SUPREME COURT OF INDIA

DIPAK MISRA, J. & PRAFULLA C.PANT, J.

W.P.(C) NO. 690 OF 2015
WITH
(W.P.(C) NOs. 715 & 273 OF 2015)

SURESH CHAND GAUTAM ……..Petitioner(s)

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ARTS. 16(4-A), (4-B)

Reservation in promotion – Whether in the context of Articles 16(4-A) and 16(4-B), a writ or direction can be issued to a State Government or its functionaries or the instrumentalities of the State to collect and gather the necessary data for the purpose of taking a decision as regards the promotion and consequential fixation of seniority ?

Article 16(4-A) and 16(4-B) do not alter the structure of Article 16(4) – When there is a provision and right accrues in favour of the SCs and STs, a Court need not issue a direction to effectuate an enabling constitutional provision which has to be exercised by a State in its discretion on being satisfied of certain conditions – Moreover when state is not bound to make reservation for SCs and STs in the matter of promotion, the Court can not direct the State commanding to frame a legislation or a delegated legislation for reservation – Court neither legislates nor does it issue a mandamus to legislate – Held, in this case, writ of mandamus or direction can not be issued to the State.

(Paras 34 to 44)

Case Laws Referred to :-

1. (2006) 8 SCC 212 : Nagaraj & Ors v. Union of India & Ors.
2. (2012) 7 SCC 1 : U.P : Power Corporation Limited v. Rajesh Kumar & Ors.
3. (1992) Supp. 3 SCC 217 : Indra Sawhney & Ors. v. Union of India & Ors.
4. 1995 (2) SCC 745 : R.K. Sabharwal v. State of Pubjab.
5. (1995) 6 SCC 684 : Union of India v. Virpal Singh Chauhan
6. (1996) 2 SCC 715 : Ajit Singh Januja v. State of Punjab
7. (1999) 7 SCC 209 : (Ajit Singh-I), Ajit Singh (II) v. State of Punjab
8. (2000) 1 SCC 430: Ajit Singh (III) v. State of Punjab
9. (2001) 2 SCC 666: Indra Sawhney v. Union of India (supra) and M.G. Badappanavar v. State of Karnataka
10. (2011) 1 SCC 467 : Suraj Bhan Meena & another v. State of Rajasthan & Ors.
11. (2001) 6 SCC 89 : Ganga Ram oolchandani v. State of Rajasthan & Ors.
12. (1980) 3 SCC587 : Waman Rao v. Union of India

13. (1986) 2 SCC 249 : Atam Prakash v. State of Haryana
14. (1991) Supp 1 SCC 430 : Orissa Cement Ltd. v. State of Orissa
15. (1991) 1 SCC 588 Union of India v. Mohd. Ramzan Khan
16. (1993) 4 SCC 727 : Managing Director, ECIL v. B. Karunakar
17. (2003) 7 SCC 517 : M.A. Murthy v. State of Karnataka & Others
18. (1997) 4 SCC 18 : Ashok Kumar Sharma case No. II
19. (1971) 1 SCC 85 : Madhav Rao Jivaji Rao Scindia v. Union of India
20. (1987) 1 SCC 213 Ambica Querry Works v. State of Gujarat
21. AIR 1966 SC 296 : State of Rajasthan v.Harishanker Rajendrapal
22. (1880) 5 AC 214 : Julius v. Lord Bishop of Oxford
23. (2012) 6 SCC 502 **:** *Brij Mohan Lal v. Union of India & Ors*.
24. (2014) 1 SCC 554 : Aneesh D. Lawande & others v. State of Goa & others
25. (2007) 8SCC 338 : Dhampur Sugar Mills Ltd. v.State of U.P. and others
26. (1995) 1 SCC 574 : Khoday distilleries Ltd. v. State of Karnataka
27. (1890) 44 Ch D 262 (CA): Baker, Re Nichols v. Baker
28. De Smith, Judicial Review of Administrative Action, 1995, pp. 300-01: a passage from Judicial Review of Administrative Action
29. Wade & Forsyth, Administrative Law, 9th Edn., p.233: an instructive passage from Administrative Law.
30. [1968] 1 All ER 694 (HL) : Padfield v. Minister of Agriculture, Fisheries & Food.
31. AIR 1952 SC 16 : Commr. of Police v. Gordhandas Bhanji .
32. (1980) 4 SCC 162 : Municipal Council, Ratlam v. Vardichan .
33. (2015) 8 SCC 744 : D.K. Basu v. State of West Bengal & others
34. (2010) 11 SCC 493: Ranveer Yadav v. State of Bihar
35. AIR 2009 SC 187 : Nagar Palika Nigam v. Krishi Upaj Mandi Samiti
36. (2013) 6 SCC 770 : Ankush Shivaji Gaikwad v. State of Maharashtra
37. AIR 1950 SC 222 : Province of Bombay v. Khushaldas S. Advani
38. AIR 1992 SC 320 : Sub-Committee on Judicial Accountability v. Union of India & Ors.
39. AIR 1980 SC 1682 : Tara Prasad Singh & others v. Union of India & Ors.
40. (2013) 9 SCC 136 : Markand Dattatreya Sugavkar v. Municipal Corporation of Greater Mumbai & Ors.
41. 1981 Supp (1) SCC 87: S.P. Gupta v. Union of India
42. (1993) 4 SCC 441 : Supreme Court Advocates-on-Record Association & others v. Union of India
43. (2012) 2 SCC 688 : Imtiyaz Ahmad v. State of U.P. & Ors.
44. (1971) 2 QB 175 : 190 : Breen v. Amalgamated Engineering Union
45. (2014) 4 SCC 61 : T.N. Godavarman Thirumulpad v. Union of India and Ors.
46. (2011) 7 SCC 338 : Lafarge Umiam Mining (P) Ltd. v. Union of India & Ors.
47. Lee District Board v. LCC (1989) 82 LT 306; R v. Marshland Smeeth and Fen District Commr [1920] 1 KB 155, DC
48. R.v. Archbishop of Canterbury and Bishop of London,(1812) 15 East 117, at 136
49. R. v. Bank of England, (1819) 2 B & Ald 620, at 622; R v. Thomas (1892) 1 QB 426
50 (1986) 4 SCC 632 : State of Kerala v. A. Lakshmikutt.

51. (1973)1 SCC 485 : Dr. Umakant Saran v. State of Bihar & Ors.
52. 1962 Supp. 2SCR 144 : Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College.
53. (1978 1 SCC 1 : Sharif Ahmad and others v. Regional Transport Authority, Meerut and Ors.
54. (2002) 4 SCC 638 : Director of Settlements, A.P. and others v. M.R. Apparao and Anr.
55. AIR 1962 SC 1183 : (Kalyan Singh v. State of U.P.)
56. (2002) 4 SCC 247 : All India Judges' Association & Ors. v. Union of India & Ors.
57. (1997) 6 SCC 241 : Vishaka & Ors. v. State of Rajasthan & Ors.
58. (2006) 8 SCC 1 : Prakash Singh & Ors. v. Union of India & Ors.
59. 2015 (1) SCALE 169 : Chairman & Managing Director, Central Bank of India & Ors. v. Central Bank of India SC/ST Employees Welfare Association & Ors.
60. (2015) 2 SCC 796 : Census Commissioner & Ors. v. R. Krishnamurthy.

For Petitioner(s) : Mr. Rajeev Kumar Bansal

Date of Judgment :11.3.2016

JUDGMENT

DIPAK MISRA, J.

In this batch of Writ Petitions preferred under Article 32 of the Constitution of India the prayer relates to issue of a direction in the nature of mandamus commanding the respondents to enforce appropriately the constitutional mandate as contained under the provisions of Articles 16(4-A), 16(4-B) and 335 of the Constitution of India or, in the alternative, directing the respondents to constitute a Committee or appoint a Commission chaired either by a retired Judge of the High Court or Supreme Court in making survey and collecting necessary qualitative data of the Scheduled Castes and the Scheduled Tribes in the services of the State for granting reservation in promotion in the light of direction given by this Court in ***M. Nagaraj & others v. Union of India & others*** [1]. Let it be clarified in the beginning, apart from this prayer, other reliefs sought for in the petitions have not been argued and rightly so, as the said grievances have already been directed to be dealt with in interlocutory applications to be filed in the case of ***U.P. Power Corporation Limited v. Rajesh Kumar & others***[2].

2. At the commencement of the hearing, Dr. K.S. Chauhan, learned counsel appearing for the petitioner in Writ Petition (Civil) No. 715 of 2015, had submitted that the decision in ***M. Nagaraj*** (supra) by the Constitution

1. (2006) 8 SCC 212
2. (2012) 7 SCC 1

Bench requires reconsideration. For the said purpose, he has made an effort to refer to certain passages from ***Indra Sawhney & others v. Union of India & others***[3] and ***R.K. Sabharwal v. State of Pubjab***[4]. We are not inclined to enter into the said issue as we are of the considered opinion that the pronouncement in ***M. Nagaraj*** (supra) is a binding precedent and has been followed in number of authorities and that apart, it has referred to, in detail, all other binding previous authorities of larger Benches and there does not appear any weighty argument to convince us, even for a moment, that the said decision requires any reconsideration. The submission on the said score is repelled.

3. The principal submission of Mr. Salman Khurshid, Mr. K.V. Vishwanathan, learned senior counsel and Dr. K.S. Chauhan learned counsel appearing for the respective petitioners is the alternative submission which can be put in three compartments:- (i) the decision rendered in ***M. Nagaraj*** (supra) has not been appositely applied (ii) the authority in ***Rajesh Kumar*** (supra) has to apply prospectively and cannot have retrospective effect, and (iii) even if it is assumed, as interpreted in ***M. Nagaraj*** (supra), Articles 16(4-A) and 16(4-B) are enabling constitutional provisions, the concept of power coupled with duty requires the authorities to perform the duty and they are obliged to collect the quantifiable data to enable them to take a decision on reservation in promotion and hence, a mandamus should be issued to all authorities to carry out the constitutional command. We have permitted Dr. Rajiv Dhavan to argue the matter as he had appeared for some of the respondents in the case of ***Rajesh Kumar*** (supra).

4. Articles 16(4), 16(4-A) and 16(4-B) read as under:-

> "**Article 16. Equality of opportunity in matters of public employment.—**
>
> (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
>
> (4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

3. (1992) Supp. 3 SCC 217 4. 1995 (2) SCC 745

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year".

5. In ***M. Nagaraj*** (supra), the Court has encompassed the facts in the following manner:-

"The petitioners have invoked Article 32 of the Constitution for a writ in the nature of certiorari to quash the Constitution (Eighty-fifth Amendment) Act, 2001 inserting Article 16(4-A) of the Constitution retrospectively from 17-6-1995 providing reservation in promotion with consequential seniority as being unconstitutional and violative of the basic structure. According to the petitioners, the impugned amendment reverses the decisions of this Court in ***Union of India*** **v.** ***Virpal Singh Chauhan***[5]**,** ***Ajit Singh Januja*** **v.** ***State of Punjab***[6] ***(Ajit Singh-I), Ajit Singh (II)*** **v.** ***State of Punjab***[7]**,** ***Ajit Singh (III)*** **v.** ***State of Punjab***[8]**,** ***Indra Sawhney*** **v.** ***Union of India (supra)*** **and** ***M.G. Badappanavar*** **v.** ***State of Karnataka***[9]**.** The petitioners say that Parliament has appropriated the judicial power to itself and has acted as an Appellate Authority by reversing the judicial pronouncements of this Court by the use of power of amendment as done by the impugned amendment and is, therefore, violative of the basic structure of the Constitution. The said amendment is, therefore, constitutionally invalid and is liable to be set aside. The petitioners have further pleaded that the amendment also seeks to alter the fundamental right of equality which is part of the basic structure of the Constitution. The petitioners say that the equality in the context of Article 16(1) connotes "accelerated promotion" so as not to include consequential seniority. The petitioners say that by attaching consequential seniority to the accelerated promotion, the impugned amendment violates equality in Article 14 read with Article 16(1). The petitioners further say that by providing reservation in the matter of promotion with consequential seniority, there is impairment of

5. (1995) 6 SCC 684 6. (1996) 2 SCC 715 7. (1999) 7 SCC 209
8. (2000) 1 SCC 430 9. (2001) 2 SCC 666

efficiency. The petitioners say that in *Indra Sawhney* (supra) decided on 16-11-1992, this Court has held that under Article 16(4), reservation to the Backward Classes is permissible only at the time of initial recruitment and not in promotion. The petitioners say that contrary to the said judgment delivered on 16-11-1992, Parliament enacted the Constitution (Seventy-seventh Amendment) Act, 1995. By the said amendment, Article 16(4-A) was inserted, which reintroduced reservation in promotion. The Constitution (Seventy-seventh Amendment) Act, 1995 is also challenged by some of the petitioners. The petitioners say that if accelerated seniority is given to the roster-point promotees, the consequences would be disastrous. …"

6. After referring to a series of authorities, the Court concluded as follows:-

"121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney* (supra), the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal* (supra).

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As

stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.

125. We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate Bench in accordance with law laid down by us in the present case."

7. In ***Rajesh Kumar***'s case, a two-Judge Bench, apart from referring to the paragraphs we have reproduced hereinabove, also adverted to paragraphs 44, 48, 49, 86, 98, 99, 102, 107, 108, 110, 117, 123 and 124 and culled out certain principles. We think it absolutely appropriate to reproduce the said principles:-

"(*i*) Vesting of the power by an enabling provision may be constitutionally valid and yet "exercise of power" by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure the backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

(*ii*) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of the principle of equality under Article 14.

(*iii*) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

(*iv*) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.

(*v*) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4-A). Therefore, clause (4-A) will be governed by the two compelling reasons—"backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

(*vi*) If the ceiling limit on the carry over of unfilled vacancies is removed, the other alternative time factor comes in and in that event, the timescale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the timescale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact situation.

(*vii*) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335, then this Court will certainly set aside and strike down such legislation.

(*viii*) The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

(*ix*) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That

exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

(*x*) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment."

8. ***Rajesh Kumar***'s case also referred to the authority in ***Suraj Bhan Meena & another v. State of Rajasthan & others***[10] wherein it has been ruled thus:-

"*66*. The position after the decision in *M. Nagaraj case* (supra) is that reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition of ascertaining as to whether such reservation was at all required.

67. The view of the High Court is based on the decision in *M. Nagaraj cases*(supra) as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Caste and Scheduled Tribe communities in public services. The Rajasthan High Court has rightly quashed the Notifications dated 28-12-2002 and 25-4-2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Caste and Scheduled Tribe communities and the same does not call for any interference."

9. After referring to the said decision, the Court in ***Rajesh Kumar***'s case took note of the Social Justice Committee Report and the chart and opined that the said exercise was done regard being had to the population and vacancies and not keeping in view the concepts that have been evolved in ***M. Nagaraj*** (supra). It is one thing to think that there are statutory rules or executive instructions to grant promotion but it cannot be forgotten that they were all subject to the pronouncement by this Court in ***Virpal Singh***

10. (2011) 1 SCC 467

Chauhan (supra) and ***Ajit Singh (2)*** (supra). Being of this view, the Court held that a fresh exercise in the light of the judgment of the Constitution Bench in ***M. Nagaraj*** (supra) is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken.

On the said score, the Court did not accept the submission as the provisions of the Constitution are treated valid with certain conditions and riders. Thereafter the Court concluded:-

> "In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8-A of the 2007 Rules are ultra vires as they run counter to the dictum in *M. Nagaraj* (supra). Any promotion that has been given on the dictum of *Indra Sawhney* (supra) and without the aid or assistance of Section 3(7) and Rule 8-A shall remain undisturbed."

10. To have a complete picture, we may reproduce Section 3(7) of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short, "1994 Act") which reads as follows:-

> "**Section 3.** ***Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes***.—
>
> (1)-(6) * * *
>
> (7) If, on the date of commencement of this Act, reservation was in force under government orders for appointment to posts to be filled by promotion, such government orders shall continue to be applicable till they are modified or revoked."

11. Rule 8-A was inserted by the Uttar Pradesh Government Servants Seniority (First Amendment) Rules, 2002 (for short, '2002 Rules') in the U.P. Government Servants Seniority Rules, 1991, which is extracted below:-

> "**8-A.** ***Entitlement of consequential seniority to a person belonging to Scheduled Castes or Scheduled Tribes***.—Notwithstanding anything contained in Rules 6, 7 or 8 of these Rules, a person belonging to the Scheduled Castes or Scheduled Tribes shall, on his

promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also."

12. Rule 8-A was omitted on 13.05.2005 by the Uttar Pradesh Government Servants Seniority (Second Amendment) Rules, 2005. However, it was provided in the said Rules that the promotions made in accordance with the revised seniority as determined under Rule 8-A prior to the commencement of the 2005 Rules could not be affected. Thereafter, on 14.9.2007, by the Uttar Pradesh Government Servants Seniority (Third Amendment) Rules, 2007, Rule 8-A was inserted with the same language. It has been mentioned in the said Rule that it shall be deemed to have come into force on 17.6.1995.

13. It is contended by Dr. Chauhan, that the decision in ***Rajesh Kumar*** (supra) has a prospective application. To buttress the said submission he has commended us to paragraphs 85 to 87.

14. Placing reliance on the said paragraphs, it is argued by Dr. Chauhan that the provisions of Section 3(7) of the 1994 Act remained in force upto 07.05.2012 as it was omitted by Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Amendment Ordinance, 2012. We do not intend to address to the said facets. Suffice it to say, the Court in ***Rajesh Kumar*** (supra) has clearly held that Section 3(7) of the 1994 Act and Rule 8-A are *ultra vires.* What has been stated in the said judgment is that any promotion that has been given on the dictum of ***Indra Sawhney*** (supra) and without the aid or assistance of Section 3(7) and Rule 8-A was to remain undisturbed. Thus, the decision has made it distinctly clear what has been stated.

15. The stand that the provisions remained in force till the State omits it by an omission has no force. When the statutory provisions and the rules have been declared *ultra vires*, the two-Judge Bench was absolutely conscious what is to be stated and accordingly, has directed so. In this regard, reference may be made to the decision in ***Ganga Ram oolchandani v. State of Rajasthan & others***[11], wherein a particular rule was declared *ultra vires*. A contention was advanced that the Court must hold that the decision would have prospective operation to avoid a lot of complications.The Court referred to the authorities in ***Ganga RamMoolchandani*** (supra) and observed thus:-

"To meet the then extraordinary situation that may be caused by the said decision, the Court felt that it must evolve some doctrine which

11. (2001) 6 SCC 89

had roots in reason and precedents so that the past may be preserved and the future protected. In that case it was laid down that the doctrine of prospective overruling can be invoked only in matters arising under the Constitution and the same can be applied only by this Court in its discretion to be moulded in accordance with the justice of the cause or matter before it."

After so stating, the Court proceeded to hold as follows:-

"20. Accepting the lead given in the above decision, this Court has since extended the doctrine to the interpretation of ordinary statutes as well. In the cases of ***Waman Rao* v. *Union of India***[12]**, *Atam Prakash* v. *State of Haryana***[13]**, *Orissa Cement Ltd.* v. *State of Orissa***[14]**, *Union of India* v. *Mohd. Ramzan Khan***[15] **and** *Managing Director, ECIL* v. *B. Karunakar***[16] the device of prospective overruling was resorted to even in the case of ordinary statutes. We find in the fitness of things, the law decided in this case be declared to be prospective in operation."

16. In the said case, eventually the Court, while declaring the rules *ultra vires*, opined that:-

".. It is made clear that this judgment will not affect any appointment made prior to this date under the Rules which have been found to be invalid hereinabove."

17. In ***M.A. Murthy v. State of Karnataka & Others***[17], it has been held that:-

".. It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. That being the position, the High Court was in error by holding that the judgment which operated on the date of selection was operative and not the review judgment in ***Ashok Kumar Sharma case***

12. (1980) 3 SCC587 13. (1986) 2 SCC 249 14. (1991) Supp 1 SCC 430
15. (1991) 1 SCC 588 16. (1993) 4 SCC 727 17. (2003) 7 SCC 517 18. (1997) 4 SCC 18

> ***No. II***[18]. All the more so when the subsequent judgment is by way of review of the first judgment in which case there are no judgments at all and the subsequent judgment rendered on review petitions is the one and only judgment rendered, effectively and for all purposes, the earlier decision having been erased by countenancing the review applications. The impugned judgments of the High Court are, therefore, set aside."

18. Tested on the aforesaid principles, it is luminescent that the pronouncement in ***Rajesh Kumar*** (supra) is by no means prospective. The declaration is clear and the directions are absolutely limpid. The Court has not stated that the entire past promotions should be saved. It allows limited sphere of saving. Thus viewed, the submission that prospectivity is inhered in the said judgment does not appeal to us. If a promotee is saved as per the judgment of the said case, the same is saved; and for that reason, the Court has already directed in certain interlocutory applications that the promotees who have been reversed, their grievance shall be looked into by a committee and the decision of the committee can directly be challenged by way of interlocutory application before this Court in this case. We may ingeminate without any reservation that by no means prospectivity in entirety can be given to the said decision.

19. The centripodal stand of the petitioners is that assuming the principle stated in ***M. Nagaraj*** (supra) is correct and what has been stated in ***Rajesh Kumar's*** case following the dictum in ***M. Nagaraj*** (supra) holds sound; then also the enabling constitutional provisions cannot remain absolutely static. The constitutional amendments have been brought in, and once they have been held valid, it is the obligation of the State and the competent authority to give effect to the same as per the norms envisaged in the judgments of this Court. In case the said exercise is not carried out, it is the constitutional duty of this Court to see that the constitutional norm, philosophy and the purpose are worked out, especially keeping in view Articles 16(4), 16(4-A), 16(4-B), 46 and 335 of the Constitution of India and also the principle of affirmative action which is meant for certain historically disadvantaged groups. It is further argued that in ***M. Nagaraj*** (supra) Articles 16(4-A) and 16(4-B) have been regarded as enabling provisions which confer powers on the State authorities to provide reservation in promotion with consequential seniority subject to the condition of availability of appropriate data to justify exercise of the enabling provision. The said authorities do not debar the State to carry

out the said exercise and when it is not done, it is to be presumed that the State as a model employer has failed in its duty and hence, it is obligatory on the part of this Court to require it to carry out the procedure so that the constitutional vision is realized. It has been highlighted before us that the concept of "power coupled with duty" comes into play in the instant case and, therefore, the court should issue appropriate direction to the State to collect the necessary qualitative data. Reliance has been placed on eleven-Judge Bench decision in ***Madhav Rao Jivaji Rao Scindia v. Union of India***[19]. We have been commended to paragraph 117 from the majority judgment by Justice J.C. Shah, which is to the following effect:-

> "117. There are many analogous provisions in the Constitution which confer upon the President a power coupled with a duty. We may refer to two such provisions. The President has under Articles 341 and 342 to specify Scheduled Castes and Scheduled Tribes and he has done so. Specification so made carries for the members of the Scheduled Castes and Scheduled Tribes certain special benefits e.g. reservation of seats in the House of the People, and in the State Legislative Assemblies by Articles 330 and 332, and of the numerous provisions made in Schedules V and VI. It may be noticed that Scheduled Castes and Scheduled Tribes are specially defined for the purposes of the Constitution by Articles 366(24) and 366(25). <u>If power to declare certain classes of citizens as belonging to Scheduled Castes and Scheduled Tribes includes power to withdraw declaration without substituting a fresh declaration, the President will be destroying the constitutional scheme. The power to specify may carry with it the power to withdraw specification, but it is coupled with a duty to specify in a manner which makes the constitutional provisions operative</u>." [underlining is ours]

20. Learned counsel has also drawn our attention to the opinion of Hegde, J. which reads as follows:-

> "In my opinion Article 366(22) imposes a duty on the President and for that purpose has conferred on him certain powers. In other words the power conferred on the President under that provision is one coupled with duty. There are similar powers conferred on the President under the Constitution.

19. (1971) 1 SCC 85

> Under Chapter XVI of the Constitution certain special provisions were made for the benefit of the Scheduled Castes and certain Scheduled Tribes. Seats were reserved for them both in the Parliament as well as in the State Assemblies. Certain other benefits were also secured to them in the matter of appointments to services and posts in connection with the affairs of the Union or of a State. But the Constitution did not specify which castes were Scheduled Castes and which Tribes were Scheduled Tribes. Under Articles 341(1) and 342(1) of the Constitution, the President was given power to specify the castes which he considered to be Scheduled Castes and the Tribes which he considered to be Scheduled Tribes. Though both the Articles say the President "may" specify the castes which he considers as Scheduled and Tribes which he considers Scheduled, it is clear that a constitutional duty was imposed on him to specify which castes were Scheduled Castes and which tribes were Scheduled Tribes for the purpose of the Constitution. The word "may" in those clauses must be read as "must" because if he had failed or declined to specify the castes and tribes, Articles 330, 332, 334, 335, 338 and 340 would have become inoperative and the constitutional guarantees given to the Scheduled Castes and Scheduled Tribes would have become meaningless."

21. Inspiration has also been drawn from ***Ambica Querry Works v. State of Gujarat***[20]**.** In the said case, the Court was engaged in interpretation of certain rules of Gujarat Minor Mineral Rules, 1966. On behalf of the appellant therein, reliance was placed on ***State of Rajasthan v.Harishanker Rajendrapal***[21] to advance a contention that the word 'may' is to be read as 'shall' and thereby convey the meaning that it is mandatory. In that context, the Court observed:-

> "Often when a public authority is vested with power, the expression "may" has been construed as "shall" because power if the conditions for the exercise are fulfilled is coupled with duty. As observed in *Craies on Statute Law*, 7th Edn., p. 229, the expression "may" and "shall" have often been subject of constant and conflicting interpretation. "May" is a permissive or enabling expression but there are cases in which for various reasons as soon as the person who is within the statute is entrusted with the power, it becomes his duty to

20. (1987) 1 SCC 213 21. AIR 1966 SC 296

exercise it. As early as 1880 the Privy Council in ***Julius* v. *Lord Bishop of Oxford***[22] explained the position. Earl Cairns, Lord Chancellor speaking for the judicial committee observed dealing with the expression "it shall be lawful" that these words confer a faculty or power and they do not of themselves do more than confer a faculty or power. But the Lord Chancellor explained there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty must depend upon the facts and circumstances of each case and must be so decided by the courts in each case. Lord Blackburn observed in the said decision that enabling words were always compulsory where the words were to effectuate a legal right."

Be it noted, in the said decision, the Court has approved and applied the principle stated in ***Julius*** (supra).

22. We have also been referred to ***Brij Mohan Lal v. Union of India & others***[23]. In the said case, apart from other issues, the relief related to issue of direction to the respondents therein to stop the scheme and policy of appointment of retired District and Sessions Judges as *ad hoc* Judges of the Fast Track Courts (FTCs) in the State Judicial Services. We need not refer to the contentions raised and how the issue was eventually answered. In the said case, the two-Judge Bench deliberated on the question whether a writ of mandamus can at all be issued regard being had to the factual score of the case. The Court took note of the fact that origin of FTC Scheme was in a policy decision by the Central Government and the said decision was taken to implement the FTC Scheme, particularly, to deal with the arrears of criminal cases in the country and it had taken upon itself the burden of financing the entire scheme. The Court referred to the concept of judicial review in policy matters and the scope of interference in that regard, adverted to the principles stated in ***S.P. Gupta***'s case and other decisions and opined thus:-

"106. This Court has consistently held that the writ of mandamus can be issued, perhaps not as regards the manner of discharge of public duty but with respect to the due exercise of discretion in the course of

22. (1880) 5 AC 214 23. (2012) 6 SCC 502

> such duty. In *S.P. Gupta* v. *Union of India* (supra) this Court issued directions to the Union of India to determine, within a reasonable time, the strength of permanent Judges required for disposal of cases instituted in the High Courts and to take tests to fill up the vacancies after making such determination.
>
> x x x x x
>
> 111. It is, thus, clear that it is the constitutional duty of this Court to ensure maintenance of the independence of judiciary as well as the effectiveness of the justice delivery system in the country. The data and statistics placed on record, of which this Court can even otherwise take judicial notice, show that certain and effective measures are required to be taken by the State Governments to bring down the pendency of cases in the lower courts. It necessarily implies that the Government should not frame any policies or do any acts which shall derogate from the very ethos of the stated basic principle of judicial independence. If the policy decision of the State is likely to prove counterproductive and increase the pendency of cases, thereby limiting the right to fair and expeditious trial to the litigants in this country, it will tantamount to infringement of their basic rights and constitutional protections.Thus, we have no hesitation in holding that in these cases, the Court could issue a mandamus. The extent of such power, we shall discuss shortly hereinafter."

The aforesaid decision, in our considered opinion, is quite distinguishable. The Court was referring to certain constitutional concepts, namely, constitutional duty, independence of judiciary, effectiveness of justice delivery system in the country, the infringement of specific rights and constitutional protection. We will in course of our deliberations advert to whether the said principles can be taken recourse to in the case at hand.

23. Reliance has also been placed by the learned counsel on the decision in ***Aneesh D. Lawande & others v. State of Goa & others***[24], where the Court has referred to the authority in ***Julius*** (supra) and observed every public authority who has a duty coupled with power before exercising the power is required to understand the object of such power and the conditions in which the same is to be exercised. Learned counsel for the petitioners emphasizing on the conception of "power coupled with duty" has referred to series of judgments. We have already referred to some and we think it appropriate to refer to some. In ***Dhampur Sugar Mills Ltd. v. State of U.P. and others***[25], the attention of the two-Judge Bench was engaged in relation to

24. (2014) 1 SCC 554 25. (2007) 8SCC 338

constitution of the Advisory Committee under Uttar Pradesh Sheera Niyantran Adhiniyam, 1964. Before the High Court reliance was placed on ***Khoday distilleries Ltd. v. State of Karnataka***[26] for *inter alia* that Section 3 of 1964 Act could merely be an enabling provision and thus, directory in nature and hence, the writ petitioner could not compel the State to constitute an Advisory Committee. The High Court referred to the decision in ***Khoday distilleries Ltd.*** (supra) and opined that the provision was directory in nature. This Court referred to the relevant provisions of the Act, the Rules framed under the Act and the notification issued thereunder and came to hold that the submission of the writ petitioner that such a Committee ought to have been constituted by the State was well founded. It did not accept the view expressed by the High Court that the provision was directory. It observed that several statutes confer power on authorities and officers to be exercised by them at their discretion and they are couched in permissive language, such as, "it may be lawful", "it may be permissible", "it may be open to do", etc. But in certain situations, such power is coupled with duty and must be exercised. The Court referred to ***Baker, Re Nichols v. Baker***[27], a passage from Judicial Review of Administrative Action[28], an instructive passage from Administrative Law[29], the authority in ***Padfield v. Minister of Agriculture, Fisheries and Food30, Commr. of Police v. Gordhandas Bhanji***[31] and ***Municipal Council, Ratlam v. Vardichan***[32] and on that basis, concurred with the view expressed in ***Julius*** (supra) and eventually, held that it was obligatory on the Government to constitute a Committee to carry out the purpose and objective of the Act. The import and effect of the aforesaid authorities we shall dwell upon when we will be addressing the issue whether a writ of mandamus can be issued in the present factual matrix regard being had to the nature of constitutional provisions.

24. We will be failing in our duty if we do not take note of another facet of the submissions advanced by the learned counsel for the petitioners. It is urged by them that it is the constitutional duty and obligation of the authorities to work out the constitutional provisions to effectuate theaffirmative action meant for scheduled castes and the scheduled tribes persons and regard being had to the principles stated in ***M. Nagaraj*** (supra), the reservation in promotion with consequential seniority cannot be thought of without collection of the necessary quantitative data in regard to certain aspects. Mechanisms are to be provided for collection of such data. It is

26. (1995) 1 SCC 574 27. (1890) 44 Ch D 262 (CA) 28. De Smith, Judicial Review of Administrative Action,1995, pp. 300-01 29. Wade & Forsyth, Administrative Law, 9th Edn., p.233 30. [1968] 1 All ER 694 (HL) 31. AIR 1952 SC 16 32. (1980) 4 SCC 162

contended that failure to do so tantamounts to failure of performance of constitutional duty. Elaborating further, it is highlighted that when there is apathy in taking the steps to live up to the constitutional obligation, the Court is expected in law to issue a mandamus to command the authorities to carry out the constitutional duty, for non-performance of such duty would affect and eventually jeopardize the fundamental affirmative facets of the Constitution. It is also argued that this Court has in many an authority framed the guidelines, issued directions for performance of duty and also filled the gaps wherever required and, therefore, in the present situation, the Court can direct for collection of the requisite data so that ultimate constitutional goal is achieved . In this regard, we have been commended to ***D.K. Basu v. State of West Bengal & others***[33]***, Ranveer Yadav v. State of Bihar***[34]***, Nagar Palika Nigam v. Krishi Upaj Mandi Samiti***[35]***, Ankush Shivaji Gaikwad v. State of Maharashtra***[36]***, Province of Bombay v. Khushaldas S. Advani***[37]***, Sub-Committee on Judicial Accountability v. Union of India & others38, Tara Prasad Singh & others v. Union of India & others***[39]***, Markand Dattatreya Sugavkar v. Municipal Corporation of Greater Mumbai & others***[40]***, S.P. Gupta v. Union of India***[41] ***and Supreme Court Advocates-on-Record Association & others v. Union of India***[42].

25. In ***S.P. Gupta*** (supra) the larger Bench has held thus:-

> "It is true that the words in Article 216 of the Constitution are undoubtedly empowering but it has been so often decided as to have become an axiom that in public statutes words only directory, permissory or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice. Thus, the enabling power cannot be refused to be exercised by the repository of that power, as such refusal would be contrary to the constitutional principles and such action is not permissible under the scheme of the Constitution."

26. Relying on the said decision, learned counsel would submit the said principle has not been upset by the nine-Judge Bench in ***Supreme Court Advocates-on-Record*** (supra). We have been also apprised that the seven-Judge Bench has approved the principle stated in ***Julius*** (supra), wherein it has been held thus:-

> "there may be something in the nature of thing empowered to be done, something in the object for which it is to be done, something in

33. (2015) 8 SCC 744 34. (2010) 11 SCC 493 35. AIR 2009 SC 187 36. (2013) 6 SCC 770
37. AIR 1950 SC 222 38. AIR 1992 SC 320 39. AIR 1980 SC 1682 40. (2013) 9 SCC 136
41. 1981 Supp (1) SCC 87 42. (1993) 4 SCC 441

> the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

27. Immense emphasis has been laid on ***D.K. Basu*** (supra) wherein the Court was dealing with Section 21 of the Protection of Human Rights Act, 1993 which deals with setting up of State Human Rights Commission. Interpreting the said provision, the Court has observed:-

"A plain reading of the above would show that Parliament has used the word "may" in sub-section (1) of Section 21 while providing for the setting up of a State Human Rights Commission. In contrast Parliament has used the word "shall" in Section 3(1) while providing for constitution of a National Commission. The argument on behalf of the defaulting States, therefore, was that the use of two different expressions which dealing with the subject of analogous nature is a clear indication that while a National Human Rights Commission is mandatory a State Commission is not. That argument is no doubt attractive, but does not stand close scrutiny. The use of the word "*may*" is not by itself determinative of the true nature of the power or the obligation conferred or created under a provision. The legal position on the subject is fairly well settled by a long line of decisions of this Court. The stated position is that the use of the word "*may*" does not always mean that the authority upon which the power is vested may or may not exercise that power. Whether or not the word "*may*" should be construed as mandatory and equivalent to the word "*shall*" would depend upon the object and the purpose of the enactment under which the said power is conferred as also related provisions made in the enactment. The word "*may*" has been often read as "*shall*" or "*must*" when there is something in the nature of the thing to be done which must compel such a reading. In other words, the conferment of the power upon the authority may having regard to the context in which such power has been conferred and the purpose of its conferment as also the circumstances in which it is meant to be exercised carry with such power an obligation which compels its exercise."

28. In the said case reference was made to ***Julius*** (supra) and the opinion of Justice Cairns, L.C. was quoted and thereafter, the opinion of Lord Blackburn which is to the following effect was reproduced:-

> "I do not think the words 'it shall be lawful' are in themselves ambiguous at all. They are apt words to express that a power is given;

> and as, prima facie, the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, prima facie, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf."

29. As is evident, the Court has referred to number of judgments that the word "may" at times can assume the character of "shall". In the said case, stress was laid on access of justice and in that context, reliance was placed on ***Imtiyaz Ahmad v. State of U.P.* & others**[43]. After referring certain recommendations, the Court issued number of directions.

30. Learned counsel for the petitioner, as stated earlier, has founded his argument on the principles stated in many authorities which pertain to interpretation of "power coupled with duty". Reference has been made to ***Breen v. Amalgamated Engineering Union***[44] which has been cited by the House of Lords in ***Padfield*** (supra) wherein their Lordships considering the discretion of statutory authority under the Agriculture Marketing Act, 1958 (UK) opined:-

> "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations, which is ought not to have taken into account, then the decision cannot stand."

31. The said view has been accepted by the Court in ***S.P. Gupta*** (supra).

32. In ***T.N. Godavarman Thirumulpad v. Union of India and others***[45] the Court referred to the decision in ***Lafarge Umiam Mining (P) Ltd. v. Union of India & others***[46], reproduced a paragraph from it and observed:-

> "It will be clear from the italicised portions of the order of this Court in *Lafarge Umiam Mining (P) Ltd.* (supra) extracted above that this Court on an interpretation of Section 3(3) of the Environment (Protection) Act, 1986 has taken a view that it confers a power coupled with duty to appoint an appropriate authority in the form of a Regulator at the State and at the Central level for appraising projects, enforcing environmental conditions for approvals and to impose

43. (2012) 2 SCC 688 44. (1971) 2 OB 175,190 45. (2014) 4 SCC 61 46. (2011) 7 SCC 338

penalties on polluters and has, accordingly, directed the Central Government to appoint a National Regulator under the said provision of the Act. Mr Parasaran is, therefore, not right in arguing that in *Lafarge Umiam Mining (P) Ltd.* (supra), this Court has merely suggested that a National Regulator should be appointed and has not issued any mandamus to appoint a National Regulator."

33. The argument is, assuming the principles stated in ***M. Nagraj*** (supra) are correct, it is the duty of the State to give effect to the same and it cannot remain in apathy or lie in slumber. In such a situation, the Court has the power under the Constitution, when moved, to direct them to wake up and act.

34. The core issue is whether in the context of Articles 16(4-A) and 16(4-B), a writ or direction can be issued to the State Government or its functionaries or the instrumentalities of the State to collect and gather the necessary data for the purpose of taking a decision as regards the promotion and consequential fixation of seniority. In this regard, it is imperative to appreciate in proper perspective the concept of mandamus and the circumstances in which it can be issued.

35. In Halsbury's Laws of England, Fourth Edition, Volume 1, it has been stated:-

> **"89. Nature of mandamus.** The order of mandamus[47] is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right[48]; and it may issue in cases where, although there is an alternative legal remedy yet that mode of redress is less convenient beneficial and effectual[49]."

36. This Court in ***State of Kerala v. A. Lakshmikutt***[50], while dealing with the concept of mandamus, opined thus:-

> "… It is well settled that a writ of mandamus is not a writ of course or

47. Lee District Board v. LCC (1989) 82 LT 306; R v. Marshland Smeeth and Fen District Commr [1920] 1 KB 155, DC 48. R. v. Archbishop of Canterbury and Bishop of London, (1812) 15 East 117, at 136 49. R. v. Bank of England, (1819) 2 B & Ald 620, at 622; R v. Thomas (1892) 1 QB 426
50. (1986) 4 SCC 632

> a writ of right, but is, as a rule, discretionary. There must be ajudicially enforceable right for the enforcement of which a mandamus will lie. The legal right to enforce the performance of a duty must be in the applicant himself. In general, therefore, the court will only enforce the performance of statutory duties by public bodies on application of a person who can show that he has himself a legal right to insist on such performance. …"
>
> [Emphasis added]

37. In ***Dr. Umakant Saran v. State of Bihar and others***[51], the Court referred to its earlier decision in ***Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College***[52] and observed that in order that mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.

38. In ***Sharif Ahmad and others v. Regional Transport Authority, Meerut and others***[53], the Court observed thus:-

> "Mr A.K. Sen, learned counsel for the appellants drew our attention to what S.A. de Smith has pointed out at p. 59 of the third Edn. of his well known treatise "*Judicial Review of Administrative Action*":
>
> "It may describe any duty, the discharge of which involves no element of discretion or independent judgment. Since an order of mandamus will issue to compel the performance of a ministerial act, and since, moreover, wrongful refusal to carry out a ministerial duty may give rise to liability in tort, it is often of practical importance to determine whether discretion is present in the performance of a statutory function. The cases on mandamus show, however, that the presence of a minor discretionary element is not enough to deter the Courts from characterising a function as ministerial."
>
> We think that the Regional Transport Authority, pursuant to the order of the Appellate Tribunal, had merely to perform a ministerial duty and the minor discretionary element given to it for finding out whether the terms of the Appellate Order had been complied with or not is not enough to deter the Courts from characterising the function as ministerial. On the facts and in the circumstances of this case by a writ of mandamus the saidauthority must be directed to perform its function."

