RATH, J.

This writ petition has been filed assailing the order dated 29.11.2008 passed by the Civil Judge (Junior Division) Nimapara in C. S. No. 96 of 2006.

Short background of the case is whether the suit for permanent injunction is to abate or stayed during pendency of the proceeding under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as 'the OCH & PFL Act, 1972'). Pending Civil Suit for permanent injunction at the instance of the petitioner, a proceeding was initiated under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972. It is at this stage, the defendants filed an application under Section 51 of the OCH & PFL Act, 1972 for stay or to dismiss or to abate the suit on the grounds stated therein. In filing the application, the defendants contended that in view of clear bar under Section 4 (4) of the Act, 1972, read with provision contained in Section 51 of the Act, 1972 adjudication of such nature of suit should abate or stayed in view of the pendency of the proceeding under the Act, 1972.

Plaintiff-petitioner filed objection inter alia contending therein that the suit being for injunction simplicitor, the provision of Section 4 (4) of the Act nor the provision contained in Section 51 of the Act, 1972 does not attract and therefore the application under Section 51 of the Act, 1972 is not maintainable.

Considering the rival submission of the parties, the Civil Judge (Junior Division), Nimapara by an order dated 29.11.2008 while allowing the application at the instance of the defendant passed the following:-

XXX XXX XXX

"Heard. *One information submitted to the Court on behalf of defendants which shows that it is issued by the Asst. Consolidation officer, Gop stating that the notification U/s. 41 of the Act has not been published in mouza-Astaranga, P.s. Kakatpur, Thana No. 191. One ROR is also filed which relates to the same mouza of Thana No. 191 and the was ROR was published U/s. 29 of OCH & PFL Act. The consolidation authorities have the jurisdiction to decide right, title, interest of the parties and this suit is file for permanent injunction which depends on the decision on right, title interest over the suit land. Thus, the petition is allowed. The suit is stayed till publication of the notification U/s. 41 of OCH & PFL Act. Put up on 27.02.2009 awaiting notification by the consolidation authorities. The earlier order dtd. 27.06.2008 is recalled."*

In filing the present writ application, the parties have repeated their respective submissions already laid down by them before the authority below and in view of the commonness of the submissions, this Court feels it appropriate not to repeat this Act to avoid unnecessary repetition of the facts and grounds made therein.

Section 4(4) of the Act, 1972 reads as follows:--

"Every suit and proceedings for declaration of any right or interest in any land situate within the consolidation area in regard to which proceedings could be or ought to be started under this Act, which is pending before any Civil Court, whether of the first instance or appeal reference or revision shall, on an order being passed in that behalf by the court before which such suit or proceeding is pending stand abate."

Section 51 of the Act, 1972 reads as follows:-

> *"51. Bar of jurisdiction of Civil Courts-Notwithstanding anything contained in any other law for the time being a force, but subject to the provisions contained in Clause (3) of Section 4 and Sub-section (1) of Section 7-*
>
> *(1) All questions relating to right, title, interest and liability in land lying in the consolidation area, except those coming within the jurisdiction of Revenue Courts or authorities under any local law for the time being in force, shall be decided under the provisions of this Act by the appropriate authority during the consolidation operations; and*
>
> *(2) No Civil Court shall entertain any suit or proceedings in respect of any matter which an officer or authority empowered under this Act is competent to decide."*

Reading of the above provisions clearly makes it clear that the same is related to a situation of pendency of the suit involving the questions relating to right, title and interest as well. The contingency of abatement of a suit or bar for initiation of a proceeding before the Civil Court comes under the special contingency and provided there is satisfaction to the provision under Section 4(4) or Section 51 of the Act, 1972. There is no dispute at the Bar that the Suit pending, is a suit for injunction simplicitor in the court below and does not involve the question regarding right, title and interest of the parties concerned and dispute pending before the Consolidation Authority at this stage in revision. The question as to whether a suit concerning sole prayer for injunction shall be stayed or abated in view of the provisions, referred to hereinabove, have been answered again and again by this Court and in a decision of the Full Bench of this Court as reported ***in AIR 1988 Orissa (166), 65 (1988) CLT 440*** this Court in a Full Bench is of categoric opinion that while considering such questions, two essential ingredients are to be found that the disputed properties included in the consolidation scheme and the relief sought for in the suit can be granted by the authorities under the Act. If any of these conditions is not satisfied in a case, then the suit will not abate under Section 4(4) or under Section 51 of the Act.

This Court in deciding a matter of similar nature in the case between ***Raghunath Sahu and another vrs. Sarat Nayak and others*** as reported in ***1987 (1) OLR 144*** relying upon a decision in between ***Rahas Bewa vrs.***

Kanduri reported in ***54 (1982) CLT 143*** in paragraph -6 while holding that simplicitor suit for injunction shall not abate following provision of Section of 4 (4) of the Act, 1972 in para observed as follows:-

"XXX XXX XXX

> The trial Court by the impugned order overruled the objection by the plaintiffs-petitioners and held that the suit comes within the purview of Sec. 4(4) of the Consolidation Act and therefore, it abates. The main basis for the view taken by the Court appears to be that the suit is not one for permanent injunction simplicitor: since the relief for declaration of title and recovery of possession are also sought for in the suit. This view is clearly erroneous. No doubt the Division Bench of this Court in the case of (Rahas Bewa v. Kanduri Charan Sutar and others) 54 (1982) CLT 143, held that the suit for permanent injunction simpliciter would not abate, but that does not mean that whenever the reliefs for declaration of title and recovery of possession are sought in addition to the relief for permanent injunction, the suit ceases to be one for injunction. All the averments in the plaint are to be taken into consideration while determining the question whether the suit can be said to be one for injunction. It is now well-settled that merely because the question of title would be gone into in the suit, it would not be out of the jurisdiction of the common law forum, i.e., Civil Court. There is also no dispute over the legal position that the authorities under the Consolidation Act are not competent to grant relief for injunction and therefore a suit for permanent injunction could continue in the Civil Court. Unless on consideration of the pleadings in the suit it is held that the relief of injunction is wholly irrelevant or superfluous or that it has been included only with a view to avoid abatement under Sec. 4(4) of the Consolidation Act, it cannot be said that the suit abates despite the relief of permanent injunction being sought therein."

XXX XXX XXX

In view of the above Full Bench decision as well as the decisions referred to herein above, it is now to be decided whether the impugned order can be legally sustained or not ? Considering the facts involved in the present dispute, this Court finds that the suit at the instance of the petitioner is for injunction simplicitor and there is no involvement of adjudication of the question as to right, title and interest of the parties and the suit can be

decided without even delving into the question of right, title and interest, which is already a subject matter of the consolidation proceeding. Further looking to the prayer made in the plaint, this Court is of the opinion that the prayer for injunction does not come within the domain of the Consolidation Authority and the Civil Court has the only right to deal with such matters.

Per contra, the learned counsel appearing for the opposite party brought to my notice a decision reported in ***105 (208) CLT 501***. I have gone through the decision and the facts involved in the reported case does not suit to the facts involved in the case in hand and the decision is not applicable to the present case.

Under the circumstances, this Court finds the impugned order is bad in law, the same is accordingly set aside and consequently direct the Civil Court to dispose of the suit on its own merit. Writ petition stands allowed but however, there is no order as to cost.

Writ petition allowed.

2016 (I) ILR - CUT- 1213

S.K.SAHOO,J.

JCRLA NO. 81 OF 2012

GORA PURTY ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 – S. 201

Offence U/s 201, I.P.C. – Ingredients – In order to attract the offence the prosecution is required to prove the following aspects :-

(I) The accused had knowledge or reason to believe that an offence has been committed;

(ii) The accused caused disappearance of the evidence which is related to such offence;

(iii) Such disappearance has been done with the intention of screening himself or any other offender from legal punishment which is co-related to such offence;

(iv) After having knowledge or reason to believe regarding commission of offence, the accused intentionally gave any false information relating to such offence and thereby caused disappearance of evidence.

In the present case since cadaver of the deceased as well as weapons of the offence were lying in the spot house and there are discrepancies relating to the place from where the cadaver was buried and exhumed, it would be unsafe to convict the appellant U/s 201 I.P.C. – Held, the sentence imposed U/s 201 I.P.C. by the trial Court is setaside. (Para 9)

For Appellant : Mrs. Susamarani Sahoo
For Respondent : Mr. Jyoti Prakash Patra
Addl. Standing Counsel

Date of hearing :08.02.2016
Date of Judgment:11.03.2016

JUDGMENT

S. K. SAHOO, J.

It is a case of uxoricide. The appellant Gora Purty faced trial in the Court of learned Adhoc Additional Sessions Judge, Fast Track Court, Keonjhar in S.T. Case No.27/20 of 2012 for offences punishable under sections 302 and 201 of the Indian Penal Code for committing murder of his wife Menjari Munda (hereafter 'the deceased') on 29.08.2011 at about 6.00 p.m. in village Sitabinj Dankasahi under Ghatagaon police station in the district of Keonjhar and committing disappearance of evidence with the intention of screening himself from legal punishment.

The learned Trial Court vide impugned judgment and order dated 03.09.2012 found the appellant guilty under sections 304 Part-I and 201 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.2000/-, in default, to undergo rigorous imprisonment for three months more for the offence under section 304 Part-I of the Indian Penal Code. The appellant was further sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.2000/-, in default, to undergo rigorous imprisonment for three months more for the commission of offence under section 201 of the Indian Penal Code. Both the substantive sentences were directed to run concurrently.

2. The prosecution case as per the First Information Report lodged by Budhuram Munda (P.W.2) on 31.08.2011 before the Inspector in-charge,

Ghatagaon Police Station is that the deceased Menjari Munda was his sister and the appellant had married her since last twelve years and they were blessed with three children. The informant received message from his uncle Tura Munda that the appellant after committing murder of the deceased buried her dead body at a little distance from his house. Hearing such news, the informant proceeded to the village of the appellant and asked his niece Nirasa Purty (P.W.4), the daughter of the deceased about the occurrence who told that on 29.8.2011 at about 6.00 p.m. a quarrel ensued between her father (appellant) and mother (deceased) and the appellant dealt blows by means of a crowbar on the head and other parts of the body of the deceased and buried the dead body in a field nearer to their house. The informant found blood stains in the house. The appellant was found absent from the house and it was found that the dead body had been buried at a little distance away from the house and the soil was covered with leaves and branches. The informant suspected that due to domestic quarrel, the appellant committed murder of the deceased.

The oral report of P.W.2 Budhuram Munda was reduced into writing by the Inspector in-charge of Ghatagaon Police Station namely Jayakrushna Pagal which was treated as F.I.R. (Ext.2) and accordingly Ghatagaon P.S. case No. 109 dated 31.08.2011 was registered under sections 302 and 201 of the Indian Penal Code. The Inspector in-charge directed P.W.12 Chamaru Sabar to take up investigation of the case. During course of investigation, P.W.12 examined the informant, recorded his statement and made requisition to the Executive Magistrate to remain present at the time of inquest over the cadaver of the deceased. He deputed a constable to guard the place where the dead body was buried. He prepared the spot map Ext.10, seized blood stained earth and sample earth from the spot room under seizure list Ext.3. In presence of the Executive Magistrate, Ghatagaon, the dead body of the deceased was exhumed and P.W.12 held inquest over the dead body and prepared inquest report Ext.1 and then the dead body was sent to C.H.C., Patna for post mortem examination under dead body challan Ext.11. P.W.12 arrested the appellant on 31.08.2011 and seized the wearing apparels of the appellant under seizure list Ext.5 and also seized the weapon of offence i.e., crowbar and a spade having wooden handle under seizure list Ext.4. The wearing apparels of the deceased as well as command certificate were seized under seizure list Ext.12. On 1.9.2011 the appellant was sent to Ghatagaon Hospital for collection of nail clippings and blood sample and after the same were collected and kept in separate vials, those were seized under seizure list

Ext.6. The weapon of offence i.e., crowbar was produced before the autopsy surgeon for his opinion who gave his opinion under Ext.9. The seized material objects were sent to S.F.S.L, Rasulgarh, Bhubaneswar for forensic analysis through the Court of learned S.D.J.M., Keonjhar. After completion of investigation, Inspector in-charge of Ghatagoan police station submitted charge sheet against the appellant on 16.12.2011 under sections 302 and 201 of the Indian Penal Code.

3. After submission of charge sheet, the case was committed to the court of session for trial after observing due committal procedure where the learned Trial Court charged the appellant under sections 302 and 201 of the Indian Penal Code on 2.4.2012 and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. In order to prove his case, the prosecution examined twelve witnesses.

P.W.1 Fakira Munda is the younger brother of the deceased who stated to have seen the dead body of the deceased lying in the house of the appellant. He further stated that the police was informed about the incident and the dead body was exhumed from the burial ground where the dead body was buried and inquest was held under inquest report Ext.1.

P.W.2 Budhuram Munda is the informant in the case and he stated that when he along with his mother and younger brother came to the house of the appellant, they saw the deceased was lying dead in the house of the appellant having injuries on her head and face and further stated that the daughter of the deceased namely Nirasa (P.W.4) narrated the incident before them. He further stated that police exhumed the dead body of the deceased and inquest was held under inquest report Ext.1.

P.W.3 Sankar @ Sankarsan Nayak stated about the seizure of blood stained earth and sample earth under seizure list Ext.3. He also stated about the seizure of a crowbar and one spade under seizure list Ext.4. He is also a witness to the inquest over the dead body of the deceased. P.W. 4 Kumari Nirasa Purty is the daughter of the appellant and the deceased and she is an eye witness to the occurrence.

P.W.5 Santanu Kumar Bej and P.W.6 Sanjaya Kumar Karjee were the homeguards attached to Ghatagaon police station who stated about the seizure of one check lungi stained with blood, one white-red lungi stained with blood and another T-shirt stained with blood under seizure list Ext.5. He

also stated about the seizure of two vials containing nail clippings and blood sample under seizure list Ext.6.

P.W.7 Smt. Janaki Munda is the unt of the appellant who stated about the disclosure made by P.W.4 that the appellant committed murder of the deceased. He further stated that the dead body was exhumed by the police from the bari of the appellant.

P.W.8 Dr. Bikram Sahoo was attached to C.H.C, Ghatagaon as Medical Officer who collected blood sample and nail scrapings of the appellant and kept it in two separate vials and handed it over to the escorting constable. He proved his report Ext.7.

P.W.9 Madhusudan Munda stated that in the presence of police and also the parents of the deceased, the dead body was exhumed and inquest was held under inquest report Ext.1.

P.W.10 Dr. Krushna Chandra Parida was attached to Patna C.H.C. as Medical Officer who conducted post mortem examination over the dead body of the deceased on 31.8.2011 and proved his report Ext.8. He also gave his opinion regarding possibility of injuries by the crowbar which was produced before him by the Investigating Officer and further opined that the injuries sustained by the deceased are sufficient to cause death in ordinary course of nature.

P.W.11 Subash Chandra Panda was the Inspector incharge of Ghatagaon Police Station who took over the charge of investigation from P.W.12 on 16.12.2011 and on the very day he submitted charge sheet under sections 302 and 201 of the Indian Penal Code finding sufficient materials against the appellant.

P.W.12 Sri Chamaru Sabar is the Investigating Officer.

The prosecution exhibited thirteen documents. Ext.1 is the inquest report, Ext.2 is the First information Report, Ext.3 is the seizure list relating to seizure of blood stained earth and sample earth, Ext.4 is the seizure list relating to seizure of weapon of offence i.e. crowbar, Ext.5 is the seizure list relating to seizure of wearing apparels of the appellant, Ext.6 is the seizure list relating to seizure of nail scrapings and blood sample collected from the appellant, Ext.7 is report of doctor about collection of nail scrapings and blood sample, Ext.8 is the post mortem examination report, Ext.9 is the query report, Ext.10 is the spot map, Ext.11 is the dead body challan, Ext.12 is the

seizure list relating to seizure of wearing apparels of the deceased and Ext.13 is the forwarding letter of seized material objects for forensic analysis.

5. The defence plea of the appellant was one of denial and it was pleaded that the appellant had not committed the murder of the deceased.

6. The learned Trial Court has been pleased to hold that the evidence of P.W.4 is very much clear and she gave graphic narration about the occurrence and under such circumstances remaining silent by the appellant without giving any plausible explanation is liable to go against him. The learned Trial Court further held that the evidence of P.W.4 is of sterling quality and her evidence is also gaining overwhelming corroboration from the evidence of P.W.1, P.W.2 and medical evidence and the evidence of other witnesses like P.W.7 Smt. Janaki Munda who corroborated the material particular about the evidence. The learned Trial Court further held that when the evidence of P.W.4 is believed, the conviction on the basis of her sole testimony can be recorded as her evidence is reliable, cogent, trustworthy and unimpeachable. The learned Trial Court further held that the prosecution has proved the case beyond all reasonable doubt on adducing overwhelming evidence in favour of prosecution including evidence of eye witness who is none but the daughter of the appellant and evidence of P.W.7 Smt. Janaki Munda who is the neighbouring household of the appellant. The learned Trial Court further held that it is surfaced that the appellant quarreled with the deceased and lost his self control and out of sudden provocation, he committed murder and it is further deduced that the appellant voluntarily got provoked under the influence of liquor and Handia and therefore the act of the appellant was coming within the Exception 4 to section 300 of the Indian Penal Code and accordingly found the appellant guilty of the offences under sections 304 Part-I and 201 of the Indian Penal Code.

7. Adverting over the nature and cause of death of the deceased, I find that apart from the inquest report Ext.1, the prosecution has also relied upon the evidence of P.W.10 Dr. Krushna Chandra Parida who was attached to Patna C.H.C as Medical Officer and he conducted the post mortem examination over the cadaver of the deceased on 31.08.2011 and found the following external injuries:-

(i) Lacerted injury on the left eye brow of size 2” X 1” X bone deep;

(ii) Abrasion of size 4” X 2” over left shin (Tibial anterior surface) bone with black eye left side;

(iii) Fracture of right scapula posterior aspect.

On examination of the cranium and spinal canal, the doctor noticed fracture of the frontal bone with hemorrhage into the frontal lobe of brain. On examination of thorax, the doctor found walls, ribs and cartilages were found intact. On dissection of the brain frontal lobe, hematoma of size 1" X 0.5" X 0.5" was seen with bleeding into the frontal lobe of the brain. The doctor opined the cause of death was on account of hemorrhage of the frontal lobe of the brain and hemorrhage into both lungs. He proved the post mortem report Ext.8.

The learned Trial Court has held that on due scrutiny of materials available on record, it is unerringly held that the death of the deceased was homicidal.

The learned counsel for the appellant has not challenged the findings of the post mortem report.

After perusing the evidence on record, the post mortem examination report Ext.8 and the evidence of P.W.10 Dr. Krushna Chandra Parida, I am of the view that there is no dispute regarding cause of death of the deceased due to hemorrhage of the frontal lobe of the brain and hemorrhage into both lungs and accordingly, I concur with the findings of the learned Trial Court that it is unerringly proved that the death of the deceased was homicidal in nature.

8. Mrs. Susamarani Sahoo, learned counsel for the appellant emphatically contended that the evidence of the child witness (P.W.4) should not have been accepted by the learned Trial Court to convict the appellant as it smacks of tutoring. She fervently urged that since the deceased was also consuming liquor as stated by her brother (P.W.2) and the doctor (P.W.10) conducting post-mortem examination has stated that the injuries noticed on the person of the deceased can be possible by fall over the hard and rough surface, therefore the possibility of the deceased sustaining injuries due to fall under the influence of liquor cannot be altogether ruled out. It is further contended that there are discrepancies in the evidence of the witnesses as to the location of the burial spot of the dead body and though it is the prosecution case that the buried dead body was exhumed in the presence of the Executive Magistrate but since the Executive Magistrate has not been examined, the burial aspect and the exhumation of the cadaver of the deceased should not be believed. She further contended that neither the seized crowbar, spade, wearing apparels of the appellant were produced during trial nor the chemical examination report was proved and therefore it was urged to give benefit of doubt to the appellant.

Mr. Jyoti Prakash Patra, the learned counsel for the State on the other hand contended that the evidence of the child witness (P.W.4) who is none else than the daughter of the appellant and the deceased is clear, cogent and trustworthy and merely because after the death of her mother, P.W.4 was residing in the house of her maternal uncle and had come to the Court with him for deposing during trial, it cannot be said that she had been tutored by her maternal uncle to depose against the appellant. He further urged that non-production of weapon of offence or wearing apparels of the appellant in Court during trial cannot be a ground to give benefit of doubt to the appellant and since the ocular evidence of the P.W.4 gets ample corroboration from the medical evidence and the doctor has specifically replied to the query made by the I.O. that the injuries sustained by the deceased were possible by crowbar, therefore there is no infirmity or illegality in the impugned judgment and order of conviction.

9. Coming to the charge under section 201 of the Indian Penal Code, it is the prosecution case that the cadaver of the deceased was buried by the appellant with the intention of screening himself from legal punishment and it was exhumed in the presence of the Executive Magistrate.

P.W.1 has stated to have seen the dead body of the deceased lying in the house of the appellant. P.W.2 has stated that when he along with his mother and younger brother (P.W.1) proceeded to the house of the appellant in village Sitabinz, they saw the deceased was lying dead in the house of the appellant having injuries on her head and face. However, the evidence of P.W.7 is something different and she has stated that the dead body of the deceased was in the house of the appellant when the brothers of the deceased came but the appellant buried the dead body in his bari when the brothers went to the police station. Such a statement cannot be accepted as after going from the spot, P.W.2 lodged the First Information Report wherein the burial aspect is reflected. Had such thing taken place after P.W.2 left to the police station from the spot, the burial aspect would not have been mentioned there in the First Information Report.

Regarding the place where the cadaver of the deceased was buried, there appears to be contradictory statements. P.W.1 has stated that the dead body was exhumed from the burial ground. P.W.7 has stated that the appellant buried the dead body in his bari which was exhumed by the police. P.W.9 has stated that the dead body was buried in a field adjacent to the house of the appellant. P.W.12 has stated that the dead body was buried in the cultivable field which was about 100 meters away from the house of the

appellant. The Executive Magistrate, Ghatagaon in whose presence the dead body was exhumed has not been examined.

Similarly so far as the weapons of offence are concerned, P.W.3 has stated that the crowbar and spade were seized from the spot house where the dead body of the deceased was lying.

In order to attract the ingredients of the offence under section 201 of the Indian Penal Code, the prosecution is required to prove the following aspects:-

(i) The accused had knowledge or reason to believe that an offence has been committed;

(ii) The accused caused disappearance of the evidence which is related to such offence;

(iii) Such disappearance has been done with the intention of screening himself or any other offender from legal punishment which is co-related to such offence;

(iv) After having knowledge or reason to believe regarding commission of offence, the accused intentionally gave any false information relating to such offence and thereby caused disappearance of evidence.

Coming to the evidence on record, when the cadaver of the deceased as well as the weapons of the offence were lying in the spot house and there are discrepancies relating to the place from where the cadaver was buried and exhumed, it would be unsafe to convict the appellant under section 201 of the Indian Penal Code and therefore the conviction of the appellant under section 201 of the Indian Penal Code and the sentence imposed there under by the learned Trial Court is hereby set aside.

10. Adverting to the contentions raised for the conviction of the appellant under section 304 Part-I of the Indian Penal Code, the star witness on behalf of the prosecution is P.W.4 Kumari Nirasa Pruty, the eleven years daughter of the appellant and the deceased.