51. (1973) 1 SCC 485 52. 1962 SUPP 2SCR 144 53. 1978) 1 SCC1

39. Dr. Dhavan, who has been permitted to argue, has placed reliance on the said decision only to point out that the mandamus sought in the present case does not come in the nature of mandamus that the Court has dealt with, in the aforesaid case. It is his submission that the facts in which directions have been issued are quite different and that apart, the Court has issued a writ of mandamus in cases which involved minor discretionary element but not where a major policy decision is involved. It is his submission that when the authority has a discretion to exercise the discretion or not regard being had to many an administrative contingencies, the Court should refrain from issuing a mandamus. It is because at this stage there is neither any semblance of right nor exercise of power coupled
with duty.

40. In this regard reference to the decision in ***Director of Settlements, A.P. and others v. M.R. Apparao and another***[54] would be fruitful. In the said case, a three-Judge Bench of the Court, while dealing with the order of the High Court to issue mandamus, opined:-

> "… One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by a statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right *must be subsisting on the date of the petition* (***Kalyan Singh* v. *State of U.P.***[55]**).** The duty that may be enjoined by

54. (2002) 4 SCC 638 55. AIR 1962 SC 1183

> mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law. …"

41. Having stated about general principles relating to mandamus, the question arises — whether a court should issue a direction to effectuate an enabling constitutional provision which has to be exercised by the State in its discretion on being satisfied of certain conditions precedent. There can be no doubt that certain constitutional duties are inferred from the various Articles of the Constitution and this Court has issued directions. Certain directions have been issued in ***S.P. Gupta*** (supra) and ***Supreme Court Advocates-on-Record Association*** (supra) (IInd Judges case) but they are based on principles of secure operation of legal system, access to justice and speedy disposal of cases. In ***All India Judges' Association & others v. Union of India & others***[56], the Court issued directions by stating that it is the constitutional obligation to ensure that the backlog of cases is decreased and efforts are made to increase the disposal of cases. Keeping in view the concept of constitutional silence or abeyance, guidelines were issued in ***Vishaka & others v. State of Rajasthan & others*** [57] and for the said purpose, reliance was placed on international Treaties, norms of gender equality and right to life and liberty of working women. Guidelines have been issued in ***D.K. Basu*** (supra) to lay down the procedure to be followed in case of arrest and detention based on fundamental rights of convicts, prisoners and under trials under Article 21 of the Constitution. Similarly, in ***Prakash Singh & others v. Union of India & others***[58], the Court has laid down specific guidelines for police reform so as to insulate the police machinery from political/executive interference and the same is founded on the backdrop of right to life and the enhancement of the criminal justice delivery system.

42. In the case at hand, we are concerned with the enabling power as engrafted under Articles 16, 16(4-A)and 16(4-B). The said Articles being enabling provisions, there is no power coupled with duty. In ***Ajit Singh (II)*** (supra), it has been held that no mandamus can be issued either to provide for reservation or for relaxation. Recently, in ***Chairman & Managing Director, Central Bank of India & Ors. v. Central Bank of India SC/ST Employees Welfare Association & Ors***.[59] it has been held thus:-

> "In the first instance, we make it clear that there is no dispute about the constitutional position envisaged in Articles 15 and 16, insofar as these provisions empower the State to take affirmative action in

56. (2002) 4 SCC 247 57. (1997) 6 SCC 241 58. (2006) 8 SCC 1 59. 2015 (1) SCALE 169

favour of SC/ST category persons by making reservations for them in the employment in the Union or the State (or for that matter, public sector/authorities which are treated as State under Article 12 of the Constitution). The laudable objective underlying these provisions is also to be kept in mind while undertaking any exercise pertaining to the issues touching upon the reservation of such SC/ST employees. Further, such a reservation can not only be made at the entry level but is permissible in the matters of promotions as wells. At the same time, it is also to be borne in mind that Clauses 4 and 4A of Article 16 of the Constitution are only the enabling provisions which permit the State to make provision for reservation of these category of persons. Insofar as making of provisions for reservation in matters of promotion to any class or classes of post is concerned, such a provision can be made in favour of SC/ST Civil Appeal No. of 2015 & Ors. (arising out of SLP (C) No. 4385 of 2010 & Ors.) category employees if, in the opinion of the State, they are not adequately represented in services under the State. Thus, no doubt, power lies with the State to make a provision, but, at the same time, courts cannot issue any mandamus to the State to necessarily make such a provision. It is for the State to act, in a given situation, and to take such an affirmative action. Of course, whenever there exists such a provision for reservation in the matters of recruitment or the promotion, it would bestow an enforceable right in favour of persons belonging to SC/ST category and on failure on the part of any authority to reserve the posts, while making selections/promotions, the beneficiaries of these provisions can approach the Court to get their rights enforced. What is to be highlighted is that existence of provision for reservation in the matter of selection or promotion, as the case may be, is the sine qua non for seeking mandamus as it is only when such a provision is made by the State, a right shall accrue in favour of SC/ST candidates and not otherwise."

The aforesaid passage makes its luminescent that existence of a provision for reservation in the matter of selection or promotion is the *sine qua non* for seeking mandamus. The right accrues in favour of the Scheduled Castes and the Scheduled Tribes candidates when there is a provision. We are absolute in conscious that the controversy before us is quite different. The relief is not sought on the basis of existence of a provision. The grievance pertains to steps being not taken to collect the quantifiable data as has been envisaged in ***M. Nagaraj*** (supra). To appreciate the relief in its quintessence,

it is imperative to clearly understand the ratio laid down in ***M. Nagaraj*** (supra). The Constitution Bench while opining that Articles 16(4-A) and (4-B) are enabling provisions had observed thus:-

> "…Extent of reservation, as stated above, will depend on the facts of each case. Backwardness and inadequacy of representation are compelling reasons for the State Governments to provide representation in public employment. Therefore, if in a given case the court finds excessive reservation under the State enactment then such an enactment would be liable to be struck down since it would amount to derogation of the above constitutional requirements."

After so stating, the larger Bench has clearly held that Article 16(4-A) and 16 (4-B) do not alter the structure of Article 16(4). The said Articles are confined to the Scheduled Castes and the Scheduled Tribes and do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in ***Indra Sawhney*** (supra), the concept of post-based roster with inbuilt concept of replacement as held in ***R.K. Sabharwal*** (supra). After so stating, the Court has adverted to the concept of "extent of reservation". In that regard, it has been opined that the State concerned is required to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. It has been clearly laid down that the State is not bound to make reservation for SCs/STs in matters of promotion. However, if the State wishes to exercise the discretion and make such provision, it has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. The expression of the opinion clearly demonstrates that the regard being had to the enabling provisions of Articles 16(4-A) and (4-B), the State is not bound to make reservation. It has a discretion to do so and the State's discretion can only be exercised on certain conditions being satisfied. In ***Rajesh Kumar***'s case, after culling out the principles stated in ***M. Nagaraj*** (supra) the Court has graphically stated that a fresh exercise in accord with the law laid down in ***M. Nagaraj*** (supra) is a categorical imperative. It has been held that the State can make provisions for reservation in promotion with consequential seniority on certain basis or foundation and conditions precedents have to be satisfied. The Court has declared Section 3(9) of the 1994 Act and Rule 8-A of the

favour of SC/ST category persons by making reservations 2002 Rules as unconstitutional as no fresh exercise had been undertaken. The submission of the learned counsel for the petitioners is that a command should be issued to the State of Uttar Pradesh to collect the data as enshrined in the Constitution Bench decision in ***M. Nagaraj*** (supra) so that benefit of reservation in promotion can be given. The relief sought may appear innocuous or simple but when the Court thinks of issue of a writ of mandamus, it has to apprise itself of an existing right or a power to be exercised regard being had to the conception of duty. The concept of power coupled with duty is always based on facts. If we keenly scrutinize the relief sought, the prayer is to issue a mandamus to the State and its functionaries to carry out an exercise for the purpose of exercising a discretion. To elucidate, the discretion is to take a decision to have the reservation, and to have reservation there is a necessity for collection of data in accordance with the principles stated in ***M. Nagaraj*** (supra) as the same is the condition precedent. A writ of mandamus is sought to collect material or data which is in the realm of condition precedent for exercising a discretion which flows from the enabling constitutional provision. Direction of this nature, in our considered opinion, would not come within the principle of exercise of power coupled with duty. A direction for exercise of a duty which has inherent and insegretable nexus with the constitutional provision like Article 21 of the Constitution or a statutory duty which is essential for prayer as laid down in ***Julius*** (supra) where a power is deposited with a public officer but the purpose of being used for the benefit of persons who are specifically pointed out with regard to whom a discretion is applied by the Legislature on the conditions upon which they are entitled. We are inclined to think so as the language employed in **M.Nagaraj** (supra) clearly states that the State is not bound to make reservation in promotion. Thus, there is no constitutional obligation. The decisions wherein this Court has placed reliance on **Julius** (supra) and the other judgments of this Court and issued directions, the language employed in the statute is different and subserves immense public interest in the said authorities, the purpose and purport are quite different.

43. Be it clearly stated, the Courts do not formulate any policy, remains away from making anything that would amount to legislation, rules and regulation or policy relating to reservation. The Courts can test the validity of the same when they are challenged. The court cannot direct for making legislation or for that matter any kind of sub-ordinate legislation. We may hasten to add that in certain decisions directions have been issued for framing of guidelines or the court has itself framed guidelines for sustaining certain

favour of SC/ST category persons by making reservations rights of women, children or prisoners or under-trial prisoners. The said category of cases falls in a different compartment. They are in different sphere than what is envisaged in Article 16 (4-A) and 16 (4-B) whose constitutional validity have been upheld by the Constitution Bench with certain qualifiers. They have been regarded as enabling constitutional provisions. Additionally it has been postulated that the State is not bound to make reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. Therefore, there is no duty. In such a situation, to issue a mandamus to collect the data would tantamount to asking the authorities whether there is ample data to frame a rule or regulation. This will be in a way, entering into the domain of legislation, for it is a step towards commanding to frame a legislation or a delegated legislation for reservation.

44. Recently in ***Census Commissioner & others v. R. Krishnamurthy***[60] a three-Judge Bench while dealing with the correctness of the judgment of the high court wherein the High court had directed that the Census Department of Government of India shall take such measures towards conducting the caste-wise census in the country at the earliest and in a time-bound manner, so as to achieve the goal of social justice in its true sense, which is the need of the hour, the court analyzing the context opined thus :-

> "Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue notification regarding the manner in which the census has to be carried out and the Central Government has issued notifications, and the competent authority has issued directions. It is not within the domain of the court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy-making by adding something to the policy by ways of issuing a writ of mandamus."

We have referred to the said authority as the court has clearly held that it neither legislates nor does it issue a mandamus to legislate. The relief in the present case, when appositely appreciated, tantamounts to a prayer for issue of a mandamus to take a step towards framing of a rule or a regulation

60 (2015) 2 SCC 796

for the purpose of reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. In our considered opinion a writ of mandamus of such a nature cannot be issued.

45. Consequently, the Writ Petitions, being devoid of merit, stand dismissed. There shall be no order as to costs.

Writ Petitions dismissed.

2016 (II) ILR – CUT-30

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

W.P.(C) NO. 16847 OF 2015

NATIONAL BUILDINGS CONSTRUCTION CORPORATION LTD. (NBCC) ……..Petitioner

.Vrs.

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

(A) CONSTITUTION OF INDIA, 1950 – ART.14

Government Contract – Petitioner-corporation entered into an agreement with Cuttack Development Authority (CDA) in the year 1999 for construction of residential as well as commercial complex in the old jail premises, Cuttack – Project to be completed by 2001 but the same could not be completed even though time extended till 2013 – CDA informed the petitioner to go for an open bid for the rest of the work – Hence the writ petition – Merely because the petitioner is a Government of India enterprise it would not have any special status in the matter of contract – If the petitioner-corporation has not able to complete the work within the assigned time or the extended time, it would not have any right to complete the unfinished work – Authority calling for the tender is the best judge to exercise its choice to go for a fresh bid – Moreover no bidder, as a matter of right, can insist to enter into further negotiations in the absence of any terms in the contract – There is also no material that the action of the CDA is arbitrary, malafide or actuated by bias – Held, the impugned action of the CDA does not call for any interference by this Court. (Paras 7 to13)

(B) CONSTITUTION OF INDIA, 1950 – ART. 226 & 227

Writ petition – Delay – Impugned order passed on 04.01.2013 – Writ petition filed in September, 2015 i.e two and half years after –

Contents in the writ petition do not indicate that the delay has been properly explained – Writ petition is also liable to be dismissed on the ground of delay and latches on the part of the petitioner.

(Para 13)

Case Laws Referred to :-

1. AIR 2009 SC 2894 : Pawan Kumar Agarwal v. Meerut Development Authority.
2. AIR 2000 SC 2272 : Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation.
3. AIR 2005 SC 2299 : Master Marine Services Pvt. Ltd. v.Metcafe & Hodgkinson.

For Petitioner : M/s. S.K.Padhi, Sr. Counsel with S.S.Mohanty
For Opp. Parties : Mr. B.P.Pradhan, Addl. Govt. Advocate

Date of Judgemnt : 02.05.2016

JUDGEMNT

VINEET SARAN, C.J.

National Buildings Construction Corporation Limited (hereinafter referred to as the 'Corporation'), which is a Government of India Enterprise, has filed this application to quash the letter dated 04.01.2013 issued by the Vice Chairman, Cuttack Development Authority vide Annexure-17, to the Sr. General Manager of the Corporation, pursuant to the communication made by the Government in Housing & Urban Development Department, Odisha to go for an open and transparent bid to obtain best offer for the proposed construction work by rejecting the proposal filed by the Corporation, and further seeks for a direction to the opposite parties to execute necessary paper works so as to enable it to execute phase-II of commercial complex, as approved, along with ancillary relief.

2. The brief facts of the case are that in the year 1999 the petitioner-Corporation entered into an agreement with the Cuttack Development Authority (for short, 'Authority') for construction of residential as well as commercial complex in the Old Jail premises, Cuttack. The said project was to be completed within two years, i.e. by 2001. However, due to certain reasons which, according to the petitioner, were beyond its control, the project could not be completed within time, and the matter kept pending consideration for extension and also change in the project, with the Government, till the year 2008. Then, in the year 2008 onwards, till early 2013, fresh negotiation between the Corporation and the Authority went on,

as the Authority wanted the place to be structured as commercial complex as well as residential complex. There was no finality arrived at between the parties with regard to the construction work to be given by the Authority. There was also no assurance given that the petitioner alone would be given the contract for further development of the area. Then on 04.01.2013, the Vice Chairman Cuttack Development Authority informed the petitioner-Corporation that the Government of Odisha, Department of Housing & Urban Development had taken a decision to go for an open and transparent bid to obtain the best offer for the proposed work. Hence, this petition.

3. Mr. S.K. Padhi, learned Sr. Counsel along with Mr. S.S. Mohanty, learned counsel appearing for the petitioner, urged that since the entire work was initially assigned to the Corporation in the year 1999, and if construction of the complex is to be undertaken in the area (for which agreement was entered into between the Corporation and the Authority) and the Corporation was negotiating with the Authority ever since completion of period, contract for such construction ought to be awarded to the Corporation alone. Further, it is urged that from the year 2008 onwards till early 2013, fresh negotiation between the Corporation and the Authority continued and now if the same work is to be undertaken, the petitioner should have been allowed to execute the work instead of allotting the same in favour of anyone else by open bid/tender.

4. Mr. B.P. Pradhan, learned Addl. Govt. Advocate contended that the tenure of the petitioner having already completed in 2001, even though it has continued to subsequently negotiate with the Authority, that *ipso facto* cannot give any right to the petitioner to execute the work. It is further urged that time being the essence of the contract, the period having been completed, the petitioner has no right to claim that the work should now be allotted in its favour.

5. After hearing the learned counsel for the parties and after going through the records, we dispose of the writ petition at the stage of admission, without issuing notice to the opposite party no.2 and without calling for any counter affidavit.

6. The undisputed fact is that the petitioner had entered into an agreement on 4.12.1999 with the Authority for construction of a residential/commercial complex within the Old Jail complex, Cuttack on joint venture, and such agreement was for a period of two years, which ended in the year 2001. In our view, merely because the petitioner-

Corporation is a Government of India enterprise, it would not have any special status in the matter of contract. It is noticed that the opp. party-Authority is also a government authority. Admittedly, the initial contract came to an end in 2001 and the extension, if any, granted thereafter has also expired.

7. Time is the essence of every contract. If the petitioner-Corporation has not been able to complete the work within the assigned time or the extended time, it would not have any right to complete the unfinished work. It is the choice of the Authority, thereafter, to get the work completed or even change the nature of construction, through any other contractor. Merely because the Corporation was engaged in negotiation with the Authority for undertaking the remaining left over construction, the same would not entitle the petitioner, as of right, to be given the contract for the remaining work. The decision of the State Government, which controls the Development Authority, to go in for an open and transparent bid to obtain the best offer for the proposed work, cannot be faulted with.

8. In ***Pawan Kumar Agarwal v. Meerut Development Authority,*** AIR 2009 SC 2894, the Apex Court held that the bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender, except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled, as a matter of right, to insist on the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice provided for such negotiations.

9. No material has been produced before this Court to consider that the Corporation is entitled, as a matter of right, to insist on the Authority to enter into further negotiation. Therefore, even after completion of the period of contract in 2001, the so called negotiation done by the petitioner with the Authority is beyond the terms and conditions of the agreement executed in the year 1999. In absence of any such condition, the so called negotiation held by the Corporation with the Authority cannot be a justification to allow it to perform the work on the basis of agreement executed on 4.12.1999.

10. In ***Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation***, AIR 2000 SC 2272, the Apex Court held that the

Court would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

11. In ***Directorate of Education v. Educomp Datamatics Ltd.,*** AIR 2004 SC 1962, the Apex Court held that the Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. Similar view has also been taken in ***Master Marine Services Pvt. Ltd. v. Metcafe & Hodgkinson Pvt. Ltd.,*** AIR 2005 SC 2299.

12. In view of the law laid down by the Apex Court as mentioned supra, in the facts of this case, we find that nothing material has been placed by the petitioner on the basis of which the action of the Authority can be considered as arbitrary, discretionary, mala fide or actuated by bias. Rather, the impugned order of rejection clearly indicates that the Government in Housing and Urban Development Department, has directed to go in for an open and transparent bid to obtain the best offer for the proposed work, which cannot be construed to be an arbitrary, discretionary and mala fide action of the authority or actuated with bias. The petitioner may be a Government Corporation, but the decision of the Authority to go in for an open and transparent bid for awarding the unfinished or further contract work is perfectly justified in law, and does not call for any interference.

13. Besides on merits, this petition also suffers from delay and latches. The impugned order was passed on 04.01.2013, but the writ petition challenging the said order has been filed after more than two and half years i.e. in September, 2015. Perusal of the pleadings do not indicate that the latches in filing the writ petition have been properly explained. Therefore, for this reason also, we do not find any good ground to interfere with the order impugned in this writ petition.

14. Accordingly, the writ petition is dismissed. No order as to costs.

Writ petition dismissed.

2016 (II) ILR - CUT-35

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

W.P.(C) NO. 8130 OF 2015

BIMALA PRASAD SETHY ……..Petitioner

.Vrs.

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

ODISHA MINOR MINERAL CONCESSION RULES, 2004 – RULE 26(5)

Application for Sand Quarry lease – In the tender O.P.No.5 became the highest bidder, O.P.No.4 and the petitioner became the second and third highest bidders respectively – When O.P.No.5 failed to deposit the requisite amount within 7 days, notice issued to O.P.No.4 on 15.04.2015 to deposit the said amount – O.P.No.4 deposited the amount on 20.04.2015 – However, as the said amount was not deposited in the Treasury in time, the petitioner filed the present writ petition for a direction to the authorities to issue notice to him to deposit the required amount and to get the lease executed in his favour – O.P.No.4 filed Counter annexing the receipt that he had deposited the money with the Nazir of the concerned Tahasil office on 20.04.2015 i.e. within 5 days from the date of notice Dt. 15.04.2015 and he is not concerned if the Nazir deposited the same in the Treasury on 18.05.2015 – Held, the money deposited by O.P.No.4 is not time barred as he has discharged his responsibility within time – Writ petition filed by the petitioner is liable to be dismissed.

For Petitioner : M/s. S.K.Bhanjadeo, S.Balabantaray & B.K.Behera

For Opp. Parties : Mr. B.P.Pradhan, Addl. Govt. Advocate
Mr. S.K.Dalai, P.N.Swain & S.Mohapatra

Date of Judgment: 13.05.2016

JUDGMENT

VINEET SARAN, C.J.

Heard Mr. S.K. Bhanjadeo, learned counsel for the petitioner as well as learned Additional Government Advocate for State-opposite party nos.1 to 3 and Mr. S.K. Dalai, learned counsel for opposite party no.4. Counter and rejoinder affidavits between the contesting parties have been exchanged, and with consent of learned counsel for the parties, this writ petition is being disposed of finally at this stage.

2. The facts of the present case are that for the years 2015-16 to 2019-20, the lease for sand quarry of Mundilo Patenigaon was to be granted by auction, for which an advertisement was issued on 11.03.2015. Opposite party no.5 was the highest bidder, whereas opposite party no.4 was the second highest bidder and the petitioner was the third highest bidder. Initially, the bid of opposite party no.5 was accepted on the condition that opposite party no.5 shall deposit the requisite amount, for which as per Rule 26(5) of the OMMC Rules, seven days notice was given on 06.04.2015. When the requisite amount was not deposited by opposite party no.5 within seven days, as per the relevant Rules, opposite party no.4 was issued notice on 15.04.2015 to deposit the requisite amount as he was the second highest bidder. The period of seven days from the notice dated 15.04.2015 was to expire on 22.04.2015. The petitioner, who was the third highest bidder, approached this Court on 24.04.2015 by filing this writ petition, with the prayer for a direction to opposite parties no.2 and 3 to issue notice to him for depositing the money, to enable him to get lease executed in his favour. An interim order of status quo was passed by this Court on 04.05.2015.

3. The facts stated as above are not disputed by the parties.

4. In the counter affidavits filed by the State opposite parties, as well as opposite party no.4, it has been categorically stated that in response to the notice dated 15.04.2015, opposite party no.4, who was the second highest bidder, deposited an amount of Rs.5,44,597/- on 20.04.2015, which was within five days of the notice dated 15.04.2015. Copy of the receipt issued by the Nazir, Jagatsinghpur Tahasil has been filed by the State in Annexure-A/3 to its counter affidavit, as well as Annexure-A/4 to the misc. case No.4584/2016 filed by opposite no.4. In the rejoinder affidavit, learned counsel for the petitioner has stated that the amount was deposited in the Treasury on 18.05.2015, which was not within the period of seven days from the notice dated 15.04.2015.

5. The deposit receipt of the Nazir, which is dated 20.04.2015, is what is relevant. Opposite party no.4 was required to deposit the money with the Nazir and it was, in turn, for the Nazir to deposit the said amount in the Treasury. This procedure is not disputed. According to the petitioner, the Nazir ought to have deposited the entire amount with the Treasury on the very next day, as is provided in the relevant Rules.

6. The Nazir, by not having done so, the deposit made by opposite party no.4 on 20.04.2015, in our opinion, would not become time barred. The liability of opposite party no.4 was to deposit the amount in question within

the stipulated time, which opposite party no.4 has deposited. If the authorities failed to deposit the said amount in the Treasury on the very next day or actually deposited the same after four weeks, it is not the concern of opposite party no.4, as he had discharged his liability under the notice dated 15.04.2015 within the stipulated time. As such, the contention of the petitioner that the notice for grant of lease be issued to him, being the 3rd highest bidder, in terms of the Rule-26(5) of the OMMC Rules, would not be justified in the facts of the present case.

7. Accordingly, for the reasons given above, the prayer made in the writ petition does not deserve to be granted. The petition is thus dismissed. No order to cost.

Writ petition dismissed.

2016 (II) ILR - CUT-37

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

W.P.(C) NO. 18820 OF 2015

TELSA TRANSFORMERS LTD. ……..Petitioner

.Vrs.

ODISHA POWER TRANSMISSION CORPORATION LTD. & ANR. ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – ARTS 19(1)(g), 14

Black listing Contractor – O.P.No.1-Corporation debarred the petitioner-company from participating in any tender for a period of three years – No notice issued giving the petitioner an opportunity to show cause before taking such action – Violation of principles of natural justice – Held, such portion of the impugned order by which the petitioner has been debarred is quashed. (Para 13)

Case Laws Referred to :-

1. AIR 2014 SC 3371: Gorkha Security Services v. Govt. of NCT of Delhi & Ors.
2. (1975) 1 SCC 70 : M/s Erusian Equipment & Chemicals Ltd. v. State of West Bengal and Anr.
3. (2014) 14 SCC 731 : Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Ltd. & Ors.

4. AIR 1959 SC 149 : Basheshar Nath v. Commissioner of Income Tax, Delhi and Rajasthan
5. AIR 1965 SC 1405 : Mademsetty Satyanarayana v. G. Yelloji Rao
6. AIR 1968 SC 933 : Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh
7. AIR 2001 SC 2062 : Sikkim Subba Associates v. State of Sikkim

For Petitioner : M/s. P.C.Nayak & S.K.Mishra
For Opp. Parties : M/s. N.C.Panigrahi, Sr. Counsel, S.R.Panigrahi, N.K.Tripathy, D.Dhal.

Date of Judgment : 03.05.2016

JUDGMENT

VINEET SARAN, C.J.

The petitioner TELSA Transformers Limited, a Private Limited Company registered under the Companies Act, has filed this application challenging the order dated 14.09.2015 passed by the Sr. General Manager (CPC), Odisha Power Transmission Corporation Limited (hereinafter referred to as the 'Corporation') vide Annexure-1, debarring it for a period of three years from participating in future tenders and not to encash the bank guarantee, and further seeks for a direction to release the amount of pending bills in respect of transformers already supplied and received by the Corporation.

2. The factual matrix of the case in hand is that in response to the tender notice floated by the opposite party- Odisha Power Transmission Corporation Ltd. on 08.02.2014 inviting e-Tender for supply of transformers, the petitioner had participated and was found to be the second lowest tenderer. However, the petitioner was awarded 30% of the tender work on the rate quoted by the lowest tenderer. On 18.06.2014 purchase order was issued in favour of the petitioner for supply of 446 nos. of 63 KVA transformers and 402 numbers of 100 KVA transformers to be delivered in three phases, the first phase being within three months, the second phase within six months and the third phase within nine months i.e. by 17.03.2015. For the said purpose the petitioner furnished bank guarantee to the tune of 10% of the purchase order value which comes to about Rs. 84 lakhs. Since the petitioner failed to make the supplies in the first two phases, notice for cancellation of the purchase order and for forfeiture of performance security for non supply of transformer was issued on 03.02.2015. Pursuant to the said communication, the petitioner offered to supply certain lesser numbers of

transformers i.e. only 60 numbers of 63 KVA and 80 nos. of transformers of 100 KVA. Then on 12.02.2015 the petitioner made a representation to reduce the quantity to be supplied by it as it was unable to supply the balance transformers. By 17.03.2015, which was the last date for supply of transformer, the petitioner did not supply any transformers. Pursuant to the aforesaid request made by the petitioner, the opposite party-Corporation amended the purchase order on 20.04.2015 and allowed the petitioner to supply 80 nos. of transformer of 100 KVA and 60 nos. of transformers of 63 KVA. The opposite party-Corporation got the same inspected and consequently, the supply of the aforesaid quantity of transformer was accepted by the Corporation.

Then on 01.06.2015, the opposite party-Corporation wrote to the State Bank of India, which had issued bank guarantee in favour of the Corporation on behalf of the petitioner, requesting that the process of the Bank Guarantee may be remitted in favour of the Corporation. On coming to know of the said communication by the Corporation to the Bank, the petitioner vide his communication dated 04.06.2015, requested the opposite party-Corporation not to encash the Bank Guarantee, and offered to pay the amount towards Bank Guarantee by way of demand draft. The opposite party-Corporation agreed to such offer and did not encash the Bank Guarantee and accepted the demand draft for the amount of Bank Guarantee on 26.09.2015. On 14.09.2015, the opposite party-Corporation had already passed an order directing for encashment of the bank guarantee and also communicated to the petitioner that a resolution has been passed on 21.08.2015 debarring the petitioner from participating in any tender for a period of three years. Hence, this petition.

3. The facts as stated above are not disputed by the parties. Mr. P.C. Nayak, learned counsel appearing for the petitioner has raised two fold contentions. Firstly, it is submitted that no show cause notice was issued to the petitioner before passing the impugned order dated 14.09.2015; and secondly, it is contended that by the amended purchase order issued on 20.04.2015, the opposite party-Corporation had itself amended the terms of the contract, and as such debarring the petitioner from participating in any tender, imposing any penalty or invoking the bank guarantee cannot be justified in law. Debarring the petitioner from participating in any tender for a period of three years without affording any opportunity amounts to blacklisting of contract, which is not permissible under law. To substantiate his contention, reliance has been placed on the judgments of the Apex Court

in ***Gorkha Security Services v. Govt. of NCT of Delhi & Ors.,*** AIR 2014 SC 3371 and ***M/s Erusian Equipment & Chemicals Ltd. v. State of West Bengal and another***, (1975) 1 SCC 70.

4. Per contra, Sri N.C. Panigrahi, learned Senior counsel appearing for the opposite party-Corporation has submitted that vide its communication dated 4.6.2015, the petitioner had itself offered to pay the amount in lieu of the bank guarantee furnished by it, because encashment of the bank guarantee would adversely affect the reputation of the petitioner. It is thus submitted that the letter of encashment of bank guarantee has been sent after the admission of the petitioner with regard to the same. It is further submitted that time is the essence of the contract, and since the petitioner did not supply the transformers within time i.e. by 17.03.2015, encashment of the bank guarantee, as well as debarring the petitioner from participating in any tender for a period of three years, is fully justified and that the order dated 20.04.2015 was not in the form of extension of contract/ purchase order but only to be treated as a fresh purchase order, independent of the earlier contract/purchase order. To substantiate his contention, reliance has been placed on the judgment of the Apex Court in ***Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others,*** (2014) 14 SCC 731.

5. Having heard learned counsel for the parties and after going through the records, it appears that the opposite party, pursuant to the e-Tender Notice No. CPC-28-2013-14.docx. and Tender Specification No. Tender-DTR-CPC-28-2013-14.docx., issued a purchase order dated 18.6.2014 for procurement of transformers. Clause-16 of the condition of contract of purchase order states as follows:-

Clause-16:- Extension of Delivery Time:-

> *"If the delivery of the transformers is delayed due to reasons beyond your control, then you will without delay give notice to this office in writing of your claim for an extension of delivery time. On receipt of such notice, OPTCL may or may not agree to extend the contractual delivery date as may be reasonable but without prejudice to other terms and conditions of the contract."*

6. The purchase order was issued for supply of certain quantities of transformers. Subsequently, pursuant to the amended purchase order dated 20.04.2015 (vide Annexure-14) referring to the very same e-tender notice and tender specification, the opposite parties had agreed to the supply of

reduced number of transformers. There is no doubt that time is the essence of the contract, but when provision for extension is provided under clause-16 of the contract itself, and amended purchase order in terms of the said contract has been issued, the terms of which have been complied with by the petitioner, the original contract/agreement/purchase order would automatically stand amended to the extent of the subsequent order.

7. In ***Basheshar Nath v. Commissioner of Income Tax, Delhi and Rajasthan,*** AIR 1959 SC 149, ***Mademsetty Satyanarayana v. G. Yelloji Rao,*** AIR 1965 SC 1405, ***Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh,*** AIR 1968 SC 933 and ***Sikkim Subba Associates v. State of Sikkim***, AIR 2001 SC 2062, the Apex Court held that even in case of mandatory provision, under specific circumstances, a party can waive its right. Waiver means relinquishment of one's own right. It is referable to a conduct signifying intentional abandonment of right. It may be express or may even be implied but should be manifest from some overt act. Waiver involves a conscious, voluntary and intentional relinquishment or abandonment of a known existing legal right. Thus, benefit, claim or privilege, which, except for such a waiver, the party would enjoy. Even in a case if a plea is taken and evidence is not led, it would amount to be a waiver.

8. Applying the said principle to the present context, it appears that by amended purchase order dated 20.04.2015 by reducing the quantity of transformer to be supplied by the petitioner, the opposite parties had waived the condition of initial purchase order dated 18.06.2014 with regard to the quantity to be supplied pursuant to the initial contract, and as such the opposite parties had acted upon with the amended purchase order by accepting the supply of reduced quantity of transformers. Therefore, the opposite parties are estopped from taking any further coercive action against the petitioner.

9. As such, in our view, debarring the petitioner for a further period of three years, despite the terms of the initial purchase order dated 18.06.2014 having been amended by the subsequent purchase order dated 20.04.2015, cannot be justified in law. Debarment of the petitioner, without following due procedure of law, and without complying with the principles of natural justice, amounts to blacklisting him, which is also not permissible under law.

10. In ***M/s Erusian Equipment & Chemicals Ltd.*** (supra), the Apex Court held that fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the black list.

11. In ***Gorkha Security Services*** (supra), the Apex Court held that merely because clause in Notice Inviting Tender empowers department to impose such penalty that does not mean that such penalty can be imposed without putting defaulting contractor to notice to this effect.

12. The reference made to ***Kulja Industries Limited*** (supra) by the learned Sr. Counsel for the opposite party also supports the stand of the petitioner. In the said judgment, the Apex Court held that if State or its instrumentality takes decision on blacklisting then such decision is subject to judicial review on grounds of principles of natural justice, doctrine of proportionality, arbitrariness and discrimination under Article 14 of the Constitution of India.

13. On perusal of the impugned order, it appears that before debarring the petitioner to participate in future tender for a period of three years, no notice of opportunity was given to him before passing such order. Even otherwise, no notice or opportunity was ever given to the petitioner before passing any such order, and merely reference of the same has been made in the impugned order dated 14.09.2015, wherein it is stated that by resolution dated 21.08.2015, the petitioner has been debarred from participating in any Tender for a period of three years. In the facts of the present case, such resolution could not have been passed without giving opportunity to the petitioner. Such portion of the order dated 14.09.2015, by which the petitioner has been debarred, is liable to be quashed, and is accordingly quashed.

14. So far as the question of encashment of bank guarantee is concerned, we are of the view that, just as the opposite party-Corporation is estopped from raising any dispute with regard to the extension or amendment of the purchase order, after having amended the same by its communication dated 20.04.2015, the petitioner also cannot raise any dispute with regard to the encashment of the bank guarantee, as its communication dated 04.06.2015 itself is an offer to pay the bank guarantee amount in lieu of the bank guarantee which was returned to the petitioner on furnishing bank draft, and the same was only acted upon by the petitioner after passing the impugned order on 14.09.2015, on 26.09.2015 when the petitioner submitted the bank draft of equivalent amount for taking back the bank guarantee. In such view of the matter, we would not be inclined to interfere with the direction in the impugned order dated 14.09.2015, with regard to the encashment of the bank guarantee.

15. At this stage learned counsel for the petitioner has submitted, that the pending bills of the petitioner may be cleared as admittedly the petitioner has made certain supplies, which bills are not being paid.

Sri N.C. Panigrahi, learned Senior Counsel appearing for the opposite party-Corporation has fairly submitted, that the account of the petitioner will be cleared by the opposite party-Corporation within two months from the date of filing of the certified copy before opposite party-Corporation.

16. For the reasons given hereinabove and balancing equity between the parties, it is directed that the amount equivalent to the bank guarantee already paid by the petitioner in lieu of return of the original bank guarantee is sustained, and the direction given in the order dated 14.09.2015 with regard to debarring the petitioner from participating in any future contract of the opposite party-Corporation, is quashed.

17. Accordingly, the writ petition stands allowed in part. No order to costs.

Writ petition allowed.

2016 (II) ILR - CUT- 43

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

W.P.(C) NO. 6426 OF 2016

MAHESWAR BHATRA ……..Petitioner

.Vrs.

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

ODISHA GRAMA PANCHAYATS ACT, 1964 – S.8

Creation of Headquarters for reconstituted Grama Panchayats – Owing to Government notification Dt. 01.07.2015, Block Level Committee (BLC) vide report Dt. 25.07.2015 recommended for reconstitution of G.P. Headquarters at Tarakonadi – Objections raised – Due to such objection District Level Committee (DLC) directed BLC to submit a fresh report – BLC submitted fresh report Dt. 25.08.2015 for creation of G.P. Headquarters at Bhalukanadi instead of Tarakonadi – DLC without inviting objection to the fresh report, recommended the same to the State Government on 26.08.2015 – Hence the writ petition –

There is neither any provision for BLC to change its recommendation nor the DLC to direct BLC to submit a fresh report – No opportunity was given to the petitioner or other villagers to file objection to the fresh report as provided in the Government Notification Dt. 01.07.2015 – Violation of rules of natural justice – Held, the entire proceeding initiated for creation of Headquarters of reconstituted Grama Panchayat are set aside – Direction issued that BLC shall give its fresh proposal in terms of the above Government Notification which shall be considered by the DLC after inviting objections from all concerned and there after the State Government shall take a final decision.

(Paras 12,13,14)

Case Laws Referred to :-

1. 2013 (12) SCALE 304 : Mahipal Singh Tomar -V- State of Uttar Pradesh

For Petitioner : M/s. S.K.Dalai, P.Swain & S.Mohapatra
For Opp. Parties : Sri B.P.Pradhan, Addl.Govt.Adv.
Mr. Neelakantha Panda & Ms. Latika Mohanty

Date of judgment:12.05.2016

JUDGMENT

VINEET SARAN, C.J.

The petitioner, who is the resident of Purniguda village under Phupugaon Gram Panchayat has filed this application objecting to the recommendation made by the District Level Committee on 26.08.2015 recommending for setting up of the Gram Panchayat Headquarter at Bhalukanadi instead of Tarakonadi.

2. The brief facts of the case are that in terms of Government Notification dated 1.7.2015 with regard to reconstitution of Gram Panchayat in the State of Odisha, by report dated 25.07.2015, the Block Level Committee recommended for reconstitution of Gram Panchayat with Headquarters at Tarakonadi which was forwarded to the Collector. The District Level Committee invited objection/suggestion and accordingly objections were filed by the residents of the village Bhalukanadi and from the record produced by the Addl. Govt. Advocate, it is clear that on 21.08.2015, the Collector directed the Block Development Officer, Jharigam "to submit the field visit report along with proceeding of the Block Level Team by 25.08.2015 basing on petition of the villagers regarding creation of New Gram Panchayat at village Bhalukanadi".

On the basis of such direction issued by the Collector, a fresh report was submitted by the Block Level Committee on 25.08.2015 proposing for creation of the Headquarters of Gram Panchayat at Bhalukanadi instead of Tarakonadi. Based on the aforesaid recommendation, on 26.08.2015, the District Level Committee recommended for creation of Headquarters of new Gram Panchayat at Bhalukanadi. Such matter is pending consideration before the State Government which is in terms of the notification dated 01.07.2015. Hence, this petition.

3. Heard Mr. S.K. Dalai, learned counsel for the petitioner as well as learned Addl. Govt. Advocate appearing for the State-opposite parties and perused the records. We have also heard Mr. Neelakantha Panda, learned counsel for the residents of village Bhalukanadi, who have filed an intervention application.

4. Earlier time was granted to learned Addl. Govt. Advocate to obtain instructions and produce the record, which has been produced today. We have perused the same.

5. By the Constitution (Seventy-third Amendment) Act, 1992, Part-IX containing Articles 243, 243A to 243O has been inserted. Article 243C states about Composition of Panchayats. Sub Article (1) of Article 243C states as follows:-

> *"243C. Composition of Panchayats.-(1) Subject to the provisions of this Part, the Legislature of a State may, by law, make provisions with respect to the composition of Panchayats;*
>
> *Provided that the ratio between the population of the territorial area of a Panchayat at any level and the number of seats in such Panchayat to be filled by election shall, so far as practicable, be the same throughout the State."*

6. The State Legislature amended the Orissa Gram Panchayat Act, 1964 in the year 1994 to bring it in tune with the Constitution (Seventy-third Amendment) Act, 1992. Chapter-II of Gram Panchayat Act, 1964 deals with Grama, Grama Sasan, Grama Sabha and Palli Sabha whereas Chapter-III deals with Constitution of Gram Panchayats. Section 8 of Chapter-III deals with Constitution and delimitation of wards, which reads as follows:-

> *"(1) As soon as may be after the constitution of a Gram the Collector shall for the purpose of constitution of the Grama Panchayat determine the number of wards into which the Grama is to be divided and the e xtent of each such ward and shall prepare a*

statement showing the number of wards and the extent of each ward which shall be published by him in the prescribed manner for the prescribed period inviting objections from the persons interested to be filed within the said period;

Provided that-

(i) the determination of the number of such wards shall be subject to the provisions in Article 243-C of the Constitution;

(ii) the total number of wards in any Grama shall not be less than eleven and more than twenty five and

(iii) the population of every ward shall, as far as practicable, be equal.