When P.W.4 appeared in the witness box, the learned Trial Court put some questions to her and from the answers given which were reflected in the first paragraph of her deposition, the learned Trial Court held her to be competent to testify in the Court as she was able to give rational answers to the questions put to her. The challenge before this Court is not regarding her

competency to testify but on the ground that she was tutored to give evidence.

P.W.4 has stated that on the date of occurrence in the evening hours, her father (appellant) and mother (deceased) quarreled and her father got enraged and dealt blows by means of a crowbar which landed on the leg, head and chest of her mother and she died. She further stated that she was present in the same house where her mother was murdered by her father. The doctor (P.W.10) conducting post mortem examination noticed bleeding lacerated injury on the left eye brow, abrasion over left shin (Tibial anterior surface) and fracture of right scapula on posterior aspects. There was fracture of frontal bones with hemorrhage into the frontal lobe of the brain. The doctor has specifically opined vide Ext.9 that injuries were possible by the crowbar which was produced before him by the I.O. for opinion and he has further stated that the injuries are sufficient in ordinary course of nature to cause death. Thus the ocular testimony of P.W.4 is corroborated by the medical evidence.

The conduct of P.W.4 in disclosing about the occurrence before P.W.2 and P.W.7 implicating the appellant as the assailant of the deceased almost immediately after the occurrence is admissible under section 6 of the Evidence Act as res gestae.

The contentions raised that P.W.4 is a tutored witness is based on assumptions and presumptions and there is no sufficient force in it. P.W.4 has stated that nobody had tutored her to speak against her father. P.W.4 has stated that after the death of her mother, she was residing in the house of her maternal uncles who use to love her and stated her to depose in the Court and accordingly she was deposing in the Court. She has further stated that her maternal uncle was standing inside the Court. She has specifically denied to the suggestion made by the learned defence counsel that she was deposing falsehood on being tutored by her maternal uncles.

Learned counsel for the appellant placed reliance in the case of **Sukhram –Vrs.- State of M.P. reported in 1995 Criminal Law Journal 595** wherein it was held that when the prosecution case is solely resting on the evidence of a small child witness of tender age and it is tainted with infirmities of description, on the part of proper identification and when there is evidence to show that child was tutored, it is unsafe to base conviction on such evidence in murder case. Learned counsel for the appellant further placed reliance in the case of **State of H.P. –Vrs.- Kuldeep Singh reported in 2012 Criminal Law Journal 150** wherein it is held that when the

evidence of the child witness was unspecific with regard to time and place and she deposed something which was not the case of the prosecution, it was held that her statement was not of much help to the prosecution.

The citations placed by the learned counsel for the appellant are not relevant to the facts and circumstances of the present case. The evidence of P.W.4 is crystal clear, cogent, convincing, consistent and reliable. Her evidence not only gets corroboration from the evidence of other witnesses like P.W.2 and P.W.7 before whom she disclosed about the occurrence but also from the medical evidence.

In **Nivrutti Pandurang Kokate and Ors. –Vrs.- State of Maharashtra reported in (2008) 39 Orissa Criminal Reports (SC) 928**, it has been observed that the section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease- whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The decision on the question whether the child witness has sufficient intelligence primarily rests with the Trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the Trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence, the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

In the case of **Dattu Ramrao Sakhare and Ors.** - **Vrs.**- **State of Maharashtra reported in (1997) 5 Supreme Court Cases 340**, it is held as follows:-

> "A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words, even in the absence of oath, the evidence of a child witness can be

considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the Court always finds it desirable to have the orroboration to such evidence from other dependable evidence on record."

In the case of **State of M.P. -Vs.- Ramesh reported in (2011) 49 Orissa Criminal Reports (SC) 95**, it is held that deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

In the case of **K. Venkateshwarlu -Vrs.- The State of Andhra Pradesh reported in (2012) 53 Orissa Criminal Reports (SC) 443**, it is held that the evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the Court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the Court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the Court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell

the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the Court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the Court decides to rely upon it.

Keeping in view the law laid down by the Hon'ble Supreme Court and after carefully scanning the evidence of P.W.4 with great circumspection, I am not able to accept the contentions raised on behalf of the appellant that P.W.4 is a tutored witness rather she is a truthful witness and therefore I find no hesitation to accept her evidence.

P.W.4 has stated that the appellant was not working and was not purchasing rice for their meals but the deceasedwas purchasing rice for their meals and other things and she was maintaining them. P.W.4 has further stated that her father was under inebriated condition on consuming Handia (fermented rice) and liquor. P.W.2 has stated that the appellant was in the habit of consuming liquor and the deceased was also occasionally consuming liquor. Not only from the evidence of P.W.4 but also from the evidence of P.W.7, it appears that there was quarrel between the appellant and the deceased at the time of occurrence.

The learned Trial Court has held that the appellant quarrelled with the deceased and lost his self control and out of sudden provocation, the appellant committed murder. The appellant voluntarily got provoked under the influence of liquor drink and Handia drink and the act of the appellant is coming within the Exception 4 to section 300 of the Indian Penal Code.

The basic difference between sections 85 and 86 of the Indian Penal Code is that as per section 85 of the Indian Penal Code, if the intoxication is involuntary and the accused was intoxicated without his knowledge or against his will then neither knowledge nor intention in committing the offence will be imputed to him provided that at the time of doing it, by reason of intoxication, he was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. As per section 86 of the Indian Penal Code, if the intoxication is voluntary, then only knowledge of the offence on the part of the offender will be presumed but not the intention in committing it. A person by reason of intoxication under certain circumstances may be incapable of knowing the nature of a particular act he commits or that it is either wrong or contrary to law but drunkenness cannot be a defence or an excuse to commit an offence. So far knowledge is concerned, the Court must attribute to the intoxicated man the same knowledge as if he was quite sober. However, so far as the intention is

concerned, the Court must gather it from the attending circumstances giving due regard to the degree of intoxication. The intoxication must be such as to prevent the accused restraining him from committing the offence or to take away from him the power of forming any specific intention. The mind must be so obscured by drink that the accused was incapable of forming any intent to commit the crime. The evidence of drunkenness falling short of proved incapacity to form the intent necessary to constitute the crime does not rebut the presumption that a man intends the natural consequences of his act.

The basic distinction between section 304 Part-I and 304 Part-II of the Indian Penal Code is that after coming to a finding that the offence committed is culpable homicide not amounting to murder as it falls under any of the five exceptions enumerated under section 300 of the Indian Penal Code, the Court has to scrutinise the "intention" or "knowledge" aspect. If there is intention to cause death or intention of causing such bodily injury as is likely to cause death, the offence would fall within the purview of section 304 Part-I of the Indian Penal Code. If there is no such intention but only knowledge that it is likely to cause death, then it would come within the purview of section 304 Part-II of the Indian Penal Code. The intention is a state of mind which has to be inferred from the facts and circumstances of each case. The nature of the weapon used, how it was used, what type of injuries were inflicted, the part of body where injuries were caused, the pre-crime and post-crime conduct of the accused are some of the relevant factors which are to be taken note of by the Court. The accused can be said to have 'intention' when not only he had the knowledge of likely result of his act but also he acted to achieve the desired result.

Even though the occurrence in question occurred during sudden quarrel and the appellant was in a drunken condition but taking into account the weapon of offence i.e. crowbar and repeated blows dealt by the appellant in causing injuries on the deceased on the left eye brow which led to fracture of frontal bone with haemorrhage into the frontal lobe of the brain, left shin (Tibial anterior surface) and fracture of right scapula and the opinion of the doctor that injuries were sufficient in ordinary course of nature to cause death, I am of the view that even though the act of the appellant is covered under Exception 4 to section 300 of the Indian Penal Code but since he has intentionally caused the bodily injuries as were likely to cause death, he is liable under section 304 Part-I of the Indian Penal Code.

11. In the result, Jail Criminal Appeal is allowed in part. The impugned judgment and order of conviction of the appellant under section 201 of the Indian Penal Code and sentence imposed there under is set aside and the appellant is acquitted of the said charge. However, the impugned judgment and order of conviction of the appellant under section 304 Part-I of the Indian Penal Code and sentence of rigorous imprisonment for ten years and to pay a fine of Rs.2000/-(rupees two thousand), in default, to undergo rigorous imprisonment for three months as was imposed by the learned Trial Court for such offence suffers from no infirmity and therefore stands confirmed. Accordingly, the Jail Criminal Appeal is allowed in part.

Appeal allowed.

2016 (I) ILR - CUT- 1227

S. K. SAHOO, J.

CRLA NO. 51 OF 2010

BAYAMANI MANDINGA .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

(A) N.D.P.S. ACT, 1985 – S.42(2)

Empowered Officer (P.W.6) stated in cross examination that on getting reliable information about cultivation of hemp plants he made requisition to police and Magistrate but failed to prove such written requisition – There is also no evidence that P.W.6 has sent the copy of such written information to his immediate Superior Officer – In the other hand, though P.W.6 stated that the Excise Superintendent, his immediate Superior Officer accompanied in the raiding party that was not supported by any official witness – Moreover when P.W.5 deposed that on the direction of the Superintendent Excise, Koraput he alongwith other Excise Staff proceeded to the place of occurrence, learned trial Court held in his judgment that from the evidence of P.W.5 it is clear that the Superintendent of Excise, Koraput was very much present in the raiding party at the time of the alleged search

and seizure, is a complete error of record – Held, there being non-compliance of the mandatory provision U/s 42 (2) of the Act, the impugned judgment of conviction and sentence is liable to be set aside. (Paras 8, 9)

(B) N.D.P.S. ACT, 1985 – Seizure of hemp plants and ganza – Malkhana register not proved to substantiate that the contraband articles after seizure were kept in safe custody till it was produced in Court – Non-production of brass seal – If the brass seal remains with the person who has effected search and seizure, then chance of tampering can not be ruled out – So brass seal has to be left in the Zima of a reliable person under Zimanama with instruction to produce it before the Court for verification at the time of production of articles – Though P.W.6 has deposed that after affixing the impression of his personal brass seal on the seized articles, he left the seal in the Zima of the Executive Magistrate (P.W.3), the same was not supported by P.W.3 – Held, in the absence of any clinching material that the seized articles were kept in safe custody till its production in the Court, it is not safe to convict the accused. (Paras 8, 9)

(C) N.D.P.S. ACT, 1985 – Offence U/s. 20(b)(ii)(c) of the Act – Prosecution has not proved any documentary evidence that the spot house or the bari in question belong to the accused or he was in possession of the same – No person from the neighbourhood has been examined to prove that aspect – Even the evidence of the Executive Magistrate (P.W.3) was totally silent that the accused-appellant was present, either in the spot house or in the spot bari at the time of search and seizure – Held, it can not be said that the seizure of hemp plants or ganja was either from the exclusive or conscious possession of the appellant. (Para 8)

Case Laws Referred to :-

1. (2001) 6 SCC 692 : Sajan Abraham –Vrs.- State of Kerala
2. (2004) 12 SCC 201 :State of West Bengal –Vrs.- Babu Chakraborthy
3. (2007) 36 OCR (SC) 170 : Dilip and another –Vrs.- State of M.P
4. (2011) 50 OCR (SC) 217 : Rajender Singh –Vrs.- State of Haryana
5. (2009) 44 OCR (SC) 183 : Karnail Singh –Vrs.- State of Haryana
6. (1994) 7 OCR (SC) 283 : State of Punjab -v- Balbir Singh

For Appellant : Mr. Basudev Mishra
For Respondents : Mr. Anil Kumar Nayak (Addl.Standing Counsel)

Date of hearing : 23. 02.2016
Date of Judgment: 23.02.2016

JUDGMENT

S. K. SAHOO, J.

The appellant Bayamani Mandinga faced trial in the Court of learned Sessions Judge-cum-Special Judge, Koraput at Jeypore in Criminal Trial No.154 of 2007 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') for cultivating ganja plants and in possession of 31 kgs. of ganja and 149 numbers of cannabis plants without any authority or licence on 30.09.2007 at about 5.00 p.m. at village Baghamari under Laxmipur Police Station in the district of Koraput. The appellant was found guilty of the said charge and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo further rigorous imprisonment for one year.

2. The prosecution case, in short, is that on 30.09.2007 at about 3.00 p.m., P.W.6 Abhiram Behera, who was the Sub-Inspector of Excise at Laxmipur along with his staff, Excise Inspector, Koraput, Excise Superintendent, Koraput, Excise S.I., Nandapur, police staff of Koraput at Laxmipur and Executive Magistrate, Koraput, all proceeded to village Baghamari to detect excise offences. They reached at village Baghamari at about 5.00 p.m. when P.W.6 got reliable oral information about illegal cultivation of hemp plants by the appellant in his Bari adjoining to the backside of his residential house. They also proceeded to the house of the appellant and on reaching there, they found that the appellant was watering hemp plants inside his fenced Bari. P.W.6 called two witnesses namely, Krupadan Kondhpan (P.W.1) of village Sutiguda and Sala Hikoka (P.W.2) of village Baghamari and in their presence, he searched the Bari of the appellant and during search, he recovered 149 numbers of hemp plants with height ranging from 1' to 8' having flowers, fruits and tops. Those plants were uprooted and kept in the spot Bari. During the search of the Bari, P.W.6 also recovered two polythene gunny bags containing ganja and on weighment of the ganja, it was found to be 11 kgs. and 20 kgs. P.W.6 seized the hemp plants as well as polythene bags containing ganja at the spot in presence of the witnesses and the Executive Magistrate under seizure list Ext.1. He collected two samples of hemp plants, each sample containing two hemp plants in presence of the witnesses. He also collected two samples of ganja from each polythene bag, each sample containing 100 grams of ganja in presence of the witnesses. After the seizure, P.W.6 sealed the bulk ganja,

bulk hemp plants, the sample ganja and sample hemp plants by paper seal affixing there over wax with impression of his personal brass seal. He obtained signatures of the witnesses on those sealed packets and also put his own signature. On 1.10.2007 P.W.6 produced all the seized articles along with sample packets before the Trial Court and also produced the appellant before him. As per the direction of the Special Judge, the J.M.F.C., Laxmipur sent the samples of hemp plant and ganja for chemical examination under Ext.3 and thereafter P.W.6 received the report of the chemical analyser which indicated that the subject sample marked as "Ex.A1" & "Ex.B1" were found to be ganja (cannabis) as defined under section 2 (iii) (b) of the N.D.P.S. Act and sample marked as "cl." was found to be hemp plant as defined under section 2(iv) of the N.D.P.S. Act. According to P.W.6, before making search of the Bari of the appellant, he made personal search of the appellant after obtaining his option of being searched in presence of a Magistrate but no incriminating materials were recovered from the possession of the appellant. After completion of investigation, P.W.6 submitted prosecution report against the appellant.

3. During course of trial, in order to prove its case, the prosecution examined six witnesses.

P.W.1 Krupadan Kandhpan did not support the prosecution case, for which he was declared hostile.

P.W. 2 Sole Hikoka also did not support the prosecution case, for which he was declared hostile.

P.W.3 Bibekananda Sahu was the Revenue Officer-cum-Executive Magistrate, Koraput who is a witness to the seizure of hemp plants and ganja from the house premises of the appellant.

P.W.4 Ganga Paikaray was A.S.I. of Excise, Narayanpatna who stated about the seizure of two bags of ganja as well as hemp plants from the Bari of the appellant.

P.W.5 Subash Chandra Jena was the S.I. of Excise, Nandapur who accompanied the other Excise Officials to village Baghamari and stated about the search of the house of the appellant and seizure of ganja and hemp plants.

P.W.6 Abhiram Behera was the S.I. of Excise at Laxmipur who not only conducted search and seizure of hemp plants and ganja but he is also the Investigating Officer.

The prosecution exhibited four documents. Ext.1/1 is the seizure list, Ext.2/1 is the option of the accused, Ext.3 is the forwarding letter of the material objects and Ext.4 is the Chemical Examiner report.

The prosecution also proved six material objects. M.O.I and M.O.II are the bulk ganja bags, M.O.III and IV are the sample covers, M.O.V is the bundle of ganja plants and M.O.VI is the sample bundle of plants.

4. The defence plea of the appellant was one of denial and it was pleaded that no ganja or hemp plants were seized from his house or Bari and a false case has been foisted against him. Neither any witness has been examined nor has any document been proved on behalf of the defence.

5. The learned Trial Court held that there was no necessity for P.W.6 to send the copy of the information as recorded in the Register C-1 to the immediate official superior since the Superintendent of Excise, Koraput who was the immediate official superior of P.W.6 was very much present in the raiding party. The learned Trial Court further held that since P.W.6 has recorded the reliable information in C-1 register maintained in his office after returning to his office, the requirement of section 42(2) of the N.D.P.S. Act has been complied with. The learned Trial Court further held that the evidence of P.W.3 to P.W.6 coupled with the seizure list Ext.1 and from the fact of actual production of the seized bulk ganja and hemp plants in Court and proved as M.O.I to M.O.VI, it is established beyond any doubts that the bulk Ganja and the bulk hemp plants were recovered and seized from a fenced bari in which the appellant was found present alone and watering the hemp plants at the time of raid. The learned Trial Court further held that no malafideness or unreasonable interestedness of the official witnesses has been shown with regard to the search, recovery and seizure rather their evidence in the circumstances of the case seems to be cogent and trustworthy to accept the prosecution version that the bulk ganja and hemp plants were recovered from the possession of the appellant. The learned Trial Court further held that from the fact of watering of the hemp plants at the time of arrival of the raiding party, it is established that the appellant was in exclusive and conscious possession of the hemp plants and bulk ganja at the time of search of the Bari by excise police. The learned Trial Court further held that the mandatory provisions of section 50 of the N.D.P.S. Act are found to have been fully complied with in regard to the personal search of the appellant. The learned Trial Court ultimately held that the prosecution has proved the charge against the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act beyond all reasonable doubts.

6. Mr. Basudev Mishra, learned counsel appearing for the appellant strenuously argued that no documentary evidence has been seized in this case to prove the title or possession of the house and Bari in question from where the ganja and hemp plants were allegedly seized to be that of the appellant. The learned counsel further urged that the evidence of the witnesses are discrepant with regard to the exact place from where ganja bags were seized and the mandatory provision of section 42(2) of the N.D.P.S. Act has not been complied with and the learned Trial Court has committed error of record in observing that the evidence of P.W.5 indicates that the Superintendent of Excise, Koraput was present in the raiding party at the time of search and seizure. The learned counsel further urged that in a case of this nature where the punishment is stringent and the evidence of the witnesses are discrepant in nature and the mandatory provisions are not complied with, it is a fit case where benefit of the doubt should be extended in favour of the appellant.

Mr. Anil Kumar Nayak, learned Additional Standing Counsel on the other hand contended that since the reliable information was received while the raiding party was on transit, therefore it is not required to reduce the reliable information into writing and when the immediate Superior Officer of P.W.6 was very much present with him at the time of raid, there was no necessity again for P.W.6 to send the reliable information to his superior officer in writing and therefore, it cannot be said that there was any violation of the provisions under section 42 of the N.D.P.S. Act. The learned counsel for the State further urged that since the appellant was very much present in his house and was watering the hemp plants, it can be said that the contraband articles as well as hemp plants were seized from his conscious and exclusive possession and therefore the learned Trial Court was justified in convicting the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act.

7. Adverting to the contentions raised at the Bar, it is evident that P.W.1 Krupadan Kandhapan as well as P.W.2 Sole Hikoka, the two independent witnesses have not supported the prosecution case but they were not declared hostile by the prosecution nor any questions were put to them by the prosecution after obtaining permission from the Trial Court as provided under section 154 of the Evidence Act. P.W.1 has stated that he put his signature on plain papers and he had not seen the seizure of Ganja and hemp plants and the appellant was not present at the time of his signature. P.W.2 has stated that nothing was seized by Excise staff in his presence and he has not seen any seizure of Ganja or hemp plants and the accused was not present when his LTI were taken on some papers. He has further stated that the

appellant had got no house or land at village Baghamari. Thus the evidence of P.W.1 and P.W.2 are in no way helpful to the prosecution.

Law is well settled that in a case of this nature even if the independent witnesses do not support the prosecution case but the version of the official witnesses relating to search and seizure inspires confidence and found to be clear, cogent and trustworthy then the Court can consider the same and adjudicate the guilt of the accused.

Coming to the evidence of official witnesses, it is seen that P.W.3 who was the Revenue Officer-cum-Executive Magistrate, Koraput has stated that on 30.9.2007 in his presence the house and the premises of the appellant were searched by the Excise officials and Ganja plants were found planted in the house premises of the appellant which were counted and it came to 150 and from the house of the appellant about 25 to 30 kgs. of ganja were recovered in two bags, one weighed 20 kgs. and the other 11 kgs. He further stated samples from both were taken and kept in two separate covers and paper slips containing his signature and signatures of witnesses and others were taken. From the evidence of P.W.3, it is clear that he has not stated about the presence of the appellant in the spot house when the raid was conducted. He has further stated that no document regarding title and possession of the house and the Bari from where the bags and ganja plants were found were verified by the Excise officials. He further stated that all the documents were prepared in the Excise office at Laxmipur.

P.W.4 Ganga Paikray was the A.S.I. of Excise, Narayanpatna and he has stated that when he along with his Senior Excise officials and Executive Magistrate came to village Baghamari, they found the appellant was watering ganja Plants in his bari and when P.W.6 Abhiram Behera, the S.I. of Excise gave his personal identity and asked the appellant as to whether he wanted to be searched in the presence of the Magistrate, the appellant opted for being searched in presence of the Magistrate. He further stated that in the house premises of the appellant, two bags of ganja were recovered, one weighed 20 kgs. and the other weighed 11 kgs. and samples were drawn from both the bags and kept under separate covers. He further stated that 149 numbers of ganja plants were also recovered and seized from the bari of the appellant. The evidence of P.W.4 that the appellant was watering ganja plants in his Bari has not been stated by P.W.3. The evidence of P.W.4 that option was given by P.W.6 to the appellant regarding search in presence of the Magistrate has also not been stated by P.W.3. P.W.4 has stated that he cannot

say if documents of title or possession of the house and bari were examined by the S.I. of Excise.

Coming to the evidence of P.W.5 Subash Chandra Jena, S.I. of Excise at Nandapur, he has stated that as per the direction of the Superintendent of Excise, Koraput, he accompanied the Excise staff, Laxmipur headed by Sri Abhiram Behera (P.W.6), S.I. of Excise, Laxmipur to village Baghamari under Laxmipur Police Station. He further stated that P.W.3 also accompanied them to village Baghamari from Laxmipur. It is pertinent to note here that P.W.5 has not specifically stated that P.W.4 accompanied them to the spot. P.W.5 has further stated that when they reached at village Baghamari, they found the appellant was giving water to ganja plants inside his fenced bari situated in the adjoining back side of his house. He further stated that on being called by the S.I. of Excise, the appellant went with them inside his house and then his house was searched in presence of the Executive Magistrate and two polythene bags containing ganja were recovered and on weighment, it was found to be 20 kgs. and other polythene bag weighed 11 kgs.

P.W.5 has further stated that when they entered inside the Bari of the appellant, they found 149 numbers of ganja plants each grown to a height of around 7' to 8' were found standing. Those plants were uprooted and then sample were collected not only from each of the polythene bags containing ganja but also small bunch of sample ganja plants were also collected. The evidence of this witness regarding the presence of the appellant in the spot house at the time of raid has not been stated by P.W.3. No persons from the neighborhood has also been examined to prove the occupation of the spot house even though it is stated by P.W.5 that about 10 to 15 persons of the occurrence village were present near the spot house and bari at the time of recovery and seizure. P.W.5 has further stated that the gunny bags were found kept on the corner of the bed room of the appellant.