(2) The Collector shall after considering all such objections and making such further inquiry as he may deem necessary cause such alternation as may be necessary to be made in the statement shall finally publish the statement so as altered in the prescribed manner and thereupon the division of the Gram into wards as shown in the statement shall become final.

(3) In cases where the population of any Grama according to the relevant figures of a census has exceeded its population, as recorded in the preceding census, the Collector may re-delimit the wards of the Grama and form new wards wherever necessary and in doing so, he shall follow the same procedure as is provided in respect of division of wards under Sub-sections (1) and (2)."

7. To give effect to the provisions contained in Section 8 of the Gram Panchayat Act, the State Government issued notification on 01.07.2015 for reorganization of the existing Gram Panchayats on the basis of its location, area, population fixing a new Gram Panchayat Headquarters. Accordingly, Block Level Committees and District Level Committees have been constituted and finally the decision rests on the State Level Committee with regard to the reconstitution of the Gram Panchayats.

8. Mr. S.K. Dalai, learned counsel for the petitioner states that the District Level Committee on 26.08.2015 recommended for setting up of the Gram Panchayat Headquarters at Bhalukanadi instead of Tarakonadi. It is stated that after recommendation is made by the Block Level Committee, the parties have to be given opportunity to file objections. However, it is contended that when the fresh report of the Block Level Committee was submitted on 25.08.2015, no opportunity was given to the petitioners and other villager to file any objection as on the very next dated i.e. 26.08.2015,

the recommendation was made by the Collector basing it on the subsequent report and ignoring the earlier report dated 25.07.2015. Consequentially, he seeks for interference of this Court.

9. Mr. B.P. Pradhan, learned Addl. Govt. Advocate produced the record and stated that opportunity of hearing has been given to the petitioners. Therefore, this Court should not interfere with the recommendation made by the Collector to the State Government to have the Headquarters at Bhalukanadi instead of Tarakonadi.

10. Mr. Neelakanta Panda, learned counsel appearing for the intervenors supported the contentions raised by learned Addl. Govt. Advocate and urged that since the recommendation made by the Collector is justified in the eye of law, this Court should not interfere with the same at this stage when the matter is pending before the Government for consideration.

11. Having heard learned counsel for the parties and after going through the records, with the consent of learned counsel for the parties, this petition is disposed of at this stage without calling for any counter affidavit.

12. On the basis of the facts pleaded above, it is clear that no opportunity as contemplated in the Government Notification dated 01.07.2015 was given to the petitioners and other residents of the village in question. As such, the recommendation made by the Collector on 26.08.2015 without inviting objections on the fresh recommendation by the Block Level Committee deserves to be quashed. Even otherwise, once recommendation is made by the Block Level Committee, there is no provision of changing the recommendation and, if at all, it is the District Level Committee which can make fresh recommendation and was not to direct the Block Level Committee to give a fresh report basing on the representation of the petitioner or objection filed by any such villages.

13. In ***Mahipal Singh Tomar v. State of Uttar Pradesh***, 2013 (12) SCALE 304, the Apex Court held that in administrative law, the 'rules of natural justice' have traditionally been regarded as comprising '*audi alteram partem'* and '*nemo judex in causa sua'*. The first of these rules requires the maker of a decision to give prior notice of the proposed decision to the persons affected by it and an opportunity to them to make representation. The second rule disqualifies a person from judging a cause if he has direct pecuniary or proprietary interest or might otherwise be biased. The first principle is of great importance because it embraces the rule of fair procedure or due process. Generally speaking, the notion of a fair hearing extends to the

right to have notice of the other side's case, the right to bring evidence and the right to argue. This has been used by the Courts for nullifying administrative actions. The premise on which the Courts extended their jurisdiction against the administrative action was that the duty to give every victim a fair hearing was as much a principle of good administration as of good legal procedure.

14. In view of the aforesaid, the entire proceedings initiated, with regard to the creation of Headquarters of reconstituted Gram Panchayat, are set aside and it is directed that the Block Level Committee shall give its fresh proposal/recommendation in terms of the Government Notification dated 01.07.2015 which shall be considered by the District Level Committee in terms of the Government Notification dated 01.07.2015 after inviting objections from all concerned. The State Government shall thereafter take a final decision in the matter after considering the recommendations of the Block Level Committee as well as District Level Committee and the objections, if any, filed by the residents of the villages in question.

15. The writ petition is allowed with the extent indicated above.

Writ petition allowed.

2016 (II) ILR - CUT- 48

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

WRIT APPEAL NO. 222 OF 2016

SASWATI PATRA ……..Appellant

.Vrs.

SARASWATI BISWAL & ORS. ……Respondents

Letters Patent Appeal – When maintainable before Division Bench of High Court against orders of the learned Single Judge in exercise of writ jurisdiction – Scope of jurisdiction under Article 227 is distinct from Article 226 of the Constitution of India – Order passed by the Civil Court is only amenable to be scrutinized by the High Court in exercise of jurisdiction under Article 227 of the Constitution of India and in that case no Letters Patent Appeal is maintainable – However, if a person has invoked the jurisdiction of the High Court for issuance of certain writ under Article 226 but Article 227 is mentioned and

principally the judgment appealed against falls under Article 226, the appeal would be maintainable – Even a statement by the learned single judge that he has exercised power under Article 227, cannot take away the right of appeal against such judgement if power is otherwise found to have been exercised under Article 226 – Important is the pleadings in the writ petition and true nature of the principal order passed by the learned single judge but not what provision he mentions while exercising such powers – So a Letters patent Appeal or an intra-Court appeal is maintainable in such cases where the order of the learned Single Judge, in substance falls under Article 226 either wholly or partially.

In this case the appellant filed writ petition challenging the order passed by the learned Election Tribunal-cum-District Judge Puri in an Election Petition under the provisions of the Odisha Zilla Parishad Act, 1991 by invoking jurisdiction under Articles 226 and 227 of the Constitution of India and on perusal of the order passed by the learned single judge, it appears that he has exercised the jurisdiction under Article 226 of the Constitution of India – Held, the intra-Court appeal is maintainable before this Court. (Paras 7 to17)

Case Laws Referred to :-

1. (1982) 1 SCC 691 : Jyoti Basu and others v. Debi Ghosal & Ors.
2. (2015) 5 SCC 423 : Radhey Shyam v. Chhabi Nath.
3. AIR 2009 SC 1999 : State of Madhya Pradesh and others v. Visan Kumar Shiv Charan Lal.
4. 110(2010) CLT, 162 : Tarachand Majhi v. Lalit Pradhan.
5. AIR 2011 Bombay 84(FB) : M/s. Advani Oerlikon Ltd. v. Machindra Govind Makasore & Ors.
6. AIR 2016 (NOC) 127 (Tri) : Sailesh Chandra Bhattacharjee & others v. State of Tripura & Ors.
7. AIR 1964 SC 1545 : Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore & Ors.
8. 2003(I) OLR 668 : Rabinarayan Hati v. Nityananda Patra & Anr.
9. (2015) 9 SCC 1 : Jogendrasinhji Vijaysinghji v. State of Gujarat & Ors.
10. AIR 1976 SC 1886 : Kanhaiyalal v. Mannalal.
11. AIR 1984 SC 135 : P. Nalla Thampty Thera (Dr.) v. B.L. Shanker
12. AIR 1952 SC 64 : N.P. Ponnuswami v. Returning Officer.

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

For Respondents : Mr. K.P.Mishra (for Resp. No.1)
Mr. Debasish Swain, S.K.Dash, K.P.Mishra, B.Basakh, A.Pradhan (for caveator)

Date of Hearing : 11.05.2016
Date of Judgment: 16.05.2016

JUDGMENT

DR. B.R. SARANGI, J.

The appellant, being the writ petitioner, has filed this intra-Court appeal against the order dated 29.04.2016 passed by the learned Single Judge of this Court in W.P.(C) No. 6657 of 2016 confirming the order dated 08.04.2016 passed by the learned District Judge-cum- Election Tribunal, Puri, rejecting the application filed by the appellant under Order 6 Rule 16 and Order 7 Rule 11 of C.P.C in Election Petition No. 1 of 2012.

2. The factual matrix of the case, in hand, is that the appellant has been elected as a Member of Zilla Parishad, Puri representing Satyabadi-3 Constituency No. 33 pursuant to the election held on 13.02.2012 where the respondents were contesting her in the said election. The election of the appellant has been challenged by respondent no.1 by raising election dispute under Section 32 of the Orissa Zilla Parishad Act, 1991 before learned Election Tribunal –cum- District Judge, Puri on the ground that the caste certificate showing that she belongs to OBC category is not a genuine one, thereby acceptance of nomination and declaring the appellant as returned candidate is void.

3. It is admitted that evidence from both the sides have already been closed and the matter has been posted for argument and it is also stated at the bar that on completion of such argument the matter has been posted to 17.05.2016 for delivery of judgment by the Election Tribunal –cum- District Judge, Puri in Election Petition No. 1 of 2012. When the matter was posted for argument, the appellant filed three separate applications, one to recall P.W. 3 for further cross-examination, second to call for the case record in Misc. Case No. 162 of 2012 from the Tahasildar, Satyabadi and for time of examination of respondent no.1 and third petition under Order 6 Rule 16 read with Order 7 Rule 11 of the CPC to reject the election petition as no cause of action has arisen. The Election Tribunal –cum- District Judge, Puri on consideration of the application filed under Order 6 Rule 16 read with Order 7 Rule 11 of C.P.C held that the election petition as a whole, if read together, make out all the facts necessary to the satisfaction of the Tribunal regarding the cause of action for challenging the election of the appellant as she does not belong to the caste for which the seat is reserved and accordingly, rejected the application filed under Order 7 Rule 11 of C.P.C on

the ground that it lacks merit. Assailing the said order, the appellant preferred writ petition bearing W.P.(C) No. 6656 of 2016 before this Court and the learned Single Judge vide impugned order dated 29.04.2016 dismissed the writ petition holding that the appellant shall come with the expression that such person is disqualified for election. Hence this appeal.

4. Mr. U.K. Samal, learned counsel for the appellant urged that Section 33 of the Orissa Panchyat Samiti Act, 1959 provides for disqualification of a member. The caste certificate, on the basis of which she was declared elected, cannot be challenged as a fraudulent one to nullify the effect of election as it does not cover election to be void under Section 44-L of the said Act, which stipulates that improper acceptance of nomination cannot be a ground for declaring an election void. More particularly, Section 44-L(1)(c) of the said Act provides that the Civil Judge (Senior Division) shall declare the election of a returned candidate void, if he is of the opinion that such person is disqualified for election under the provision of this Act. Section 33 of the Orissa Zilla Parishad Act deals with disqualification for becoming a member and continuing as member. Production of caste certificate, which is not genuine, is not a disqualification mentioned under the said provision and therefore, he seeks for setting aside of the impugned order dated 29.04.2016 passed by the learned Single Judge. To substantiate his contention, he has relied upon the judgments in **Jyoti Basu and others v. Debi Ghosal and others, (1982) 1 SCC 691, Radhey Shyam v. Chhabi Nath, (2015) 5 SCC 423, State of Madhya Pradesh and others v. Visan Kumar Shiv Charan Lal, AIR 2009 SC 1999, Tarachand Majhi v. Lalit Pradhan, 110(2010) CLT, 162, M/s. Advani Oerlikon Ltd. v. Machindra Govind Makasore & others, AIR 2011 Bombay 84(FB), and Sailesh Chandra Bhattacharjee & others v. State of Tripura & others, AIR 2016 (NOC) 127 (Tri).**

5. Mr. K.P. Mishra, learned counsel for respondent no.1, per contra, raised a preliminary question with regard to maintainability of the writ appeal. It is further urged that when the genuineness of the caste certificate issued by the Tahasildar, Satyabadi in Misc. Case No. 213 of 2008, basing upon which the appellant has been elected, is a subject matter of dispute before the Election Tribunal –cum- District Judge, Puri and the argument has already been over and the matter has been posted for judgment, the present writ appeal should not have been entertained. It is further contended that a person having been elected by producing a fraudulent certificate, her election cannot be assailed under the election law even though she was otherwise not

eligible to participate in the election process. In support of his contention he has relied upon the judgments in **Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore & Others, AIR 1964 SC 1545, Rabinarayan Hati v. Nityananda Patra and another, 2003(I) OLR 668, Jogendrasinhji Vijaysinghji v. State of Gujarat and others, (2015) 9 SCC 1.**

6. On the basis of the facts pleaded above, the following questions emerge for consideration.

(i) Whether the writ appeal is maintainable?

(ii) Whether the learned Single Judge is justified in dismissing the writ petition and directing the learned Election Tribunal –cum- District Judge, Puri to dispose of the election petition within two weeks from the date of receipt of the order?

Question No.(i)

7. Several judgments have been cited by the learned counsel for the parties with regard to maintainability of the writ appeal before this Court. The question with regard to maintainability of the intra-Court appeal has been considered by the Apex Court in **Jogendrasinhji Vijaysinghji (supra)** and the Apex Court relying upon the various judgments held that Article 226 of the Constitution of India confers a power on a High Court to issue writs, orders, or directions mentioned therein for enforcement of any of the rights conferred by Part III or for any other purpose. This is neither an appellate nor a revisional jurisdiction of the High Court. The High Court in exercise of its power under Article 226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction. If that be so, it cannot be contended that a petition under Article 226 of the Constitution is a continuation of the proceedings under the Act concerned. The order passed by the Civil Court is only amenable to be scrutinized by the High Court in exercise of jurisdiction under Article 227 of the Constitution. Once it is exclusively assailable under Article 227 of the Constitution of India, no intra Court appeal is maintainable. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226 of the Constitution and, therefore, a Letters Patent Appeal or an intra-Court appeal in respect of an order passed by the learned Single Judge dealing with an order arising out of

a proceeding from a Civil Court would not lie before the Division Bench. No writ can be issued against the order passed by the Civil Court and, therefore, no Letters Patent Appeal would be maintainable.

8. Where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal, the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order, the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. If the judgment under appeal falls squarely within four corners of Article 227, it goes without saying that intra-Court appeal from such judgment would not be maintainable. On the other hand, if the petitioner has invoked the jurisdiction of the High Court for issuance of certain writ under Article 226, although Article 227 is also mentioned, and principally the judgment appealed against falls under Article 226, the appeal would be maintainable. What is important to be ascertained is the true nature of order passed by the learned Single Judge and not what provision he mentions while exercising such powers. A statement by a learned Single Judge that he has exercised power under Article 227, cannot take away the right of appeal against such judgment if power is otherwise found to have been exercised under Article 226. The vital factor for determination of maintainability of intra Court appeal is the nature of jurisdiction invoked by the party and the true nature of principal order passed by the learned Single Judge.

9. Consequently, maintainability of the Letters Patent Appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the learned Single Judge, and the type of directions issued, regard being had to the jurisdictional perspectives in the constitutional context. Whether a Letters Patent Appeal would lie against the order passed by the learned Single Judge that has travelled to him from the other tribunals or authorities, would depend upon many a facet. It is clarified that in certain enactments, the District Judges function as Election Tribunals from whose orders a revision or a writ may lie depending upon the provisions in the Act. In such a situation, the superior court, that is, the High Court, even if required to call for the records, the District Judge need not be a party. But how the jurisdiction under the letters patent appeal is to be exercised cannot

exhaustively be stated. It will depend upon the Bench adjudicating the *lis* how it understands and appreciates the order passed by the learned Single Judge and as such, there cannot be a straitjacket formula for the same. But the High Court while exercising jurisdiction under Article 227 of the Constitution has to be guided by the parameters laid down by the Supreme Court. The apex Court in **Jogendrasinhji Vijaysinghji (supra)** summarised the guidelines in paragrtaph-45, which reads as follows:

> ***"45.*** *In view of the aforesaid analysis, we proceed to summarise our conclusions as follows:*
>
> ***45.1.*** *Whether a letters patent appeal would lie against the order passed by the learned Single Judge that has travelled to him from the other tribunals or authorities, would depend upon many a facet. The court fee payable on a petition to make it under Article 226 or Article 227 or both, would depend upon the rules framed by the High Court.*
>
> ***45.2.*** *The order passed by the civil court is only amenable to be scrutinised by the High Court in exercise of jurisdiction under Article 227 of the Constitution of India which is different from Article 226 of the Constitution and as per the pronouncement in* ***Radhey Shyam v. Chhabi Nath****, (2015) 5 SCC 423, no writ can be issued against the order passed by the civil court and, therefore, no letters patent appeal would be maintainable.*
>
> ***45.3.*** *The writ petition can be held to be not maintainable if a tribunal or authority that is required to defend the impugned order has not been arrayed as a party, as it is a necessary party.*
>
> ***45.4.*** *The tribunal being or not being party in a writ petition is not determinative of the maintainability of a letters patent appeal."*

10. In the Forty-Second year of the Republic of India, the Legislature of the State of Orissa has enacted a law to provide for the establishment of Zilla Parishads in the State of Orissa and for matters connected therewith or incidental thereto called " The Orissa Zilla Parishad Act, 1991". Chapter-V of the said Act deals with election disputes. Section 32 states that no election of a person either as a member or as the President or Vice-President of a Parishad held under this Act shall be called in question except by an election petition presented before the District Judge having jurisdiction over the place at which office of the Parishad is situated. Sub-Section (2) of Section 32 states that for the purpose of Sub-section (1), the provisions contained in Chapter-VI-A of the Orissa Panchayat Samiti Act, 1959 shall *mutatis*

mutandis apply except as provided thereunder. In the said Chapter, reference to the expression "Samiti" and "Election Commissioner" wherever they occur, shall be construed as reference to "Parishad" and "District Judge" respectively.

11. In **Kanhaiyalal v. Mannalal,** AIR 1976 SC 1886, the Apex Court held that an "election dispute" is not a private feud between one individual and another. The whole constituency is intimately involved in such a dispute. Shaky and wavering oral testimony of a handful of witness cannot steal the dominant voice of the majority of an electorate.

12. In **P. Nalla Thampty Thera (Dr.) v. B.L. Shanker,** AIR 1984 SC 135, the Apex Court in para-8 held that election and election disputes are a matter of special nature and though the right to franchise and right to office are involved in an election dispute, it is not a *lis* at common law nor an action in equity.

13. In view of Section 32 of the Zilla Parishad Act, 1991 no election of a person, either as a member or as the President or Vice-President of a Parishad, held under the said Act, shall be called in question except by filing a properly constituted election petition, which means a petition for enquiry into the validity of elections. A prayer made to the competent authority for challenging the result of an election, the election can be called in question by an election petition presented on one or more of the grounds specified in the election law, by a candidate at such election or any elector, within time specified from the date of election of the returned candidates. The Court which has the jurisdiction to try an election petition is the District Judge in the said Act.

14. In **N.P. Ponnuswami v. Returning Officer,** AIR 1952 SC 64, the apex Court held that "election" has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected.

15. Considering the above meaning of "election", "election dispute" and "election Petition" and taking into consideration the Sub-section(2) of Section 32 of the Zilla Parishad Act, 1991, Chapter- VI-A of the Orissa Panchayat Samiti Act, 1959 which deals with the election disputes, the

election dispute is to be decided strictly in accordance with the provisions contained under Zilla Parishad Act, 1991 read with the Orissa Panchayat Samiti Act, 1959 and procedure envisaged therein.

16. Section-44-F of the Orissa Panchayat Samiti Act, 1959 states about "Procedure before the Civil Judge (Senior Division)". Since it is a case under the Zillla Parishad Act wherever the expression used as "Civil Judge (Senior Division)" under Orissa Panchayat Samiti Act, 1959 has to be read as District Judge. Similarly, Section-44-H deals with Powers of Civil Judge (Senior Division) and that power has been enumerated in Clauses (a) to (g), thereby, the District Judge has to exercise such power while considering the election dispute. Section 44-B (1) it was prescribed that in case of an election, in respect of Samiti, the Civil Judge(Sr. Division) having jurisdiction over the place at which the Office of the Samiti is situated well within the jurisdiction to try the election petition. So far as the Zilla Parishad Act is concerned, it is the District Judge, who is to hear the matter. The District Judge who exercises the power under his jurisdiction under the Zilla Parishad Act is a "Court" within the meaning of evidence Act.

17. The District Judge cannot be held to be persona designate and come under the definition of the 'Court' as defined in the Indian Evidence Act and more so, the District Judge, has exercised the power as envisaged under the Orissa Zilla Parishad Act, 1991 read with Panchyat Samiti Rules, 1959. Though by designation he discharged his duties under the Act and as such, being called as "Election Tribunal" and taking into consideration the law laid down by the apex Court as mentioned supra and applying the same to the present context, it appears that the District Judge has exercised the jurisdiction as Election Tribunal under the Orissa Zilla Parishad Act, 1991. The appellant files writ application challenging the order dated 08.04.2016 passed by the learned Election Tribunal –cum- District Judge, Puri in Election Petition No. 1 of 2012 under the provisions of the Orissa Zilla Parishad Act, 1991 by invoking the jurisdiction under Articles 226 and 227 of the Constitution of India and on perusal of the order passed by the learned Signal Judge, it appears that he has exercised the jurisdiction under Article 226 of the Constitution of India and the nature of order he has passed can only be construed to be an order passed under the said Article of the Constitution. Therefore, the intra-Court appeal is maintainable before this Court. Question no.(i) is answered accordingly.

Question No.(ii)

18. Learned counsel for the appellant advanced his argument to the issue that the validity of caste certificate, cannot be challenged in an election petition filed under Section 32 of the Orissa Zilla Parishad Act, 1991. Section 32 relates to election disputes. Sub-section(2) of Section 32 provides that for the purpose of Sub-Section(1), the provisions contained in Chapter VI-A of the Orissa Panchyat Samiti Act, 1959 shall *mutatis mutandis* apply except as provided thereunder. In the said chapter reference to the expression "Samiti" and "Election Commissioner" wherever they occur shall be construed as reference to "Parishad" and "District Judge" respectively. Perusal of the provisions contained in Chapter VI-A of the Orissa Panchyat Samiti Act, 1959, indicates that it deals with "election disputes". Sections 44-A to Section 44-Q have various provisions available under the statute to deal with election petition. The election of the present appellant is challenged on the ground that she has relied upon the forged/fake certificate issued by the Tahasildar, Satyabadi as per the order in Misc. Case No. 2013 of 2008. Therefore, the learned Election Tribunal-cum-District Judge, Puri can only declare the election void as per the provisions contained under Section 44-L and more so, the said provision does not provide for declaring the election void for improper or illegal acceptance of nomination paper. Clause-(c) of Sub-Section(1) of Section 44-L provides that such person disqualified for election under the provisions of this Act. Admittedly, the constituency from which the appellant has participated in the election is reserved for OBC female candidate. The appellant being an OBC female candidate having participated in the election on the basis of the forged/fake certificate granted by the competent authority, the same can be construed that the person is disqualified for the election under the provisions of this Act. So far as obtaining the certificate fraudulently is concerned, this being a subject matter of election dispute itself, this Court refrains from giving any opinion at this stage. In any case, the arguments from both the sides having been over in the meantime and the matter is pending for judgment, which has been fixed to 17.05.2016, as stated at the bar, at this stage it is too late to be considered that the rejection of the application filed under Order 6 Rule 16 read with Order 7 Rule 11 of the CPC can have any bearing.

19. Looking at the conduct of the appellant, it appears that she being a returned candidate, tries to adopt dilly dally tactics to complete her tenure. The learned Single Judge in paragraph-2 of his order specifically indicates as follows:

> *"This is the fourth journey of the petitioner to the Court. On three earlier occasions three separate writ petitions have been filed by the*

same petitioner and have been disposed of. This is a classic case of the petitioner abusing the process of law to fragment the proceeding, in which her election is challenged and thereby delayed the disposal of the election petition."

20. The caste certificate having been granted by the competent authority under the provisions of the Orissa Miscellaneous Certificate Rules, 1984, the question with regard to the fact whether the petitioner belongs to OBC category or not, or she has filed forged/fake certificate or not and on the basis of such certificate whether she can participate in the election from reserved seat of category of OBC, can only be considered on merits by properly constituted election petition filed before the appropriate forum in respect of an election dispute. In fact, the same is pending for consideration. The election having been held in the year 2012, in the meantime four years have expired and reasons for delay in disposal of such election petition is well founded as the appellant had got fourth journey to this Court and adopted dilly dally tactics so that the purpose of the Act is to be defeated. Learned Single Judge is justified in directing disposal of the election proceeding within a time specified. Question No.(ii) is answered accordingly.

21. In view of the aforesaid facts and circumstances this Court finds no illegality or irregularity to have been committed by the learned Single Judge so as to interfere with the same in this intra-Court appeal preferred by the appellant. More so, the learned Single Judge has targeted the election dispute and directed the learned Election Tribunal –cum- District Judge, Puri to conclude the proceeding within a period of two weeks. Therefore, we are not inclined to interfere with the order passed by the learned Single Judge. Accordingly, the writ appeal is dismissed. No order as to costs.

Writ appeal dismissed.

2016 (II) ILR - CUT-59

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

I.T.A. NOS. 16,17,18,19,20 & 21 OF 2005

SURU BHASKAR RAO ……..Appellant

.Vrs.

COMMISSIONER OF INCOME TAX, ORISSA, BHUBANESWAR & ANR. ……Respondents

INCOME TAX ACT, 1961 – S.64

Whether, clubbing of income of daughter at the hands of her father, Permissible ?

The assessee-appellant claims that his daughter 'KS' purchased the Small Scale Industrial Unit from his wife "SP" on payment of Rs. 10,000/- and execution of promissory note of Rs. 60,000/- in favour of 'KS' as consideration – Facts reveal that 'KS' was minor at the time of transaction – 'KS' admits before the authority that documents were prepared at the behest of her father, the assessee-appellant – Minor is not competent to enter into a Contract U/s. 11 of the Contract Act – Authorities below consistently found that 'KS' was minor while executing promissory note to succeed to small scale industry of her mother "SP" – Such promissory note is void – Moreover, 'KS' admits before the authority that documents were prepared at the instance of her father and she had no knowledge of acquisition of property and M/s. Parbati Engineering Works is benami property of the assessee-appellant – Held, section 64(1) and 64(1A) of the Act clearly enshrines about clubbing of income of minor child and wife with the income of the appellant-assessee.

Case Laws Referred to :-

1. (2015) 5 SCC 622 : Mathai Mathai -V- Joseph Mary @ Marykkutty Joseph & Ors.
2. (1903) ILR 30 Calc. 539 (P.C.) : Mohari Bibee -V- Dharmodas Ghose

For Appellant : M/s. S.Ray, S.Dey & A.Mallick
For Respondents : Mr. S.K.Acharya, Sr. Standing Counsel, I.T. Dept.

Date of hearing : 15.03.2016
Date of judgment: 31.03.2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

The captioned Appeals arise out of a common order dated 23.6.2004 passed by the learned Income Tax Appellate tribunal, Cuttack Bench, Cuttack (hereinafter called "ITAT") in I.T.A. Nos. 277 to 280/CTK/2002 for the assessment years 1994-95 to 1997-98 and another common order dated 2.7.2004 in ITA Nos. 56 and 57 of 2004 for the assessment years 1992-93 and 1993-94. As common questions of law involved in all the Appeals, they are disposed of by this common order.

FACTS

2. The factual matrix leading to the case of the appellant is that the appellant is the proprietor of a fabrication Unit in the name and style of Jeypore Small Scale Industries at Jeypore being an assessee under the status of individual. The appellant filed return in the name of his daughter K. Sandhyarani under section 143(1)(a) of the Income Tax Act, 1961 (hereinafter called "the Act") for the years 1992-93 to 1997-98 declaring the income for the respective years. It is stated that Smt. K. Sadhyarani, who happens to be the daughter of the appellant was deriving income from M/s. Parbati Engineering Works till her marriage in 1994. After marriage she could not give personal attention and executed power of attorney in favour of the appellant to run the business. It is stated that Smt. K. Sandhayarani got proprietorship of M/s. Parbati Engineering Works from her mother Smt. S. Parbati having purchased same from her mother on payment of Rs.10,000/- and executed a promissory note of Rs.60,000/- as security in favour of her mother. It is averred that M/s. Parbati Engineering Works is a separate small scale unit under the Director of Industries and has got licence under the Sales Tax department. It is alleged inter alia that the Assessing Officer without affording reasonable opportunity of being heard reopened the assessment under sections 144/147 of the Act by issuing notice under section 148 of the Act to the appellant. The Assessing Officer passed ex parte reassessment order for the assessment years 1994-1998 without serving statutory notice on the appellant. In the order the Assessing Officer for no good reason clubbed the income of M/s. Parbati Engineering Works along with the fabrication unit of the appellant and demand was made for Rs.5,09,494/- for 1995-96, Rs.6,42,146/- for 1994-95, Rs.12,18,714/- for 1997-98, Rs.2,37,422/- for 1992-93, Rs.1,93,550/- for 1993-94 and Rs.3,65,512/- for 1996-97. Against these orders the appellant filed appeals before the Commissioner of Income Tax (Appeals) who without examining any materials on record illegally observed that the income declared by Smt. K. Sadhyarani belongs to the appellant without understanding law thereof. Against that order the appellant

preferred appeals before the ITAT, Cuttack Bench, Cuttack challenging the orders passed by the Commissioner of Income Tax. The appellant did not appear before the ITAT on the date of hearing. Thereafter without affording any further opportunity to the appellant the ITAT disposed of the cases against the appellant by affirming the orders passed by the authorities below. Then against the orders of the ITAT the present appeals have been filed by the **appellant challenging same raising various contentions.**

SUBMISIONS

3. Learned counsel for the appellant submitted that the order of the ITAT are illegal and arbitrary for violation of natural justice for being not followed the principles of audi alterm partem. The ITAT has also committed error by confirming the order of the First Appellate Authority in observing that the income of the major daughter of the appellant also belongs to the income of the appellant. He further submitted that the impugned order suffers from illegality by not considering the income of the daughter of the appellant as separate income of the daughter of the appellant. The ITAT has also erred in law by considering the property of the daughter of the appellant as Benami property of the appellant. The impugned order also suffers from illegality by doubting about the promissory note executed by the daughter of the appellant as she was minor by then.

4. It is submitted by learned counsel for the appellant that the ITAT has failed to appreciate the facts of the case by not affording reasonable opportunity of being heard to the appellant. The ITAT has also failed to appreciate that the Assessing Officer without following the statutory provisions of the Act has reopened the case under section 148 of the Income Tax Act. He further submitted that section 64 of the Act provides that income of an individual will also include the income of spouse, minor daughter etc. under certain circumstances as has been provided therein and the impugned order passed by the Tribunal has not taken into consideration properly about applicability of such statutory provision. Section 64 (1-A) of the Act provides that income accruing to a minor child shall be included in the total income of the individual in particular situation, otherwise clubbing is not legally permissible. But in the present case the authorities below without considering such provision of law, clubbed the income of the daughter of the appellant, who is major at the time of assessment with the income of the appellant. It is submitted by learned counsel for the appellant that the order passed by the ITAT being dehors to the provisions of law should be set aside. Learned

counsel for the appellant raises the following questions of law for determination:

(i) Whether in the facts and circumstances of the case, the ITAT Cuttack Bench, Cuttack is legally correct in sustaining the reasons of the Forums below and legally justified in clubbing the income of Smt. K. Sadhyarani in the hands of her father, the present appellant and whether such a conclusion does not run contrary to law laid down in (190 ITR 336)?

(ii) Whether in the facts and circumstances of the case, the clubbing of income of Smt. K. Sandhyarani at the hands of her father, the present appellant is not contrary to the provision contained U/s. 64 of the Income Tax Act, 1961 and therefore legally unsustainable in the particular circumstances of the case?

(iii) Whether in the facts and circumstances of the case, failure on the part of the ITAT, Cuttack Bench, Cuttack to decide on each of the grounds of appeal taken by the appellant does not vitiate the proceedings and render the order non-est in law?

(iv) Whether in the facts and circumstances of the case, the appeal decided ex parte without ext ending reasonable opportunity of being heard to the appellant, should not be held as arbitrary and highly prejudicial, and should not be struck down as being in gross violation of rules of natural justice?

5. Learned Senior Standing Counsel for the revenue submitted that the impugned orders suffered from no illegality and they are based on facts of the case. According to him, the daughter of the appellant has been examined by the assessing Officer and in her statement she categorically stated that M/s. Parbati Engineering Works is owned by her father although purchased in her name, in view of such submission there is no wrong in clubbing the income of M/s. Parbati Engineering Works, which is under the control of the assessee, with the income of the appellant. He further submitted that rightly the authorities below have appreciated the fact that the daughter of the appellant being minor has acquired the property of M/s. Parbati Engineering Works as Benami property of the appellant inasmuch as minor has no capacity to contract under the Contract Act and she had no income to acquire the property. He further submitted that the story of execution of promissory note by the daughter of the appellant towards the balance purchase cost of M/s. Parbati Engineering Works is a void document as she was minor by

then. So he supported the impugned orders and submitted to dismiss the appeals.

POINT FOR CONSIDERATION.

6. The points for consideration in these appeals as formulated by the Court is "Whether in the facts & circumstances of the case, it is legal and justified to club the income of a daughter at the hands of her father and whether it is contrary to the provisions of Section 64 of the Income Tax Act, 1961?"

DISCUSSIONS.

7. It is an admitted fact that the appellant is an assessee under individual capacity. It is also an admitted fact that Smt. K. Parbati is the wife of the appellant and Smt. K. Sandhyarani is the daughter born out of their wedlock. It is also the admitted fact that the appellant being assessee has derived his income in his fabrication unit in the name of Jeypore Small Scale Industries.

8. It is the claim of the appellant that M/s. Parbati Engineering Works belonged to his wife and subsequently it has been transferred by his wife to his daughter K. Sandhyarani. With regard to the manner of purchase of such unit it is revealed from the orders of assessment that daughter paid Rs.10,000/- and a promissory note of Rs.60,000/- in favour of her mother as consideration. It is revealed from the orders passed by the authorities below including the Assessing Officer at the time of such transaction K. Sandhyarani was minor. If she was minor it is difficult to understand how she earned money to pay the same to her mother. Moreover, when she was minor how she has got capacity to execute promissory note in favour of her mother. Section 11 of the Indian Contract Act reads follows:-

> "11. **Who are competent to contract**.—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. —Every person is competent to contract who is of the age of majority according to the law to which he is subject,1 and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

9. From the aforesaid provision it is clear that no minor is competent to enter into contract. To acquire competence to enter into a contract K. Sandhyarani should have been age of majority as required under section 11 of the Indian Contract Act. In the case of **Mathai Mathai v. Joseph Mary @**

Marykkutty Joseph & ors., reported in (2015) 5 SCC 622, where Their Lordships observed at paragraphs-9 and 10 as follows:-

> "9. The first point is required to be answered against the appellant for the following reasons:-
>
> It is an undisputed fact that Exh. A1 is the mortgage deed executed by the uncle of the appellant and the first respondent in favour of the deceased mother of the appellant as collateral security towards the dowry amount. At the time of execution and registration of the document, it is an undisputed fact that the age of the mortgagee, the deceased mother of the appellant was 15 years as mentioned in the mortgage deed itself. Therefore, she had not attained the majority under the Indian Majority Act, 1875. To acquire the competency to enter into a contract with the uncle of both the appellant and the first respondent the parties should have been of age of majority as required under Section 11 of the Indian Contract Act, 1872. The aforesaid aspect fell for interpretation before the Privy Council in the case of Mohori Bibee v. Dharmodas Ghose[1], wherein the Privy Council after interpretations of relevant provisions of Section 11 of the Indian Contract Act, 1872, has held that the contracting parties should be competent to contract as per the above provision and the minor's contract was held to be void as he cannot be the mortgagor, the relevant paragraphs referred to in the aforesaid decision are extracted hereunder :-
>
> "Looking at these sections their Lordships are satisfied that the Act makes it essential that all contracting parties should be "competent to contract," and expressly provides that a person, who by reason of infancy is incompetent to contract, cannot make a contract within the meaning of the Act" In the later part of the same paragraph, it is stated, "The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are therefore of opinion that in the present case there is not any such voidable contract as is dealt with in section 64." Thus, it was held that a minor cannot be a contracting party, as a minor is not competent to contract as per Section 11 of the Indian Contract Act. At this juncture, it is also necessary to extract Sections 2 and 11 of the Indian Contract Act, 1872 which read as under:-

"2.Interpretation-clause. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :-

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

(c) The person making the proposal is called the "promisor" and the person accepting the proposal is called the "promisee";

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;

(f) Promises, which form the consideration or part of the consideration for each other, are called reciprocal promises;

(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract;

(i) An agreement which is enforceable by law at the option of one or more of the parties- thereto, but not at the option of the other or others, is a voidable contract;

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

11. Who are competent to contract- Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject." This important factual and legal aspect has been conveniently ignored by the authorities including the High Court while adverting to Exh.A1, the mortgage deed. A strong reliance was placed upon it by both the Land Tribunal and the Appellate Authority in allowing the claim application of the appellant holding that he is a deemed tenant under Section 4A of the

K.L.R. Act without noticing the aforesaid relevant factual aspect of the matter. Therefore, we have to hold that the mortgage deed-Ex. A1 executed by the uncle of the appellant and the first respondent, in favour of the deceased mother of the appellant, is not a valid mortgage deed in respect of the property covered in the said document for the reason that the deceased mother at the time of execution and registration of the document was a minor, aged 15 years, and she was not represented by her natural guardian to constitute the document as valid as she has not attained majority according to law. Many courts have held that a minor can be a mortgagee as it is transfer of property in the interest of the minor. We feel that this is an erroneous application of the law keeping in mind the decision of the Privy Council in Mohori Bibee's case (supra).

10. As per the Indian Contract Act, 1872 it is clearly stated that for an agreement to become a contract, the parties must be competent to contract, wherein age of majority is a condition for competency. A deed of mortgage is a contract and we cannot hold that a mortgage in the name of a minor is valid, simply because it is in the interests of the minor unless she is represented by her natural guardian or guardian appointed by the court. The law cannot be read differently for a minor who is a mortgagor and a minor who is a mortgagee as there are rights and liabilities in respect of the immovable property would flow out of such a contract on both of them. Therefore, this Court has to hold that the mortgage deed-Ex.A1 is void ab initio in law and the appellant cannot claim any rights under it. Accordingly, the first part of first point is answered against the appellant."

10. With due respect it appears from the aforesaid decision that the Hon'ble Apex Court has also followed the Privy Council in the case of **Mohori Bibee v. Dharmodas Ghose**, reported in (1903) ILR 30 Calc. 539 (P.C.). Thus, it is clear from the authorities as stated above that any contract by the minor is void and thus he is not competent to execute any promissory note which is also agreement between her and her mother. Apart from this, such view has been taken consistently taken by the authorities below. Since we are in seisin of the Second Appeal and the authorities below have consistently found fact that K. Sandhyarani was a minor while executed the promissory note to succeed to M/s. Parbati Engineering Works of her mother and there being no objection to such findings by the appellant, we are constrained to observe that such document is void one. Apart from this,

question arises in mind as to her capacity to earn money and pay Rs.10,000/- for purchasing of M/s. Parbati Engineering Works from her mother. On the other hand, it is clear from the orders of the authorities below that K. Sandhyarani has admitted before the Assessing Officer that the entire document of promissory note and other documents were only prepared at the instance of her father who is the appellant and she had no any knowledge of purchase of the property.

11. It is also available from the documents filed that K. Sandhyarani has executed one power of attorney in favour of the appellant to look after the affairs of M/s. Parbati Engineering Works and take all necessary steps to file the Income Tax return etc. It is revealed from orders of the Assessing Officer that while K. Sandhyaani was examined, she admitted that she has no knowledge about M/s. Parbati Engineering Works and such property belongs to her fat her. She has also admitted before the Assessing Officer that all documents are created b y appellant. So taking into consideration of all these documents and statement of K. Sandhdyarani, we are of the considered view that M/s. Parbati Engineering Works is not owned by K. Sandhyarani. Moreover, neither the appellant takes the plea nor document is proved to show that such property is owned by his wife K. Parbati. On the other hand, we are of the considered view that M/s. Parbati Engineering Works is a Benami property of the appellant.

12. Section 64 of the Income Tax Act reads in the following manner:-

64. Income of individual to include income of spouse, minor child, etc.- (1) In computing the total income of any individual, there shall be included all such income as arises directly or indirectly—

(i) [Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.]