Coming to the evidence of P.W.6 Abhiram Behera, S.I. of Excise, Laxmipur, it is found that he has stated that on 30.9.2007 when they reached village Baghamari at about 5 p.m., he received a reliable oral information about illegal cultivation of hemp plants by the appellant in his Bari adjoining backside of his residential house. P.W. 6 has stated about the search of the Bari of the appellant and recovery of 149 numbers of hemp plants. He has further stated that during search of the Bari, he also recovered two polythene gunny bags containing ganja which is contradictory to the evidence of P.W.5 that the gunny bags containing ganja were found inside the bed room of the

appellant. P.W.6 has further stated that after affixing the impression of his personal brass seal over the seized articles, he left the brass seal in the zima of the Executive Magistrate Sri Bibekananda Sahu (P.W.3) but P.W.3 has not whispered anything about taking zima of the brass seal from P.W.6. P.W. 6 has further stated that before making search of the Bari of the appellant, he made personal search of the appellant after obtaining his option of being searched in presence of a Magistrate but P.W.3 is silent on this aspect. P.W.6 has further stated that on 10.12.2007, he made a requisition to the Tahasildar, Koraput for demarcation of the spot Bari in order to ascertain the ownership of the Bari but no reply was received from the Tahasildar. P.W.6 has further stated that after making necessary seizure and seal of the seized articles, he brought the same to his office and kept it in his office Malkhana on 30.9.2007 and produced those articles before the Special Judge, Jeypore on the next day but no Malkhana register has been proved in this case not the in-charge officer of Malkhana was examined.

8. Section 42(1) of the N.D.P.S. Act deals with the power of the empowered officer or authorized officer as mentioned in that section to effect entry, search, seizure and arrest without warrant or authorization. If any such officer has reason to believe either from personal knowledge or information given by any person regarding commission of offence relating to any narcotic drug, or psychotropic substance, or controlled substance which is punishable under the N.D.P.S. Act then he has to take it down in writing. Such procedure of taking down in writing has also to be followed by the officer where information relates to keeping or concealment of any document or other article which may furnish evidence of the commission of such offence in any building, conveyance or enclosed place. In between sunrise and sunset, such officer can enter into and search any such building, conveyance or place. The section further provides that if the officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. Recording of grounds of belief must indicate as to why the officer conducting search and seizure in between sunset and sunrise thought it proper not to obtain a search warrant or authorization. Ordinarily a search warrant or authorization should be obtained before making an entry or searching any building, conveyance or enclosed place at such time but the exception has been provided therein. Recording of grounds of belief is not mandatory

if the search period is in between sunrise and sunset. Section 42(2) of the N.D.P.S. Act statesd that if an officer takes down any information in writing under section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours, send a copy thereof to his immediate official superior.

In the case of **State of Punjab -v- Balbir Singh reported in (1994) 7 Orissa Criminal Reports (SC) 283**, it has been held as follows:-

> "27. xxx xxx xxx xxx
>
> (3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision, the same affects the prosecution case. To that extent, it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

In the case of **State of West Bengal –Vrs.- Babu Chakraborthy reported in (2004) 12 Supreme Court Cases 201**, it is hold that great significance has been attached to the mandatory nature of the provisions, keeping in view the stringent punishment prescribed in the Act. Great importance has been attached to the recording of the information and the ground of belief since that would be the earliest version that will be available to a Court of law and the accused while defending his prosecution. The failure to comply with section 42(1), proviso to section 42(1) and section 42(2) would render the entire prosecution case suspect and cause prejudice to the accused.

In the case of **Dilip and another –Vrs.- State of M.P reported in (2007) 36 Orissa Criminal Reports (SC) 170**, it is held that the effect of a search carried out in violation of the provisions of law would have a bearing on the credibility of the evidence of the official witnesses, which would of course be considered on the facts and circumstances of each case.

In the case of **Rajender Singh –Vrs.- State of Haryana (2011) 50 Orissa Criminal Reports (SC) 217,** it is held that the total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible and it vitiates the conviction.

In the case of **Karnail Singh –Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183**, it is held that the officer on

receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1), but if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior. It is further held that the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period that is after the search, entry and seizure. The question is one of urgency and expediency. It is further held that while total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case.

Mr. Nayak, learned counsel for the State placed a decision of the Hon'ble Supreme Court reported in **Sajan Abraham –Vrs.- State of Kerala reported in (2001) 6 Supreme Court Cases 692** wherein it is held that in construing any facts to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with a pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply with, which the Courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of the law. The Court however while

construing such provisions strictly should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of a mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out. In that case, it was held that when P.W.3, the Head Constable got information with reference to the appellant only at about 7 p.m. that the person is selling injectable narcotic drugs near Blue Tronics Junction, Palluruthy, he proceeded to Palluruthy Police Station to give this information to his immediate superior, SI of Police, P.W.5. He found that P.W.5 along with his police party, who were on patrol duty coming, hence the said information was communicated thereby P.W.3 to P.W.5. Thereafter, P.W.5 along with his police party and P.W.3 immediately proceeded towards the place where the appellant was standing. Had they not done so immediately, the opportunity of seizure and arrest of the appellant would have been lost. How P.W.5 could have recorded the information given by P.W.3 and communicated to the superior while he was on motion, on patrol duty, in the jeep before proceeding to apprehend him is not understandable. Had they not acted immediately, the appellant would have escaped. On these facts, the Hon'ble Court did not find any inference could be drawn that there has been any violation of Section 42 of the Act.

Coming to the present case, P.W.6 has stated in the cross-examination that while in the morning of the fateful day, he along with his staff were on patrol duty in his locality, he got information from reliable sources about cultivation of hemp plants in different villages under his jurisdiction including village Baghamari and for that purpose, he made requisition to the police and Executive Magistrate and requested his higher officials to come to Laxmipur and assist him in detection of the offence of cultivating hemp plants by any person in the locality. No such written requisition has been proved in this case. P.W.6 has stated that the information against the appellant about the cultivation of hemp plants was received when they reached in village Baghamari. He states that information was subsequently entered by him in C-1 register in his office after return to his headquarters. Such register or the extract of the register has not been proved in this case nor the copy thereof has been sent to the immediate superior officer. Though P.W.6 has stated that Excise Superintendent accompanied them to detect the excise offence on the date of occurrence but no other official witnesses have stated about such aspect rather P.W.5 has stated that on the direction of the

Superintendent of Excise, Koraput, he along with other Excise staff proceeded to village Baghamari. Learned Trial Court has held in his impugned judgment that from the evidence of P.W.5, it is clear that the Superintendent of Excise, Koraput who was the immediate official superior of P.W.6 was very much present in the raiding party at the time of alleged search, recovery and seizure. This is a complete error of record. P.W.3 and P.W.4, the other two official witnesses have also not stated about the presence of Superintendent of Excise, Koraput with the raiding party. Therefore when the immediate official superior of P.W.6 was not present with the raiding party and reliable information was received while he was on the move and P.W.6 has taken down the said reliable information in C-1 register of his office after return to the headquarters then in compliance of the mandatory provisions of section 42 (2) of the N.D.P.S. Act, he should have forthwith sent copy of such writing to the immediate superior officer which has not been done. Therefore, I am of the view that the mandatory provisions of section 42(2) of the N.D.P.S Act has not been complied with.

9. The prosecution has not proved any documentary evidence that the spot house or the bari in question belong to the accused or that he was in possession of the same. Not a single person from the neighborhood has been examined to substantiate such aspect. When the Executive Magistrate has been examined by the prosecution as P.W.3 and his evidence is totally silent that the appellant was present either in the spot bari or in the spot house at the time of search and seizure, it cannot be said that the seizure of hemp plants or ganja was held either from the exclusive or conscious possession of the appellant.

The evidence of the witnesses are discrepant in nature and the relevant documents like Malkhana register has not been proved which would have substantiated that the contraband articles after seizure were kept in safe custody till it was produced in Court. Law is well settled that the prosecution has to prove that the articles which were produced before the Court were the very articles which were seized and the entire path has to be proved by adducing reliable, cogent, unimpeachable and trustworthy evidence. Since the punishment is stringent in nature, any deviation from it would create suspicion which would result in giving benefit of doubt to the accused.

In this case, there is no evidence that the specimen seal impression which was given on the seized articles was produced before the Court at the time of production of the seized articles for verification. It is also the

requirement of law that when the contraband articles are seized and sealed with the seal impression then the brass seal has to be left in the zima of a reliable person under zimanama and instruction is to be given to such person to produce it before the Court for verification at the time of production of articles. If the brass seal remains with the person who has effected search and seizure, then chance of tampering cannot be ruled out. Though P.W.6 has stated that after affixing the impression of his personal brass seal over the seized articles, he left the brass seal in the zima of the Executive Magistrate Sri Bibekananda Sahu (P.W.3) but the Executive Magistrate (P.W.3) has not been supported the same. The other official witnesses like P.W.4 and P.W.5 have also not stated about the same. The order sheet of the learned Sessions Judge-cum-Special Judge, Koraput dated 1.10.2007 indicates that when the accused was produced, no such brass seal was produced before the Court. Even during trial also, the brass seal which is alleged to have been given in the zima of P.W.3 has also not been produced.

9. In view of the glaring inconsistencies in the evidence of prosecution witnesses, non-compliance of mandatory provision under section 42(2) of the N.D.P.S. Act, absence of any clinching materials that the seized articles were kept in safe custody till its production in the Court and absence of either any documentary or clinching oral evidence that the spot house belongs to the appellant or that he was in possession of the same, I am of the view that it would be very risky to uphold the impugned judgment and order of conviction. Therefore, the conviction of the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act and sentence to undergo R.I. for ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh) and in default of payment of fine, to undergo further R.I. for one year as was imposed by the learned Trial Court, is hereby set aside. In the result, the appeal is allowed.The appellant who is in jail custody shall be released forthwith, if his detention is not otherwise required in any other case. Lower Court records with a copy of this judgment be sent down to the learned Trial Court forthwith for information.

Appeal is allowed.

2016 (I) ILR - CUT- 1241

S. N. PRASAD, J.

O.J.C. NO. 12904 OF 1999

KISHORE CH. SINGH SAMANTA ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp. Parties

SERVICE LAW – Compulsory retirement – Petitioner was working as conductor in OSRTC – Order challenged on the ground of malice – Service record shows that the petitioner was suspended on fifteen occasions – Still, there was no improvement in his performance – Order passed in public interest – So it cannot be said that the authorities have acted with malice and arbitrariness – Held, the decision being the subjective satisfaction of the employer, it cannot be judicially reviewed by this Court. (Paras 12 to15)

Case Laws Referred to :-

1. (2010) 10 SCC 693 : Pyare Mohan Lal -V- State of Jharkhand & Ors.
2. (2013) 10 SCC 551 : Rajastan State Road Transport Corporation & Ors. -V- Babu Lal Jangir
3. AIR 2015 SC 2426 : Punjab State Power Corporatin Ltd. -V- Kari Kishan Verma

For Petitioner : M/s. Biswamohan Patnaik, R.Sharma, S.Singh Samant, S.Mohanty & A.Mishra

For Opp. Parties :M/s. Asok Mohanty (Sr. Advocate) B.K.Nayak

Date of hearing : 18.04.2016
Date of Judgment : 18.04.2016

JUDGMENT

S.N. PRASAD, J.

Order of compulsory retirement passed against the petitioner is under challenge.

2. Brief facts of the case of the petitioner is that he was appointed as Conductor in the year 1966 and after rendering 33 years of service he has been served with an office order dated 30.01.1999 passed in exercise of power under Regulation 118 of the Orissa State Road Transport Corporation

Employees (Classification, Recruitment and Conditions of Service) Regulation, 1978 (in short the "Regulation 1978") retiring him from service in the public interest w.e.f. 31.01.1999 at the age of 50 years and accordingly the petitioner was relieved from his duty.

3. Ground taken by the petitioner in assailing the order of retirement is that the decision taken by the Review Committee is arbitrary, illegal and without any justification.