(ii) to the spouse of such individual by way of salary, commission, fees or any other form of remuneration whether in cash or in kind from a concern in which such individual has a substantial interest:

Provided that nothing in this clause shall apply in relation to any income arising to the spouse where the spouse possesses technical or professional qualifications and the income is solely attributable to the application of his or her technical or professional knowledge and experience ;

xx xx xx

64 (1A) In computing the total income of any individual, there shall be included all such income as arises or accrues to his minor child, not

being a minor child suffering from any disability of the nature specified in section 80U :

Provided that nothing contained in this sub-section shall apply in respect of such income as arises or accrues to the minor child on account of any—

(*a*) manual work done by him; or

(*b*) activity involving application of his skill, talent or specialised knowledge and experience.

Explanation.—For the purposes of this sub-section, the income of the minor child shall be included,—

(*a*) where the marriage of his parents subsists, in the income of that parent whose total income (excluding the income includible under this sub-section) is greater ; or

(*b*) where the marriage of his parents does not subsist, in the income of that parent who maintains the minor child in the previous year,

and where any such income is once included in the total income of either parent, any such income arising in any succeeding year shall not be included in the total income of the other parent, unless the Assessing Officer is satisfied, after giving that parent an opportunity of being heard, that it is necessary so to do.

13. From the aforesaid provisions it is made clear that Section 64 of the Act purportedly directs for computing income of individual where income of wife be included. Section 64A of the Act also enshrines about clubbing of income of minor child with income of father under individual category if it is not derived from his (minor) manual work or activity concerning minor's skill, talent and likewise. So even if for argument shake it is considered that this property of M/s. Parbati Engineering Works belongs to his wife or minor daughter, income of such property will be clubbed with the income derived from M/s. Jeypore Small Scale Industries of the appellant.

14. In view of the analysis made above, we are of the view that M/s.Parbati Engineering Works belongs to appellant and income of such fabrication unit is income of the appellant. So, we are of the considered view that income of M/s. Parbati Engineering Works should be clubbed with the income of the appellant. Thus, we do not find any infirmity with the impugned orders of the ITAT.

CONCLUSION.

15. Now adverting to points for consideration as formulated, we are of considered view that facts and circumstances of the case as discussed above do not purportedly show income derived from M/s. Parbati Engineering Works is of K. Sandhyarani or K. Parbati but it is income of appellant. So, the appellant being assesee is liable to pay Income Tax on the income derived from M/s. Parbati Engineering Works and question of income of his daughter at the hand of appellant does not arise. Moreover, other questions whether provisions of Section 64 of the Act is contrary to above findings now becomes academic.

In toto we are of the considered view that orders of the ITAT in all these appeals being affirmed by us need no interference. As such the Appeals being devoid of merit stand dismissed.

Appeals dismissed.

2016 (II) ILR - CUT-69

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

W.P.(C) NO. 6923 OF 2015

DR. SATYABRATA KANUNGO .....Petitioner

.Vrs.

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

MEDICAL EDUCATION – Petitioner untimely discontinued from P.G. Course – He was debarred from undergoing higher medical education for three years as per clause I(6) of the Prospectus 2014-2015 and clause F(5) of the Prospectus 2015-2016 – Hence this writ petition – Candidates may be penalized in the shape of payment of money instead of forfeiting their future to prosecute higher studies – Such prospectus, not being under MCI guidelines are unreasonable and violative of articles 14 and 21 of the Constitution of India – Held, the impugned clauses are quashed and direction issued not to repeat the said clauses in the prospectus 2016-2017 but to insert clause D(2) of the prospectus of 2015-2016 of AIIMS, New Delhi in the prospectus 2016-2017 to safeguard the interest of the State and the candidates.

(Paras 30,31)

Case Laws Referred to :-

1. AIR 1971 SC 2560 : State of A.P. v. L. Narendra Nath

2. (1997) 9 SCC 495 : Krishnan Kakkanth v. Government of Kerala & Ors.
3. 2001 (8) SCC 491 : Union of India & Ors. V. Dinesh Engineering Corporation & anr.
4. (2002) 6 SCC 562 : Kailash Chand Sharma v. State of Rajasthan & Ors.

For Petitioner : M/s. Jaganath Patnaik, B.Mohanty, T.K.Patnaik, S.Patnaik, A.Patnaik, R.P.Roy & B.S.Rayaguru
For Opp. Parties (1&2) : Mr. Jyoti Pattnaik, Addl.Govt.Adv.,
For Opp. Parties (3&4) : Mr. R.C.Mohanty, K.C.Swain & S.Pattnaik

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Date of hearing : 17.03.2016
Date of Judgment: 31.03.2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge is made to Clauses I (6) & F (5) enshrined under the Guidelines for counseling and admission of candidates for Post Graduate (Medical) courses in the Medical Colleges of Odisha for the academic sessions 2014-2015 and 2015-2016, respectively (hereinafter called Guideline 2014-2015 and Guideline 2015-2016), as the same are ultra vires to Articles 14 and 16 of the Constitution of India by debarring the petitioner to be considered for selection in the next three academic sessions of P.G. course as well as ineligible to participate for P.G. (Medical) counselling.

FACTS

2. The unshorn details of the case of the petitioner is that the petitioner is a doctor by profession having completed MBBS from V.S.S. Medical College, Burla in the year 2006. Thereafter the petitioner joined at P.H.C. (N), Kodabhata, Jharigaon Block, Nabarangpur as Medical Officer and worked till 31.3.2015 having duration of service for 1862 days.

3. While the matter stood thus, the petitioner applied for P.G. Medical Entrance Examination (as an in-service candidate) for the period from 2014-2015 and he got selected in fourth counselling in the subject Radiotherapy. He took admission on 26.6.2014 at S.C.B. Medical College & Hospital, Cuttack but later on he did not find himself comfortable to the subject for which he surrendered the seat in Radiotherapy stream on 8.7.2014 with the hope that he will get another subject which will be more comfortable for him to render service to the patients. It is stated that on 10.7.2014 fifth round of counseling for the academic year 2014-2015 was held but the seat left by the petitioner remained unfilled.

4. The petitioner again applied for the P.G. Medical Course for the academic session 2015-2016 and got him selected having AIPGEMEE rank of 13911 as in-service candidate. In in-service category in the State his rank became reflected as Sl. No.40. While he waited for the counseling, on 24.3.2015 a notice was served on him stating that he is ineligible to participate in the counseling during 2014-2015 as he being admitted to Radiotherapy course during 2014-15 did not join at the S.C.B. Medical College & Hospital.

5. It is alleged, inter alia, that petitioner being meritorious and having secured the rank 40 in the in-service category failed to get qualified for counselling in the P.G. Medical course for next three years due to Clause-I (6) and F (5) to the year 2014-2015 and 2015-2016, respectively, in their respective Guidelines. He came to know that Clause F (5) of the Guideline for the year 2015-2016 read with Clause K (2) of the same Guideline is very harsh for the meritorious students who had left the course after being offered, is too onerous and harsh, essentially challenge those clauses having narrated the same as ultra vires being violative of Articles 14 and 16 of the Constitution of India.

6. It is averred by the petitioner that the Clause like I (6) & F (5) read with Clause K(2) respectively as enshrined in the Guidelines for the year 2014-2015 and 2015-2016 for State of Orissa not only debar the students for prosecuting the P.G. course for a period of three years but also penalize the students having directed to collect the stipend received by them and also to recover Rs.1 lakh from their possession, in default of payment such money, the original certificates ought to be retained by the authorities without being disbursed to the concerned candidate. There is no such provision maintained in other States like Karnataka, Postgraduate Institute of Medical Education and Research, Chandigarh and States like West Bengal and Uttaranchal. Thus, the petitioner alleged that such conditions being harsh and creating hardship on the petitioner are detrimental to the interest of meritorious students in the medical service which is undoubtedly cream service to the people at large. Be that as it may, the petitioner prayed to declare Clause-I (6) and F (5) in the Guidelines for counselling and admission of candidates for P.G. (Medical) courses in the Medical Colleges of Odisha for the academic session 2014-2015 and 2015-2016 respectively, under Annexure-1 series be declared ultra vires and quash them. It is also prayed by the petitioner that the opposite parties should allow the petitioner to participate in the counselling for 2015-2016 onwards. Hence the writ petition.

7. The opposite parties filed counter stating that the opposite parties have got responsibility for making counselling for admission in P.G. Medical course for 2015 in accordance with the guidelines of Medical Council of India and Council for Allotment of candidates for P.G. Medical courses in Government Colleges of Orissa. In fact the petitioner got selected for joining Radiotherapy course in S.C.B. Medical College & Hospital for the session 2014-2015 but he did not join and informed about his non-joining after the cutoff date for admission in P.G. Medical course is over.

8. Clause I (6) and Clause F (5) of the Guidelines 2014-2015 & 2015-2016, respectively, were there and after understanding such clauses the petitioner has applied without challenging the same while he went through the Guidelines for the respective years. When he was aware of the provisions and the same was not challenged, remained binding upon all. Since he left the course after the cutoff date was over, a seat in Radiotherapy remained without being filled up and as such state was put to loss. As per the provisions of the Guidelines he was not called to the counselling although he secured the rank 40 in Common Entrance Test to get admission into P.G. course.

9. It is also made clear from the counter that Postgraduate Institute of Medical Education and Research, Chandigarh and All India Institute of Medical Sciences (AIIMS) are autonomous institutions and governed by their own rules and regulations. The candidates taking admission in such institutions continued to complete the course without breaking the course in middle of the session. Since the opposite parties have acted according to law and necessary guidelines, the writ petition be dismissed with cost.

SUBMISSIONS

10. Mr. J. Patnaik, learned Senior Advocate for the petitioner submitted that the petitioner has been illegally debarred from getting admission in P.G. course in the subject other than Radiotherapy due to faulty prospectus issued by the opposite parties. He further submitted that the prospectus issued by the opposite parties is saddled with malice, arbitrariness and unreasonableness for which the fundamental rights of the petitioner has been infringed under Article 14 of the Constitution. The Guidelines for the academic session 2014-2015 and its Clause I (6) only contains about three years bar and there is no any penalty prescribed in such Guidelines for admission in P.G. course for 2014-2015. At the same time the Guidelines for admission to P.G. course during the academic year 2015-2016 contains the Clause F(5) and K(2) indicating that in addition to three years ban for taking admission into P.G.

courses and penalty to pay money in the event of either not joining the course or leaving the course in the subject after being admitted is a double jeopardy, hardship and arbitrary policy decision of the State Government. He submitted that in such situation such impugned Clause F (5) in the Guidelines 2015-2016 being de hors to Article 14 of the Constitution should be scrapped. It is also submitted on behalf of the petitioner that the petitioner appeared in the entrance test for the year 2015-2016 and selected but the authorities with all malice did not call to the counselling thereby deprived the petitioner arbitrarily by not considering the candidature to take admission, for which his liberty to go ahead further education is violative of Article 21 of the Constitution. Since the policy decision of the Government by incorporating the provisions in the Guidelines for admission into P.G. course is unreasonable, unjust and improper, Clause I (6) in the Guidelines 2014-2015 and F (5) in the Guidelines for admission during the academic year 2015-2016 should be declared ultra vires and the same should be quashed. It is also submitted that the petitioner should be allowed to take admission in the event of selection for 2016-2017 to the P.G. course.

11. Mr. Jyoti Pattnaik, learned Additional Government Advocate for opposite party Nos.1 and 2 and Mr. R.C. Mohanty, learned Advocate for opposite party Nos.3, 4 and 5 submitted that as per the decision of the Government the Guidelines for 2014-2015 and 2015-2016 have been issued and those Guidelines have been issued keeping in view the interest of the Medical education because if a student after being admitted into P.G. course leaves the course, that seat remains vacant for next three years as P.G. course is for three years and there is heavy loss to the State. They submitted that in order to cover the loss and discourage the students from leaving the courses, they have joined, such strict provision has been made in the Guidelines 2014-2015 and 2015-2016. They also stated that the penalty clause has been added during the academic year 2015-2016 to strengthen the medical education more by encouraging students to continue their courses and complete the same for the services rendered to the people of the State. According to them the provisions in the Guidelines for admission to P.G. courses have been made with reasons and rational for which it cannot be said that they are arbitrary or unreasonable requiring interference by this Court. Since the policy decision of the Government in no way affects the individual right of the petitioner and the same has been made keeping in view the interest of the State and large number of vacancies of doctors in the State, the Court should refrain from interfering with such decision and the writ petition should be dismissed.

12. The points for consideration:-

(i) Whether Clause I (6) in the Guidelines 2014-2015 and F(5) read with K (2) in the Guidelines 2015-2016 are arbitrary, unreasonable and unjust affecting the right of the petitioner under Article 14 and Article 21 of the Constitution.

(ii) Whether the petitioner is entitled to the reliefs prayed for.

DISCUSSIONS

POINT NO.(i) :

13. It is admitted fact that the petitioner was an in-service candidate for admission to the P.G. course for the academic year 2014-2015 and got selected in the subject Radiotherapy. It is also admitted fact that after being admitted in S.C.B. Medical College & Hospital, Cuttack, the petitioner surrendered the seat in the subject Radiotherapy with intimation to the opposite party Nos.2 and 3. It is not disputed that the petitioner again applied for admission into P.G. course during the academic year 2015-2016 and got the all India rank and also in the State list he remained in the merit list at Sl. No.40 but he was not allowed to attend counselling on the ground that by virtue of Clause F (5) in the Guidelines 2015-2016 he is disentitled to attend the counselling.

14. In the writ petition it has been pleaded that the petitioner after being selected in 2014-2015 for joining the course for the subject Radiotherapy took admission on 26.6.2014 by joining at S.C.B. Medical College & Hospital, but he found the subject was not favourable to him for which he surrendered the seat in Radiotherapy stream on 8.7.2014 before the fifth round counselling on 10.7.2014. According to the petitioner the opposite parties did not notify the said surrendered seat for admission for which the subject Radiotherapy remained unfilled. On the other hand, in the counter it is asserted by opposite parties that before joining the course the petitioner surrendered Radiotherapy subject but the intimation for leaving that course was made after the cutoff date for admission was over. The counter of the opposite parties is not specific about the cutoff date of admission and it is not also specific on which date intimation of the petitioner was received by them. It is settled in law that writ is the nature of the suit in a civil matter and the counter is equivalent to the written statement in the suit. Order 8 Rule 5 (1) states as follows:-

> "5. Special denial- (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not

> admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:
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> Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

From the aforesaid provision, it is clear that where there is no specific denial by the opposite parties to the fact pleaded by the petitioner it shall be taken to be admitted. When there is specific averment of the petitioner that he joined the course on 26.6.2014 and surrendered the seat on 8.7.2014 before fifth counselling on 10.7.2014, this fact is said to have been admitted by the opposite parties while the opposite parties have not come clear denial of such fact and have only stated that the intimation was received after the cutoff date of admission was over particularly without mentioning the date of cutoff date of admission and date of receipt of intimation in the counter. At the same time the opposite parties stated that before joining the course the petitioner has surrendered the seat in Radiotherapy. However, the facts remain that petitioner did not join the course after taking admission but surrendered the seat in Radiotherapy during academic year 2014-2015.

15. The impugned Clause I (6) of the Guidelines for candidates for Post Graduate Medical courses in the Medical Colleges for the academic session 2014-2015 is prescribed hereunder:

> "I(6) If any candidate does not join or leaves after joining the PG Course, due to which a seat goes lapsed, then the candidate concerned shall not be considered for selection in the next three academic sessions of the PG Course and the stipend/salary already received by him/her will have to be refunded."

16. On perusal of the aforesaid Clause, it appears a candidate is being punished for next three years being debarred from prosecuting higher medical education which seems to be against ethics, morale and can be said to be unreasonable. Clause I (6) in the prospectus 2014-2015 is harsh one, unreasonable, unfair on the part of a candidate to lose his next three years if he does not join the course for any reason being offered or selected. It is true fact that for his non-joining a seat goes lapsed to the State but that cannot be a ground to take away the right of a candidate to be considered for getting admission to higher medical education without looking to the future of the concerned candidate.

17. In the Guidelines for counselling and admission of candidates for Post-Graduate (Medical) Courses in the Medical Colleges of Odisha for the academic session 2015-2016, Clause F(5) states as follows:-

"F (5) Candidates who have completed or undergoing P.G. (Medical) Course in any subject or have taken admission in P.G. (Medical) Course in any of the three Govt. Medical Colleges of Odisha or HITECH Medical College, Pandara, Bhubaneswar, but have not joined/discontinued after joining with in last 3(three) years, shall not be eligible to participate for P.G. Medical Counselling."

Aforesaid Clause appears to be not in consonance with any principle of law inasmuch as the Clause refers to the candidates who have completed or undergoing P.G. course or being taken admission in any P.G. Medical course but again it has directed that in case of not joining or discontinuing in the last three years will forfeit his eligibility to join the Medical Counselling. The aforesaid Clause is ambiguous one. However, for the case in hand, it is considered that the petitioner having not joined the Radiotherapy subject after being admitted in the year 2014-2015 is debarred from participating in P.G. Medical Counselling although there is no such Clause like I(6) as discussed above in the present Guidelines for 2015-2016 but it has got same effect having debarred the petitioner from getting call to Medical Counselling. Since Clause I(6) in the Guidelines 2014-2015 is unreasonable, improper, the related Clause F(5) in this Guidelines 2015-2016 is equally found to be ambiguous, unreasonable and unjust.

18. When the State Government is facing hardship to recruit doctors due to paucity of number of doctors, presence of such improper and unreasonable Clauses having being kept inconsistently on different years can be said to have violated Article 14 of the Constitution being unreasonable, improper and against the public policy. If there would be flexibility in the professional guideline, the candidates will be more encouraged to get the different disciplines and more doctors would be available to prosecute the studies. It is true that the State has to also look after the hardship for the State to fill up the seat vacated by the candidates in the midst of the session but that can be compensated by payment of reasonable cost or compensation, as the case may be.

19. Petitioner had produced the prospectus of All India Institute of Medical Sciences, New Delhi (AIIMS), Postgraduate Institute of Medical Education and Research, Chandigarh and Dr. NTR University of Health Sciences, Andhra Pradesh, Vijayawada for admission to PG Medical Degree and Diploma Courses for the academic session 2015-2016 under Annexure-6 series. It will be prudent to quote the necessary clauses from those prospectuses. In the prospectus of AIIMS, New Delhi, Clause-D (2) is prescribed hereunder:-

"**D. Contract**

2. Original certificates of any candidate who opts for a confirmed seat will be retained in the Academic Section. The same will not be returned to the candidate before completion of the course unless he/she deposits a sum of Rs.1,00,000/- (Rupees One Lax only) once seat has been confirmed irrespective of the fact whether he/she joints the course or not. If any candidate who joins the MD/MS/MDS course, leaves the said course within six months of joining, he/she shall be liable to pay a sum of Rs.1,00,000/- (Rupees One Lakh only) and any candidate who joins the PG courses and leaves after six months of joining shall be liable to pay a sum of Rs.5,00,000/- (Rupees Five Lakh only) as compensation for losses incurred by the AIIMS due to such midstream departure. The salary for the month in which his/her resignation from the PG seat becomes effective, shall also stand forfeited."

In the prospectus of Postgraduate Institute of Medical Education and Research, Chandigarh, the necessary clause is also placed hereunder:-

The Junior Residents will be on contract service for a period of three years and will be required to execute an agreement and undertaking on non-judicial stamp paper of minimum Rs.5 value. Any candidate who joins MD/MS course and leaves the course midway, will be penalized in following manner:

Period at which resignation is tendered/accepted	Penalty (Rs.)
- Within one month of joining	50,000/-
- After one month and within six months of joining	75,000/-
- After six months and within one year of joining	1,25,000/-
- After one year and within two years of joining	1,75,000/-
- After two years of joining	2,25,000/-
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Two sureties, preferably from local residents, are required to be submitted at the time of admission on non-judicial stamp paper of Rs.25/-. Any candidate who fails to submit the same shall not be allowed to join the course. Sureties from Junior/Senior Residents are not acceptable. Formats for the same will be provided by the office at the time of Counseling/ Counseling."

Similarly, in the prospectus for admission to PG Medical Degree and Diploma courses for the academic year 2015-16 of Dr. NTR University of

Health Sciences, Andhra Pradesh, Vijayawada, Clause-10.2 is prescribed hereunder:-

> "10.2 All the candidates including service candidates joining the Post Graduate degree, diploma courses should execute bond on a stamped paper of Rs.100/- value as prescribed in Annexure-II to the effect that he/she will complete the prescribed period of training or in default to pay Rs.2,00,000/- (Rupees Two Lakhs only) to the University and shall refund the amount received as stipend upto that date to the Government."

20. From all the aforesaid prospectus it is found that the candidates have been penalized for their untimed discontinuance of the P.G. course prosecuted by them but that penalty is in the shape of payment of money but not forfeit their future to prosecute the higher study. It is the plea of the opposite parties as pleaded in the counter that these institutions are autonomous and they can take any decision. It is not the question of any principle of autonomous institution or Government institution but it is a question of constitutional right of a person to prosecute higher study to exercise his right and liberty to life. Moreover, it is not pleaded in the counter which Guideline of Medical Council of India (MCI) has been followed by the State Government to retain the impugned Clauses in the respective Guidelines, 2014-2015 and 2015-2016 inasmuch as it is settled that M.C.I. is the apex body and no Medical Colleges in the country can admit students without following its Guidelines. At the same time the interest of public is not involved because more strict view will deter the doctors from joining the services and causing irreparable loss to the general public to get their right to health to be exercised at their option. On the other hand, the medical profession is well connected with the public interest. Therefore, the prospectus should be reasonable and fair one so as to cater the need of the individual and the society including the people. We are, therefore, of the considered view that Clause I (6) in the prospectus 2014-2015 and Clause F (5) in the prospectus 2015-2016 are unreasonable and improper and as such violative of Article 14 of the Constitution.

21. The decision reported in ***AIR 1971 SC 2560*** in the case of ***State of A.P. v. L. Narendra Nath*** wherein Their Lordship observed in paragraphs-18 and 19 of the said judgment are as follows:-

> "18. Lastly it was urged that such test affected the personal liberty of the candidates secured under Article 21 of the Constitution. We fail

to see how refusal of an application to enter a medical college can be said to affect one's personal liberty guaranteed under that Article. Everybody, subject to the eligibility prescribed by the University, was at liberty to apply for admission to the Medical College. The number of seats being limited compared to the number of applicants every candidate could not expect to be admitted. Once it is held that the test is not invalid the deprivation of personal liberty, if any, in the matter of admission to a medical College was according to procedure established by law. Our attention was drawn to the case of Spottswood v. Sharpe, (1953) 98 L. Ed. 884 in which it was held that due process clause of the Fifth Amendment of the American Constitution prohibited racial segregation in the District of Columbia. Incidentally the Court made a remark (at p.887):

"Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

The problem before us is altogether different. In this case everybody subject to the minimum qualification prescribed was at liberty to apply for admission. The Government objective in selecting a number of them was certainly not improper in the circumstances of the case.

19. Learned counsel also referred us to an observation of this Court in Satwant Singh v. Passport Officer, (1967) 3 SCR 525 at p. 540 (AIR 1967 SC 1836 at p. 1844) that:

" 'liberty' in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5th and 14th Amendments to the U.S. Constitution and the expression "personal liberty" in Article 21 only excludes the ingredients of "liberty" enshrined in Article 19 of the Constitution."

We do not find it necessary to dilate on this point in view of our conclusion that even if personal liberty extends to such conduct there has not been any deprivation thereof in violation of any procedure established by law."

22. With due respect, we are of the view that Hon'ble Apex Court did not consider the case of the petitioner in that case as no liberty of the petitioner has been violated by such procedure in admission to Medical Colleges. At the same time Their Lordships had made observation by referring to the case under American Constitution where segregation in public education is not reasonably related to any proper Governmental objective by imposing on Negro children a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause. On the other hand, the liberty in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the American Constitution and thus Article 21 of the Constitution of India protects the liberty. In the case in hand, we are of view that when the students of medical education are debarred from undergoing higher Medical education for next three years by such impugned Clause which are not issued under any M.C.I. Guidelines and unlike any other reputed P.G. Institutions Guidelines, same not only smacks the test of reasonability but also interfere with the personal liberty of petitioner to prosecute higher study and as such impugned clauses are violative of Article 21 of the Constitution. Thus, we are of the considered view that Clause I (6) in Guidelines 2014-2015 and F (5) in the Guidelines 2015-2016 are unreasonable, unjust, unfair and violative of Article 14 and 21 of the Constitution of India. Point No.(i) is answered accordingly.

POINT NO.(ii)

23. It is contended by the learned counsel for the opposite parties that such Clauses are made as per public policy of the State Government and the courts should be refrained from interfering with the public policy formulated by the Government. Now the question arises whether this Court can interfere with such public policy which is otherwise violative of Article 14 and 21 of the Constitution. It is reported in ***(1997) 9 Supreme Court Cases 495*** in the case of ***Krishnan Kakkanth v. Government of Kerala and others*** where Their Lordships have observed as follows:-

> "36. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial whether a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not

> informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, courts should avoid "embarking on uncharted ocean of public policy".
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> 37. The contention that the impugned circular suffers from hostile discrimination meted out to the farmers in the northern region of the State covered by the financial assistance under the governmental schemes, by fastening such assistance with an obligation to purchase pumpsets only from the two approved dealers, cannot be accepted in the facts of the case. The reasons for fastening the farmers of northern region with the obligation to purchase pumpsets from the said two dealers have been indicated by Mr Bhat and Mr Gupta and, in our view, it cannot be held that such reasoning suffers from lack of objectivity. The law is well settled that even in the matter of grant of largesse, award of job contracts etc. the Government is permitted to depart from the general norms set down by it, in favour of a particular group of persons by subjecting such persons with different standard or norm, if such departure is not arbitrary but based on some valid principle which in itself is not irrational, unreasonable or discriminatory (*Dayaram Shetty case*).

24. In the aforesaid decision Their Lordships were considering the circular issued by the Government of Kerala directing for distribution of pumpsets under Comprehensive Coconut Development Programme and other similar schemes. Therefore, the question arose about the interference of the Court to the policy of the Government of Kerala issued through the circular. Of course in the aforesaid case the Hon'ble Apex Court did not find fault with the policy decision of the Government of Kerala for which refused to interfere with the direction of the Government of Kerala. But the principle as stated above is very clear to the effect that the court can interfere if the policy decision is capricious, arbitrary and suffers from vice of discrimination or influence any statutory provisions of Constitution particularly Article 14 of the Constitution.

25. It is reported in ***2001 (8) Supreme Court Cases 491*** in the case of ***Union of India and others V. Dinesh Engineering Corporation and another*** where Their Lordships have observed as follows:-

> "16. But then as has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognized by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while, we are told the Railways are making purchases without any tender on a proprietary basis only from EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of non-application of mind, hence, it has to be quashed as has been done by the High Court."

26. In the aforesaid case with due respect we found that although Railway invited tender for supply of spare parts for use in GE governors but selected one EDC company on the assumption that there was no other party to supply such spares with the requisite degree of sophistication, complexity and precision. Such policy decision is arbitrary and non-application of mind without examining the characteristics of the spare parts supplied by the writ petitioner. In that case Their Lordships held it as violative of Article 14 of the Constitution for which concurred with the view of the High Court against which Civil Appeals were preferred. So, the Hon'ble Apex Court also interfered with the policy decision which was issued without application of mind and suffers from requirements of law especially Article 14 of the Constitution.

27. It is reported in ***(2002) 6 Supreme Court Cases 562*** in the case of ***Kailash Chand Sharma v. State of Rajasthan and others*** where Their Lordships have observed as follows:-

"33. The above discussion leads us to the conclusion that the award of bonus marks to the residents of the district and the residents of the rural areas of the district amounts to impermissible discrimination. There is no rational basis for such preferential treatment on the material available before us. The ostensible reasons put forward to distinguish the citizens residing in the State are either non-existent or irrelevant and they have no nexus with the object sought to be achieved, namely, spread of education at primary level. The offending part of the circular has the effect of diluting merit, without in any way promoting the objective. The impugned circular dated 10.6.1998 insofar as the award of bonus marks is concerned, has been rightly declared to be illegal and unconstitutional by the High Court.

34. One more serious infirmity in the impugned circular is that it does not spell out any criteria or indicia for determining whether the applicant is a resident of rural area. Everything is left bald with the potential of giving rise to varying interpretations thereby defeating the apparent object of the rule. On matters such as duration of residence, place of schooling etc., there are bound to be controversies. The authorities, who are competent to issue residential certificates, are left to apply the criteria according to their thinking, which can by no means be uniform. The decision in State of Maharashtra v. Raj Kumar is illustrative of the problem created by vague or irrelevant criteria. In that case a rule was made by the State of Maharashtra that a candidate will be considered a rural candidate if he had passed SSC Examination held from a village or a town having only 'C' type municipality. The object of the rule, as noticed by this Court, was to appoint candidates having full knowledge of rural life so that they would be more suitable for working as officers in rural areas. The rule was struck down on the ground that there was no nexus between the classification made and the object sought to be achieved because "as the rule stands any person who may not have lived in a village at all can appear for SSC Examination from a village and yet become eligible for selection" (SCC p.314, para 2). The rule was held to be violative of Articles 14 and 16. When no guidance at all is discernible from the impugned circular as to the identification of the residence of the applicants especially having regard to the indefinite nature of the concept of residence, the

provision giving the benefit of bonus marks to the rural residents will fall foul of Article 14."

With due respect we found the Hon'ble High Court declared the circular as illegal and unconstitutional, and the same has confirmed by Hon'ble Apex Court by observing that when no guidance at all is discernible from the impugned circular as to the identification of the residence of the applicants especially having regard to the indefinite nature of the concept of residence, the provision for giving the benefit of bonus marks to the rural residents will fall foul of Article 14. On the other hand the provisions of Article 14 are violated by issuance of such circular.

28. With due respect to the said decisions we are of the considered view that the impugned Clauses in the Guidelines issued by the opposite parties having been unreasonable, improper, non-application of mind and violative of Article 14 and Article 21 of the Constitution of India, can be interfered herein as the pleas of the opposite parties do not meet the required parameters of law. We find, the contention of the learned counsel for the opposite parties that the courts should not interfere with the policy decision of the State Government is untenable.

29. Since we have already observed above that Clause I (6) in the Guidelines 2014-2015 and F (5) in the Guidelines 2015-2016 are arbitrary, unreasonable, discriminatory and against constitutional provision, the policy decision of the State Government in retaining such clauses in the respective Guidelines can be interfered with for the reasons stated above. So far Clause K (2) in the Guidelines 2015-2016 is concerned, it is discernible with objective as that clause will come to operation after the students got admitted but before completion of the course he or she resignes, he or she has to pay penalty. Such clause in no way is violative of principle of law. On the other hand, we are of the view that the relevant clause in the prospectus of AIIMS, New Delhi is more acceptable and reasonable and it does not at all create any embargo for the students to prosecute higher medical study for subsequent years except penalizing them in terms of payment of cost.

30. In course of hearing, this Court has directed to consider for revisiting the necessary prospectus to be issued for admission in P.G. courses during 2016-2017 and the learned Additional Government Advocate agreed to take decision by Government. It is profitable to quote the relevant portion of the order dated 20.11.2015 in the following manner:-

"06. 20.11.2015We are of the considered view that the examples of All India Institute of Medical Sciences (AIIMS), New Delhi and the

> Postgraduate Institute of Medical Education and Research, Chandigarh ought to be also taken into consideration by the State, since we are of the considered view that, in this manner loss to the State exchequer, if any, can be compensated and the students who have opted out of the courses for joining, are not debarred for their future education. We may also record that, denying in-service students further opportunity of enhancing their knowledge by pursuing Postgraduate and other higher degrees, can in no manner in the interest of the State since such in-service candidates will continue to work for the State after completion of the courses which they are admitted into. We are, therefore, of the considered view that the State ought to take the aforesaid aspects into consideration while framing the guidelines for admission into the year 2016-17."

It is lamented to observe that no decision could be taken so far as Mr. Mohanty appearing for the O.P.Nos.3 and 4 informed the Court that the decision is yet to be taken. Since we have found that Clause I (6) in the Guidelines 2014-2015 and Clause F (5) in the Guidelines 2015-2016 are violative of Article 14 and 21 of the Constitution of India, these Clauses are liable to be quashed. Rather, the State Government should delete such Clauses in the Guidelines 2016-2017 by incorporating likewise Clause D(2) of the AIIMS as published in the prospectus of 2015-2016 of AIIMS, New Delhi to safeguard the interest of the State. Point No.(ii) is answered accordingly.

CONCLUSION

31. We have already held that the decision of the State Government with regard to Clause I (6) in the Guidelines 2014-2015 and Clause F(5) in the Guidelines 2015-2016 are liable to be quashed being vioaltive of Article 14 and 21 of the Constitution, we hereby quash the same. We have already observed in the aforesaid para that the prospectus for admission in P.G. courses 2016-2017 should not repeat the same clauses as of 2014-2015 and 2015-2016 but should insert the Clause D (2) of the prospectus of AIIMS, New Delhi to safeguard the interest of the State and the candidates, it is apposite for the opposite parties to incorporate the same in the prospectus for 2016-2017 and accordingly we direct.

During course of argument, it is brought to the notice of the Court that the petitioner has already appeared in the entrance test for admission to P.G. course during 2016-2017, we hereby direct the opposite party No.2 to permit the petitioner to attend the counselling if he has qualified in the test

conducted for admission to P.G. course for the year 2016-2017 and subject to insertion of Clause as directed in aforesaid para in the prospectus for 2016-2017. The writ petition is disposed of accordingly.

Writ petition disposed of.

2016 (II) ILR - CUT- 86

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

W.P.(C) NO. 1854 OF 2016

M/S. JAGANNATH SWEETS ……..Petitioner

.Vrs.

DY.COMMISSIONER OF SALES TAX, CUTTACK-I EAST CIRCLE ……...Opp. Party

ODISHA VAT ACT, 2004 – S.43(1)

Best judgment assessment – Factors for consideration – It is to be exercised within the frame work of settled and invariable principles of justice – The judgment should not depend upon the arbitrary caprice of a quasi-judicial authority but it should be based on true wisdom and meet the legal principle – Although the best judgment revolves around the element of guess work, the same cannot be a wild one but it must have a reasonable nexus to the available material and circumstances of the case and it must be more than suspicion.

In this case no material or evidence produced or relied on by the opposite party to come to a conclusion that daily average business of the petitioner comes to Rs. 15,000/- when return was filed for Rs. 2,000/- basing on the books of account – Moreover, the petitioner has engaged six persons including himself and his brother and selling low cost tiffin and Rasgola – Held, the impugned order is liable to be quashed being illegal and based on caprices and whims of the opposite party. (Paras 11,12,13)

Case Laws Referred to :-

1. (2006) 148 VST 61 (Orissa) : Indure Ltd. -V- Commissioner of Sales Tax & Ors.
2. 17 S.T.C.465 (S.C.) : State of Kerala -V- C.Velukutty
3. (1957) 8 S.T.C. 770 : Raghubar Mandal -V- State of Bihar

For Petitioner :M/s. B.P.Mohanty, N.Paikray, A.N.Ray & J.J.Pradhan
For Opp. Party :Mr. S.P.Dalei, Addl.Standing Counsel,Sales Tax Dept.

Date of hearing : 04. 04.2016
Date of Judgment: 06.05.2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

In the captioned writ petition challenge has been made to the order of assessment under Section 43 of the Odisha Value Added Tax Act, 2004 (hereinafter called 'the Act') without making any assessment under Sections 39, 40, 42 or 44 of the Act served on the petitioner. The impugned order has also been challenged on the ground that without forming any "opinion" by the learned assessing authority in respect of turnover escaped from the assessment.

FACTS

2. The factual matrix leading to the case of the petitioner is that the petitioner carries on business in preparation and selling of Vada, Piaji, Aluchop, Mixture and sweets (Rasgola) being a registered dealer under the Act. The petitioner used to maintain books of account in course of the business basing upon which statutory returns under the statute are filed before the opposite party. The petitioner has filed the return but no order of assessment under Section 39 of the Act was passed. But a notice in the Form VAT-307 was served on the petitioner to produce the books of account for assessment of tax on escaped turnover by the opposite party for the purpose of assessment under Section 43 of the Act for the period from 1.4.2013 to 31.3.2015.

3. It is alleged, inter alia, that before issue of notice under Section 43 of the Act no assessment has been completed under Sections 39, 40, 42 or 44 of the Act and notice has been issued without forming any opinion as to the turnover escaping assessment as required under Sub-Section (1) of Section 43. It is stated that without service of any report and without giving proper opportunity to the petitioner, the impugned assessment order was passed on 20.11.2015 in Form VAT-312 showing daily average sale of the petitioner of Rs.15,000/- instead of Rs.2,000/- as contended by the petitioner basing upon the books of account. It is claimed by the petitioner that the opposite party ridiculously determined the GTO and TTO of the petitioner at Rs.1,03,50,000/- to the best of his judgment and computed tax illegally at

Rs.8,81,238/- for the petitioner to pay. The petitioner also alleged that the opposite party illegally levied penalty to the tune of Rs.8,81,238/- and thus the petitioner was asked to pay total tax and penalty of Rs.17,62,476/-. So, the petitioner filed the present writ petition for quashing the impugned order of assessment and the consequential notices of demand.

4. Learned counsel appearing for the petitioner submitted that the order of the opposite party is illegal, perverse and against the principles of natural justice. He further submitted that the initiation of the proceeding under Section 43 of the Act without making the petitioner being assessed under Sections 39, 40, 42 or 44 of the Act and as such the opposite party lacks jurisdiction to pass any order. It is also submitted that the opposite party has never formed any opinion as to which part of the turnover of the petitioner is escaped assessment and in absence of his opinion to be recorded in writing, initiation of proceeding under Section 43 of the Act and resultant notices thereunder are not tenable in law, being void and without jurisdiction. He further submitted that in ***Indure Ltd. V. Commissioner of Sales Tax & others,*** reported in ***(2006) 148 VST 61 (Orissa)*** where this Court has categorically held that assessment cannot be reopened mechanically by the authorities and without showing any application of mind by not recording any reason and the statutory authorities in issuing reassessment notice cannot surrender or abdicate its statutory discretionary power in favour of a non-statutory authority and completely act under the dictate of such an authority. In support of such contention he further submitted that the impugned order has no supporting material and no independent opinion has been taken by opposite party to impose the tax in question.

5. It is further submitted on behalf of the petitioner that the best assessment made by the petitioner is not based on material and it is arbitrary, unfair and unreasonable. When there is no suppression of any purchase or sale at all, the assessment/reassessment has been made by the opposite party on the basis of surmises and presumption without any material supporting it, the same is bad in law and liable to be quashed. It is further submitted by the learned counsel for the petitioner that no report on which the assessment depends has been served on the petitioner and as such the opposite party has violated the natural justice, consequently the impugned order is liable to be interfered with and same should be quashed.

6. Learned Additional Standing Counsel appearing for the Revenue submitted that the Dealer was issued notice to produce the books of account and after production of the books of account the opposite party was not

satisfied with the contents of the books of account maintained towards sale and purchase and as such came to hold best assessment procedure. He fairly submitted that the assumption made by the opposite party about the GTO and TTO is on his knowledge but there is no any supporting material to prove his knowledge and belief. He also submitted that the assessment under Section 43 (1) (a) of the Act has been made but learned counsel for the Revenue could not explain which item has escaped assessment. However, he fairly submitted to quash the order of assessment and remit back the matter to the opposite party for reassessment according to law.

7. Now the question arises whether the impugned order is passed arbitrarily, without jurisdiction and against the principles of law so as to quash the same.

8. It is admitted fact that petitioner is a Dealer having a sweet stall on a Government land. It is not disputed that the petitioner has submitted the income tax return for the period from 1.4.2013 to 31.3.2015. It is admitted fact that the petitioner used to maintain the books of account.

9. It is revealed from the petition that the petitioner has mainly urged about best judgment assessment procedure which has not been legally adopted by the opposite party. Of course the opposite party in the impugned order has mentioned that during personal hearing the petitioner could not reconcile daily average sale of his business. The opposite party took up the best Judgment assessment procedure. The relevant portion of the impugned order is quoted herein below:-

> "xxx Now the assessment is completed to the best of judgment in the following manner. The daily average of business is treated as Rs.15,000:00 and the total number of days under the period of assessment is calculated to 690 days (345 for each year after deducting 20 days from each year as off days of the business). Accordingly, the turnover for the year 2013-14 is calculated to Rs.15,000:00 *345=51,75,000.00. As the dealer deals in both 5% and 13.5% tax rate goods the proportion of two different tax rate goods is calculated as 53.3% and 46.7% respectively. Accordingly value of 5% goods comes to Rs.27,58,275:00 and 13.5% goods valued Rs.24,16,725.00. Likewise for the year 2014-15 out of total turnover of Rs.51,75,000.00, value of 5% goods calculates to Rs.25,09,875.00 (48.5% of the turnover) and value of 13.5% goods comes to Rs.26,65,125.00 (51.5% of total turnover). This proportion of

different tax rate goods are calculated on the basis of different tax rate goods disclosed in the returns for the concern financial year.

Thus for the F.Y. 2013-14 and 14-15 taken together, the GTO of the dealer is determined as Rs.1,03,50,000.00 and same is also treated as TTO as no deduction is admissible. Tax @ 5% of goods valued Rs.52,68,150:00 calculates to the tune of Rs.2,63,407:00 and tax @13.5% on goods valued Rs.50,81,850:00 calculates to Rs.6,86,049:75.Thus the total tax amount calculates to Rs.9,49,456:75. After the dealer is allowed deduction of Rs.24,555.00 towards input tax credit on purchase and Rs.43,664.00 towards the VAT payment at the time of filing of return, the balance tax due comes to Rs.8,81,238:00. The dealer is also visited with a penalty equal to one time of tax due amounting to Rs.8,81,238:00 u/s 43(2) of the OVAT Act. Thus the tax & penalty together comes to Rs.17,62,476:00, which is required to pay the dealer as per the terms and conditions of the demand notice enclosed".

10. From the aforesaid order, it does not appear how the opposite party could put the daily average business of the petitioner as Rs.15,000/- when the return was filed showing the sale business as Rs.2,000/-. No document or statement of any person or the report of the Sales Tax Officer has been computed by the opposite party to daily average business sale of the petitioner as Rs.15,000/-. It is reported in ***State of Kerala v. C. Velukutty, 17 S.T.C. 465 (S.C.),*** at page 470 where their Lordships observed:-

> " The limits of the power are implicit in the expression "best of his judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess-work in a "best judgment assessment", it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case."

11. With due respect, It is found that the power of making a best judgment assessment is to be exercised within the frame work of settled and invariable principles of justice. The judgment should not depend upon the arbitrary caprice of a quasi-judicial authority and should be based on true wisdom and meet the legal principle. It has also been laid down in the aforesaid decision although the best judgment revolves around the element of guess work but the same cannot be a wild one, it must have a reasonable

nexus to the available material and the circumstances of the case. It is also reported in ***Raghubar Mandal v. State of Bihar; (1957) 8 S.T.C. 770***, at page 778 where Their Lordships observed:-

> "We find nothing in those observations which runs counter to the observations made in Dhakeswari Cotton Mills' case. No doubt it is true that when the returns and the books of account are rejected, the assessing officer must make an estimate, and to that extent he must make a guess; but the estimate must be related to some evidence or material and it must be something more than mere suspicion. To use the words of Lord Russell of Killowen again, " he must make what he honestly believes to be a fair estimate of the proper figure of assessment" and for this purpose he must take into consideration such materials as the assessing officer has before him, including the assessee's circumstances, knowledge of previous returns and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate. In the case under our consideration, the assessing officer did not do so, and that is where the grievance of the assessee arises".

12. With due respect to the decision, it appears that the best judgment procedure adopted by the assessing authority must be related to some evidence or material and must be more than their suspicion.

13. Now averting to the fact of the case it appears none of the material or evidence has been produced or relied upon by the opposite party to come to a conclusion that average business of the petitioner comes to Rs.15,000/-. Moreover, when the petitioner is engaged in selling of some low cost Tiffin and some Rasgola at no stretch of imagination the daily business would reach to such an amount. It is a fact that he has engaged six persons including himself and his brother. Be that as it may, the best judgment procedure adopted by the opposite party does not meet the requirement of law as propounded by the Hon'ble Apex Court. Consequently, we are of the view that such impugned order is illegal, perverse and based on caprices and whims of the opposite party for which the same is liable to be quashed.

14. In view of the aforesaid analysis, we are of the view that the best judgment assessment as required to be followed under law as propounded by the Hon'ble Apex Court (supra) to make assessment under Section 43 (1) of the Act being not followed by the opposite party, the impugned order is illegal, bad in law, vulnerable and liable to be quashed. We, therefore, quash the impugned order. Accordingly, the writ petition is allowed.

Writ petition allowed.

2016 (II) ILR - CUT-92

S. PANDA, J.

W.P.(C) NO. 13503 OF 2001

M/S BALASORE SOLVENTS PVT. LTD. ……..Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART -226

Application of the petitioner for grant of Eligibility Certificate to avail the incentives under I.P.R., 1996 – Application rejected on the ground that petitioner's unit was an oil mill and as such not eligible to get the benefits – Hence the writ petition – The petitioner-Unit involved in manufacturing De-oiled cakes from oil cakes and they only recycle the waste products i.e. oil cakes to De-oiled cakes to be used as organic manure, cattle feed etc. – Since the above unit is not using oil seeds for manufacturing oil, the Unit is not coming under the purview of oil mill as well as under the definition of oil mill as enlisted at Sl. No 23 of the I.P.R., 1996 – Held, the impugned order is setaside and the matter is remitted back to O.P. No.1 with a direction to issue eligibility certificate in favour of the petitioner-unit to get incentives as declared under I.P.R., 1996. (para 5)

For Petitioners : M/s. A.K.Ray, S.Ray, S.Dey, A.Mohanty, S.P.Das, and M.P.Jena

For opposite parties : Addl. Government Advocate

Date of Judgment : 27.04.2016

JUDGMENT

S.PANDA, J.

The petitioner in this Writ Application challenged the order dated 01.8.2001 passed by the Government of Odisha in the Department of Industries, rejecting the application of the petitioner-Unit for grant of Eligibility Certificate to avail the incentives as declared under Industrial Policy Resolution, 1996.

2. The facts leading to this application as narrated are as follows:-

The petitioner-Company set up a unit at Banparia in the district of Balasore for manufacturing of 'DE-OILED CAKES', which is to be used as a Poultry feed, Cattle feed, Fishmeal and organic manure, being allured and attracted to the package of incentives declared under Industrial Policy

Resolution, 1996. The petitioner-Unit started its commercial production w.e.f. 07.7.1998. The said unit required Oil Cakes as raw material. The Oil Cakes are processed to produce ‘‘DE-OILED CAKES’, which is the finished product of the petitioner-Unit. Accordingly, the manufacturing process is entirely different from the Oil Mills which produces Oil from Oil Seeds. The petitioner-Unit uses the raw material i.e. Oil Cake only to produce further finished product i.e. ‘DE-OILED CAKES’.

3. Learned counsel for the petitioner submitted that since the petitioner-Unit is engaged to recycle the waste product, it is not coming under the definition of Oil Mill. The Unit is being different from the Oil Mills is eligible to get Sales Tax incentives under Industrial Policy Resolution, 1996. However, opposite party no.1 by misinterpreting the same, rejected the application of the petitioner by the impugned order to receive such incentives. Earlier the Director of Industries, Odisha, Cuttack vide letter dated 15.12.1998 under Annexure-4 has recommended the case of the petitioner-Unit for issuance of Eligibility Certificate to receive the incentives as the manufacturing process of the petitioner-Unit is different from that of an Oil Mill. He further submitted that besides under Industrial Policy Resolution, 1982 the Oil Mill / Expelling of less than 10 M.T plant in put capacity (Sl. No.11) is not eligible for incentives but extraction of Oil through Solvent Extraction process or refining unit both are eligible for incentives. In subsequent Industrial Policy Resolutions, 1992 and 1996 in the list of ineligible unit the Oil Mills and refining units are both included not to get the benefits. However, no where it was mentioned that the Solvent Extraction Process Unit is ineligible to get incentives as such the impugned order is liable to be set aside.

4. Learned Addl. Government Advocate however supported the impugned order and submitted that in Industrial Policy Resolution, 1996 the Oil Mill was listed at Sl. No.23 under ineligible category of industry. The Government enlisted all Oil Mills including activities of extraction of Oil are not eligible to get incentives under the said I.P.R, 1996. The petitioner-Unit is coming under the said category, as such rightly the impugned order was passed. However, in the counter affidavit filed by opposite party nos.1 to 4 they have admitted that the petitioner-Unit is involved in manufacturing process of Solvent Extracted Oil from Oil Cakes and produce De-Oiled Cakes.

5. In view of the rival submission of the parties and after going through the materials available on record, it reveals that the petitioner-Unit is

involved in manufacturing process which is different from the Oil Mill. The petitioner-Unit is manufacturing De-Oiled Cakes from Oil Cakes, as such they recycle the waste products i.e. Oil Cakes to De-Oiled Cakes to be used as organic manure, cattle feed etc. The unit is not using Oil Seeds for manufacturing oil. Therefore, the Unit is not coming under the purview of Oil Mill as well as under the definition of Oil Mill as enlisted at Sl. No.23 of Industrial Policy Resolution, 1996. It is a Solvent Extraction Process Unit and not an Oil Mill. Accordingly, this Court sets aside the impugned order and remits the matter back to opposite party no.1 with a direction to issue Eligibility Certificate in favour of the petitioner-Unit to get incentives as declared under Industrial Policy Resolution, 1996, as expeditiously as possible, preferably within a period of four weeks from the date of production of certified copy of this order. The Writ Application along with Misc. Case is accordingly disposed of.

Writ petition disposed of.

2016 (II) ILR - CUT-94

S. PANDA, J.

W.P.(C) NO. 17960 OF 2015 (WITH BATCH)

PATITAPABAN PANDA ……..Petitioner

.Vrs.

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

ODISHA DEVELOPMENT AUTHORITIES ACT, 1982 – Ss. 19,90,91

Whether residential plots allotted by CDA in Abhinab Bidanasi Project Area, Cuttack, can be used for commercial purposes ? No contingency to allow conversion of the plots other than residential use – Some owners have converted their residential plots into Schools, Hostels and other commercial purposes, though Sector 10 and 11 of CDA does not provide any scheme for the same – Breach of the terms and conditions of lease – O.P.No.5 has converted his residential house into a Ladies Hostel for which CDA has initiated proceedings – Due to such Hostels and plying of city Buses/Town buses there is nuisance in the area and people are unable to live peacefully – Violation of article 21 of the Constitution of India – Held, since CDA has issued notice to the allotees who have deviated the approved plan, direction issued to CDA to take a decision in the matter within two months after hearing

the parties – The Hon'ble Court further directed O.P.No.4 who shall take steps so that city Buses/Town Buses shall ply at a suitable distance from the residential area, i.e., in the Ring Road area only.

(Paras 10,11)

Case Laws Referred to :-

1. AIR 1997 SC 579 : Dr.K.Madan Vs. Smt. Krishnawati & another
2. AIR 2000 SC 2623 : Munshi Ram and another Vs. Union of India & Ors.
3. 2015 (2) Supreme 677 : Anirudh Kumar Vs. Municipal Corporation of Delhi & Ors.
4. 2006 (II) OLR 423 : Bireswar Das Mohapatra and another Vs. State Bank of India
5. 1996 (I) OLR 282 : Dr. Nirupama Rath Vs. State of Orissa & Anr.

For Petitioner : In person
For Opp. Parties : M/s. G.K.Acharya, P.K.Das, S.K.Behera, D.P.Mishra & D.K.Naik
M/s. D.Mohapatra, M.Mahapatra, G.R,Mohapatra, A.Dash & B.K.Mukharji
M/s. S.K.Nayak-1, D.Nayak, B.P.Swain and Debasmita Nayak. M/s.A.K.Mohapatra, B/Panda, S.Samal,T.Dash, S.Mohanty, S.Nath, S.Mangaraj & S.K.Barik
For Intervenors : M/s. S.Das, R.P.Dalai, K.Mohanty & S.D.Routray
M/s. G.K.Acharya, P.K.Das, S.K.Behera, D.P.Mishra & D.K.Naik

Date of Judgment : 24.06.2016

JUDGMENT

S.PANDA, J.

As all the Writ Petitions involve common questions and parties are same, the matters are taken up for hearing together and are disposed of by this common judgment.

2. W.P.(C) No.17960 of 2015 has been filed by the petitioner challenging the illegal action of opposite party no.5 in running private hostels in the residential area of C.D.A over Plot No.1498/C, Sector-10, C.D.A, Cuttack which is adjacent to the petitioner's residential house.

2.1 W.P.(C) No.23245 of 2015 has been filed by the petitioner challenging the notice dated 14.12.2015 issued by the Law Officer, Cuttack Development Authority, Cuttack to the Inspector-in-Charge, Markatnagar

Police Station for closure of Ladies Hostel running in the building of the petitioner over Plot No.1498/C, Sector-10, C.D.A, Cuttack.

2.2 W.P.(C) No.227 of 2016 has been filed by the petitioner challenging the notice dated 30.12.2015 issued by the Law Officer Cuttack Development Authority, Cuttack directing for closure of the Ladies Hostel running in the building of the petitioner over Plot No.1498/C, Sector-10, C.D.A, Cuttack.

2.3 W.P.(C) No.1334 of 2016 has been filed by the petitioner challenging the show cause notice dated 15.01.2016 issued by the Law Officer, Cuttack Development Authority, Cuttack under Sections 91 (1) and (2(1) of Orissa Development Authorities Act, 1982 in U.C Case No.21 of 2016 for running a Hostel Restaurant over Plot No.11-2B/1095, Sector-11, C.D.A, Cuttack.

2.4 And W.P.(C) No.1425 of 2016 has been filed by the petitioner challenging the notice dated 18.1.25016 issued by the Law Officer, Cuttack Development Authority, Cuttack directing closure of the Boys Hostel running in the building of the petitioner over Plot No.5-B/1667, Sector-10, C.D.A, Cuttack.

3. The brief facts of the cases are that Cuttack Development Authority (CDA) created under Orissa Development Authority Act, 1982 had launched residential plotted scheme being commonly known as 'Abhinab Bidanasi Project Area, Cuttack' in order to cater the needs of residential houses in Cuttack City. Under the aforesaid residential plotted scheme various plots were created in a phased manner having different sectors. The plots are being allotted on long term lease basis for residential purposes only. There is a specific condition in the allotment order as well as in application Brochure that the allotted plots shall be used only for residential purposes with certain terms and conditions under the Orissa Development Authorities Act, 1982 (hereinafter referred to as 'the Act'). However, it is alleged that some owners violating the terms and conditions of the land allotment letter and Brochure issued by Cuttack Development Authority are running private hostels in the residential area for commercial purposes. The moot question in all these Writ Petitions is as to whether residential plots allotted by Cuttack Development Authority in 'Abhinab Bidanasi Project Area, Cuttack' can be used for commercial purposes.

4. The petitioner has taken a stand that opposite party no.5 has violated the terms and conditions of allotment order as well as the approved plan, which creates nuisance in the residential area. The petitioner espouses the cause of all the local residents, who are being affected by air, noise and water

pollution and all these are in the interest of public. The petitioner has fundamental right to live peacefully and in a good condition within the residential area specified by the authorities as per the statutory provisions. The petitioner has made a complaint before the C.D.A authorities regarding the nuisance created due to utilization of residential building as hostel and the Town Buses, which are running in the area not only creates sound and air pollution but also endanger to the life of the small children, who are playing nearby. However, the C.D.A authorities have not taken any action. His constitutional right has been affected due to inaction of Cuttack Development Authority.

5. Learned counsel for the petitioner in W.P.(C) No.17960 of 2015 further submitted that opposite party no.5 is running a Private Hostel in the residential area of C.D.A for commercial purposes, which is creating nuisance to women and elderly people and the same may be shifted to commercial premises or institutional areas. The vehicular movement is very difficult and the area is polluted due to overcrowded of the inmates of the Hostel. Due to accommodation of a large number of inmates the debris's are thrown here and there causing atmosphere pollution, roof of the nearby residential houses are completely dirty and become unused and there is also air and noise pollution. The area is being fully polluted due to unhygienic situation created by boys and girls hostels run by some private persons for commercial gain and thereby the peaceful life of the inhabitants has been seriously affected. In support of his contention he has relied on the decisions reported in **AIR 1997 SC 579, AIR 2000 SC 2623** and **2015 (2) Supreme 677.**

5.1 In the case of **Dr.K.Madan Vs. Smt. Krishnawati and another** reported in **AIR 1997 SC 579** the Apex Court held that controller cannot merely ask for payment of penalty or compensation permitting the misuser to continue.

5.2 In the case of **Munshi Ram and another Vs. Union of India and others** reported in **AIR 2000 SC 2623** it was held that tenants using premises in breach of terms of lease, paramount lessor, Development Authority taking action to terminate lease – not debarred for exercising its rights under the terms of lease.

5.3 The Apex Court in the case of **Anirudh Kumar Vs. Municipal Corporation of Delhi and others** reported in **2015 (2) Supreme 677** held that the litigation initiated by appellant, though resident of the same building,

espouses cause of all the local residents, therefore, it is public interest litigation.

6. Learned counsel appearing for opposite party no.5-Debendra Hazra submitted that opposite party no.5 is running a private hostel in Plot No.1498/C, Sector-10, C.D.A, Cuttack allotted to him by the Cuttack Development Authority for residential purposes. He further submitted that as per the definition of 'Residential Building' in Regulation 21 (G) of the 2010 Regulations, hostels have been included in the definition which was not there in the 2001 Regulations or the ODA Act of 1982. Hence a Hostel can be run in a residential building of the CDA Sectors, the same being permissible under the Regulations which have been brought into effect after receiving concurrence from the State Government. He further submitted that the use of hostels does not come within the purview of commercial activities. The hostels are not run for profits but merely provide an accommodation to the students of the college, who only pay the room rent and subsidies rates for their food. Opposite party no.5 has filed an application before the C.D.A authorities on 12.4.2013 seeking permission to use his residential building as a Hostel, which is pending as alleged. He also submitted that proceedings under Section 90 and 91 of the Act are initiated against 456 individuals including opposite party no.5 for use of residential plots for commercial purposes. He further stated that the Writ Petition is not maintainable in view of alternative remedy available under law. In support of his contention he has relied on the decisions reported in **2004 (I) OLR (SC) 81, 2006 (II) OLR 423** and **1996 (I) OLR 282.**

6.1 In the case of **2004 (I) OLR (SC) 81** the Apex Court held that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. The High Court may exercise its writ jurisdiction in at least three contingencies:

i) Where the writ petition seeks enforcement of any of the fundamental rights,

ii) Where there is failure of principles of natural justice or,

iii) Where the orders or proceedings are wholly without jurisdiction on the *vires* of the Act is challenged.

6.2 This Court in the case of **Bireswar Das Mohapatra and another Vs. State Bank of India** reported in **2006 (II) OLR 423** held that the existence of an alternative remedy only inhibits the exercise of discretion by the High Court, not its jurisdiction. Though certain exceptions have been carved out

through judicial pronouncements, indicating where High Court can intervene despite the existence of an alternative remedy, but those are in the nature of guidelines for exercise of discretion by the High Court. They are, if I may say so, not exhaustive but are illustrative. In fact there is no straight jacket formula in this regard. Whether a High Court would exercise its discretion in the given facts of a case depends on its facts and the legal questions arising from those facts.

6.3 In the case of **Dr. Nirupama Rath Vs. State of Orissa and another** reported in **1996 (I) OLR 282** this Court while dealing with Section 2 (4) of Orissa Shops and Commercial Establishments Act, 1956 have expressed their views with regard to the wider meaning of 'Commercial Establishment' and have categorized it into four headings and further sub-classified it. However, hostel was not covered in such classification or sub-classifications.

7. A counter affidavit has been filed by Cuttack Development Authority - contending *inter alia* that the authority has already taken steps against the allottee, who are using the plots contrary to the permission granted and the purpose for which the lease was given. CDA ensures use of the residential plots exclusive for residential use and no commercial activities shall be permitted in the residential plots. CDA consciously prepared the layout and carved out the plot exclusively for residential purpose. There is no contingency to allow conversion of the said plots otherwise than for residential use. CDA developed comprehensive development plan for CDA area and such areas have been divided into different zones, each zones were carved out for specific purpose and the permissible use of the zone have been specified in the Building Regulation. Such planning and formation of zones has nothing to do with the special developed planning area over the land owned by the authority. Such areas are called as Special Scheme area and one of such scheme is Abhinaba Bidanasi Project Scheme. So far as Sector 10 and 11 of CDA are concerned the dominant purpose is for residential use and the carved out plots were allotted for residential house only and accordingly lease deeds are executed for that purpose. To facilitate the residential house, some plots in a specified scheme area are carved out for commercial use, health centre, institution, public utility and open space etc. Sector 10 and 11 of CDA does not provide any scheme for the purpose of hostel etc. Some of the allottees having residential plots are converting their plots and using it for hostel, school and other commercial purposes for which CDA has already taken steps to initiate proceedings.

8. Learned counsel for Cuttack Development Authority has produced the Development Plan prepared by the authorities as per Section 8 of the Act. It is not disputed that opposite party no.5 has submitted plan for approval as per the statutory provisions and the construction was made for the purpose of residential house. The plot was allotted for the said purpose and he has given undertaking to the effect that he will construct the building for residential purpose. The plot was within the Scheme area developed by the Cuttack Development Authority and lay out plan has been drawn by the authorities. It is also not disputed that the land was allotted by the Government for the aforesaid purpose to the authorities. As per the said lay out plan the areas are divided into different sectors, each sectors comprises of different plots, different sizes such as residential, residential-cum-commercial plots and etc. The lay out plan exclusively provides various other amenities for public purpose. The relevant terms and conditions incorporated in the allotment letter issued in favour of opposite party no.5 are quoted hereunder:-

"4. The plot allotted shall be used only for residential purpose. The residential building must be constructed within a span of three years from the date of handing over of possession. In case of failure to construct the building within the stipulated period, the lease would be determined and allotment will be cancelled and the possession of the plot would be taken over by the Authority. In that eventuality the total amount paid would be refunded without payment of any interest.

9. The planning and building norms in force on Cuttack Development Authority would be applicable to the construction of residential building on the plot.

17. The Authority reserves the right to alter or modify the plan, scheme, the size of plots, if required, in the interest of the scheme or due to the conditions beyond its control. All information on dimensions and area are provisional.

22. Infringement or breach or non observance of any of the terms and conditions would result in immediate determination of the lease / cancellation of allotment of plot and reversion of the plot of land to Authority free from all encumbrances without payment of any compensation for the loan or for any structure erected thereupon or for any improvement done on the plot.

23. On the question of infringement of or breach or non-observance of any of the terms and conditions of this allotment, the Authority shall

be the sole judge and order of the Authority declaring that there has been such infringement or breach or non-observance, shall be final and conclusive proof of such infringement or breach or non-observance as between the Authority and the allottee.

24. On infringement of breach or non-observance of any of the aforesaid terms and conditions, the Authority may declare that the lease has been determined / allotment has been cancelled and that after expiry of one month from the date of such order, the Authority or any of its officer shall be entitled to re-enter and take possession of the plot of land and of the building and other structures erected thereupon.

Provides that in case the plot of land is so resumed, the allottee shall not be entitled to any compensation. Whatever, for the building or other structures etc. erected by the allottee on the land. But the allottee will be at liberty to remove the materials and such buildings or structures etc. within a month from the date of determination of the lease / cancellation of allotment order. Failing which, the Authority shall be entitled to cause such materials or constructions removed at your cost and sell the same by public auction. You will in that event entitled to the balance of the same proceeds after deduction of arrear of cost, arrear of ground rent, Municipal taxes etc.

Provides, however, that before such determination of lease / cancellation of allotment order, the Authority shall give you a written notice of its intention to do so and you shall have the right to remedy / the infringement or breach or non-observance complained of, with the given reasonable time from the date of such notice and in that event, the Authority shall not be entitled to reenter or take possession."

9. For better appreciation some of the provisions of the Act are quoted hereunder:-

Section 2 (v) of the Act: ***Building*** *– includes any structure or erection or part of a structure or erection which is intended to be used for residential, commercial, industrial, or other purposes, whether in actual use or not.*

Section 2 (viii) of the Act: ***Commerce*** *– means the carrying on of any trade, business or profession, sale or exchange of goods of any type whatsoever and includes the running of with a view to making profit, hospitals, nursing homes, infirmaries or educational institutions, and also includes the running of sarais, hotels, restaurants and of*

boarding houses not attached to any educational institution and the word 'commercial' shall be construed accordingly.

Section 2 (ix) of the Act: ***Commercial use*** *– includes the use of any land or building or any part thereof for purpose of commerce or for storage of goods, or as an office, whether attached to any industry or otherwise.*

Section 2 (xxviii) of the Act: ***Public building*** *– means any building to which the public or any class or section of the public are granted access or any building, which is open to the public or any class or section of the public and includes any building-*

(a) used as a –

(i) School or College or a University or other educational institution,

(ii) Hostel,

(iii) Library,

(iv) Hospital, Nursing Home, Dispensary, Clinic, Maternity Centre or any other like institution,

(v) Club ,

(vi) Lodging House,

(vii) Choultry,

(viii) Coffee House, Boarding House, Hotel or Eating House.

Section 19 of the Act mandates regarding use of lands and buildings in contravention of development plan – after coming into operation of any of the development plans in any area no person shall use or permit to be used any land or building in that area otherwise than in conformity with such development plan.

Provided that it shall be lawful to continue the use upon such terms and conditions as may be prescribed by regulations made in this behalf of any land or building for the purpose and to the extent for and to which it is being used upon the date on which such development plan comes into force.

10. Cuttack Development Authority in its counter affidavit has specifically stated that as per the development plan they have allotted the plot in favour of opposite party no.5 within the residential area. The change of residential building for other purpose is not permissible as per the statutory provisions. However, deviating the terms and conditions of the allotment, opposite party no.5 and similarly persons who have been allotted with plots for residential purpose, using the same for other purposes, for which CDA

has already initiated proceedings. The action of the inmates of the Hostels severely affects the peace and tranquility of the area and creates severe health hazards to the members of the petitioner's family and his children, who are prosecuting their studies as well as the localities. The youngsters coming to the area with motorbikes and loiter around for other purposes, harassing young girls and old people. Use of residential building for other purposes and the City Buses create nuisance in the area, as such those activities need to be stopped in the residential area more specifically as per the Town Plan, which was developed as per the Scheme.

11. The action of opposite party no.5 and inaction of opposite parties are violating the principle of sustainable development, public trust, intergenerational equity which amounts to infuriation of Article 21 of the Constitution of India. It is the fundamental right of the citizen to live peacefully in their residential / dwelling house. The peace and tranquility of the residential area shall be maintained by all and those who are disturbing the same in the area by creating nuisance need be strictly dealt with. All those activities need be stopped. Accordingly, this Court disposes of all the Writ Petitions with a direction to the Cuttack Development Authority – opposite party no.2 to take a decision on the notices issued to the allottees, who have deviated the approved plan and the terms and conditions of the allotment order as expeditiously as possible, preferably within a period of two months from the date of production of certified copy of this judgment after giving opportunity of hearing to the parties. It is needless to say that the City Buses / Town Buses which are plying in the area and creating nuisance, the authorities more specifically opposite party no.4 shall take steps so that the said Buses shall ply at a suitable distance from the residential area i.e. in the Ring Road area only, which is at a walk-able distance from any side of the residential area. The said Buses should not enter into the residential areas.

Writ petitions disposed of.

2016 (II) ILR - CUT-104

B.K. NAYAK, J & B.RATH, J.

GCRLA NO. 3 OF 2003

STATE ……...Appellant

.Vrs.

ANANTA MURMU ……Respondent

PENAL CODE, 1860 – S. 84

Plea of "Un soundness of mind" or "insanity" – Such plea must be available with the accused "at the time of occurrence" and not other wise – Even,such plea after or before commission of the offence is not relevant.

In this case, evidence available on record did not at all establish the defence plea of "insanity" at the time when the offence was committed – Observation of the sessions Court that section 84 I.P.C. applies to this case is improper and defective – Held, impugned order of acquittal is setaside – This Court finds the accused guilty of the offence of double murder and convicted him U/s 302 I.P.C.

(Paras 11,11,12)

For Appellant : Mr. Soubhagya Ketan Nayak,
Addl.GovT. Advocate.
For Respondent : Mr. A.Mohanty, Advocate

Date of hearing:06.6.2016
Date of judgment:22.6.2016

JUDGMENT

BISWANATH RATH, J.

This appeal arises out of an order of acquittal dated 4.5.1999 passed by the Sessions Judge, Dhenkanal-Angul at Dhenkanal acquitting the respondent from the charge under Section 302 of the Indian Penal Code.

2. Prosecution led the story that on 21.4.1996 at about 3 P.M. while the son of the accused was counting money, the accused demanded for immediate handing over the money to him failing which accused threatened to kill his son. Son of the accused being afraid of the same ran away from the place and it is alleged that after the above, the accused chased his daughter, namely, Salma and assaulted her by means of a spade inflicting several blows resulting death of his daughter Salma in the backyard near the fence. Prosecution has the further story that at the above point of time, wife of the

accused, namely, Basanti, who had been to fetch water, on her arrival protested the drastic act of the husband. Unfortunately, the husband then chased his wife Basanti and killed her by use of same spade. Prosecution story further reveals that for the ghastly act of the accused-respondent people from the neighborhood fled away from their houses and gathered at the end of the village. When the informant, who is the immediate neighbor of the accused, returned to village he was told about the incident by the villagers as well as his mother, who were all then assembled at the end of the village. Where after the informant rushed to the house and found the dead body of Salma lying near their common fence. As per informant, he also heard the shoutings raised by the accused being present inside the house. The informant along with two other villagers proceeded to Kamakhyanagar Police Station and reported the incident, which was reduced in to writing by the Officer-In-Charge, Kamakhyanagar Police Station on 21.4.1996 at about 8 P.M. Upon completion of investigation, the police submitted charge sheet against the accused-respondent under Section 302 of the Indian Penal Code facing the trial.

3. The plea of the accused is a complete denial. The accused took his defence on his examination under Section 313 of the Code of Criminal Procedure that he was not only innocent but had no idea regarding the alleged incident and he was not even in a position to say as to who is the author of the crime and who are responsible for killing his wife and daughter. The accused had also disclosed in the said statement that two months preceding to the date of occurrence he was suffering from fever.

4. To prove the charge, prosecution examined as many as six witnesses. P.W.1 is the informant and is a post occurrence witness. P.W. 2 is the son of the accused claiming to be an eye witness to the occurrence. P.W.3 claimed to be a witness to the occurrence. P.W.4 is the old mother of the informant and the immediate neighbour of the accused also claiming to be an eye witness to the occurrence. P.W.5 is the witness to the seizure of blood stained earth from the spot and the blood stained wearing apparels of the accused. P.W.6 is the Officer-In-Charge of Kamakhyanagar Police Station at the relevant point of time and investigated into the matter. On the other hand, defence examined none. Basing on the prosecution story, depending on the evidence of P.W.2 disclosing that the accused was semi-mad and was howling on the date of occurrence further applying the provisions under Section 84 of the Indian Penal Code, particularly, the general exception in Chapter-IV of the Indian Penal Code, the Sessions trial was concluded with

an order of acquittal, thereby further directing setting the accused to liberty forthwith.

5. Challenging the aforesaid judgment, the State filed the Government Appeal which was admitted by this Court vide its order dated 24.11.2003.

6. Challenging the judgment of acquittal, Sri Soubhagya Ketan Nayak, learned Additional Government Advocate urged that prosecution had a strong case against the accused-respondent. Prosecution established its case against the accused with sufficient evidence resulting a clear finding by the trial court in paragraph-15 to the effect that the murder was committed by the accused in sudden mood but with a wrong note of insanity. Challenging the application of Section 84 of the Indian Penal Code in acquitting the accused, learned Additional Government Advocate contended that even though there was a stray plea through some of the prosecution witnesses that the accused was suffering from mental disorder, the defence has miserably failed to establish the plea of insanity with the accused at the relevant point of time so as to attract the provision of Section 84 of the Indian Penal Code. Learned Additional Government Advocate also contended that the trial court has also misapplied the decision relied on by him in the judgment in applying Section 84 of the Indian Penal Code and lastly contended that in view of totality of the evidence available on record, the case at hand does not fall within the ambit of Section 84 of the Indian Penal Code and, therefore, prayed for conviction of the accused-respondent on reversal of the judgment of acquittal. Learned Additional Government Advocate also placed reliance on a decision reported in the case of *S.W.Mohammed v. State of Maharashtra, AIR 1972 SC 2443* in support of his case and contended that the case does not fall within the ambit of Section 84 of the Indian Penal Code and the trial warranted conviction.

7. On a close scrutiny of the impugned judgment, this Court finds that the trial court relying on the evidence of P.W.2 after observing that the evidence of this witnesses should not be discarded in toto and further relying a decision of this Court in the case of *Shama Tudu v. State, 1986 (I) OLR 536* deciding the principle governing the application of Section 84 of the Indian Penal Code and drawing an analogy between the words 'medical insanity' and 'legal insanity' and partial reliance of some of the evidence of P.W.1, the informant, observed that the prosecution witness supports the case of the defence regarding madness the accused had at the relevant point of time. Taking resort to the provision contained in Section 84 of the Indian Penal Code and in further reliance of the decision of this Court reported in

(1993) 6 O.C.R. 41, the case between *Ajaya Mahakud v. State*, gave the benefit of Section 84 of the Indian Penal Code to the accused-respondent and consequently passed the judgment and the order of acquittal. Looking to the prosecution case including the evidence in the side of the prosecution and the observation of the Sessions Court, this Court finds that there is a clear observation of Section 84 of the Indian Penal Code in committing the double murder. In absence of challenge to the said, this Court is now required to see whether the application of Section 84 of the Indian Penal Code to the present case is justified or not. In the process, this Court now looks first of all the F.I.R. story vide Ext.7. The F.I.R. story remains wholly silent on the claim of insanity with the accused-respondent. From recording of the statement of accused under Section 313 of the Code of Criminal Procedure, the accused while claiming that he is innocent, he has a clear statement that he had absolutely no idea regarding the alleged incident and he also cannot say as to who is the author of the crime, further that he was suffering from fever from two months preceding to the date of occurrence. P.W.1, the informant in cross-examination on the issue of madness of the accused stated as follows:

> "The accused was semi-mad by the date of occurrence. I cannot say as to if the accused was complete mad at that time".

8. P.W.2, the sole eye witness, is the son of the accused-respondent and he was 13 years of age at the time of incident and has been examined as a child witness. In his examination in chief, this witness stated as follows:

> "On the date of occurrence the accused was mad for which my mother asked me to bring out money for his treatment".
>
> In cross-examination, P.W.2 stated as follows:
>
> "My father was complete mad by the date of occurrence. He used to throw away his wearing apparels and most of the times was remaining naked. He was unable to distinguish good from bad. He was not sleeping at all and roaming hither and thither aimlessly and sometimes howling unnecessarily".

9. Prayer of the Public Prosecutor to recall this witness and declare him hostile was allowed. In further cross-examination by prosecution with the permission of the court below in paragraph-6, this witness admitted that he had not disclosed before the Police that his father was mad and that he was moving hither and thither naked and that he was unable to distinguish true

from falsehood with a further disclosure that he did not say that as the police did not ask him any such question. His deposition further reveals a specific statement that before arrest of his father and putting him in jail, his father was earning and giving money to this witness, the son, to prosecute his studies. In the cross-examination by the accused, this witness in paragraph-7 stated that the madness developed with his father intermittently once or twice a year and when madness developed with him, he used to remain idle without taking up any work and at the end he also deposed that his father and mother used to tend their goats and sheeps. P.W.6, the Officer-In-Charge, who investigated the matter, in his cross examination at paragraph-6 while deposing that when he visited the spot being informed about the incident, he found the accused sitting near the dead body of his wife. At the same time he also deposed that he had never suspected the symptoms of insanity with the accused prior to the occurrence. Now coming to consider the aspect of Section 84 of the Indian Penal Code. Section 84 of I.P.C. reads as follows:-

> "**Act of a person of unsound mind**-Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

The requirement of this provision is that insanity or un- soundness of mind must be available with the person doing the act at the time of the occurrence. The term 'insanity' is not defined in the Indian Penal Code. Section 105 of the Indian Evidence Act reads as follows:

> "Burden of proving that case of accused comes within exceptions. existence of circumstances bringing the case within any f the General Exceptions in the Indian Penal Code, (45 of 1860) or within any special exception or provision contained in any other part of the same Code, or in any law defining the offence, is upon him, and he Court shall presume the absence of such circumstances
>
> xxxx xxxx **Illustrations** xxxx xxxx
>
> (a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A"

10. Reading of both the above legal provisions makes it clear that legal insanity as distinguished from medical insanity envisaged and covered by Section 84 IPC is narrower and is applicable only if the person accused was incapable of knowing the nature of the act or knowing that what he was doing

was either wrong or contrary to law and that too at the time of incident and not otherwise. In the case of *Siddhapal Kamala Yadav v. State of Maharashtra, AIR 2009 SC 97*, it clarified that to establish insanity under Section 84 IPC, it has to be established that the accused was laboring under such disability, i.e. unsoundness of mind, as not to know the nature or quality of the act he was committing or the act was wrong/contrary to law. Further, the crucial time for ascertaining insanity is the time when crime was committed i.e. the time when the incident has occurred and more, particularly, unsoundness of mind after or before commission of the offence is not relevant. This is also the view of the Hon'ble Apex Court in the cases of State of Madhya *Pradesh v. Ahmadulla, AIR 1961 SC 998. Dahyabhai Chhaganbhai Thakker v. State of Gujarat AIR 1964 SC 1563 and S.W.Mohammed v. State of Maharashtra, AIR 1972 SC 2443* where it has been clearly observed that it is common knowledge that every man is presumed to be sane, till contrary is established. Plea of unsoundness of mind of the type stipulated in Section 84 IPC is an exception. Illustration (a) to Section 105 of the Evidence Act, 1872 casts burden on the accused to show the exception carved out under Section 84 IPC and the burden is on the accused to prove insanity at the time when the offence was committed.

11. From the discussions in the aforesaid paragraphs, this Court has considered the defence plea of insanity of the accused and the reading of the factual evidence available on record did not at all establish the defence of insanity of the accused at the time when the offence was committed. Section 84 IPC has no mere application to the case claiming insanity. Such claim has to be established with preponderance of probability. There is no establishment of this claim either conclusively or beyond reasonable doubt to get the benefit of Section 84 IPC. Therefore, this Court is of the firm view that the defence has totally failed in establishing the plea of insanity of the accused. Thus, this Court finds that the observation of the Sessions court in the matter of application of Section 84 IPC in the present case is improper and defective.

12. This Court has gone through the decisions relied on by the Sessions Judge as reported in the case of *S.W.Mohammed v. State of Maharashtra, AIR 1972 SC 2443.* Reading of the aforesaid decision, this Court also observes that there has been improper application of the principle laid down therein by the Sessions Court and under the circumstances, this Court sets aside the impugned order of acquittal dated 4.5.1999 passed by the learned Sessions Judge, Dhenkanal-Angul, Dhenkanal in S.T .Case No.71-D of 1996 and find

the accused-respondent guilty of the offence of murder and accordingly convict him under Section 302,IPC.

13. Now, coming to the question of sentence, this Court finds that the Sessions court has given a clear finding that the prosecution succeeded in proving that the murder of the wife and daughter has been committed by none else than the accused-respondent. There is some evidence that the incident had occurred involving family quarrel, though the testimony is silent as to who initiated quarrel and for what reason. However, looking to the materials available on record, particularly the background and the manner in which the crime has taken place, it is not possible to bring this case within the frame of a murder rarest among the rare. Consequently, this Court sentences the accused to undergo rigorous imprisonment for life and also with a fine of Rs.2,000/- (Rupees two thousand), in default of which the accused-respondent has to undergo rigorous imprisonment for two months.

14. The bail of the respondent stands cancelled and he is directed to surrender to custody forthwith to serve the sentence.Send back the L.C.R. forthwith. Appeal allowed.

2016 (II) ILR – CUT-110

S. K. MISHRA, J.

CRLA NO. 67 OF 2010

PRASADI SAHU ……..Appellant

.Vrs.

STATE OF ORISSA ……Opp. Party

PENAL CODE, 1860 – S.304-B

In order to bring home the charge U/s. 304-B I.P.C, prosecution must prove three essential ingredients; i.e.

(i) the death is within seven years of her marriage,

(ii) the death of the deceased was otherwise than the normal circumstances, which may include homicide and suicide, and

(iii) the prosecution must establish that the deceased was subjected to cruelty in connection with the demand of dowry or that she was put to torture and ill treatment etc. for dowry by her husband or his other relations soon before the death.

In this case the death of the deceased was within seven years of her marriage and the death of the deceased was due to suicidal poisoning – So far as the torture of the deceased in connection with demand of dowry soon before her death, the only evidence is, there was a meeting in the village on the allegation of dowry demand and torture, approximately before one month prior to the death of the deceased and the time lag is so wide that it cannot be said that the dowry torture was "soon before" her death – There is also no perceptible nexus between her death and the dowry related cruelty inflicted upon her – Held, since all the ingredients are not satisfied conviction of the appellant U/s. 304-B I.P.C. can not be sustained, hence set aside. (Paras7 to15)

Case Laws Referred to :-

1. 2009) 43 OCR (SC) 720 : (Suresh Kumar Singh v. State of U.P.)
2. AIR 2000 S.C. 1454 : Tarsem Singh v. State of Punjab
3. (2006) 1 SCC 463 : Harjit Singh v State of Punjab
4. (2001) 8 SCC 633 : Satvir Singh & Ors. v. State of Punjab & Anr.