Learned Sr. Counsel appearing for the petitioner has submitted that the Chairman-cum-Managing Director of the Corporation has presided over the meeting of the Review Committee and the Committee constituted for accepting the recommendation of the review committee has also been presided over by the Chairman-cum-Managing Director of the Corporation and as such the decision taken by the Chairman-cum-Managing Director of the Corporation regarding premature retirement of the petitioner cannot be said to be bona fide.

4. Further ground is that when the order of compulsory retirement has been passed on the ground of public interest, State who has disclosed the material regarding their subjective satisfaction for reaching to this conclusion but order does not reflect this.

5. Opposite party-Corporation has appeared and filed counter affidavit inter alia stated that the competent authority of the Corporation has decided to observe the performance of one or the other employees working under Corporation and for that a Review Committee was constituted and the Review Committee after considering the service record along with other 474 employees of the Corporation has found that the petitioner needs to be separated from service in exercise of power conferred under Regulation 118 of the Regulation 1978 as because of review of the service record of the petitioner along with others it was not satisfactory hence the Review Committee had recommended for the compulsory retirement.

Further, it has been stated that there is no question of any mala fide as because the petitioner has not been single doubt regarding assessment of the service career rather the service career of other employees working under the Corporation has also been assessed by the Review Committee and whose service records has not found to be satisfactory, the Review Committee has recommended for their separation under compulsory retirement on public interest as such there is no mala fide and not justified decision of the authority.

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

7. Opposite party-Corporation has framed a Rule known as "Orissa State Road Transport Corporation Employees Service Regulation 1978" which contains a provision under Regulation 118 of the Regulation 1978 and subsequently the amended Regulation, 1990 has come containing amended provision which is being reproduced herein below:-

"In the said regulations, for regulation 118, the following regulation shall be substituted, namely:-

> "***118****(1) The age of compulsory retirement of all employees other than Class-IV and Artisan employees is the date on which he attains the age of fifty eight years:*
>
> *Provided that any such employee may retire from service at any time after completing thirty years of service or on attaining the age of fifty years by giving a notice in writing to the appointing authority of the Corporation, at least three months before the date on which he wishes to retire or by deposing in advance three months pay and allowances in lieu of such notice. The appointing authority may also require any such employee of the Corporation to retire in public interest at any time after he has completed thirty years of service or attained the age of fifty years by giving a notice in writing to the employee at least three months before the date on which he is required to retire or by giving three months pay and allowances in lieu of such notice.*
>
> *(2) The age of compulsory retirement of Class-IV and Artisan employee is the date on which he attains the age of sixty years:*
>
> *Provided that any such employee may retire from service at any time after completing thirty years of service or on attaining the age of fifty-five years by giving a notice in writing to the appointing authority of the Corporation at least one month before the date on which he wishes to retire by depositing one month's pay and allowances in lieu of such notice. The appointing authority may also require any such employee of the Corporation to retire in public interest at any time after he has completed thirty years of service or attained the age of fifty-five years by giving a notice in writing to the employee at least one month before the date on which he is required*

to retire or by giving one month's pay and allowances in lieu of such notice."

It is clear from the above provision pertaining to compulsory retirement gives opposite party-Corporation absolute right to retire any employee after he attains the age of 55 years or on completion of 30 years by giving a notice in writing to the employees at least one month before the date on which he is required to retire or by giving one month's pay and allowances in lieu of such notice.

8. A Review Committee was constituted to look into the conduct and continuation of the employees working in the Corporation who had attained the age of 50 years or had completed 30 years of service. Altogether the case of 474 employees has been placed before the Committee in which the name of the petitioner also appeared. The Review Committee on perusal of the record of the petitioner recommended his compulsory retirement and accordingly the order for compulsory retirement has been passed on 30.01.1999 which has been challenged in this writ petition on the ground of mala fide decision being unreasonable and arbitrary exercise of power.

9. From perusal of the material available on record, it is evident that the petitioner has been punished or suspended altogether on 15 occasions as would be evident from Annexure-A annexed to the counter affidavit. After taking into consideration the entire service record, the Review Committee has recommended for compulsory retirement in public interest.

10. Proposition is well laid down in the matter of power of the employer in passing the order of compulsory retirement in order to assess the capability and efficiency of one or the other employees before taking any decision the entire service career is required to be seen as to whether the continuation of such employee in service is in public interest or not, or as to whether such employee is fit to be retired compulsorily in public interest in view of the power conferred in this regard.

11. In this regard, reference may be made to the judgement rendered by the Hon'ble Supreme Court in the case of **Pyare Mohan Lal vrs. State of Jharkhand and others** reported in *(2010) 10 SCC 693* wherein their lordships has been pleased to hold that before taking the decision for compulsory retirement, the entire service record needs to be taken into consideration.

In another judgement also Hon'ble Supreme Court in the case of **Rajasthan State Road Transport Corporation and others vrs. Babu Lal Jangir** reported in *(2013) 10 SCC 551*, it has been held that overall performance on the basis of entire service record needs to be seen to come to the conclusion as to whether the employee concerned has become dead wood and it is in public interest to retire him compulsorily.

The relevant paragraph is being quoted herein below for ready reference:-

> *"**Para-24**. Having taken note of the correct principles which need to be applied, we can safely conclude that the order of the High Court based solely on the judgment in Brij Mohan Singh Chopra reported in (1987) 2 SCC 188 was not correct. The High Court could not have set aside the order merely on the ground that service record pertaining to the period 1978-1990 being old and stale could not be taken into consideration at all. As per the law laid down in the aforesaid judgment, it is clear that entire service record is relevant for deciding as to whether the government needs to be eased out prematurely. Of course, at the same time subsequent record is also relevant, and immediate past record, preceding the date on which decision is to be taken would be of more value, qualitatively. What is to be examined is the "overall performance" on the basis of "entire service record" to come to the conclusion as to whether the employee concerned has become a deadwood and it is in public interest to retire him compulsorily. The authority must consider and examine the overall effect of the entries of the officer concerned and not an isolated entry, as it may well be in some cases that in spite of satisfactory performance, the authority may desire to compulsorily retire an employee in public interest, as in the opinion of the said authority, the post has to be manned by a more efficient and dynamic person and if there is sufficient material on record to show that the employee "rendered himself a liability to the institution", there is no occasion for the court to interfere in the exercise of its limited power of judicial review.*
>
> ***Para-27**. It hardly needs to be emphasised that the order of compulsory retirement is neither punitive nor stigmatic. It is based on subjective satisfaction of the employer and a very limited scope of judicial review is available in such case. Interference is permissible*

only on the ground of non-application of mind, mala fide, perverse or arbitrary or if there is non-compliance with statutory duty by the statutory authority. Power to retire compulsorily the government servant in terms of service rule is absolute, provided that authority concerned forms a bona fide opinion that compulsory retirement is in public interest."

In another judgment rendered by Hon'ble Supreme Court in the case of **Punjab State power Corporation Ltd. vrs. Kari Kishan Verma** reported in AIR 2015 SC 2426 their Lordships after taking into consideration all the previous pronouncement of the Hon'ble Supreme Court has been pleased to hold that the entire record needs to be scrutinised by the employer to adjudge the justification of continuance of employee after reaching a particular age as contemplated in Regulations.

12. In the present case, the petitioner who was working as Conductor was charge-sheeted on several occasions suspended frequently and he has repeated the same thing 15 times but not improved his performance and accordingly the authorities in view of the power conferred under Regulation 118 of the Regulation 1978 read with Section 118 of the amended Regulation, 1990 has passed the order of compulsory retirement in public interest and it is based upon the subjective satisfaction of the employer, hence there is very limited scope of judicial review, as has been held by Hon'ble Apex Court in the case of **Rajasthan State Road Transport Corporation (supra)**.

13. Interference is permissible only on the ground of non-application of mind, mala fide, perverse or arbitrary and if there is non-compliance of the statutory duty by the authority. Power to retire compulsorily the government servant in terms of service rule is absolute, provided that the authority concerned forms a bona fide opinion that compulsory retirement is in public interest.

14. So far as the argument advanced on behalf of learned counsel representing the petitioner that the decision for premature retirement of the petitioner which has been prepared by the Review Committee having been presided over by the Chairman-cum-Managing Director of the Corporation who also presided over the meeting accepting the recommendation of the Review Committee cannot be said to be bona fide, but that cannot be accepted for the reason that as per the regulation 118 of the Regulation 1978 the appointing authority has been empowered to retire any employee in

public interest and the Chairman-cum-Managing Director in order to verify the service record of individual employee of the Corporation has constituted a committee which has been presided over by him in order to know the service record of one or the other employees of the Corporation by constituting a committee in this regard and when the committee has recommended for premature retirement of the employees including the petitioner, the said recommendation has been accepted by the Board which has been presided over by the Chairman-cum-Managing Director, hence it cannot be said that the Chairman-cum-Managing Director has acted with ulterior motive, otherwise the Chairman-cum-Managing Director would have taken decision for premature retirement in individual capacity also as per the power conferred under Regulation 118 of Regulation 1978 in the public interest. But in order to adopt fairness he has constituted a committee, hence the petitioner has been retired on the basis of the decision of the committee.

Even otherwise also from Annexure-A annexed to the courter affidavit it is evident that the petitioner has been punished on several occasions and he has also not performed well and accordingly decision was taken by the committee for premature retirement of the petitioner considering the public interest in general.

15. Taking into consideration the entire service record of the petitioner, wherein he has been charge-sheeted, suspended and punished for 15 occasions, hence it cannot be said that the authorities have acted with malice, arbitrariness and without any rational, hence the decision of the compulsory retirement being subjective satisfaction of the employer, cannot be judicially reviewed by this Court for the reasons stated above. Accordingly, the writ petition is dismissed being devoid of merits.

Writ petition dismissed.

2016 (I) ILR - CUT- 1248

S. N. PRASAD, J.

W.P.(C) NO. 6535 OF 2016

KARUNAKAR MOHARANA ……..Petitioner

.Vrs.

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

SERVICE LAW – Appointment of 'Sikshya Sahayak' – Advertisement made on 31.10.2014 fixing that a candidate is required to have passed Odisha Teacher Eligibility Test (OTET) – Petitioner did not apply as he passed OTET in the year 2015 – In the meantime a corrigendum to the Original Advertisement was issued on 09.02.2016 for clarification of some conditions in the advertisment – Pursuant to such corrigendum petitioner made an application for consideration of his candidature for appointment as Sikshya Sahayak – His application was rejected – Hence the writ Petition – Corrigendum always relates to the original and it can not be treated as a fresh advertisement – Held, petitioner having passed OTET in the year 2015 i.e. not by the date advertisement was issued, his application for appointment as Sikshya Sahayak was rightly rejected. (Paras 16,17,18)

Case Laws Referred to :-

1. (2012) 9 SCC 545 : State of Gujarat and others –V- Arvindkumar T. Tiwari & anr.
2. (1999)7 SCC 120 : Preeti Srivastava –V- State of M.P
3. (2007) 4 SCC 54 : Ashok Kumar Sonkar –V- Union of India and others
4. (2013) 11 SCC 58 : Rakesh Kumar Sharma –V- State (NCT of Delhi)& ors
5. (2007) 10 SCC 260 : Rajasthan Public Service Commission –V- Kaila Kumar Paliwal & anr.

For Petitioner : M/s. Arjun Ch. Behera, B.K.Barik & T.Sethi
For Opp. Parties : Mr. Budhiman Rout (Standing Counsel, S&ME)

Date of hearing : 20.04.2016
Date of Judgment: 20.04.2016

JUDGMENT

S.N.PRASAD, J.

In this writ petition, the petitioner has prayed for issuance of direction for consideration of his candidature for engagement as Sikshya Sahayak as he is a CT Trained and OTET passed candidate.

2. The brief facts of the case are that one advertisement was published on 31.10.2014 inviting applications from respective candidates for consideration of their candidature for being engaged as Sikshya Sahayak. The Government has issued a corrigendum on 9.2.2016 (Annexure-1) for clarification of some of the conditions of the original advertisement and in pursuance to the corrigendum, the petitioner has made an application for consideration of his candidature for engagement as Sikshya Sahayak.

3. It is the case of the petitioner that he has passed CT and +2 Arts and also passed the Odisha Teachers Eligibility Test (OTET) in the year 2015 but his case has not been considered. Hence he was constrained to file a writ petition before this Court being W.P.(C) No.3375 of 2016 and vide order dated 26.2.2016, a Bench of this Court has been pleased to pass an order to treat the writ petition as representation and take a decision in accordance with law within a specific period. Accordingly, the authority has taken decision vide order passed on 11.3.2016 (Annexure-2) rejecting the claim of the petitioner on the ground that the petitioner has passed OTET examination in the year 2015 while the advertisement has been issued in the year 2014 and as such as per the resolution issued by the Government for consideration of candidature of one or the other candidate for engagement as Sikshya Sahayak has not been fulfilled. The further case of the petitioner is that he has made an application by virtue of the corrigendum dated 9.2.2016 and as on that date, he has already passed OTET. Hence, he is eligible to be considered, but this aspect of the matter has not been considered.

4. Learned counsel representing the opposite parties-State has vehemently opposed the prayer of the petitioner by submitting and by placing the resolution No.18668 dated 6.8.2013 issued by the School and Mass Education Department, Odisha containing conditions of eligibility and other procedure for engagement of Sikshya Sahayak, one of the condition contained in Clause-6 under the heading of **ELIGIBILITY** which speaks about the engagement of Sikshya Sahayak for Cagegory-1 and 2. For category-1, it is mandatory to pass Odisha Teacher Eligibility Test (OTET-Category-1).

5. According to the learned counsel representing the opposite parties-State, the petitioner has not passed OTET as on the date of advertisement and as such, he cannot be said to be eligible for consideration due to lack of eligibility condition as provided in the resolution dated 6.8.2013. It is further contended that the corrigendum cannot said to be a fresh advertisement, rather a corrigendum always relates to the original document and admittedly

the petitioner has obtained the OTET eligibility qualification in the year 2015 while according to the petitioner, the advertisement was issued on 31.10.2015 and for this, it cannot be said to be eligible for consideration of his candidature for being engaged as Sikshya Sahayak due to lack of qualification of OTET (Category-1) on the date of advertisement.

6. It has been contended that in pursuance to the order passed by this Court in W.P.(C) No.3375 of 2015, the State Project Director, OPEPA has passed the order on 11.3.2016 discussing all these things and accordingly rejected the application of the petitioner since had not acquired the required qualification for the post as on 30.9.2014.

7. I have heard learned counsel for the parties and perused the document on record.

8. The admitted fact in this case is that the advertisement was published on 30.09.2014. The petitioner has not made an application in pursuance to the order dated 30.9.2014. The authorities have come out with a corrigendum on 9.2.2016 and in terms thereof, the petitioner has made an application for consideration of his candidature for engagement as Sikshya Sahayak.

9. It is also admitted by the petitioner that as on 30.9.2014, the petitioner has not passed the OTET (Cetegory-1), rather he has passed the same in the year 2015 and that is the reason he has made an application by virtue of the corrigendum issued on 9.2.2016. When the case of the petitioner has not been considered by the authorities, the petitioner has filed a writ petition being W.P.(C) No.3375 of 2015 and in pursuance to the order passed in the said writ petition, the State Project Director, OPEPA has passed the order on 11.3.2016 stating therein that as on 30.9.2014, the petitioner was not possessing the requisite qualification as provided under the resolution of the Government governing the field of selection process of Sikshya Sahayak. Hence, the representation has been rejected.

10. On perusal of the Resolution No.18668 dated 6.8.2013 which contains the eligibility condition at Clause-6. For ready reference, the relevant cause is reproduced as under:

> "6. ELIGIBILITY
>
> 6.1 Category-1
>
> (a) Higher Secondary (+2 or its equivalent) with at least 50% marks and 2 year Diploma in Elementary Education (CT);
>
> OR

Higher Secondary (+2 or its equivalent with at least 50% marks and 2-year Diploma in Education (Special Education).

OR

Graduation and 2-year Diploma in Elementary Eduction/2-year Diploma in Special Education.

AND

(b) Pass in the Odisha Teacher Eligibility Test (OTET-Category-I).

Xxx xxx xxx"

11. From perusal of the eligibility condition for Category-1, the petitioner, being an applicant for Category-1, has made an application for engagement as Sikshya Sahayak. It is evident that apart from the other qualifications, as contained in Clause-6.1(a) of the resolution, there is also a condition mandatorily to be possessed by a candidate i.e. pass in the Odisha Teacher Eligibility Test (OTET-Category-1) and admittedly the petitioner has passed the same in the year 2015. Admittedly, the advertisement has been issued fixing the last date of submission of application 30.9.2015 and as such, as on the date of issuance of the advertisement or even on the last date of submission of application i.e. 30.9.2014, the petitioner was not having the requisite qualification as provided in the resolution dated 6.8.2013. Hence, the petitioner cannot be said to be eligible for consideration of his candidature for engagement as Sikshya Sahayak. The petitioner although filed an application by virtue of the corrigendum and on the basis of that, he claims that his case ought to have been considered, but, this cannot be accepted for the reason that the corrigendum cannot be said to be a fresh advertisement, rather, the corrigendum always relates to the date of issuance of original documents.

12. Further, it is stated that a candidate is said to be eligible for he/she is having the requisites qualification as provided under the resolution dated 6.8.2013 as on the date of advertisement or as on the date of making an application as per the condition mentioned in the advertisement or in absence of any date mentioned the application has to be possessed by a candidate on the last day of making application as referred in the advertisement.

13. In this respect, reference may be made to the decision rendered by the Hon'ble Supreme Court in the case of ***State of Gujarat and others –V- Arvindkumar T. Tiwari and another; (2012) 9 SCC 545*** wherein the Hon'ble Apex Court placing reliance in the case of ***Preeti Srivastava –V- State of M.P; (1999)7 SCC 120,*** has been pleased to held herein as under:

> "9.The eligibility for the post may at times be misunderstood to mean qualification. In fact, eligibility connotes the minimum criteria for selection, that may be laid down by the executive authority/legislature by way of any statute or rules, while the term qualification, may connote any additional norms laid down by the authorities. However, before a candidate is considered for a post or even for admission to the institution, he must fulfill the eligibility criteria."

In the judgment rendered in the case of ***Ashok Kumar Sonkar –V- Union of India and others; (2007) 4 SCC 54***, it has been held by the Hon'ble Supreme Court that possession of requisite educational qualification is mandatory. The cut-off date for the purpose of determining the eligibility of the candidates concerned must be fixed. But in the absence of any rule or any specific date having been fixed in the advertisement, the law, as held by the Hon'ble Apex Court would be the last date for filing the application.

In the judgment of the Supreme Court rendered in the case of ***Rajasthan Public Service Commission –V- Kaila Kumar Paliwal and another; (2007) 10 SCC 260***, their Lordships, at paragrazph-21, have been pleased to held hereunder as:

> 21. Recruitment to a post must be made strictly in terms of the Rules operating in the field. Essential qualification must be possessed by a person as on the date of issuance of the notification or as specified in the rules and only in absence thereof, the qualification acquired till the last date of filing of the application would be the relevant date.

In the judgment of the Hob'ble Apex Court in the case of ***Rakesh Kumar Sharma –V- State (NCT of Delhi) and others; (2013) 11 SCC 58,*** it has been held that a candidate is required to pass requisite qualification

14. Thus, the well settled proposition of law is that a candidate, who requires to be engaged in a service, is required to possess the requisite qualification as per the reules/regulations/guidelines.

15. In this case, the advertisement was issued prescribing the last date of submission of application as 30.9.2014. But, the petitioner has not made any application, rather he has made application on the basis of corrigendum issued on 9.2.2016 and on the date of the advertisement or even on the last date of submission of application, the petitioner was not having the OTET(I) qualification which is mandatory condition for consideration of a candidature

for being engaged as Sikshya Sahayak and such, in view of the settled proposition of law, as indicated in the cases of Ashok Kumar Sonkar and Rajasthan Public Service Commission (Supra), in absence of last date having been mentioned in the Advertisement or Resolution, the candidate is required to have requisite qualification on the last date of submission of application form. Here in this case, last date of submission of application form was 30.9.2014 and admittedly the petitioner was not having OTET-I as on 30.9.2014. Since as per his case, he has obtained OTET-I in the year 2015 and as such, the petitioner cannot be said to be eligible having no requisite qualification as on 30.9.2014.

The petitioner wants a direction for consideration on account of corrigendum issued 9.2.2016, the day he obtained OTE-I, but his candidature cannot be considered on the said ground for the reason that the corrigendum has not been issued inviting fresh application as would be evident from corrigendum which has issued in terms of order passed by this Court in W.P.(C) No.6670 of 2015 in which direction has been passed to consider the application of over age candidate who could not be able to make application due to over age, The relevant part of corrigendum is being quoted:

"**ODISHA PRIMARY EDUCATION PROGRAMME**
AUTHORITY "SIKSHA SOUDHA"
UNIT-V, BHUBANESWAR-751001

No.1297/Estt./16 Dated.09.02.2016

ENGAGEMENT OF SHIKSHA SAHAYAK CORRIGENDUM

In pursuance of order of Hon'ble High Court passed in W.P.(C) No.6670/15, read with Letter No.2730/S & ME dated 04.02.2016 and in continuation to the advertisement published vide OPEPA letter No.7710 dated 11.09.2014, the last date for submission of on-line application for the post of Shikshya Sahayak (SS) is hereby extended for the candidates within the age group of 35-42 as on 30.09.2014 with relaxation of 5 years for SC/ST/SEBC/Women and 10 years ofr P.H. Candidates, those who were not able to apply due to age specification. The candidates, those who come under the age group of 35-42 with such relaxation can only be eligible to apply afresh who had not applied for the post of SS due to over age in response to the advertisement.

This relaxation of age has been made for one time only and this cannot be considered as a precedent."

It is not the case of the petitioner here that he was over age during the time when the advertisement was issued, rather his specific case is that he was not having requisite qualification and as such, corrigendum dated 9.2.2016 be treated as fresh advertisement which cannot be allowed and rightly been rejected by the authority, but not challenged.

16. The submission of the learned counsel for the petitioner that he has made an application in terms of the corrigendum dated 9.2.2016 which will be said to be a fresh advertisement which cannot be accepted for the reason that the corrigendum has been issued for those candidates who could not be able to make on-line application due to over age, but subsequently this Court, by virtue of an order passed in W.P.(C) No.6670/2015 has passed an order for consideration of candidature of those candidates whose applications have not been considered on the ground of having over age and as such in compliance of the order passed by this Court in W.P.(C) No.6670 of 2015, corrigendum has been issued.

This aspect of the matter has been considered by the State Project Director while rejecting the claim of the petitioner vide order dated 11.3.2016, but not challenged in this writ petition, stating therein that the so-called advertisement dated 9.2.2016 cannot be said to be an advertisement. Rather the corrigendum has been issued in continuation of the advertisement published vide OPEPA letter No.7710 dated 11.9.2014 for engagement of Sikshya Sahayak 2014-15, wherein except the relaxation of age, the other eligibility criteria is same in the advertisement dated 9.2.2016. As per the certificate of OTET submitted by the petitioner, it is evident that the petitioner has passed the OTET during the year 2015 and as per the eligibility criteria of Sikshya Sahayak recruitment advertisement published for the year 2014-15, the candidate should have passed OTET as on 30.9.2014 and in view thereof, it has been stated by the State Project Director that the petitioner has not acquired the required qualification for the post as on 30.9.2014, which was the last date of submission of the application form.

Thus merely on the ground of corrigendum, the candidature of other candidate who was not the applicant in pursuance to the first advertisement cannot be accepted and considered otherwise there will be no difference between corrigendum and the advertisement. Even otherwise also, corrigendum always relates to the original document which is issued for making modification/correction etc.