For Appellant : Mr. Saroj Kumar Das
For Opp. Party : Mr. P.C.Das, Addl.Standing Counsel

Date of judgment :10. 06.2016

JUDGMENT

S.K.MISHRA, J.

In this Appeal, the convict Prasadi Sahu assails his conviction under Section 304–B read with Section 498-A of the I.P.C. and sentencing him to undergo rigorous imprisonment for ten years and further sentencing him to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.1000/- under Section 4 of the Dowry Prohibition Act, to undergo rigorous imprisonment for two years and to pay fine of Rs.1000/- for the offence under Section 498-A of the I.P.C. as per the judgment passed by the learned Addl. Sessions Judge, Sambalpur dated 17.09.2009 passed in S.T. No. 90/01 of 2008-09.

2. The case of the prosecution in short is that the informant lodged an F.I.R. stating that his sister (hereinafter referred as the "deceased") was given marriage to the accused three/four years back from the date of the F.I.R. and she was being tortured by the accused in furtherance of demand of dowry and on 25.09.2007, the accused sent message to their house to give the dowry money lest the deceased would be killed. On the date of lodging of

the F.I.R. when he came, he saw that the deceased has been killed by the accused, his father-in-law and other in-laws by beating her. The F.I.R. was received at 2.30 A.M. on 26.09.2007 as revealed from the endorsement of the registering officer. Then the investigation was taken up and the charge-sheet has been filed on 17.05.2008 for the commission of offences under Sections 498-A, 302, 304-B of the I.P.C. and Section 4 of the Dowry Prohibition Act.

3. The accused took the plea of complete denial.

4. In order to prove its case, the prosecution examined as many as 26 witnesses and exhibited 14 documents, but no material objects were led into evidence. Amongst the prosecution witnesses, two witnesses namely P.W. 1 the informant, P.W. 2 the father of the deceased and P.W. 3 the mother of the deceased are important witnesses, who deposed about the dowry torture meted out to the deceased and possible connection of the dowry torture and consequent death of the deceased. P.Ws. 20 and 21 are Doctors, who have conducted postmortem examination on the dead body of the deceased. P.Ws. 12, 13, 15, 16, 17 and 19 are the co-villagers of the accused. Other witnesses are formal witnesses.

5. The defence has not examined any witness but marked one exhibit as Ext. A, i.e. the endorsement of P.W. 11 on the Inquest Report.

6. After analyzing the evidence led by the prosecution in the evidence, learned Addl. Sessions Judge, Sambalpur came to the conclusion that offence under Section 302 of the I.P.C. has not been established. However, he held that offence under Sections 498-A, 304-B of the I.P.C. and Section 4 of the Dowry Prohibition Act has been established beyond all reasonable doubts and therefore, he proceeded to convict the accused, who happens to be the husband of the deceased, and sentenced him as stated above. In course of hearing, learned counsel appearing for the appellant argued that the essential ingredients for establishing commission of offence under Section 304-B of the I.P.C. have not been made out, inasmuch as, the findings given by the learned Additional Sessions Judge are based on conjecture and surmises and soon before the death of the deceased she was not subjected to any dowry torture or otherwise.

7. In order to bring home the charge under Section 304-B of the I.P.C., prosecution must prove three essential ingredients; they are that (i) the death is within seven years of her marriage; (ii) the death of the deceased was otherwise than the normal circumstances, which may include homicide and

suicide; and (iii) the third and most vital ingredient is that the prosecution must establish that the deceased was subjected to cruelty in connection with the demand for dowry or that she was put to torture and ill-treatment etc. for dowry by her husband or his other relations soon before the death.

8. In this case, having gone through the judgment carefully and having perused the evidence of witnesses, this Court is of the opinion that the very approach of the learned Addl. Sessions Judge is erroneous. It is not disputed that the death of the deceased was within seven years of her marriage, but as far as her unnatural death is concerned, case of the prosecution is that she was poisoned or she took poison to commit suicide. From the evidence of P.Ws. 20 and 21, it is apparent that cause of the death was most probable due to intra cranial hemorrhage and they found swelling over the forehead and scalp of the frontal bone. Furthermore, P.W. 20 in his cross-examination has admitted that poisoning of the deceased cannot be ruled out, at the same time, P.W. 21 has stated that he has not found any symptoms of poisoning during the postmortem examination and said that the death cannot be due to poisoning and also has denied to the said suggestion of the defence. P.W. 20 has stated that the death is homicidal in nature, or can be accidental.

9. Taking this into consideration, statements of two doctors and the P.Ws. 11, 12 15 and 18, who have stated that the deceased was trembling out of pain and dashing her head and legs and was rolling on the ground, he disbelieved the evidence of both the doctors P.Ws. 20 and 21. At page 21 in the later portion of paragraph 30, the learned Addl. Sessions Judge has held as follows:

> "xxx No witness has stated to have seen the assault made by the accused upon the deceased. So, after very careful analysis of the evidences available, I come to the opinion that the deceased might have taken poison and after taking poison, out of pain, she rolled and dashed her head out of severe pain or in a semi-conscious state which might have been hit against any bamboo/wooden pillar or hard surface causing the injuries on her forehead as detected in the P.M. Report. So, from the aforesaid analysis, either the deceased has been died accidentally or by suicide. When most of the witnesses, who have seen the deceased just prior to her death, have consistently stated that the deceased committed suicide taking poison which is supported by the contents of the Inquest Report, particularly by the opinion under Ext. A of P.W. 11 and the opinion of P.W. 23 mentioned in that Inquest Report, I come to the conclusion that,

though most probable cause of death is the intra-cranial haemorrhage but the deceased has taken the poison for suicide. xxx"

10. The basic approach adopted by the learned Addl. Sessions Judge is erroneous in view of the fact that while deciding a criminal case when a major punishment is likely to be inflicted on the convict, in case of conviction, it is the duty of the Court to carefully examine the evidence and see if a particular ingredient has been established by the prosecution beyond all reasonable doubt and there is no scope of conjecture and surmises in such situation. The evidences of P.Ws. 20 and 21 are categorical about the death of the deceased because of intra-cranial hemorrhage. In such situation, learned Addl. Sessions Judge should not have held that the death of the deceased is due to suicidal poisoning. In this case, prosecution has not examined anybody who has seen that the deceased has taken poison. Only because she was behaving in certain manner it was presumed that she has taken poison. From the evidence of P.W. 21 it has come up that he saw no symptoms of poisoning and the viscera was not preserved for chemical and serological examination and no chemical and serological examination was conducted to find out that if the cause of death of the deceased was due to poisoning. As such, the finding recorded by the learned Addl. Sessions Judge is clearly erroneous and cannot be sustained.

11. As far as the ingredients of torture of the deceased in connection with the demand for dowry soon before her death, the learned Addl. Sessions Judge has taken into consideration the statement of P.Ws. 1, 2 and 3. P.Ws. 1, 2 and 3 have stated that the deceased had reported before them after the marriage that the accused was beating her demanding money and dowry and for that he was torturing her and due to nonpayment of the demanded money, the accused assaulted the deceased. It is also revealed from their statements including the statement of P.W. 14 that due to demand of dowry and assault made by the accused, village meetings were convened in the house of the accused in which, the accused has regretted and promised not to make any further demand of dowry and torture to the deceased. P.W. 1 has stated in her evidence that one day prior to the death of the deceased the last village meeting was convened when P.Ws. 2 and 3 have stated that the last village meeting was convened within one month from the death of death of the deceased. P.W. 1 has further denied that he had not stated so before the Investigating Officer when his statement under section 161 Cr.P.C. was recorded by the Police, which is negated by the Investigating Officer. So from the evidence of P.Ws. 2 and 3, it is clear that the last meeting that was

convened was within one month from the date of death of the deceased. It is not clear if in those meetings the deceased herself has stated before the villagers and gentlemen that she has been ill-treated and treated with cruelty for non-payment of demand of dowry. Rather, they have stated that the accused himself has confessed and stated that he shall not do any such demand in future. Taking into consideration the evidence of P.Ws 1, 2 and 3, learned Addl. Sessions Judge has opined that the last village meeting was concerned within one month prior to the death of the deceased. So, it is obvious from the evidence of those prosecution witnesses that the accused was making demand of dowry and had assaulted or tortured the deceased for demand of dowry within one month prior to her death. Thus referring to the decision reported in (2009) 43 OCR (SC) 720 (Suresh Kumar Singh v. State of U.P.) held that in order to attract the said provision, it is imperative on the part of the prosecution to establish that the cruelty or harassment has been meted out to the deceased 'soon before her death'. There cannot be any doubt or dispute that is a flexible term. Its application would depend upon the factual matrix obtaining in a particular case. No fix period can be indicated therefore. It, however, must undergo the test known as 'proximity test'. The Supreme Court has further held that it is necessary for the prosecution to bring on record that the dowry demand was not too late and not too stale before the death of the deceased.

12. Learned counsel for the appellant relied upon the reported case of **Tarsem Singh v. State of Punjab,** AIR 2000 S.C. 1454, wherein the Supreme Court has quoted with approval of another judgment of the Hon'ble Supreme Court rendered in **Harjit Singh v State of Punjab,** (2006) 1 SCC 463. The Supreme court has held that a legal fiction has been created in the said provision to the effect that in the event it is established that soon before the death, the deceased was subjected to cruelty or harassment by her husband or any of his relative; for or in connection with any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have "caused her death". Noticing the provisions of Section 113-B of the Evidence Act, it was opined that from a conjoint reading of Section 304B of the Indian Penal Code and Section 113-B of the Indian Evidence Act, it will be apparent that a presumption arising thereunder will operate if the prosecution is able to establish the circumstances as set out in Section 304B of the Indian Penal Code. The Supreme Court has further held that in the case of unnatural death of a married woman, the husband could be prosecuted under section 302, Section

304B and Section 306 of the I.P.C. The distinction as regards commission of an offence under one or the other provisions as mentioned hereinbefore came up for consideration before a Division Bench of the Hon'ble Supreme Court in **Satvir Singh and others v. State of Punjab and another**; (2001) 8 SCC 633; wherein it was held ;

> "21. Thus, there are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third is "at any time" after the marriage. The third occasion may appear to be an unending period. But the crucial words are "in connection with the marriage of the said parties". This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with the marriage of the parties. There can be many other instances for payment of money or giving property as between the spouses. For example, some customary payments in connection with birth of a child or other ceremonies are prevalent in different societies. Such payments are not enveloped within the ambit of "dowry". Hence the dowry mentioned in Section 304B should be any property or valuable security given or agreed to be given in connection with the marriage.
>
> 22. It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304B is to be invoked. But it should have happened "soon before her death." The said phrase, no doubt, is an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it. But the proximity to her death is the pivot indicated by that expression. The legislative object in providing such a radius of time by employing the words "soon before her death" is to emphasize the idea that her death should, in all probabilities have been the aftermath of such cruelty or harassment. In other words, there should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death is wide the court would be in a position to gauge that in all probabilities the harassment or cruelty would not have been the immediate cause of her death. It is hence for the court to decide, on the facts and circumstances of each case, whether the said interval in that particular case was sufficient to snuff its cord from the concept "soon before her death". "

13. Applying this principle, this Court comes to the conclusion that there is no evidence of torture within one month of her death or around one month before her death. There is no evidence that the torture led to death. The only evidence is there was a meeting in the village on the allegation of dowry demand and torture before one month, approximately, prior to the death of the deceased. It cannot be said that there is a probability in this case that before the death there was dowry torture on the deceased. The time lag is so wide that this Court is not in a position to come to a definite conclusion that the dowry torture is "soon before" her death. In other words, there appears to be no perceptible nexus between her death and the dowry related cruelty inflicted upon her. Accordingly, this Court comes to the conclusion that all the ingredients are not satisfied in this case. Hence, the conviction under section 304-B of the I.P.C. cannot be sustained.

14. As far as offences under Section 498-B of the I.P.C. and Section 4 of the Dowry Prohibition Act are concerned, learned counsel for the appellant did not advance any argument. On the basis of the materials on record, this Court is of the opinion that it has been established beyond reasonable doubt that there was ill-treatment to the deceased before her death and the offences under Section 498-A of the I.P.C. and Section 4 of the Dowry Prohibition Act are held to be established beyond all reasonable doubt and this court is not inclined to interfere with the conviction of the appellant on those counts.

15. In the result, the appeal is allowed in part. The conviction and order of sentence of the appellant for the offence under Section 304-B of the I,P.C. are hereby set aside. He is acquitted from the said charge. However, the conviction for commission of the offences under section 498-A and Section 4 of the Dowry Prohibition Act are sustained without any change in the sentence. The period undergone shall be set up against the substantive sentence and the petitioner shall be released after suffering the default sentence in both the above offences. With the aforesaid observation, the Criminal Appeal is allowed in part.

Appeal allowed in part.

2016 (II) ILR - CUT-118

C. R. DASH, J.

W.P.(C) NO. 24279 OF 2012

THE MANAGEMENT OF M/S. SAHARA INDIA (REPRESENTED THROUGH ITS ZONAL MANAGER WORKER) ……..Petitioner

.Vrs.

PRESIDING OFFICER, INDUSTRIAL TRIBUNAL, BHUBANESWAR & ANR. ……..Opp. Parties

INDUSTRIAL DISPUTES ACT, 1947 – S.15

Industrial adjudication – Dismissal of workman – Matter referred to Industrial Tribunal – Despite the written request of the workman to make all correspondences to him in English, charge-sheet supplied to him in Hindi and domestic enquiry was also conducted in that Language – Looking at the fairness and propriety in domestic enquiry, learned Tribunal took up the matter as preliminary issue, set aside the order and given an opportunity to the employer to prove its case – Hence the writ petition – Common sense and principles of natural justice demands that the enquiry should be conducted in the language which is understood by the delinquent workman so that he will be in a position to defend himself properly – Held, the enquiry having been conducted in Hindi, the same was unfair and unjust – No justification to differ from the findings of the learned Industrial Tribunal.

(Paras 7,8)

Case Laws Relied on :-

1. AIR 1975 SC 1900 : Cooper Engineering Ltd. -V- P.P.Mundhe

Case Laws Referred to :-

1. AIR 2001 SC 2090 : Karnataka State Road Transport Corporation -V- Smt. Lakshmi Devamma & Anr.
2. 1995 Lab. L.R. 338 : G.R.Venkateswr Reddy -V- Karnataka State Road Transport Corporation

For Petitioner : M/s. Pramod Kishore Chand, S. Nanda
For Opp. Parties : M/s. Sanjay Ku. Mishra, P.K.Mohapatra, S.S.Sahoo, S.K.Dash

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Date of Judgment : 27.04.2016

JUDGMENT

C.R. DASH, J.

The management-petitioner in this writ application has impugned the order dated 24.11.2012 passed by the learned Industrial Tribunal, Bhubaneswar in I.D. Case No.66 of 2010.

2. Learned Industrial Tribunal, in terms of the decision of the Hon'ble Supreme Court reported in **Cooper Engineering Ltd. v. P.P. Mundhe**, ***AIR 1975 SC 1900***, took up the issue of fairness and propriety of the domestic enquiry as a preliminary issue. Though many grounds had been raised by the Opp.Party-workman regarding the fairness and propriety of the domestic enquiry, learned Tribunal answered preliminary issue in favour of the Opp.Party-workman mainly on two grounds :-

(1) The enquiry having been conducted in Hindi without affording any opportunity to the Opp.Party-workman to exercise his option regarding the language in which the enquiry is to be conducted, the enquiry so conducted suffers from impropriety and unfairness.

The Charge Sheet and other annexures attached thereto having been supplied to the Opp.Party-workman in Hindi language and no opportunity having been afforded to him to inspect the documents relied on by the management in course of the enquiry, the fairness of the enquiry is affected.

3. Learned counsel for the management-petitioner submits that the findings of the learned Industrial Tribunal on the aforesaid score are illegal, perverse and against the evidence on record on the following grounds :-

The Enquiry Officer having been examined as M.W.1 before the Industrial Tribunal has proved through his oral evidence as well as documentary evidence that the Opp.Party-workman had given his consent to conduct the domestic enquiry in Hindi language.

In Annexure- 16 to the writ application, i.e., the evidence of M.W.1 at Para- 4, the Opp.Party-workman has stated that he would defend himself and will not examine any other witness and he will also raise no objection in the enquiry being conducted in Hindi.

At para-5 of Annexure- 16, M.W.1 has further stated that the Opp.Party-workman did not raise any objection to conduct enquiry in Hindi language.

In Annexure- 16 in his cross-examination M.W.1 at para-16, has stated that in his order sheet (Ext.C), he has mentioned that on being asked as to whether the Opp. Party-workman had any objection, if the enquiry proceeding be recorded in Hindi, he (workman) answered in the negative.

Learned Industrial Tribunal has relied on Clause-14 (4) (bb) of the Model Standing Order, but there is no such clause in the Model Standing Order and Clause- 14 (4) (bb) is there in Industrial Employment (Standing Orders) Central Rules, 1946, which is not applicable to the present parties. The parties are governed by the Orissa Industrial Employment (Standing Order) Central Rules, 1946, but there is no such provision similar to Section-14 (4) (bb) in the Orissa Rules.

4. Learned counsel for the Opp.Party-workman, on the other hand, submits that in view of the settled law, this Court, in exercise of writ jurisdiction under Article- 226 of the Constitution of India, should not enter into matters of appreciation of evidence so far as the findings under the preliminary issue is concerned. It is further submitted that in view of the rulings of the Hon'ble Supreme Court in the case of **Cooper Engineering Ltd.** (supra), this Court should not intervene at the stage of order passed on preliminary issue, when the matter, if worthy, can be agitated even after the final award. It is settled in law that (**Karnataka State Road Transport Corporation v. Smt. Lakshmi Devamma and another**, ***AIR 2001 SC 2090***) and **Cooper Engineering Ltd.** Supra, if the domestic enquiry is held to be irregular, invalid or improper in the findings on the preliminary issue, the Tribunal may give an opportunity to the employer to prove his case, and in doing so the Tribunal tries the merit itself, and for trial on merit, the prayer has to be normally made by the management in its pleading made in the written statement. In Para-10 of Annexure-14, i.e., the written statement of the management, it is averred as follows :-

> *"10- That it is humbly submitted that the 1st Party has conducted the fair and proper enquiry by giving all reasonable opportunity to the 2nd Party. The fairness of the enquiry may kindly be taken and adjudicated as a preliminary issue since the 1st Party Management in exercise of his Managerial power has conducted a fair enquiry. If the Learned Court for any reason will find the enquiry conducted by the 1st Party is not fair and proper, the 1st Party may kindly be afforded an opportunity to adduce evidence on merit."*

5. It is submitted by learned counsel for the Opposite Party-workman that, in the written statement, the management-petitioner has prayed for opportunity to adduce evidence on merit and the learned Industrial Tribunal has also given such opportunity to the management-petitioner, but the management-petitioner, without availing such opportunity, has come up

before this Court by filing this writ application to unnecessarily delay the proceeding.

6. Perusal of the impugned order vide Annexure-1 shows that the learned Industrial Tribunal has painstakingly gone into every details of the matter in passing the order. In recording the conclusion/findings regarding the language in which the enquiry should be conducted, learned Tribunal has taken into consideration all the materials available on record. There may be a mistake on the part of the Tribunal so far as its reliance on Clause- 14 (4) (bb) of the Model Standing Order is concerned. However, such a Model Standing Order is not brought to my notice at the time of hearing.

7. Be that as it may, common sense and principle of natural justice demands that the enquiry should be conducted in the language, which is understood by the delinquent or the workman. In the present case, the enquiry has been conducted in Hindi language, that too in one sitting. The enquiry proceeding commenced and completed on 10.09.2008. The Enquiring Officer must have written the order sheet portion after completion of the enquiry in which question of consent of the Opp.Party-workman is reflected. Here consent is not important. Important is option to be exercised by the Opp.Party-workman regarding the language in which the enquiry is to be conducted. The enquiry is to be conducted either in English or in Hindi or in a language with which the workman is well conversant. Such a requirement is also demand of the principle of natural justice inasmuch as, if the workman/delinquent does not understand the language in which the enquiry is conducted, he may not be in a position to defend himself properly. From the impugned order, it is also found that the Opp.Party-workman vide Ext.4, had made a request to the management to make all correspondences to him in English only and had also requested the management to supply him a copy of Letter No.64/25550, dated 21.11.2007, and in response to the same, the management-petitioner vide Ext.5 supplied a copy of the said letter to the Opp.Party-workman in English, but subsequently all the correspondences including the enquiry were held in Hindi. Such a fact itself shows that the Opp.Party-workman does not have any idea about Hindi language or at least he has no workable knowledge in Hindi language. Learned Industrial Tribunal has taken into consideration different decisions of the Bombay High Court to come to a conclusion that the enquiry having been conducted in Hindi, the same was unfair and unjust.

I do not find any reason to differ from the conclusion arrived at by the learned Industrial Tribunal by unnecessarily going into the evidence adduced, which has been taken care of by the learned Industrial Tribunal.

8. So far as supply of charge sheet and annexures attached to it in Hindi is concerned, learned Industrial Tribunal relied on the case of **G.R. Venkateswar Reddy v. Karnataka State Road Transport Corporation**, ***1995 Lab. L.R. 338*** and held thus :-

> *"….. But, as already observed, the copy of the charge sheet (Ext.6) which was served on the workman was in Hindi and for that there can be a valid presumption that the workman could not understand the contents of the charge sheet and its annexures. The enquiry proceeding further reflects that without ascertaining from the workman as to whether he had any objection on the admissibility of the documents relied on by the Management, the Enquiry Officer simply marked them as Exts.M/1 to M/5 on being merely submitted by the Presenting Officer. Therefore, the inevitable conclusion is that the workman was not furnished with copies of the documents nor was he permitted to have adequate inspection of the documents….."*

The aforesaid finding of the learned Tribunal is quite clear and within comprehension. When no option had been given to the Opp.Party-workman regarding the language in which the enquiry is to be conducted, it was rightly held that supplying him documents and charge sheet in Hindi is only an exercise in futility so far as understanding of the workman is concerned. It may be fulfillment of a requirement in form, but cannot be held to be fulfillment of requirement of the principle of natural justice in spirit. I, therefore, do not find any justification to differ from the findings of the learned Industrial Tribunal on this score.

9. In view of the discussions supra, the writ application is devoid of any merit and the same is accordingly dismissed.

10. The parties are directed to appear before the learned Industrial Tribunal on the date fixed for further hearing in the matter.

Writ petition dismissed.

2016 (II) ILR - CUT-123

DR. A.K.RATH, J.

W.P.(C) NO. 15104 OF 2015

BISHNU PRASADA DASH .....Petitioner

.Vrs.

GOVERNOR, RESERVE BANK OF INDIA & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART. 16 (1) (4)

Reservation – Recruitment for the post of Assistant by Reserve Bank of India – Twenty five posts earmarked for Bhubaneswar region, of which one reserved for disabled ex-servicemen and three posts for ex-servicemen – Petitioner was the only candidate in ex-serviceman category – Petitioner having secured 180 marks could not be selected where as O.P. No 4, the last candidate belonging to general category was selected having secured 189 marks – Hence the writ petition – There are two types of reservations i.e. vertical reservations and horizontal reservations – The reservations in favour of scheduled castes scheduled Tribes and other back ward classes (under Article 16(4))may be called vertical (Social) reservations where as reservations in favour of physically handicapped (under Article 16 (1)) is called horizontal (Special) reservations – Horizontal reservations cut across the vertical reservations, what is called inter locking reservations – In this case the petitioner being the only reserved category candidate belonging to ex-serviceman and selected, he ought to have been selected in place of O.P. No. 4 – Held, direction issued to the opposite parties to re-draw the select list of Assistant by including the name of the petitioner and appoint him in the said post.

(paras 8 to 11)

For Petitioner : In person
For Opp.Parties : Mr. D.N.Mishra

Date of hearing : 05.04. 2016
Date of judgment: 20.04. 2016

JUDGMENT

DR. A.K.RATH, J

In this writ petition, the petitioner has prayed, inter alia, for a direction to the opposite parties to re-draw the select list of general candidates by including his name in reserve category ex-serviceman and to appoint him in the post of Assistant in the Reserve Bank of India, Bhubaneswar.

2. Shorn of unnecessary details, the short facts of the case of the petitioner are that the Reserve Bank of India issued an advertisement, vide Annexure-1, in the employment news to fill up the posts of Assistant. Twenty five posts of Assistant were earmarked for Bhubaneswar region out of which, one was reserved for disabled ex-servicemen and three posts for ex-servicemen (normal). The educational qualification for the posts of Assistant was Bachelor's Degree in any discipline with a minimum of 50% marks (pass class for SC/ST/PWD candidates). For ex-servicemen, a candidate should be a graduate from a recognized University or should have passed the matriculation or its equivalent examination of the Armed Forces and rendered at least 15 years of defence service. The selection was to be made on the basis of candidate's performance in the written examination as well as interview. The petitioner being eligible applied for the same. He was the only ex-serviceman candidate and called for the interview. But then, he was not selected. He applied for the information under the RTI Act. The same was provided to him on 17.4.2015, vide Annexure-4, wherein it was indicated that the reservation for ex-servicemen was horizontal and included in the vacancies for various categories. The recruitment of ex-servicemen in each recruitment drive was made taking into consideration the general policy of reservation, wherein the upper ceiling is 50%. The select list of the Assistants of the year 2014 annexed thereto indicates that the general candidates who had secured 189 marks had been selected. Pursuant to his complaint dated 12.1.2015, he got an e-mail message, vide Annexure-5, wherein it is stated that the reservation for ex-servicemen was horizontal and included in the vacancies of various categories. Since ex-servicemen were getting extended relaxation in age, qualification etc., they had to be included in the "select list" of categories (UR/SC/ST/OBC) to which they belonged to, provided, they could be included in such list in the normal course. He made an appeal to the opposite party no.1. While the matter stood thus, he received the letter dated 9.6.2015, vide Annexure-7, which indicates that the marks secured by him were less than the marks scored by last candidate selected in the general category. Therefore, as per the extant policy followed by the bank, he was not selected in the final list. The Bank was guided by the OM 36012/58/92 Estt(SCT) dated 01.12.1994 issued by Government of India. It provides that horizontal reservations cut across vertical reservation (in what was called interlocking reservation) and the persons selected against these reservations had to be placed in the appropriate category. Even after providing for these horizontal reservations, the percentage of reservation in favour of backward class of citizens should remain the same. Thus only those ex-servicemen who

qualify in the respective categories were selected. With this factual scenario, this writ petition has been filed.

3. Pursuant to issuance of notice, a counter affidavit has been filed by the opposite parties 1 and 2. It is stated that in order to carry out its functions effectively, the Bank recruits different classes of employees such as Class I (Officers), Class II (Personal Assistants which is now abolished), Class III (Assistants/Word Processor Assistants) and Class IV (Subordinate Staff) from time to time. The recruitment in Class I and Class III is centralised, while recruitment of Class IV staff is done at Regional Office level. The Bank follows the constitutional principles and guidelines on reservation issued by Department of Personnel and Training (DoPT), Government of India in all recruitments at central and regional office level. The Bank maintains rosters for reservation of Scheduled Castes, Scheduled Tribes and Other Backward Classes (Vertical Reservation) as well as for Physically Handicapped candidates (Horizontal reservation).

4. Heard the petitioner in person and Mr. D.N. Mishra, learned counsel for the opposite party.

5. The petitioner contended that pursuant to the advertisement issued by the Reserve Bank of India to fill up the posts of Assistant in Bhubaneswar region, he being an ex-serviceman and otherwise eligible applied for the same. He came out with flying colours in the written as well as viva-voce test. He was the only candidate in ex-servicemen category. But then, the opposite parties committed a manifest illegality and impropriety in not appointing him to the post. He further submitted that in the merit list prepared for the general category, opposite party no.4 has secured 189 marks and he has secured 180 marks. He being the reserve category candidate ought to have been selected in place of opposite party no.4. He further submitted that special reservations are made for ex-servicemen. The reservations have to be adjusted within the reserved and unreserved categories and the percentage of posts reserved under the horizontal reservations have to be provided for.

6. Per contra, Mr. Mishra, learned counsel for the opposite parties 1 to 3, submitted that the Bank had issued a notification in July 16, 2014 for recruitment of Assistant in various offices of the Bank. For selection to the posts, a competitive Online Examination was conducted in September, 2014. The result of the said Examination was declared on 31 December 2014 and different cut off marks (on merit and meeting the benchmarks set by RBI) were declared for General, Scheduled Caste (SC), Scheduled Tribe (ST),

Other Backward Classes (OBC) and Persons with Disability (Orthopedically Handicapped) categories for being called for interview at various offices of the Reserve Bank. The cut-off mark for general category candidates at Bhubaneswar was fixed at 159. After interview, the final selection was made as per the merit lists prepared on the basis of total scores obtained by the candidates in the Online Examination and the Interview. The petitioner belongs to ex-serviceman (normal category). He secured 180 marks in the examination. Being the only ex-serviceman candidate he was called for the interview. The general category candidates were selected upto 180 marks. The reservation for ex-servicemen was horizontal reservation and included in the vacancies for various categories. The last candidate belonging to General Category secured 189 marks in total and was selected.

7. The principle of horizontal reservation has been succinctly stated in Indra Sawhney v. Union of India, 1992 Supp. (3) SCC 217. In paragraph 95, the apex Court held thus:

> "**95.** ….all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations – what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same."

8. On a survey of earlier decisions, the Supreme Court in the case of Rajesh Kumar Daria v. Rajasthan Public Service, AIR 2007 SC 3127 enumerated the principle of horizontal reservation and the manner of filling up the vacancies. The same is quoted hereunder:

"**5.** Before examining whether the reservation provision relating to women, had been correctly applied, it will be advantageous to refer to the nature of horizontal reservation and the manner of its application. In Indra Sawhney v. Union of India [1992 Supp.(3) SCC 217], the principle of horizontal reservation was explained thus (Pr.812) :

"all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'.The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes [(under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16) can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against the quota will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same."

A special provision for women made under Article 15(3), in respect of employment, is a special reservation as contrasted from the social reservation under Article 16(4). The method of implementing special reservation, which is a horizontal reservation, cutting across vertical reservations, was explained by this Court in Anil Kumar Gupta v. State of U.P 1995 (5) SCC 173] thus :

"The proper and correct course is to first fill up the Open Competition quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an overall horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective

social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.) [Emphasis supplied]

6. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be : "For SC : 30 posts, of which 9 posts are for women". We find that many a time this is wrongly described thus: "For SC: 21 posts for men and 9 posts for women, in all 30 posts". Obviously, there is, and there can be, no reservation category of 'male' or 'men'.

7. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - Indira Sawhney (Supra), R. K. Sabharwal vs. State of Punjab (1995 (2) SCC 745), Union of India v. Virpal Singh Chauvan (1995 (6) SCC 684 and Ritest R. Sah v. Dr. Y.L. Yamul (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the

proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example:

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.]

9. On the anvil of the decisions cited supra, the case of the petitioner may be examined. The petitioner is the only ex-serviceman candidate. He was selected in the written as well as viva-voce test. He secured 180 marks. His case was denuded on the ground that opposite party no.4 secured 189 marks.

10. The principle enumerated in Rajesh Kumar Daria applies to the reserved category candidates belonging to ex-servicemen. Since the petitioner was the only ex-serviceman candidate and selected, he ought to have been selected by deleting the corresponding number of candidates from the bottom

of such list relating to other ex-serviceman so as to ensure that the final ex-serviceman candidate contains one ex-serviceman candidate.

11 In the wake of the aforesaid, the writ petition is allowed. Opposite parties are directed to re-draw the select list of Assistant by including the name of the petitioner and appoint him in the said post. No costs.

Writ petition allowed.

2016 (II) ILR - CUT-130

DR. A. K. RATH, J.

W.P.(C) NO. 12226 OF 2009

LALITA SINGH SAMANTA (DEAD) AFTER HER PRATAP CHANDRA SINGH SAMANTA ……..Petitioner

.Vrs.

PRASANNA KU. SENAPATI & ANR. ……...Opp. Parties

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

Opposite Party No.1 filed suit impleading O.P.No.2 as defendant – Mother of the petitioner filed petition under O-1, R-10 C.P.C. to be impleaded as a party in the suit – Application rejected – In the meantime suit was decreed – She filed RFA challenging the decree and since she was not a party to the suit she made an application seeking leave to file appeal – The said petition was rejected on the ground that she having not challenged the order rejecting her application under O-1, R-10 C.P.C. before the trial court, it has attained finality – Hence this writ petition – Now question is whether the learned appellate court is justified in rejecting the application of the mother of the petitioner for grant of leave to file appeal ? – Although the expression "appeal" has not been defined in C.P.C., a party to a suit adversely affected by a decree or any of his representatives-in-interest may file an appeal – But a person who is not a party to a decree or order may, with the leave of the court, prefer an appeal from such decree or order if he is either bound by a decree or order or is aggrieved by it or is otherwise prejudicially affected by it – Held, rejection of application filed under O-1, R-10 C.P.C. is per se not a ground to reject the application for leave to file appeal – The appellate court has to see as to whether the petitioner is aggrieved by a decree or is otherwise prejudicially affected

by it – The appellate court has to examine that if the decree is allowed to stand, the same will operate resjudicata – Subsequent filing, of the suit by the petitioner for the self same property can not be a ground to reject the application – Held, the impugned order is quashed, matter is remitted back to the learned appellate court to decide the application afresh as per law. (Paras 6 to 12)

(B) CIVIL PROCEDURE CODE, 1908 – S.151

Person, not a party to a decree or order – If he is either bound by the decree or order or aggrieved by it or is otherwise prejudicially affected by it, may, with the leave of the court, prefer an appeal from such decree or order – Rejection of application filed under order 1, Rule 10 C.P.C. by the trial court is per se not a ground to reject the application for leave to file appeal – The appellate court has to examine that if the decree is allowed to stand, the same will operate resjudicata – Held, impugned order rejecting the application seeking leave to file appeal is quashed.

Case Laws Referred to :-

1. AIR 1932 PC 165 : Nagendra Nath Dey Vrs. Suresh Chandra Dey.
2. AIR 1971 SC 385 : Adi Pherozshah Gandhi Vrs. H.M.Seervai.
3. AIR 1979 SC 1436 : Smt.Sukhrani (dead) by L.R's and others, Vrs. Hari Shanker & Ors.

For Petitioner : Mr. S.K.Mishra
For Opp. Parties : Mr. J.R,Dash

Date of Hearing : 03.05.2016
Date of Judgment:13.05.2016

JUDGMENT

DR. A.K.RATH, J.

In this writ petition under Article 227 of the Constitution of India, challenge is made to the order dated 4.3.2009 passed by the learned Additional District Judge, Nayagarh in R.F.A.No.20 of 2006 rejecting the application for leave to appeal.

2. Opposite party no.1 as plaintiff instituted Civil Suit No.17 of 2004 in the court of the learned Additional Civil Judge (Jr.Division), Khandapara for declaration of right, title and interest and for permanent injunction impleading opposite party no.2 as defendant. Lalita Singh Samanta, mother of the petitioner, filed an application under Order 1 Rule 10 C.P.C. for being impleaded as a party. The same was rejected. Subsequently another

application was filed to recall the said order. The same was also rejected. While the matter stood thus, the suit was decreed on 3.4.2006. Challenging the judgment and decree dated 3.4.2006, she filed an appeal, being R.F.A. No.20 of 2006, before the learned Additional District Judge, Nayagarh. Since she was not a party to the suit, she filed an application seeking leave to file appeal. It is stated that the property would be damaged by the plaintiff and she will suffer irreparable loss. Further in Revenue Misc.Case No.26 of 52-53 share has been allotted. But the plaintiff obtained the decree by fabricating the facts. The plaintiff filed objection to the same. It is stated that mother of the petitioner had filed an application under Order 1 Rule 10 C.P.C. for being impladed as a party. The application was rejected on 9.3.2006. The said order was not challenged. Thus, the same had attained finality. Further she had instituted C.S.No.49 of 2004 in the court of the learned Additional Civil Judge (Jr.Division), Khandapara, which was withdrawn by her on 20.3.2006. She filed Civil Suit No.30 of 2006 in the same court in respect of the suit land against him. The learned appellate court came to hold that the impugned decree is not absolute for having subjected to further appraisal and reconsideration by the Board of Revenue or other concerned authorities. The petitioner had not chosen to challenge the order rejecting the application under Order 1 Rule 10 C.P.C. Moreover, she has already filed C.S. No.32 of 2006 against opposite party no.1. Held so, the learned appellate court rejected the application. The said order is impugned in this petition. During pendency of the petition, the original petitioner died and in her place, the present petitioner, her son, has been substituted.

3. Heard Mr.S.K.Mishra, learned counsel for the petitioner and Mr.J.R.Dash, learned counsel for opposite party no.1.

4. Mr.Mishra, learned counsel for the petitioner submitted that mother of the petitioner was not a party to the suit. She is essentially aggrieved by judgment and decree passed by the trial court. Thereafter she filed an application for leave to file appeal. The learned appellate court committed a manifest illegality in rejecting the said application.

5. Per contra, Mr.J.R.Dash, learned counsel for opposite party no.1 supported the order passed by the appellate court. He submitted that the application filed by the mother of the petitioner under Order 1 Rule 10 CPC for being impleaded as a party to the suit was rejected by the learned trial court. She had not chosen to challenge the same. Thus the said order has attained finality. In view of the same, the learned appellate court is quite

justified in rejecting the application for leave to file appeal. He further submitted that the order of rejection of the application under Order 1 Rule 10 C.P.C. would operate as *res judicata*.

6. The sole question that hinges for consideration of this Court is as to whether the learned appellate court is justified in rejecting the application of the mother of the petitioner for grant of leave to file appeal on the ground that earlier application under Order 1 Rule 10 C.P.C. was rejected by the learned trial court.

7. The expression of 'appeal' has not been defined in C.P.C.. Eighty years back the five Judges Bench of the Privy Council in *Nagendra Nath Dey Vrs. Suresh Chandra Dey, AIR 1932 PC 165* speaking through Sir Dinshaw Mulla proclaimed that there is no definition of appeal in the Code of Civil Procedure, but there is no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent.

8. A party to a suit adversely affected by a decree or any of his representatives-in-interest may file an appeal. But a person who is not a party to a decree or order may, with the leave of the court, prefer an appeal from such decree or order if he is either bound by a decree or order or is aggrieved by it or is otherwise prejudicially affected by it.

9. In *Adi Pherozshah Gandhi Vrs. H.M.Seervai, AIR 1971 SC 385,* the Constitution Bench of the Supreme Court in paragraph-46 held thus:-

> "46. Generally speaking, a person can be said to be aggrieved by an order which is to his detriment, pecuniary or otherwise or causes him some prejudice in some form or other. A person who is not a party to a litigation has no right to appeal merely because the judgment or order contains some adverse remarks against him. But it has been held in a number of cases that a person who is not a party to suit may prefer an appeal with the leave of the appellate court and such leave would not be refused where the judgment would be binding on him under Explanation 6 to section 11 of the Code of Civil Procedure."

10. In *Smt.Sukhrani (dead) by L.R's and others, Vrs. Hari Shanker and others, AIR 1979 SC 1436*, the interlocutory order was not challenged. The same was challenged after final order was passed by the Court. The apex Court in paragraph-5 of the report held thus:-

> "5. It is true that at an earlier stage of the suit, in the proceeding to set aside the award, the High Court recorded a finding that the plaintiff was not entitled to seek reopening of the partition on the ground of unfairness when there was neither fraud nor misrepresentation. It is true that the plaintiff did not further pursue the matter at that stage by taking it in appeal to the Supreme Court but preferred to proceed to the trial of his suit. It is also true that a decision given at an earlier stage of a suit will bind the parties at later stages of the same suit. But it is equally well settled that because a matter has been decided at an earlier stage by an interlocutory order and no appeal has been taken therefrom or no appeal did lie, a higher Court is not precluded from considering the matter again at a later stage of the same litigation".

11. On the anvil of the decisions cited supra, the instant case may be examined. Admittedly, the application filed by the mother of the petitioner under Order 1 Rule 10 C.P.C. for being impleaded as party to the suit was rejected by the learned trial court. The said order was not challenged. In view of the authoritative pronouncement of the cases cited supra, the conclusion is irresistible that rejection of the application filed under Order 1 Rule 10 C.P.C. is *per se* not a ground to reject the application for leave to file appeal. The appellate court has to see as to whether the petitioner is aggrieved by a decree or is otherwise prejudicially affected by it. The appellate court has to examine that if the decree is allowed to stand, the same will operate *res judicata*. Subsequent filing of the suit by the petitioner for the self-same property cannot be a ground to reject the application.

12. In the wake of aforesaid, the order dated 4.3.2009 passed by the learned Additional District Judge, Nayagarh in R.F.A.No.20 of 2006 is quashed. The matter is remitted back to the learned appellate court to decide the application afresh keeping in view the principles enunciated above.

13. The writ petition is allowed. No costs.

Writ petition allowed.

2016 (II) ILR - CUT-135

DR. A. K. RATH, J.

O.J.C. NO. 1301 OF 1996

BANSHIDHAR BEHURIA .....Petitioner

.Vrs.

GRID CORPORATION OF ORISSA LTD. & ORS. .....Opp. Parties

(A) SERVICE LAW – Rehabilitation Assistance Scheme – Writ petition filed by the petitioner in the year 1996 seeking appointment – Whether appointment can be made under the above scheme after lapse of so many years ? Once it is proved that inspite of death or incapacitation of the bread earner, the family survived and substantial period is over, there is no necessity to show favour to one at the cost of the interest of several others, ignoring the mandate of Article 14 of the Constitution of India – Held, the writ petition is liable to be dismissed. (Paras 7 to 9)

(B) ODISHA STATE ELECTRICITY BOARD SERVICE (REHABILITATION ASSISTANCE) REGULATION, 1992 – CLAUSE – 9(5)

Petitioner sought appointment under the Rehabilitation Assistance Scheme on the ground of his father's permanent incapacitation – His father's normal date of superannuation was 30.04.1998 but he retired on 01.11.1993 as he became invalidated – Since the father of the petitioner retired from service within five years of his service preceeding the date of his normal superannuation, the petitioner is not eligible to be appointed under the Rehabilitation Assistance Scheme under the above Regulation.

(Paras 5, 6)

Case Laws Referred to :-

1. AIR 2006 SC 2743 : State of J. & K. & Ors. -V- Sajad Ahmed Mir

For Petitioner : Ms. Madhumita Panda
For Opp. Parties : Mr. Tapas Ranjan Mohanty

Date of Hearing : 11.05. 2016
Date of Judgment: 11.05.2016

JUDGMENT

DR. A.K. RATH, J.

By this writ petition, challenge is made to the letter dated 17.8.1994 issued by the Additional District Magistrate, Bhadrak to the Executive

Engineer, Jajpur Road Electrical Division, Jajpur Road, opposite party no.4, vide Annexure-3 and the letter dated 24.7.1995 of the Deputy Secretary-III, Orissa State Electricity Board, Bhubaneswar, vide Annexure-4 series, to the Executive Engineer, Jajpur Road Electrical Division, Jajpur Road rejecting the claim of the petitioner for appointment under the Rehabilitation Assistance Scheme. An ancillary prayer has been made to appoint the petitioner under Rehabilitation Assistance Scheme.

2. Bereft of unnecessary details the short facts of the case of the petitioner are that Gopal Chandra Behuria, father of the petitioner, was serving as a Peon in the office of the opposite party no.4. Since he was invalidated, he made an application for voluntary retirement on 2.1.1992. His case was referred to the C.D.M.O., Cuttack for medical examination. On 13.10.1993, the C.D.M.O. intimated his opinion. He had six years of service to his credit at the time of application. His application was forwarded by the opposite party no.4 on 16.11.1992. While the mater stood thus, he retired from services on 1.11.1993. It is further stated that the income of the petitioner was enquired into by the Additional District Magistrate. By order dated 17.8.1994 vide Annexure-3, the Additional District Magistrate erroneously referred back the matter indicating that the application was barred by limitation. Thereafter on 24.7.1995 vide Annexure-4, his case was rejected.

3. Pursuant to issuance of notice, counter affidavit has been filed by the opposite parties. The sum and substance of the case of the opposite parties is that in exercise of power conferred by Section 79(c) of the Electricity (Supply) Act, the Orissa State Electricity Board has framed a Regulation called Orissa State Electricity Board Service (Rehabilitation Assistance) Regulation, 1992. Clause (3) of the said Regulation provides that the assistance shall be extended to a member of the family of Board's employee who dies while in service or retires under the provisions of the Orissa Pension Rules, 1977 on the ground of permanent incapacitation. Further the Regulation 4 specifically states that the rehabilitation assistance is conceived as a compassionate measure of saving the family of the Board's employee from immediate distress when Board's employee suddenly dies or is permanently incapacitated. But such benefit cannot be claimed as matter of right. It is further stated that Sri Gopal Ch. Behuria, father of the present petitioner, filed the application for declaring him as permanently incapacitated on 26.6.1992. His date of retirement was 30.4.1998. By the time the petitioner's father filed the application to declare him as permanently

incapacitated, he had 5 years, 10 months, 4 days of service. He filed an application without furnishing the detailed particulars. Therefore, he was directed to produce the invalidation certificate. Vide letter No.14336 dated 13.10.93, the C.D.M.O., Cuttack declared that the petitioner's father had been permanently incapacitated. Therefore, the application which was filed on 26.6.92 was only acceptable on 13.10.93 when it was complete in all respects. The application filed for rehabilitation assistance was grossly barred by limitation as contained in the Regulation 9(5). Thus, the petitioner is not entitled to get a rehabilitation assistance appointment. It is further stated that during the pendency of the writ application the Orissa Electricity Reforms Act has come into existence; thereby the erstwhile Electricity Board has been ceased to exist and the Grid Corporation of Orissa has come into existence with effect from the said appointed date. With the commencement of the Grid Corporation of Orissa, by virtue of Notification published and issued on 29.3.96 the erstwhile Orissa State Electricity Board Service (Rehabilitation Assistance) Regulation, 1992 has been repealed by virtue of Orissa State Electricity Board Service (Rehabilitation Assistance) (Repealing) Regulation, 1996 has come into existence. By virtue of such operation of law now the benefits under the Rehabilitation Assistance Regulation cannot be extended to any person by such repealing provision and further the Board of Directors has taken a decision not to give any appointment to any of the employees under the Grid Corporation of Orissa Limited.

4. Heard Ms. M. Panda, learned counsel for the petitioner and Mr. T.R. Mohanty, learned counsel for the opposite party no.4.

5. Clause 9(5) of the Orissa State Electricity Board Service (Rehabilitation Assistance) Regulation, 1992 (hereinafter referred as "Regulation") provides thus:-

> "The family of a Board's employee who has sought for retirement on the ground of invalidness within the last 5 years of his service proceeding the date of his normal superannuation shall in no case be eligible for rehabilitation employment under these Regulations".

6. The date of retirement of the father of the petitioner was 30.4.1998, but he retired from services on 1.11.93. In view of the Clause 9(5) of the Regulation that since the father of the petitioner retired from services within five years of his service proceeding the date of his normal superannuation, the petitioner is not eligible to appoint under Rehabilitation Assistance Scheme.

7. This matter may be examined from another angle. At the time of filing of the writ petition in the year 1996, the petitioner was 22 years. After lapse of so many years, whether appointment can be made under the Rehabilitation Assistance Scheme.

8. An identical matter came for consideration before the apex Court in the case of *State of J. & K. and others vs. Sajad Ahmed Mir*, AIR 2006 SC 2743. In paragraph 11 of the report held thus:

"xxx xxx xxx

> Normally, an employment in Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed except where compelling circumstances demand, such as, death of sole bread earner and likelihood of the family suffering because of the setback. Once it is proved that in spite of death of bread earner, the family survived and substantial period is over, there is no necessity to say 'goodbye' to normal rule of appointment and to show favour to one at the cost of interests of several others ignoring the mandate of Article 14 of the Constitution." (emphasis laid)

9. In view of the discussions made in the preceding paragraphs, this Court is of the considered opinion that the writ petition, sans merit, deserves dismissal. Accordingly, the same is dismissed.

Writ petition dismissed.

2016 (II) ILR - CUT-138

DR. B.R.SARANGI, J.

W.P.(C) NO. 4548 OF 2008

THE EXECUTIVE ENGINEER, KENDRAPARA ELECTRICAL DIVISION NO. 1, CESU, KENDRAPARA ……..Petitioner

.Vrs.

GRIEVANCE REDRESSAL FORUM, PARADEEP & ANR. ……..Opp. Parties

O.E.R.C. DISTRIBUTION (CONDITIONS OF SUPPLY) CODE, 2004 –CLAUSE 80(2)

Classification of Consumer – O.P.No. 2-consumer availed power supply to his photo processing unit under Small Industry Tariff category on the basis of certificate issued by the DIC – As the non-domestic load exceeds 20% of the total connected load, he was called upon to execute agreement on General Purpose Tariff category – Instead of complying the same he approached G.R.F – G.R.F. directed for execution of agreement under Small Industry Tariff category and for revision of electricity bills – Hence the writ petition – Learned G.R.F failed to consider the classification of consumer under clause 80 (2) of the code as well as clause 80(8) wherein Small Industry Tariff has been defined as LT Industrial (s) Supply which provides that where supply of power is utilized for industrial purpose and for industrial production (as per tariff notification) with a contract demand below 22 KVA, the said unit comes under LT Industrial (s) Supply Category – Since no such industrial production is going on in the Shop of O.P.No.2-consumer it does not come under the purview of small industries/LT Industrial (s) Tariff category – O.P.No.2 has also failed to produce the certificate by DIC categorizing it under Small Industry Tariff category – Finding of the GRF that billing has to be made on the basis of "Small Industry Category" cannot sustain – Held, the impugned judgment passed by the GRF is quashed – O.P.No.2 has to be billed under the General Purpose Tariff basis instead of Small Industry Category basis.

(Paras 11,12)

For Petitioner : Mr. B.K.Nayak
For Opp. Parties : M/s.B.K.Sahoo, K.C.Sahoo, R.P.Bhagat
(for O.P.No.2)

Date of hearing : 19.02.2016
Date of judgment: 10.03.2016

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner-Executive Engineer, Kendrapara Electrical Division No.1, CESU, Kendrapara has filed this application seeking to quash the judgment dated 20.06.2007 passed by the learned Grievance Redressal Forum, Paradeep in C.C. Case No. GRF/KED-1/05/2007 in Annexure-7 and further seeking for a direction to opposite party no.2 to execute an agreement on 18 KW load under the General Purpose Tariff Category as defined under Clause 80 (2) of the O.E.R.C. Distribution (Conditions of Supply) Code, 2004.

2. The short fact of the case in hand is that opposite party no.2 is a business concern of which Sri Purna Chandra Panda was the proprietor located at Tarini Market Complex, Tinimuhani known as "Kranti Photo Processor" which is a entrepreneur having a small scale industries permanently registered under the District Industries Centre, Kendrapara. Opposite party no.2 applied for supply of power to his photo processing unit for a contract demand of 12 KW in the year 2001 and executed the agreement on 20.1.2001 and subsequently filed an application for enhancement of contract demand of 12 KW to 20 KW. After necessary verification, the agreement was executed on 27.6.2003 with contract demand of 20 KW and accordingly agreement was executed on 27.6.2003 and thereafter the bills have been prepared on the basis of Medium Industry Tariff. Thereafter opposite party no.2 submitted an application for reduction of the contract demand from 20 KW to 18 KW and such proposal was allowed after necessary approval and communicated to the opposite party no.2 on 29.3.2007. Opposite party no.2 was also intimated to deposit an additional security of Rs.26,556/- for reduction of contract demand of 20 KW to 18 KW within seven days and to execute a fresh agreement of contract demand of 18 KW. On verification of the premises, it was found that the total connected load used by the consumer is 17.273 or say 18 KW. On 18.4.2007 a reminder was sent to opposite party no.2 for deposit of the additional security and also for execution of a fresh agreement on 18 KW on G.P. Tariff basis as per Clause 80 of the O.E.R.C. Distribution (Conditions of Supply) Code, 2004. Pending execution of agreement and deposit of the additional security amount for the month of April 2007, opposite party no.2 was billed on G.P. Tariff basis as per Clause 80 of the O.E.R.C. Distribution (Conditions of Supply) Code, 2004. It is stated by opposite party no.2 that for demand of additional security though he has approached the authority, the same has not been considered. As his unit is a small industry, billing having been done on the basis of G.P. Tariff basis, the opposite party no.2 approached the Grievance Redressal Forum with a prayer that fresh agreement for 18 KW of contract demand may be executed on small industrial category and the bill may be issued in small industry category from 18 KW of contract demand w.e.f. the date of his application i.e. 31.8.2004 after adjusting the excess amount already paid. The petitioner filed objection before the GRF and stated that since the opposite party no.2 has reduced the contract demand from 20 KW to 18 KW, the unit has to be billed on G.P. Tariff basis as per Clause 80 O.E.R.C. Distribution (Conditions of Supply) Code, 2004. Therefore, the demand so raised is in conformity with the provisions of law read with

instruction issued vide letter dated 26.12.2003 regarding classification of implementation of tariff on different types of consumers. Therefore, no illegality has been committed by the petitioner. After due adjudication, the GRF without taking into consideration the provisions mentioned in the O.E.R.C. Distribution (Conditions of Supply) Code, 2004 has come to a finding that opposite party no.2 unit is a small industrial consumer with contract demand of 18 KW from April, 2007 onwards and necessary action shall be taken accordingly and directed for revision of electricity bills of opposite party no.2 for the period from April, 2007 onwards if it has been issued on G.P. Tariff basis/Commercial tariff to S.I. tariff vide impugned judgment in Annexure-9. Challenging the said judgment in Annexure-9, the petitioner has filed this application.

3. Mr. B.K. Nayak, learned counsel for the petitioner states that while considering the case of opposite party no.2 the learned GRF has not taken into consideration the provisions contained in O.E.R.C. Distribution (Conditions of Supply) Code, 2004 in proper perspective. Since the contract demand has been reduced to 20 KW to 18 KW, the billing has to be made on the basis of G.P. Tariff basis which has been done by the authority w.e.f. April, 2007 onwards and in absence of any materials produced before the authority to satisfy the claim that it should be billed on the basis of small scale industry, the order passed by the GRF in Annexure-9 is based on surmises and conjectures inasmuch as while passing such judgment clause 80 of the O.E.R.C. Distribution (Conditions of Supply) Code, 2004 with regard to classification of consumers has not been taken into consideration in proper perspective. Therefore, the judgment in Annexure-9 cannot sustain in the eye of law.

4. Mr. B.K. Sahoo, learned counsel for opposite party no.2 strenuously urged that the impugned judgment has been passed in due application of mind inasmuch as opposite party no.2 being registered as a small scale industry under the District Industry Centre, Kendrapara, it has to be billed on the basis of small scale industry category after reduction of contract demand from 20 KW to 18 KW and as such the judgment passed by the learned GRF in Annexure-9 is wholly and fully justified and the same should not be interfered with.

5. On the basis of the facts pleaded, it appears that opposite party no.2 initially entered into an agreement for a contract demand of 12 KW on 20.1.2001 in Annexure-1 and subsequently when opposite party no.2 sought for enhancement of contract demand of 12 KW to 20 KW, the same was

allowed and also a fresh agreement was executed on 27.6.2003 vide Annexure-2. Again opposite party no.2 sought for reduction of contract demand from 20 KW to 18 KW, which has also been considered and accordingly he has been communicated vide letter dated 29.3.2007 to deposit the additional security amount of Rs.26,566/- and execute a fresh agreement for contract demand of 18 KW within seven days vide Annexure-3. Opposite party no.2 premises was also duly inspected for the said purpose and on physical verification it was found that the connected load is 17.273 or say 18 KW. Accordingly, opposite party no.2 was intimated vide letter dated 18.4.2007 that his unit comes under the G.P. Tariff basis as per clause 80 of the O.E.R.C. Distribution (Conditions of Supply) Code, 2004 and he has been requested to deposit an amount of Rs.26,566/- towards additional security deposit and to execute a fresh agreement for contract demand of 18 KW on G.P. Tariff basis immediately vide Annexure-5. Having setting up of a photo processing unit, the unit has to be billed on the basis of G.P. Tariff basis and not on the basis of small industrial tariff basis. Therefore, now it is to be considered whether opposite party no.2 is to be charged on the basis of small industrial category basis or general tariff basis. As per paragraph-2 of the agreement, the consumer has to obtain and peruse a copy of the O.E.R.C. Distribution (Conditions of Supply) Code, 1998 and undertake to observe and abide by all the terms and conditions stipulated therein. The said code has been modified from time to time to the extent they are applicable and shall form part of the agreement. Paragraph-7 of the agreement provides that tariff and conditions of supply mentioned in the agreement shall be subject to any revision that may be made by the licensee from time to time.

6. In exercise of power conferred on it by Section 181 (2) (t) (v) (w) and (x) read with Part-VI of the Electricity Act, 2003, Orissa Electricity Reform Act, 1995 and all other powers enabling it in that behalf, the Orissa Electricity Regulatory Commission make regulations to govern distribution and supply of electricity and procedures thereof such as the system of billing, modality of payment of bills, the powers, functions and obligations of the distribution licensees and/or suppliers and the rights and obligations of consumers called "Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004". Chapter-VIII provides classification of consumers. Clause-80 of the Code, 2004 deals with classification of consumers.

7. Initially as per O.E.R.C. Distribution (Conditions of Supply) Code, 1998, Clause 80 (b) defined commercial consumers whereas clause-80 (g)

defined general purpose consumers and clause-(i) defined small industries consumers, to read as follows:

> "Clause-80(b) Commercial. This Category relates to supply of power to premises, which are used as office, business, commercial or other purposes not covered under any other category with a contract demand upto but excluding 110 KVA and where the non domestic load exceeds 10% of the total connected load.
>
> (g) General Purpose This category relates to supply of power for all general purposes comprising mixed load and with a contract demand of 110 KVA and above where the non domestic load exceeds 10% of the total connected load. (i) Small Industries This category relates to supply of power for industrial production purpose with a contract demand below 22 KVA where power is generally utilized as motive force."

8. Subsequently, Code 1998 underwent amendment and Code 2004 came into existence. Relevant provisions of the classification of the consumer as defined in Regulation 80 of the O.E.R.C. Distribution (Conditions of Supply) Code, 2004 is quoted below:

The relevant provision of the classification of the consumer as defined in Regulation 80 of the O.E.R.C. Distribution (Conditions of Supply) Code, 2004 is quoted below :- Clause -80(2) General Purpose This category relates to supply of power to premises which are used for office, business, general purpose and other purposes not covered under any other category where the non domestic load exceeds 20% of the total connected load. (8) L.T. Industrial (S) Supply This category relates to supply of power for industrial purpose with a contract demand below 22 KVA."

9. On perusal of the aforementioned provisions, it appears "commercial category" mentioned in clause-80 of the O.E.R.C. Distribution (Conditions of Supply) Code, 1998 is no more available in the Code 2004. The commercial category has been merged with general purpose tariff category under clause 80 (2) of the Code 2004. In tariff notification under the heading "Schedule of Charges for Retail Supply" in paragraph-5 "small industry tariff" has been notified which reads as follows:-

> "5. Small Industry This tariff rate shall be applicable to supply of power at a single point for industrial purposes with contract demand/ connected load upto but excluding 22 KVA where power is utilized as a motive force and supplied at LT. xxx xxx xxx"

10. The Chief Executive Officer in its communication dated 26.12.2003 in Annexure-6 issued clarification regarding implementation of tariff on different types of consumers so far it relates to small industrial tariff, which reads as follows:-

> "xxxx It is therefore clarified that S.I. Tariff is made available to consumers having contract demand below 22 KVA where power is used generally as a motive force for industrial production and supplied at LT as per aforesaid tariff notification and O.E.R.C. Distribution (Conditions of Supply) Code. Similarly in case of commercial consumers, who can avail power below 110 KVA, utilized power at single point at LT/HT supplied for commercial, business, office and other purposes, not covered under any other category."

11. This being the provisions of law governing the field, it will apply to the present context. It appears that opposite party no.2-consumer is availing power supply to his shop for commercial and business purpose at L.T. supply and since the non-domestic load exceeds 20% of the total connected load, opposite party no.2 has been called upon to execute the agreement on general purpose tariff category and to deposit the additional security amount. But instead of complying the same, opposite party no.2 approached the GRF. On the basis of the undisputed facts available on record and the law governing the field, instead of taking into consideration the same, the GRF has observed that the consumer is using electrical power to the extent of 15.091 KW as per the tariff notification of small industry category and the said tariff shall be applicable to supply of power at single point for industrial production purpose with contract demand/connected load upto but excluding 22 KVA. Therefore, he came to a conclusion that opposite party no.2 comes under the small industry tariff category and directed for execution of agreement on contract demand of 18 KW from April 2007 onwards under the small industry tariff category and for revision of electricity bills w.e.f April, 2007 onwards and such finding has been arrived at by the GRF without taking into consideration clause 80 of the O.E.R.C. Distribution (Conditions of Supply) Code, 2004 wherein classification of consumers has been made. Though opposite party no.2 was issued to execute the agreement under the general purpose tariff category, the learned GRF without taking into consideration the classification of consumer as defined in Clause 80 (2) of the Code has come to an erroneous finding and more so it has lost sight of the provisions contained in clause 80 (8) of the Code, 2004 in which small industry tariff

has been defined as LT Industrial (S) Supply which provides that where supply of power is utilized for industrial purpose and for industrial production (as per tariff notification) with a contract demand below 22 KVA, the said unit comes under the LT Industrial (S) Supply category. If this classification will be taken into consideration so far opposite party no.2 unit is concerned, no such industrial production is going on in the shop and as such it does not come under the purview of small industries/LT Industrial (S) tariff category. The consumer was charged under the small industry tariff category on the basis of certificate issued by the District Industry centre but at the time of hearing when learned counsel for the opposite party no.2 was called upon to produce the certificate, he could not be able to produce the same. In any case as per the provisions of Section 65 of the Electricity Act, 2003, opposite party no.2 is entitled to come under the categorization of small industry as per the classification made by the District Industries Centre provided the State Government grants subsidy for the loss caused to the Distribution Company and deposits the required shortfall before the O.E.R.C. and as such no certificate has been extended by the District Industries Centre to categorize opposite party no.2 under the small industry tariff category. It appears from the verification report in Annexure-4 that the total utilized load of the opposite party no.2 unit is used for non domestic purpose and not for industrial purpose, therefore opposite party no.2 comes under the general purpose tariff category. But the GRF has not considered the above mentioned facts and law governing the field in proper perspective.

12. In that view of the matter, this Court is of the considered view that the GRF having lost sight of the provisions and the law enshrined under Code, 2004 and having come to an erroneous finding that the billing has to be made on the basis of "small industry category" cannot sustain in the eye of law. Accordingly, the judgment dated 20.06.2007 passed by the GRF in C.C. Case No. GRF/KED-1/05/2007 in Annexure-9 is hereby quashed and the opposite party no.2 has to be billed under the General Purpose Tariff basis instead of Small Industry Category which is in consonance with the provisions contained in Clause 80 (2) of the O.E.R.C.Distribution (Conditions of Supply) Code, 2004.

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

Writ petition allowed.

2016 (II) ILR - CUT-146

DR. B.R.SARANGI, J.

W.P.(C) NO. 8922 OF 2015

EXE. ENGINEER (ELECTRICAL) WESCO, SAMBALPUR ELECTRICAL DIVISION ……..Petitioner

.Vrs.

M/S. MAA TARA RICE INDUSTRIES PVT.LTD. ……Opp. Party

ELECTRICITY – Subsequent consumer who purchased the property in an auction U/s. 29 of the OSFC Act, is not liable to pay the past arrears of the previous consumer, as a condition precedent for supply of electric energy, when procedure is envisaged under the Act and the Code for recovery of the amount from the previous consumer – GRF has not committed any illegality for interference by this Court – Writ petition dismissed. (Paras 13,14,15)

Case Laws Referred to :-

1. AIR 1996 SC 1759 : Union Territory, Chandigarh Admn. & Ors. -V- Managing Society,Goswami, GDSDC.
2. AIR 2003 131 : Sunil Rajgarhia -V- Orissa State Financial Corporation & Anr.
3. AIR 2004 SC 2171 : Ahmedabad Electricity Co.Ltd. -V- Gujarat Inn Pvt. Ltd. & Ors.
4. AIR 2004 SC 2615 : Indian Banks' Association, Bombay & Ors. -V- M/s. Devkala Consultancy Service & Ors.

For Petitioner : M/s. P.K.Tripathy, S.Patnaik & B.P.Dhal

For Opp. Party : M/s. F.R.Mohapatra, M.K.Panda & R.K.Nayak

Date of hearing : 12.11.2015

Date of judgment : 01.12.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is the supplier of electricity has filed this application to quash the order dated 05.02.2015 passed by the Grievance Redressal Forum, Burla in GRF Case No.169/2014 under Annexure-10 on the ground that the same is contrary to the conditions stipulated in the agreement and Orissa Electricity Regulatory Commission Distribution (Condition of Supply) Code-2004 (in short hereinafter referred to as 'Code-2004) which has been amended by notification dated 18.08.2010 vide

Annexure-1. He further seeks for a declaration that the consumer-opposite party is liable to pay the arrears and liability of erstwhile owner/consumer/occupier of the premises which are recoverable from him in view of amended provision of Code-2004.

2. The factual matarix of the case in hand is that initially the power supply was provided to erstwhile consumer M/s.Jagannath Rice Industries which was under the medium category having consumer No.MI/BRL/080. On the basis of the inventory report dated 16.12.1997 provisional assessment was made on 06.10.1998 imposing penalty of Rs.5,05,816/- against the said consumer. Besides the said provisional penal amount, an arrear monthly electricity bill of Rs.3,94,816 was also pending against the said unit. Challenging the order of provisional assessment dated 06.10.1998, the erstwhile Rice Mill filed a Consumer Dispute Case No.219 of 1998 before the learned District Consumer Dispute Redressal Forum, Sambalpur who vide order dated 03.05.1999 disposed of the same stating that there was no deficiency of service on the part of the supplier and observed that the consumer will pay the outstanding dues on installment basis. Against the said order, the consumer preferred appeal before the State Consumer Dispute Redressal Commission, Cuttack in C.D. Appeal No.402/1999. During pendency of the appeal, the unit was seized under Section 29 of State Financial Corporation Act, 1951 and the same was put to auction for sale and sale was confirmed against M/s. Maa Tara Rice Industries Pvt. Ltd.-the present opposite party herein. Accordingly, the consumer-opposite party took over possession of the unit on 01.12.2000. On the basis of the application submitted by the consumer-opposite party, the Executive Engineer (Electrical) sought for permission from the Superintending Engineer on 04.12.2000 for restoration of power supply and accordingly permission was granted on the very same date for supply of power of 92 KW (MI) with a further request to the opposite party to deposit an amount of Rs.1.75 lakh towards arrear energy charges and Rs.71,539/- towards fresh security and execute an agreement. It is further intimated to the consumer-opposite party to clear up all the liabilities of the erstwhile consumer. In compliance with the same, opposite party acted upon the communication made in letter No.7783 (5) dated 04.12.2000 and paid an amount of Rs.1,75,000/- out of total monthly arrear dues of erstwhile consumer of Rs.3,94,816 without any objection and the penal bill of Rs.5,05,816/- was left open awaiting the decision of learned State Consumer Disputes Redressal Commission, Cuttack in C.D. Appeal No.402/1999. The consumer-opposite party also executed the agreement on 05.12.2000. The arrear which was lying

outstanding against the previous consumer was indicated in the bill of opposite party. C.D. Appeal No.402/1999 filed by the erstwhile consumer was heard on 01.12.2011 and the learned State Consumer Disputes Redressal Commission, Cuttack confirmed the order passed by the District Consumer Disputes Redressal Forum, Sambalpur. The consumer-opposite party applied for enhancement of load from 112.16 KVA to 140 KVA and accordingly, permission was accorded to that effect on 26.05.2014, but before execution of agreement for the said enhanced load, since the appeal preferred by the erstwhile consumer was dismissed, a demand-cum-disconnection notice was issued on 12.08.2014. Against the said demand, the consumer-opposite party filed a complaint case before the learned Grievance Redressal Forum on 05.09.2014 which was registered as GRF Case No.169/2014. Learned GRF allowed the claim of the consumer-opposite party stating that the consumer-opposite party is an auction purchaser from Orissa State Financial Corporation prior to amendment of 13(10)(b) of Code-2004, therefore, he is not liable to clear the arrears incurred by the previous consumer and accordingly, directed to grant enhancement of load which is subject matter of challenge before this Court in the present application.

3. Mr. P.K. Tripathy, learned counsel for the petitioner submits that consumer-opposite party is bound by Clause-9 of the agreement dated 05.12.2000 executed between the parties under Annexure-4. He further submits that against the order of disconnection notice dated 12.08.2014 in Annexure-6 series, the consumer-opposite party filed a complaint case bearing GRF Case No.169/2014. Before that date there is an amendment to the Orissa Electricity Regulatory Commission Distribution (Condition of Supply) Code, 2004 by virtue of notification dated 18.08.2010 published in the official Gazette dated 12.10.2010 by which Regulation 13(10)(b) has been omitted, as such Regulation in question being a statutory one and amendment is prospective in nature, the consumer-opposite party is guided by the said Clause of the Code-2004. More so, as per Clause-9 of the agreement, the opposite party having agreed to pay the arrear outstanding of the previous consumer, the GRF is not justified to hold that the consumer-opposite party is not liable to clear the arrear dues incurred by the previous owner. Therefore, the petitioner seeks for interference of this Court. To substantiate his case, he has relied upon ***Isha Marbles v. Bihar State Electricity Board and another***, (1995 2 SCC 648.

4. Per contra, Mr. F.R. Mohapatra, learned counsel for the consumer-opposite party though admits the fact that the consumer is bound by Clause-9

of the agreement dated 05.12.2000 executed between the parties, he submits that the conditions stipulated in the agreement cannot override the statutory provisions, more particularly, the provisions contained in Indian Electricity Act, 2003 read with Code-2004. In exercise of power conferred under Section 181 of the Indian Electricity Act, 2003, the Code-2004 which was published clearly stipulates that an auction purchaser is not liable to pay the arrear dues of the previous consumer as per Regulation 13(10)(b) of the Code-2004. After execution of the agreement between the parties, subsequently Clause-9 of the agreement was incorporated under Annexure-4. Therefore, the consumer-opposite party is not liable to pay the liability of the previous owner and as such incorporation of Clause-9 of the agreement by committing fraud cannot sustain in the eye of law. Accordingly, the opposite party seeks for dismissal of this writ petition. To substantiate his contention, learned counsel for the consumer-opposite party has relied upon ***Union Territory, Chandigarh Admn. And others v. Managing Society, Goswami, GDSDC***, AIR 1996 SC 1759, ***Sunil Rajgarhia v. Orissa State Financial Corporation and antoher***, AIR 2003 Orissa 131, ***Ahmedabad Electricity Co. Ltd v. Gujarat Inn Pvt. Ltd and others***, AIR 2004 SC 2171, ***Indian Banks' Association, Bombay and others v. M/s. Devkala Consultancy Service and others***, AIR 2004 SC 2615.

6. On the basis of the facts pleaded above, it is to be examined as to whether the consumer-opposite party being a subsequent purchaser pursuant to auction conducted by the OSFC is liable to pay the liability of the previous owner or not.

The admitted fact is that the consumer-opposite party has purchased the property pursuant to auction sale held by the OSFC when the previous-consumer had some liability towards electricity and the matter was subjudiced before the State Consumer Disputes Redressal Commission in C.D. Appeal No.402/1999. By virtue of dismissal of the appeal preferred by the previous consumer, a demand has been made by the petitioner along with disconnection notice to pay the arrear dues in terms of Clause-9 of the agreement dated 05.12.2000 executed by the parties. Clause-9 is quoted below:

> "This agreement on and from date of operation supersedes the earlier agreement executed between the supplier and the consumer M/s. Jagannath Rice Industries, Sansinagar, P.O.A-Katapali, Dist-Sambalpur on dated 25.11.19993 for the purpose of power supply to the same premises and for the same purpose.

> Provided, that all arrears and liabilities under the old and/or superseded Agreement above shall be treated as arrears and liabilities under the present agreement".

7. On perusal of the agreement under Annexure-4, it appears that the consumer has been called upon to execute the agreement for availing of the power supply. The same being a standard form, the petitioner has put his signature to abide by the conditions stipulated therein. But, it reveals that Clause-9 having been typed out separately and incorporated in the agreement itself though in the standard form, clause-9 deals with stamp duty. Therefore, incorporation of Clause-9 in the agreement directing that the opposite party has to bear the liability of the previous consumer creates doubt with regard to the conduct of the petitioner who might have done so by using external pressure. In any case, the incorporation of Clause-9 which has been typed out and inserted into the standard form to which both the parties are the signatories of the same whether the same has been done by using external pressure or coercion, this Court expresses no opinion at this point of time as the same has not been challenged at any point of time. This question can only be considered by an appropriate forum, if the consumer so likes.

8. By the time the petitioner executed the agreement on 05.12.2000 in exercise of power conferred by Sub-Section (2) of Section 9 and Section 54 of the Orissa Electricity Reforms Act, 1995 and all other powers enabling it on that behalf, the Orissa Electricity Regulatory Commission framed regulations to govern distribution and supply of electricity and procedures thereof such as the system of billing, modality of payment of bills, powers, functions and obligations of the suppliers and the rights and obligations of consumers and matters connected therewith and incidental thereto. Regulations-10 and 14 of Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 1998 (in short hereinafter referred to as "Code-1998") are quoted below.

> 10. If the applicant in respect of an earlier agreement executed in his name or in the name of his spouse or in the name of his spouse or in the name of a firm or company with which he was associated either as a partner, director or managing director, is in arrears of electricity dues or other dues for the same premises payable to the licensee, the application for supply shall not be allowed by the engineer until the arrears are paid in full.

> 14. **Licensee's Obligation to Supply** – (1) The supply of power shall be made, if it is available in the system, technically feasible and remunerative as per the norms fixed by the licensee with the approval of the Commission and the applicant enters into an agreement in the Standard Agreement Form (Form No. 1) or Form of Requisition (Form No. 2) under Regulation 15 accepting the terms relating to tariff and other conditions of supply of the licensee.
>
> (2) In case the scheme of supply is not remunerative as above, the applicant shall be required to bear the portion of charges to make the scheme remunerative.
>
> (3) No additional power shall be supplied by licensee unless all arrear charges for the existing power supply have either been paid in full or paid in accordance with an installment facility granted by the licensee for unconditionally paying the arrears within the stipulated time.

9. In view of the dismissal of the appeal preferred by the previous consumer, the same is binding on the present consumer-opposite party in terms of the Regulation-10 read with Regulation 14(3) of the Code-1998. As such in compliance with the conditions of the Clause-9 of the agreement, the petitioner has paid the 50% of the demand of Rs.1,75,000/- for getting power supply to the premises subject to pending adjudication of the demand by the C.D. Appeal No.402/2000 by the State Consumer Disputes Redressal Commission. The said appeal was dismissed by the State Consumer Disputes Redressal Commission. The liability of the previous owner has to be borne out by the present consumer-opposite party, the subsequent purchaser of the premises in question in terms of Regulation-10 read with 14(3) of the Code-1998. Subsequently, the Code-1998 has been replaced by OERC Supply Code 2004. Clause 13(10) (b) states as follows:

> "Provided that this shall not be applicable when the ownership of the premises is transferred under the provisions of the State Financial Corporation Act".

10. The provisions contained in Regulation 13(10(b) of the Code-2004 reads as follows:

> "The service connection from the name of a person to the name of another consumer shall not be transferred unless the arrear charges pending against the previous occupier are cleared.

Provided that this shall not be applicable when the ownership of the premises is transferred under the provisions of the State Financial Corporation Act".

The proviso to Regulation 13(10)(b) has been omitted pursuant to notification dated 18.08.2010 which has been published in official Gazette on 12.10.2010.

11. Admittedly the consumer-opposite party has purchased the property pursuant to auction sale held by the Orissa State Financial Corporation under the provisions of State Financial Act, 1951.

12. By virtue of amendment made to Code-2004, proviso to Regulation 13(10)(b) has been omitted by virtue of notification issued under Annexure-1 which has got prospective application. It appears that the consumer-opposite party has purchased the property in question and took over the possession on 01.12.2000. Where the premises come to be owned or occupied by the auction purchaser and such purchaser seeks supply of electric energy, he cannot be called upon to clear the past arrears as a condition precedent to supply. There is no charge over the property. What matters is the contract entered into by the erstwhile consumer with the supplier. Therefore, the supplier cannot seek the enforcement of contractual liability against the third party. Consequentially the supplier cannot make the auction purchaser liable. It is true that it was the same premises to which reconnection is to be given. Otherwise, with the change of every ownership new connections have to be issued does not appear to be the correct line of approach as such a situation is brought about by the inaction of the supplier in not recovering the arrears as and when they fall due or not providing itself by adequate deposits. In the present case what the Corporation sought to recover under Section 29 of the State Financial Corporation Act were the loans advanced by enforcement of a mortgage. Such sale cannot affect the right of the supplier to recover its dues. The failure of the supplier to recover the dues as and when such dues arose, is a point to be put against it.

13. Electricity is public property. Law, in its majesty, benignly protects public property and behoves everyone to respect public property. Hence, the courts must be zealous in this regard. But, the law, as it stands, is inadequate to enforce the liability of the previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. Section 24 of the Indian Electricity Act, 1910 relieves licensee/supplier of its obligation is under Section 22 to supply energy if the

consumer has not paid to it the charges for electricity supplied or where the consumer neglects to pay the same. Section 24 will come into play when the consumer neglects to pay any charge due to a licensee or the consumer neglects to pay sums other than a charge for energy due from him to the licensee. Section 24 of the Indian Electricity Act, 1910 is not the only remedy available for recovery, but the general remedy to file a suit is always available to the supplier for recovery of the said amount. In any case, the apex Court in ***Isha Marbles*** (supra) has laid down a broader principle stating that an auction purchaser cannot be made to pay the liability of the previous contracting party for supply of the electricity when the premises come to be owned or occupied by the auction purchaser and such purchaser seeks supply of electric energy, he cannot be called upon to clear the past arrears as a condition precedent to supply.

14. The apex Court in ***Ahmedabad Electricity Co. Ltd***. (supra) and this Court in ***Sunil Rajgarhia*** (supra) have also taken similar view.

Therefore, when a procedure is envisaged under the Act and Code for recovery of the amount from the previous consumer, this cannot be enforced against the 3rd party for recovery of the dues of previous consumer from the subsequent consumer like that of the opposite party who has purchased the property in an auction purchase under Section 29 of OSFC Act.

15. The apex Court in ***Indian Banks' Association*** (supra) has categorically held that while purporting to exercise their jurisdiction under a statute they were required to act in terms thereof and not in derogation thereto.

16. In view of the aforesaid facts and circumstances and law discussed above, this Court is of the considered view that the Grievance Redressal Forum has not committed any illegality or irregularities in holding that the consumer-opposite party who is the auction purchaser from State Financial Corporation is not liable to clear the arrears of the previous consumer. Accordingly, the writ petition filed by the supplier merits no consideration and the same is dismissed. No order to cost.

Writ petition dismissed.

2016 (II) ILR - CUT-154

D. DASH, J.

R.S.A. NO. 459 OF 2015

NARAYAN PRADHAN & ORS. …….Appellants

.Vrs.

DHRUBA CHARAN PRADHAN & ORS. ……..Respondents

CIVIL PROCEDURE CODE, 1908 – O-9, R-13 (Explanation)

Exparte decree – Remedy for defendant – Objective behind insertion of the "Explanation" – Appeal preferred against exparte-decree disposed of on the ground, other than the ground of withdrawal of the appeal – Application under Order 9, Rule 13 C.P.C. to set aside the exparte decree not maintainable. (Paras 6,7)

For Appellants : M/s. Ajit Ku. Choudhury, K.K.Das & P.R.Routray

For Respondents : M/s. A.R.Dash, S.K.Nanda-1, B.Mohapatra and B.K.Mishra

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Date of hearing : 04.03.2016

Date of judgment: 06.04.2016

JUDGMENT

D. DASH, J.

1. This appeal has been filed calling in question the order dated 10.9.2012 passed by the learned Addl. District Judge, Jagatsinghpur in RFA No. 28 of 2010.

2. Facts necessary for disposal of this appeal are that the respondent no.1 as the plaintiff had filed the suit i.e. Title Suit No. 115 of 2002 for partition. The suit having been preliminary decreed entitling the plaintiff with the land measuring Ac.0.18 decimals from out of the suit land, these appellants filed an application under Order 9 Rule 13 of the Cr.P.C. for setting aside the said ex parte judgment and preliminary decree passed against them which came to be registered as CMA No. 36 of 2008. The trial court came to a conclusion that the suit has been disposed of on contest against the defendants with cost and thus holding the petition under Order 9 Rule 13 of Code to be not maintainable, the same was dismissed.

This order of dismissal was passed on 15.4.2010. The appellants then filed an appeal against the judgment and decree passed in the suit along with an application under Section 5 read with Section 14 of the Limitation Act. The same came to be heard by the learned Addl. District Judge,

Jagatsinghpur. When the matter came up for consideration of that application under Section 5 read with 14 of the Limitation Act, the lower appellate court straightway in view of the explanation to Order 9 Rule 13 of the Code went on to hold the appeal as not maintainable and therefore did not feel it proper to decide the fate of the application under Section 5 read with Section 14 of the Limitation Act on merit.

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

"Whether the lower appellate court has erred in law by holding that since the appellants have availed remedy under Order 9 Rule 13 of the Code of Civil Procedure, the appeal against ex parte decree is not maintainable:"

4. Heard the learned counsel or the parties.

Perused the order impugned in this appeal.