17. The petitioner cannot be given any relief also for the reason that the petitioner on earlier round of litigation by filing a writ petition being W.P.(C) No.3375 of 2016 has prayed for issuance of direction upon the opposite parties to accept the form for the post of Sikshya Sahayak in any preferential district under OBC/SEBC category and as such, the said writ petition was disposed of vide order dated 26.2.2016 directing the State Project Director, OPEPA, Bhubaneswar to treat the writ petition as representation and take a decision in accordance with law and in pursuance thereof, the authorities have passed an order on 11.3.2016 rejecting the claim of the petitioner, but the petitioner has not challenged the said order in this writ petition and again made the same prayer which he has made in W.P.(C) No.3375 of 2016 and as such, the writ petition is not maintainable for the same cause of action without challenging the decision taken by the authority on 11.3.2016.

In this connection, the judgment of the Hon'ble Supreme Court rendered in the case of ***Sarguja Transport Service –V- State Transport Appellate Tribunal, Gwalior and others; AIR 1987 SC*** 88 needs to be referred. Further, in the said judgment, the ratio has been laid down that after withdrawal of the writ petition, second writ petition is not maintainable without taking leave from the Court, the principle has been laid down regarding maintainability of the writ petition as is being referred herein below:

> "9.The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao's case (supra) is of no assistance. But we are of the view that the principle underlying rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdraw- al does not amount

> to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was fight in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petition- er prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental fight guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. We however leave this question open.

However, here it is not the case of withdrawal but the principle will be applicable in the facts of the case that without challenging the decision of the authority which has been taken in pursuance to the order passed by this Court in its writ jurisdiction, no order can be challenged in successive writ petition otherwise it will amount to review of earlier order passed by this Court in W.P.(C) No.3375 of 2016.

18. Keeping all these facts into consideration, the authority, in pursuance to the order passed by this Court in a writ petition filed by the petitioner under Articles 226 of the Constitution of India being W.P.(C) No.3375 of 2016, has rejected the claim of the petitioner. But without challenging the same order, the writ petitioner has filed a fresh writ petition raising the same cause of action and as such, this writ petition is not fit to be entertained on this ground also.

19. In the entirety of all these facts and circumstances, there is no merit in the writ petition which accordingly is dismissed.

Writ petition dismissed.

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K. R. MOHAPATRA, J.

C.M.P. NO. 242 OF 2016

SHRUTI DAS & ANR. ……..Petitioners

.Vrs.

PROF. DR. SIDHARTH DAS …….Opp. Party

CIVIL PROCEDURE CODE, 1908 – O-26, R-10-A

Scientific investigation – Prayer made to send the disputed signatures of the testator on the alleged will for opinion of the handwriting expert – Prayer rejected – Hence the writ petition – It is argued that the signature of the testator appearing on the 2nd page of the will was obtained on a blank paper upon which the typed materials were incorporated subsequently at the behest of the opposite party to manufacture the will in question and the signature of such testator appearing in the 1st and 2nd page of the will are different to each other – On verification of documents in Court, there appear some doubt and confusion with regard to genuineness of the signature of Late Dr. Bikram Das in the alleged will – Held, the impugned order is set aside – Direction issued to the learned trial court to send the alleged document to the Central Forensic Laboratory at Nasik for an opinion on the genuineness of the signatures of Late Dr. Das by comparing the same with his admitted and contemporaneous signatures.

(Paras 5, 6)

Case Laws Relied on :-

1. AIR 1987 Orissa 7 : Natabar Behera -V- Batakrishna Das

For Petitioners : Mr. Bidyadhara Mishra, Sr. Adv.,
M/s. S.K.Pradhan-3

For Opp. Part : Mr. S.P.Mishra, Sr. Adv.,
M/s. Bebekananda Bhuyan & Chittaranjan Swain

Date of Order : 31.03.2016

O R D E R

K.R. MOHAPATRA, J.

Order dated 07.12.2015 passed by the learned Civil Senior Civil Judge, 1st Court, Cuttack in O.S. Case No.1 of 2013 rejecting an application of the defendants (petitioners herein) to send the Will dated 10.11.2002 to the

handwriting expert to give a report with regard to the genuineness of the signature of the testator, is under challenge in this Civil Miscellaneous Petition.

2. Factual matrix in brief relevant for adjudication of this case is as follows:-

The opposite party herein filed O.S. No.1 of 2013 for grant of a letter of administration and probate of Will dated 10.10.2012 executed by late Dr.Bikram Das (father of the petitioner No.1, the opposite party and husband of petitioner No.2 herein). Said Will dated 10.10.2002 was executed in favour the opposite party. On the closure of the evidence of the opposite party, the petitioners filed an application (annexure-3) contending that the petitioners as defendants have denied the execution of the Will and signature of late Dr.Bikram Das on the alleged Will. They also in paragraph-5 of their written statement stated that the alleged signatures of late Dr.Bikram Das are fabricated. On verification of documents in Court, there appear some doubt and confusion with regard to genuineness of the signature of late Dr. Bikram Das in the alleged Will. Thus, they prayed to send the alleged Will to a handwriting expert to report with regard to the genuineness of those signatures alleged to have been given by late Dr. Bikram Das. The opposite party herein filed objection to the said Misc. case (Annexure-4) refuting contentions made under Annexure-3. He contended that there is no necessity to send the said Will for handwriting expert's opinion specifically when the signatures of late Dr. Bikram Das on the alleged Will dated 10.10.2002 has not been disputed. On a conjoint reading of the stand taken at paragraph-5 of the written statement as well as paragraph-7 of the deposition of DW-1, namely, petitioner No.1 herein, makes it clear that the signature of late Dr.Bikram Das in the Will in both the pages are specifically admitted. Thus, there is absolutely no challenge to the signatures of late Dr.Bikram Das on the Will. Defendants had not taken any step for production of contemporaneous documents containing the admitted signature of late Dr. Bikram Das, namely, pension paper, service book, bank account and PAN card etc. for its comparison. Further, the application under Annexure-3 has been filed to delay the disposal of the case and to harass the opposite party. Thus, he prayed for dismissal of the petition (Annexure-3).

Learned Civil Judge, vide order dated 07.12.2015, holding that there is no justification in allowing such a prayer, rejected the petition (Annexure-

5). Hence, this Civil Miscellaneous Petition has been filed assailing the said order.

3. Mr.Bidyadhara Mishra, learned Senior Advocate appearing on behalf of the petitioners drawing attention to paragraph-7 of the deposition of DW-1, namely, Smt. Sruti Das (petitioner No.1 herein) submitted that the signature of late Dr. Bikram Das appearing on the 2nd page of the alleged Will was obtained on a blank paper upon which the typed materials were incorporated subsequently at the behest of Dr. Sidhartha Das (the opposite party) to manufacture the Will in question. The signature of late Dr. Bikram Das appearing on the 1st and 2nd page of the Will are different to each other. Thus, the scientific opinion on the genuineness of those signatures is essential for just adjudication of the case. He further submitted that the signature appearing on the 1st page of the Will has been fabricated. Learned Civil Judge without appreciating the same, most mechanically passed the impugned order, which is not sustainable in the eye of law. Thus, interference of this Court is warranted to find out the veracity of the case of the opposite party.

4. Mr.Bhuyan, learned counsel for the opposite party, on the other hand, submitted that the petitioners are playing hot and cold at the same time. They are taking different plea at different point of time to suit their convenience. Referring to paragraph-5 of the written statement (annexure-2), he submitted that the opposite party has taken a specific plea which is as follows:-

> "5. That the alleged "will" in question has not been executed by the testator Late Dr.Bikram Das. In as much as the signatures appearing on the alleged "will" to be that of late Dr.Bikram are in fact not his genuine signatures.
>
> In the alternative, it is contended that if in course of trial, it is established by the petitioner that any or all signatures appearing on the body of the alleged "will" are found proved to be genuine signature of late Dr.Bikram Das, still then it is contended that the alleged "will" has been fabricated taking advantage of the fact that such genuine signatures of Late Dr.Bikram Das were available on blank non-judicial stamp paper to the present petitioner who has subsequently manufactured the alleged "will" in question on such blank papers with close association of Advocate Maheswar Mohanty and Dr.Rama Raman Sarangi who are his (petitioner's) close friends."

Thus, he submitted that in one hand, the opposite party has taken a specific plea to the effect that the genuine signatures of late Dr.Bikram Das were available on blank non-judicial papers. On the other hand, DW-1 deposed in her evidence that the signatures of her father, late Dr.Bikram Das appearing on the 2nd page of the alleged Will was obtained on blank sheet (paper) in which typed materials were incorporated subsequently. The petitioners further take a stand that the signature of late Dr.Bikaram Das in the alleged Will are not genuine. Thus, they are not sure as to which or none of the signature of late Dr. Bikram Das in the alleged Will are genuine. Further a prayer for sending the Will to the handwriting expert has been made without submitting/calling for the admitted and/or contemporaneous signature of late Dr. Bikram Das. The petitioners have made a casual approach to the Court to send the alleged Will to the handwriting expert without justifying the nature of scientific opinion required from handwriting expert. Thus, the learned Civil Judge has rightly rejected the petition which needs no interference.

5. Upon hearing learned counsel for the parties, it is apparent that there is dispute with regard to the signature(s) of late Dr.Bikram Das on the alleged Will (Ext.2/c). However, it is not clear from the pleadings as well as the submissions of Mr.Mishra, learned Senior Advocate as to which of the signature(s) of late Dr.Bikaram Das on Ext.2/c is/are disputed by the petitioners. In a suit, where a prayer for grant of probate or letter of administration in respect of the Will is sought for, the signature of the testator along with others plays a vital role to determine the genuineness of the Will. Though no case is made out by the petitioners to send the Will to handwriting expert, the duty of the Court cannot be held to be limited to the extent of the claim made in the petition. The Court in seisin of the matter has a significant role to adjudicate upon the genuineness of the Will and for that purpose it becomes essential to determine the genuineness of the signature of the testator on the Will, the if the same is disputed. Learned Civil Judge is not an expert to compare the signature and reach at a conclusion with regard to genuineness of the signature of the testator. The report of the handwriting expert is required for that purpose which comes within the meaning of scientific investigation under Order 26 Rule 10-A of CPC. Thus, duty is cast on the Court to issue a Commission to the handwriting expert directing him to enquire into the question with regard to genuineness of the signature on the Will and report thereon to the Court. This Court in the case of ***Natabar Behera Vs. Batakrishna Das***, reported in AIR 1987 Orissa 7 has held that report of the handwriting expert comes within the meaning of scientific

investigation. Thus, the provision provided under Order 26 Rule 10-A of CPC is applicable to such a case. In order to ascertain the genuineness of the signatures of late Dr. Bikram Das on the Will (Ext. 2/c) r, the same requires to be compared with his admitted and contemporaneous signature. It is stated at the Bar, Ext.7, i.e., lease deed dated 28.10.2004 is a contemporaneous document in which Ext.7/a to 7/j are the admitted signatures of late Dr.Bikram Das. Thus, there is no difficulty in comparing the signature of late Dr. Bikram Das available in Ext.7 with that available in Ext.2/c.

6. In that view of the matter, this Court in exercise of jurisdiction under Article 227 of the Constitution sets aside the impugned order and directs the learned Senior Civil Judge, 1st Court, Cuttack to send Ext.7 as well as Ext.2/c to the Central Forensic Laboratory at Nasik for an opinion on the genuineness of the signatures of late Dr.Bikram Das on Ext.2/c by comparing those with his signatures marked as Ext.7/a to Ext.7/j on Ext.7. It is further directed that the entire exercise shall be completed within a period of three months from the date of production of certified copy of this order.

7. With the aforesaid direction, the CMP is disposed of. In view of disposal of the CMP, interim order dated 28.03.2016 stands vacated.

Petition disposed of.