5. The explanation to Order 9 Rule 13 of the Code added by the Code of Civil Procedure (Amendment) Act, 1976 which came into force w.e.f 1.2.1977, reads as under:-

xxx	xxx	xxx	xxx
xxx	xxx	xxx	xxx

"Explanation-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

In the case of Shyam Sundar Sarma-v-Pannalal Jiswal and others; AIR 2005 SC 226, it has been held that when the appeal filed prior to the filing of application under Order 9 R.13 of the Code and it has been dismissed may be as time bared, the explanation to Order 9 R.13 of the Code applies as even the dismissal of the appeal for default or as time barred which are never the less decisions in appeal and those cannot be equated with the withdrawal of the appeal as excepted under the explanation to Order 9 Rule 13 of the Code.

6. It is submitted by the learned counsel for the appellants that on the date, the petition under Order 9 Rule 13 of the Code was filed, no appeal against the decree being filed, such was not on the board; thus the bar created by the above explanation has no application to the case, since it is only provided that a petition under Order 9 Rule 13 of the Code would not be entertained only in a case where the *ex parte* decree was already subjected to an appeal. In the case in hand, after dismissal of the application under Order

9 Rule 13 of the Code of Civil Procedure, the appeal has been filed. The very purpose and objective behind the insertion of the Explanation is that it is to obviate the situation that where an *ex parte* decree being passed and it having been called in question in appeal and that appeal having been disposed of on merit or even otherwise except being withdrawn which obviously means that the appellant did so intending not to invoke the appellate jurisdiction when brings a merger of the decree of trial court in that of the appellate court, the trial court would have no further jurisdiction to set aside the *ex parte* decree passed by it, the same having lost its independent identity having merged with the decree of the appellate court. In other words the explanation is thus to obviate the situation that in that event, it would amount to sit over the decree of the superior court which is not permissible.

7. A bare reading of the last paragraph of the order of the lower appellate court clearly goes to show that the bar created by Explanation to Order 9 Rule 13 of the Code though not stand in the way of the appeal filed before, it has been erroneously so applied in holding the appeal in hand filed later to be not maintainable. The above referred decision cited therein, has not even been read with its fact situation though just so mentioned in the order for that sake of loading the order to give such an idea to its readers. At this juncture, it gives me the pain to state that the learned Additional District Judge as is seen has disposed of the appeal by throwing the provisions of law to winds. He has not even taken the slightest pain of going through the decision of the Apex Court very much cited before it or even giving a reading to the bare provision of law. A bare reading of the order exposes the understanding of law much less to say their application to the factual setting of the case which no doubt reveals a sorry state.

In that view of the matter, the order dated 10.9.2012 is held unsustainable in the eye of law and thus is liable to be set aside.

8. Resultantly, the appeal stands allowed as above and in the facts and circumstances without cost. The impugned order being set aside, the appeal is now remitted to the lower appellate court to first consider the petition under Section 5 read with Section 14 of the Limitation Act for condonation of delay in filing the appeal on its own merit and dispose of the same in accordance with law so as to accordingly proceed further in the matter. Viewing the age of litigation, in order to arrest the delay, the parties are directed to appear before the lower appellate court on 25.04.2016 to receive further instruction in the matter and enable the lower appellate court to proceed with the matter as above with expediency.

It now be clarified that whatever have been discussed and expressed herein above should not be taken as any expression on the merit of the issue standing for decision by the lower appellate court and those remain confined only for the purpose of demonstrating as to how the impugned order is unsustainable in law.

Registry is directed to forward copy of this order to all the District Judges of the State for onward circulation of the same among all the Judicial Officers in their respective judgeship for reference. A copy of the order be also sent to the concerned Judicial Officer who had passed the impugned order in order to bring it to his notice and for future reference.

Appeal allowed.

2016 (II) ILR - CUT-157

BISWANATH RATH, J.

C.M.P. NO. 1574 OF 2015

PRAHALLAD SRICHANDAN @ HULAS SRICHANDAN ……..Petitioner

.Vrs.

SIBA SWASTIK SRICHANDAN & ORS. ……..Opp. Parties

EVIDENCE ACT, 1872 – S.118 r/w O-16, R-21, C.P.C.

Witness – Examination of – A party has the right to summon its adversary as witness.

In this case O.P.No.1-Plaintiff filed the suit being represented through power of attorney holder – Petitioner-defendant No.1 filed a petition to call plaintiff as a witness on behalf of the defendants – Application rejected – Hence this C.M.P. – This court finds from rival pleadings that it is not a case where power of attorney holder has rendered some acts in pursuance of power of attorney – Since there is a straight contest between the plaintiff and defendants with serious allegations by the defendants in their written statement, there may not be effective adjudication of the suit in the absence of the evidence of the plaintiff himself – Reasons assigned by the trial court in rejecting the application of the defendant No. 1 is improper – Held, the impugned order is set aside – Application of defendant No. 1 summoning the plaintiff himself to stand as a witness on behalf of the defendants is allowed. (Paras 8,9,10)

Case Laws Referred to :-

1. AIR 2001 Madras-410 : V.K.Periasamy alias Perianna Gounder –vrs- Rajan
2. AIR 2003 Orissa-209 : Braja Mohan Patra -V- Ananta Charan Patra & Ors.
3. (2008)4 SCC 451 : B.K.Maniraju –vrs- State of Karnataka
4. (2005) 2 SCC 217 : Vashdeo Bhojwani and another-vrs-Indusind Bank Ltd. & Ors.
5. AIR 1993 Patna-122 : Awadh Kishore Singh-vrs-Brij Bihari Singh.
6. AIR 2003 Orissa-209 : Braja Mohan Patra -V- Ananta Charan Patra & Ors.

For Petitioner : M/s. N.P.Parija, S.K.Rout, A.K.Mohant & S.Parija
For Opp. Parties : M/s. Gautam Mishra, D.K.Patra, A.S.Behera, A.Dash & J.Biswal

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Date of Hearing :12.05.2016
Date of Judgment: 21.6.2016

JUDGMENT

BISWANATH RATH, J.

This Civil Miscellaneous Petition arises against an order dated 01.10.2015 passed by the Civil Judge (Senior Division), Puri in C.S. No. 15/103 of 2012/2015, thereby rejecting an application at the instance of the petitioner (defendant No.1 in the trial court) to call the Opp. party No.1 (plaintiff in the trial court) to the dock for appearing as an witness on behalf of the defendants.

2. Short factual back ground involved in the case is that C.S. No. 15/103 of 2012/2015 was instituted by the plaintiff being represented through Power of Attorney Holder-Baidyanath Srichandan seeking a decree for permanent injunction against the defendants, not to enter upon the suit land, not to create disturbance in the possession of the plaintiff and not to change the nature and character of the land, further a decree for confirmation of possession with an alternative prayer in the event the plaintiff is found dispossessed during pendency of the suit, for passing a decree of mandatory injunction directing the defendants to deliver the possession of the land to the plaintiff within a stipulated period and for any other relief as deem fit and proper with an award of cost.

3. Short back ground involved in the case at hand is that opposite party no.1 through his power of attorney claimed that considering the fact that he became handicapped for his suffering in a road accident, his grand-father at

his free will executed a Will on 21.8.2001 and by handing over the same, the grandfather permitted the opposite party no.1 to take possession and enjoy usufructs of the land involved therein and as such the opposite party no.1 took over the possession of the suit properties since 06.3.2002. The opposite party no.1 on attaining majority instituted a Probate Case registered as Test Case No.23 of 2007, converted to C.S.No.04 of 2009 for contest of present petitioner along with other defendants in the court below on transfer, subsequently, registered as C.S.No.125/04 of 2010/2009 and finally disposed of on 30.6.2010. Other properties of opposite party no.1's grandfather were shared between the coparceners. Petitioner got his share as adopted son of late Bansidhar Srichandan, defendant No.2 in the court below got his share as son of Debaraj Srichandan. Both of them joining together along with defendant Nos.3 to 14 attempted to harass the opposite party no.1 in respect of suit property and gave threatening to the father of the opposite party no.1 on 25.11.2011, resulting the present suit for protection of his right over the suit property. On the other hand defendant Nos.1 (the present petitioner) to 8 in a joint written statement while disputing the claim of the opposite party no.1 specifically alleged that suit property is ancestral property of both parties. The suit has been filed collusively by father and son keeping away the relevant co-sharers. Fact that the opposite party no.1 is handicapped is not correct. There is no voluntary execution of the Will. Fraud has been practiced in managing the so called Will. Will was also not the last Will of the testator. Will also is an outcome of fraud. When the Probate Proceeding was contested, both opposite party no.1 and his father gave assurance to all such parties to see for their legitimate share. The decree obtained in the Probate proceeding is still under adjudication of the trial court and the opposite party no.1 cannot claim his exclusive possession over the disputed property.

4. Admitted position between the parties is that following filing of written statement and completion of pleading, the Power of Attorney Holder stood as a witness on behalf of the plaintiff/opposite party no.1 and his examination-in-chief as well as cross-examination has already been closed. It is at this stage, the defendant No.1/petitioner filed a petition praying to summon the plaintiff/ opposite party no.1 to stand as an witness on behalf of the defendants. This petition was objected by the Power of Attorney Holder of opposite party no.1 on the premises that the defendants have to stand on their own leg. Plaintiff has satisfied his case upon examining the Power of Attorney Holder, representing him. The defendants are yet to lead their evidence, consequently claimed that the application so filed is premature as well as misconceived.

5. Considering the rival contentions of the parties, learned trial court rejected the application at the instance of the petitioner by the impugned order.

6. In assailing the impugned order, Mr.Parija, learned Senior counsel appearing for the petitioner contended that in view of specific allegation at the instance of the defendants including present petitioner that the Power of Attorney Holder has been examined without taking permission from the plaintiff, the defendants have a chance to prove their such allegation and such allegation can not be established or proved unless the opposite party no.1 himself comes to dock as a witness. Further there is deliberate avoidance by the opposite party no.1 to come as a witness in order to avoid some critical questions involved in the dispute.

Referring to some of the averments in the plaint as well as in the written statement, Mr.Parija, learned Senior counsel appearing for the petitioner contended that in view of the allegations and counter allegations specifically contained in the plaint as well as in the written statement, there may not be an effective adjudication in absence of examination of the opposite party no.1 himself. Mr.Parija further contended that the trial court having not taken into account the above fact in to consideration, the impugned order suffers and since the defendants will be prejudiced by not getting a fair chance of evidence, this Court should interfere in the impugned order and should allow their application. In support of his such contention, Mr.Parija, learned counsel for the petitioner relying upon two decisions of the High Court in the case of ***V.K.Periasamy alias Perianna Gounder –vrs- Rajan***, reported in ***AIR 2001 Madras-410*** and in the case of ***Braja Mohan Patra –vrs- Ananta Charan Patra and others***, reported in ***AIR 2003 Orissa-209*** submitted that his claim has been well covered by these two decisions and this Court in interfering with the impugned order, should allow their application directing the opposite party no.1 to be present personally in the court below for deposing on behalf of the defendants.

7. On the other hand, in opposition, Mr.Gautam Mishra, learned counsel appearing for the Opp.party No.1 (plaintiff) contended that defendants can not force the plaintiff to stand as an witness on their behalf and the attempt of the defendants is only to linger the conclusion of trial. That apart, Mr.Mishra also contended that it is the duty of the defendants to prove their case by resorting to appropriate evidence and they cannot force the plaintiff to stand as an witness on their behalf. Mr.Mishra, in support of his such contention, in order to establish his case, cited a decision vide a case in between

B.K.Maniraju –vrs- State of Karnataka, reported in ***(2008)4 SCC 451*** particularly referring to paragraph-24 of the said judgment contended that none is available to correct mere errors of fact or of law unless the error is manifest and apparent on the face of record, a grave injustice or gross failure of justice has occasioned thereby. Referring to the case in between ***Janki Vashdeo Bhojwani and another-vrs-Indusind Bank Ltd. and Others***, reported in ***(2005) 2 SCC 217*** referring to Paragraph-13 of the judgment submitted that the petitioner has no case in view of the principle laid down therein.

8. Perused the petition filed at the instance of defendant No.1 seeking direction of the trial court to summon the plaintiff himself to stand as an witness on behalf of the defendants. On perusal of the petition, this Court finds the following pleadings at paragraph Nos.2 and 3, which reads as follows:

"Para-2. That in the power of Attorney it has been reflected that Siba Swastik Srichandan, s/o-Baidyanath Srichandan. That in order to grab the suit property which was /is belonging to Bhagirathi Srichandan the alleged father of the plaintiff has able to procure a false will by practicing fraud as so also giving false impression to compromise the matter between the parties and subsequently without intimating the real truth the defendant has been able to obtain an exparte order i.e. in the Probate Proceeding that for which the said matter under subjudi9ce before Hon'be High Court of Orissa bearing CMP No.300/2014.

Para-3: That the alleged power of attorney holder who has examined as P.W.No.1 in the present case i.e. without taking any permission from the original plaintiff or not i.e. doubtful; as because the certificate issued in SEBC a Misc. Case No.646/2010 by the Tahasildar, Delanga i.e. in favour of Siba Swastik Srichanda, s/o-Bhagirathi Srichandan of vill -Tigiria. So aforesaid circumstance it is doubtful whether the plaintiff has instructed/directed to Baidyanath Srichandan i.e. to act on behalf of him or not i.e. great suspicious in nature. That, for which to ascertain the actual father name of the present plaintiff as because it is different in Misc. Case (SEBC) No.646/2010 and in the alleged power of attorney which are contrary to each other. Therefore in order to ascertain the real truth and the genuineness of the power of Attorney married as Ext.1.It is necessary to examine the plaintiff himself i.e. from the defendants side and which will met the real dispute between the parties.."

Perusal of the rival pleadings and after going through the averments of the plaint and pleadings in the written statement as quoted herein above and on reading together, this Court finds that this is not a case where power of attorney holder has rendered some acts in pursuance of power of attorney. This case being a straight contest between the plaintiff and defendants with serious allegations by the defendants in their written statement, this Court observes that the case at hand goes beyond the role of the power of attorney holder and as such there may not be effective adjudication of the suit in absence of the evidence of the plaintiff himself. Further since a chance of cross-examination by the Power of Attorney Holder is very much available, this Court also finds no prejudice would be caused to the Power of Attorney Holder in the event the plaintiff himself would be produced as an witness. Both the citations cited by Sri Goutam Mishra, learned counsel for the Opp. party No.1 do not find support to his case.

9. Perused the citations cited by Sri N.P.Parija, learned Senior counsel for the petitioner in the case of ***Braja Mohan Patra –vrs- Ananta Charan Patra and others***, reported in ***AIR 2003 Orissa-209.*** In deciding a parameteria situation, a previous Bench of this High Court taking into consideration the Division Bench decision of Patna High Court in the case of ***Awadh Kishore Singh-vrs-Brij Bihari Singh***, reported in ***AIR 1993 Patna-122*** came to hold that there is no harm in calling the adversary to be examined as an witness on behalf of the other party. This decision finds full support to the petitioner's case.

10. Under the afore narrated circumstances and after going through the legal position enunciated hereinabove, keeping in mind the respective pleadings, this Court finds the reasons assigned by the trial court in rejecting the application at the instance of the petitioner for summoning the plaintiff to personally stand as an witness on behalf of the defendants, is improper. Consequently while interfering in the impugned order, this Court sets aside the same, thereby allows the application at the instance of the defendant No.1 for summoning the plaintiff himself to stand as an witness on behalf of the defendants. Civil Miscellaneous Petition stands allowed. However, there is no order as to cost.

Petition allowed.

2016 (II) ILR - CUT-163

S. K. SAHOO, J.

CRIMINAL APPEAL NO. 210 OF 2010 & 213 OF 2010

PRASANTA KU. BEHERA ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

N.D.P.S. ACT, 1985 – Ss. 52(3), 57
r/w Section 100(4) Cr.P.C.

Conviction U/s. 20(b)(ii)(c) of the Act, 1985 – Non-compliance of sections 52(3) & 57 of the Act – While conducting search, P.W.4 has also not complied with the provision U/s. 100(4) Cr.P.C. as he had not called two or more independent and respectable inhabitants of the locality to remain present when the offending vehicle was searched – In the absence of clinching materials that the seized articles were kept in safe custody till its production in the Court, non-examination of relevant witnesses, non-production of brass seal in Court and other suspicious features, it would be risky to uphold the impugned conviction – Held, the impugned judgment of conviction and sentence is set aside. (Paras 9,10)

Case Laws Referred to :-

1. AIR 2001 SC 1002 : Gurbax Singh -Vrs.- State of Haryana.
2. (1994) 7 OCR (SC) : 283 State of Punjab -Vrs.- Balbir Singh.
3. (1994) 7 OCR 277 : Sinic Patricia -Vrs.- State.
4. (2010) 15 SCC 369 : State by Inspector of Police -Vrs.- Rajangam

For Appellant :Mr. Sangram Kumar Das
Mr. Saroj Kumar Dash
For Respondents :Mrs. Saswata Patnaik, Addl. Govt. Adv.

Date of hearing : 27.01.2016
Date of Judgment : 04.03.2016

JUDGMENT

S. K. SAHOO, J.

The appellants faced trial in the Court of learned Addl. Sessions Judge -cum- Special Judge under N.D.P.S. Act, Khurda in T.R. Case No. 45/13 of 2008 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 illegal possession and transportation of 342 kgs. of ganja on 12.06.2008 at Balugaon

on N.H.No.5 at about 6 p.m. to 6.15 p.m. in a TATA Safari Car bearing Registration No. OR-02-N-1368 in contravention of the provisions of the N.D.P.S. Act.

The appellants were found guilty of the said charge and were sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh) each, in default, to undergo rigorous imprisonment for two years.

2. It is the prosecution case that on 12.06.2008 at about 1.00 to 1.30 p.m. while P.W.4 Pradipta Ranjan Pattnayak, Inspector-in-Charge, E.I & E.B., Unit-I, Cuttack was performing patrol duty with other Excise staff at Balugaon Bazar area and checking suspected vehicles indulged in transporting excisable articles, he deputed two of the Excise Constables namely Rudra Charan Mohapatra and Pradeep Kumar Behera to remain present at Railway level crossing situated outside Balugaon Bazar towards Berhampur to inform him over mobile phone about the movement of suspected vehicles. According to the information of those two Excise Constables, P.W.4 checked two to three vehicles but could not find any excisable articles in those vehicles. At about 1.30 p.m., as per information received from the aforesaid Excise Constables, P.W.4 detained one white coloured TATA Safari bearing Registration No.OR-02-N-1368 on suspicion in front of Andhra Bank situated at Balugaon Bazar. P.W.4 directed the driver of the vehicle to open the door but he did not comply. P.W.4 requested two persons from among the crowd gathered namely Surendra Swain (P.W.1) and Tanuj Kumar Panda (P.W.2) to remain present for the purpose of search of the vehicle and both of them accepted the request of P.W.4., who again directed the driver of the vehicle to open the door and this time the driver opened the door and both the appellants were found inside the vehicle. Appellant Prasanta Kumar Behera was the driver of the vehicle and appellant Dinabandhu Moharana was the owner of the vehicle. P.W.4 found the smell of ganja emitting from inside the vehicle. P.W.4 gave his identity to both the appellants and expressed his intention to search the vehicle. He took personal search of both the appellants after giving notices to both of them under section 50 of the N.D.P.S. Act. Both the appellants agreed to be searched by P.W.4., who after observing all the formalities searched the vehicle in presence of P.W.1 and P.W.2 and recovered seventeen gunny bags containing ganja. On weighment, out of the seventeen gunny bags, three gunny bags were found each containing 20 kgs. of ganja, two plastic gunny bags were also found each containing 20 kgs. of ganja, two gunny bags were found each

containing 10 kgs. of ganja, two plastic gunny bags and one gunny bag were found each containing 16 kgs. of ganja, five gunny bags and one plastic gunny bag were found each containing 24 kgs. of ganja and one gunny bag was found containing 30 kgs. of ganja. P.W.4 seized the driving license of the appellant-driver and the documents of the vehicles along with the gunny bags containing ganja and prepared seizure list Ext.1/2. P.W.4 prepared a weighment chart vide Ext.6. Both the appellants also signed the seizure list. P.W.4 opened the gunny bags containing ganja and from the texture, smell and from his experience of twenty six years, he found that all the seventeen gunny bags were containing ganja. He sealed all the gunny bags containing ganja separately putting paper slips containing his signatures and that of the appellants and the witnesses. P.W.4 put his personal brass seal containing his specimen signature on each of the paper slips. The brass seal was handed over to P.W.1 under Zimanama Ext.5/1. P.W.4 made over the copies of the seizure list to the appellants who put their signatures acknowledging the receipt of such copies. P.W.4 prepared sketch map vide Ext.4/2 in presence of the appellants and the witnesses. The statements of the appellants were also recorded separately. P.W.4 arrested both the appellants explaining them the grounds of arrest.

P.W.4 took the appellants, the vehicle and seized gunny bags containing ganja to Balugaon Police Station which is the nearest police station to the place of seizure. P.W.4 found only one Constable present in the police station who reported that the Inspector-in-charge and other police officers have left for duty. P.W.4 then brought the appellants, the vehicle along with gunny bags to Bhubaneswar for production before the District and Sessions Judge, Khurda at Bhubaneswar. On reaching at Bhubaneswar, P.W.4 found that the concerned Court was closed and therefore he came to Kharvel nagar police station and gave requisition to the I.I.C. of the said police station to keep the gunny bags in the police station Malkhana. The appellants and the vehicle were taken to the Headquarters at Cuttack as the IIC, Kharvel nagar police station did not agree to keep the appellants and the vehicle. On the next day i.e. on 13.06.2008, P.W.4 took the appellants and the vehicle from Cuttack to Kharvela nagar police station, received the gunny bags from the Malkhana-in-charge and found the seals were intact. P.W.4 produced the appellants, seized articles and relevant documents before the learned District and Sessions Judge, Khurda at Bhubaneswar. P.W.4 made a prayer to the Court for collecting sample from each of the gunny bags for chemical examination. As per the direction of the learned District Judge, the

gunny bags were produced before S.D.J.M, Bhubaneswar who collected samples from each gunny bag which was duly sealed by learned S.D.J.M., Bhubaneswar. The sealed sample packets along with requisition were produced by P.W.4 before the Chemical Examiner. The broken seals were kept inside an envelope which was also sealed with the seal impression of the S.D.J.M, Bhubaneswar.

The chemical examiner to Govt. of Orissa, S.D.T. & R.L., Bhubaneswar after analysis gave his opinion under Ext.11 that all the seventeen samples produced before him were found to be ganja (cannabis) as defined under section 2(iii)(b) of the N.D.P.S. Act. On the next day of seizure, P.W.4 intimated the Commissioner of Excise regarding the search, seizure and arrest of the appellants as required under section 57 of the N.D.P.S. Act. Since prima facie case under section 20(b)(ii)(C) of the N.D.P.S. Act was found against both the appellants, P.W.4 submitted prosecution report against them on 08.10.2008.

As the learned District and Sessions Judge, Khurda at Bhubaneswar found that the cause of action had taken place at Balugaon and Additional Sessions Judge –cum- Special Judge under N.D.P.S. Act, Khurda has been empowered to try the case, the case records were transferred to the said Court. On 30.03.2009 charge was framed against the appellants by the Trial Court under section 20(b)(ii)(C) of N.D.P.S. Act. The appellants refuted the charge, pleaded not guilty and claimed to be tried.

3. In order to prove its case, the prosecution examined four witnesses.

P.W.1 Surendra Swain and P.W.2 Tanuja Kumar Panda who were the independent witnesses did not support the prosecution case, for which they were declared hostile by the prosecution.

P.W.3 Sankarsan Behera was the ASI of Excise, E.I. & E.B., Unit-I, Cuttack who accompanied the Inspector of Excise to Balugaon on patrol duty and he stated about the detection of the vehicle and its search and also the seizure of seventeen bags of ganja from the possession of the appellants in the vehicle.

P.W.4. Pradipta Ranjan Pattnayak was the Inspector-in-charge, E.I. & E.B., Unit-I, Cuttack who detected gunny bags carrying Ganja in the vehicle in which the two appellants were the occupants. He is the Investigating Officer of the case.

The prosecution exhibited fourteen documents and also proved two material objects.

Ext.1/2 is the seizure list, Ext.2/2 and Ext.3/2 are the notices served on the appellants Dinabandhu Moharana and appellant Prasanta Kumar Behera respectively under section 50 of the N.D.P.S. Act, Ext.4/2 is the rough sketch map, Ext.5/1 is the Zimanama, Ext.6 is weighment chart of gunny bags containing ganja, Ext.7 is the statement of appellant Dinabandhu Moharana, Ext.8 is the statement of appellant Prasanta Kumar Behera, Ext.9 is the requisition given by P.W.4 to IIC, Kharvel nagar police station, Ext.10 is the requisition of SDJM, Bhubaneswar to chemical examiner, S.D.T. & R.L, Ext.11 is the chemical examination report, Ext.12 is the requisition given by P.W.4 to R.T.O., Bhubaneswar, Ext.13 is the intimation received from R.T.O., Bhubaneswar and Ext.14 is the report submitted to the Commissioner of Excise in Form No. C/4.

The prosecution marked one envelope containing broken seals as M.O.I and one gunny bag containing ganja as M.O.II.

4. The defence plea of the appellants is that on the date of occurrence, both of them were returning from Berhampur and they were at Balugaon petrol pump to fill up oil and at that time some persons who were in civil dresses came there and took their signatures in some blank papers and foisted a case against them.

One witness namely Pranab Kumar Panigrahi who was working as officer-in-charge of Balugaon Police station at the relevant point of time was examined as D.W.1 who stated that the station diary entry of the date of occurrence did not reveal that the excise people had come to the police station with contraband articles like ganja with any accused persons.

The defence exhibited the station diary entry of Balungaon Police station as Ext.A.

5. The learned Trial Court formulated the point for determination as to whether on 12.06.2008 at about 1.30 p.m, the appellants were transporting ganja (Cannabis) and seventeen gunny bags containing 342 kgs. of Ganja were recovered and seized from their possession.

The learned Trial Court held that even though P.W.1 and P.W.2, the two independent witnesses are not the local inhabitants of Balugaon at which place the contraband articles were seized, no prejudice has been caused to the accused persons because of non-compliance of provision under section 100 (4) of Cr.P.C. as those witnesses have not supported the prosecution case regarding search and seizure. The learned Trial Court further held that the seizure list can be relied upon as corroborative evidence and nothing has been

elicited from the cross examination of the two official witnesses i.e. P.W.3 and P.W.4 that they had deliberately lodged a false case against the appellants due to their previous enmity and therefore their evidence are worthy of credence which can be safely relied on. The learned Trial Court further held that there is no violation of section 52 of the N.D.P.S. Act and on that score, the accused persons are not entitled to an order of acquittal. The learned Trial Court further held that violation, if any of section 52 of the N.D.P.S. Act cannot be a bonus and on that score, the accused persons are not entitled to an order of acquittal and section 57 of the N.D.P.S. Act is directory and nothing has been brought out as to how the accused persons were prejudiced because of its non-compliance. The learned Trial Court further held that the evidence of P.W.3 and P.W.4 relating to search and seizure is found to be cogent, convincing and the same inspires confidence. It is further held that the non-examination of Excise Constables does not affect the credibility of the prosecution case. The learned Trial Court further held that the appellant Prasanta Kumar Behera was the driver and appellant Dinabhadnu Moharana was the owner of the vehicle which was transporting huge quantity of ganja i.e., 342 kgs. and accordingly the appellants were convicted under section 20 (b)(ii)(C) of the N.D.P.S. Act.

6. Mr. Sangram Kumar Das, learned counsel appearing for appellant Prasanta Kumar Behera contended that the two material witnesses namely Rudra Mohapatra and Pradeep Kumar Behera on whose information the offending vehicle was detained and searched were not examined during trial. While conducting search, P.W.4 has not complied with the provisions laid down under section 100 (4) of the Criminal Procedure Code as he had not called two or more independent and respectable inhabitants of the locality to remain present when the offending vehicle was searched. It is further contended that section 52 (3) of the N.D.P.S. Act has not been complied with inasmuch as after the appellants were arrested, they were not forwarded to the Officer in-charge of Balugaon Police Station with the seized ganja. The learned counsel emphasized that the statement of P.W.4 that on the date of occurrence when they produced the appellants, the vehicle and the seized gunny bags in Balugaon Police Station, the Inspector in-charge and the other officers were absent is not correct in view of the statement of D.W.1, the Officer in-charge of Balugaon Police Station that the station diary did not reveal that the Excise people had come to the police station with contraband articles like ganja and with the appellants. The learned counsel further emphasized that even though several police stations were there by the side of

N.H. No.5 from Balugaon Police Station to Bhubaneswar but the contraband articles and the appellants were not produced in any of those police stations which create grave doubt regarding the actual place of seizure of the contraband articles. The learned counsel urged that neither the Officer in-charge of Kharavel nagar Police Station nor the Malkhana in-charge of that police station has been examined to substantiate that the contraband articles were kept in safe custody. The brass seal has not been produced by the witness who was given zima of such seal by P.W.4 at the time of production of contraband articles in Court for verification and therefore it cannot be said with certainty that the seal has not been tampered with or the articles which were produced in Court and sent for chemical examination were the very articles which were seized. The learned counsel contended that since the entire process of search, seizure and arrest appears to be suspicious and shrouded in mystery, benefit of doubt should be extended in favour of the appellant.

Mr. Saroj Kumar Dash, learned counsel appearing for appellant Dinabandhu Moharana contended that when P.W.4 had conducted search and seizure, he should not have investigated the matter and submitted charge sheet and therefore investigation cannot be said to be impartial, unbiased and unmotivated. There were shops, petrol pump and bank nearer to the spot but none of the persons of the locality were made witness to the search and seizure on the other hand P.W.1 and P.W.2 who belonged to distance places have been cited as witnesses. He emphasized that the conduct of P.W.4 in keeping the contraband articles at Kharavel nagar Police Station, Bhubaneswar and taking the appellants and the vehicle to Cuttack is suspicious. The Malkhana register of Kharavel nagar Police Station should have been produced to substantiate that the contraband articles were kept in safe custody. The learned counsel further contended that the statement of P.W.4 that he sent the full report in compliance with section 57 of the N.D.P.S. Act to the Commissioner of Excise vide Ext.14 should not be accepted as the original was not seized from the office of the Commissioner. The learned counsel further submitted that when P.W.4 received the sample packets from S.D.J.M., Bhubaneswar on 13.6.2008, he should have produced it immediately before the chemical examiner and not on 17.6.2008 and since P.W.4 kept the sample packets with him for about four days without delivering to the chemical examiner, the possibility of tampering with the sample packets cannot be ruled out. While concluding his argument, the learned counsel emphasized that the punishment being stringent in nature, it

was the duty of the Investigating Officer to comply with the provisions of the N.D.P.S. Act in its letter and spirit and having not done so, benefit of doubt should be extended in favour of the appellants.

Mrs. Saswat Patnaik, learned Addl. Government Advocate on the other hand placed the relevant parts of the impugned judgment and contended that the learned Trial Court has dealt with all the aspects and it cannot be said that there is any illegality or infirmity in the impugned judgment and when the appellants were found transporting huge quantity of ganja in the vehicle which were seized by P.W.4 in presence of the official and independent witnesses, the same should be accepted and merely because independent witnesses did not support the prosecution case, that cannot be a ground to throw away the entire case in view of the settled position of law that in such type of cases the version of official witnesses can be acted upon to adjudicate the guilt of the accused.

7. Law is well settled that the provisions of sections 100 and 165 of the Code of Criminal Procedure, 1973 which are not inconsistent with the provisions of the N.D.P.S. Act are applicable for effecting search and seizure under the N.D.P.S. Act.

Section 165 Cr.P.C. deals with search by an officer in charge of a police station or by a police officer making an investigation into any offence which he is authorized to investigate. Sub-section (4) of section 165 of the Code states that the provisions of the Code as to search-warrants and the general provisions as to searches contained in section 100 of Cr.P.C. shall, so far as may be, apply to a search made under section 165 Cr.P.C. Sub-section (4) of section 100 of Cr.P.C. states that before making a search under Chapter-VII, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and the officer may issue an order in writing to such persons or any of them to be a witness to the search.

Even though sub-section (4) of section 100 Cr.P.C. states that such provision is applicable to Chapter-VIII but in view of sub-section (4) of section 165 of Cr.P.C., the procedure has to be followed in all cases of search by either the officer in charge of the police station or a police officer making an investigation into any offence which he is authorised to investigate. If any subordinate officer is entrusted by the officer in charge to carry out such search by an order in writing, then such subordinate officer has also to follow

the procedure laid down under section 100 Cr.P.C. Even though section 100 Cr.P.C. states about the search of a closed place but in view of definition of 'place' as per section 2 (p) of Cr.P.C., it includes a house, building, tent and vessel.

Contentions were raised by the learned counsel for the appellants that the independent witnesses P.W.1 and P.W.2 are not the inhabitants of the locality in which place the vehicle was detained and searched and there is also no evidence that they were respectable persons and therefore section 100(4) of the Cr.P.C. has not been followed. It is the further contentions of learned counsel for the appellants that P.W.1 has stated that his village is at a distance of 5 kms. away from Balugaon and similarly P.W.2 states that his village is at a distance of about 1 km. away from petrol pump at Balugaon. It was urged that when it was a market area and number of shops, bank and two petrol pumps were available in the locality, P.W.4 should have taken the assistance of the persons of the locality while conducting search and seizure and not cited two persons like P.W.1 and P.W.2 as witnesses who are neither of that locality nor they are respectable persons.

Adverting to the contentions raised, it is found that the search and seizure were made on 12.6.2008 in the afternoon. The time and place was such that P.W.4 could have easily got independent and respectable persons of the locality as witnesses to the search and seizure. The location of the spot was at Balugaon market which was also nearer to bank and petrol pumps. P.W.4 states that he has not mentioned about the status of P.W.1 and P.W.2. There is no evidence that P.W.4 approached any independent inhabitants of the locality to be the witnesses but they refused or it was such an odd time that it was practically impossible for P.W.4 or his team to procure the attendance of independent and respectable inhabitants of the locality. There is also no evidence that nobody came forward to join the search party as witness.

The timing of search and seizure, non-availability of independent and respectable witnesses of the locality and non-inclination of such persons even though available to become witnesses to the search and seizure are the factors to be taken note of while assessing the non-compliance of sections 100 (4) and 165 (4) of Cr.P.C. If after making reasonable efforts, the police officer is not able to get public witnesses to associate with the raid or arrest of the accused, the arrest and the recovery made would not be necessarily vitiated.

If no such inhabitants of the locality were available or were willing to be witnesses to the search, then P.W.4 could have issued an order in writing to the persons of any other locality to attend and witness the search. Since there is no evidence that P.W.4 and his team made any effort/ attempt to get independent and respectable persons of the locality or that it was practically impossible to get such witnesses or that such witnesses even though present were not inclined to be the witnesses, I am of the view the I.O. has deliberately flouted the statutory provisions. An officer conducting search and seizure under N.D.P.S. Act is bound to follow the procedure envisaged under law and cannot act at his sweet will, whim and fancy.

Both the independent witnesses have not supported the prosecution case and they have been declared hostile by the prosecution. P.W.1 has stated that his signatures were obtained on blank papers near Hanuman Mandir which was situated at a distance of about 1 km. away from Andhra Bank, Balugaon Branch and he put his signatures being directed out of fear and he had not seen the accused persons when his signatures were taken. Similarly P.W.2 has stated that the contents of the papers which were written were not read over and explained to him before he was asked to sign and he did not voluntarily put his signature but on being compelled, he signed on the papers and he was also threatened. P.W.1 is a cultivator and P.W.2 was having a hotel as per their statement. Therefore the evidence of these independent witnesses are no way helpful to the prosecution and accordingly those are to be discarded.

However it is the settled principle of law that even though the independent witnesses in such type of cases for one reason or the other do not support the prosecution case, that cannot be a ground to discard the prosecution case in toto. On the other hand if the statements of the official witnesses relating to search and seizure are found to be cogent, reliable and trustworthy, the same can be acted upon to adjudicate the guilt of the accused. The Court will have to appreciate the relevant evidence and determine whether the evidence of the Police Officer/Excise Officer is believable after taking due care and caution in evaluating their evidence.

8. It is the prosecution case that on the date of occurrence P.W.4 had deputed two excise constables namely, Rudra Charan Mohapatra and Pradip Kumar Behera to remain present at the railway level crossing situated outside Balugaon Town towards Berhampur to inform him over mobile phone about the movement of the suspected vehicles and that basing on their information, the offending vehicle was detained in front of Andhra Bank situated at

Balugaon Bazar. P.W.4 stated that after the vehicle was detained and ganja was found inside, he telephoned to the two excise constables who were deputed to perform duty near the Railway level crossing and they returned after getting information from him. However P.W.4 states that the documents exhibited in the case do not indicate that two of the excise constables were deputed to perform duty near Railway level crossing or that those two constables intimated over mobile phone to him. Those two excise constables who were the informers have not been examined as witnesses.

It is the case of P.W.4 that he received the phone call from the excise constables in between 1.00 p.m. to 1.30 p.m. and the railway level crossing would be at distance of about two and half kilometers from the place where they were performing patrol duty. In view of such distance between the two places i.e. the place where the two excise constables were posted to give information and the place where P.W.4 and other excise staffs were performing patrol duty, the statement of P.W.4 that the Tata Safari reached near Andhra Bank about 10 to 15 minutes after he received the telephone from the excise constables appears to be a suspicious feature.

P.W.4 has not stated that either he or any of his excise staff gave their personal search before conducting search of the vehicle.

P.W.4 has stated that he made over the brass seal of the specimen impression which was put on the seal of the gunny bags to P.W.1 who executed a zimanama to that effect but P.W.1 has not supported such evidence. P.W.4 states that the zimadar himself did not write in his own hand that he received zima of the personal seal. The brass seal was not produced in Court on 13.6.2008 when the accused persons and seized articles were produced in Court which is evident from the order sheet. Handing over the brass seal to an independent, reliable and respectable person and asking him to produce it before the Court at the time of production of the seized articles in Court for verification are not the empty formalities or rituals but is a necessity to eliminate the chance of tampering with the articles.

Sub-section (3) of section 52 of the N.D.P.S. Act states that every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to the officer-in-charge of the nearest Police Station or the officer empowered under section 53 of the N.D.P.S. Act.

Once the seized articles are produced in the nearest police station, the Officer in charge of such police station has to follow the procedure laid down under section 55 of the N.D.P.S. Act. P.W.4 states that he took the appellants,

the vehicle and the seized gunny bags containing ganja to Balugaon Police Station but found one constable to be present in the Police Station who reported that IIC and other police officers had left for duty and therefore he brought the accused persons, the vehicle along with the gunny bags containing ganja to Bhubaneswar. In that respect the evidence of D.W.1 who was the Officer in-charge of Balugaon Police Station at the relevant time is very much important. D.W.1 has stated that from 9.30 a.m. of 12.06.2008 to 9.00 a.m. of 13.06.2008, Sri S.N. Purohit, A.S.I. of Police was in charge of the station diary but the station diary dated 12.06.2008 does not reveal that excise people had come to the police station with contraband articles like ganja and with any accused persons. He further stated that had any such instance of coming to the police station with ganja and accused persons was there, there would have been entry in the station diary entry Ext.A. Thus the evidence of P.W.4 regarding production of the appellant with the seized articles at the nearest police station to the spot i.e. Balugaon Police Station on the date of occurrence is not corroborated either by documentary evidence or by the evidence of D.W.1. P.W.4 has stated that Tangi Police Station, Jankia Police Station, Khandagiri Police Station, Nayapalli and Sahidnagar Police Station fall by the side of N.H.5 while coming from Balugaon to the Sessions Court at Bhubaneswar but the appellants and the seized articles were not produced in any of those Police Stations and it was produced only at Kharvel Nagar Police Station. Thus the contentions raised by the learned counsels for the appellants that P.W.4 deliberately flouted the provisions under section 52(3) of the N.D.P.S. Act appear to have sufficient force.

In case of **Gurbax Singh –Vrs.- State of Haryana reported in AIR 2001 SC 1002**, it is held that it is true that provisions of Sections 52 and 57 of the N.D.P.S. Act are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, I.O. cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In case of **State of Punjab –Vrs.- Balbir Singh reported in (1994) 7 Orissa Criminal Reports (SC) 283,** it is held that the provisions of sections 52 and 57 of the N.D.P.S. Act which deal with the steps to be taken by the officers after making arrest or seizure under sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

P.W.4 stated that the ganja found inside the bags were mixed with leaves, seeds and small branches but he has not noted the percentage of seeds, leaves and branches of the seized ganja. In view of definition of "ganja" under section 2(iii)(b), the seeds and leaves when those were not accompanied by the tops should have been excluded. Even though the same was not done in this case before taking the weight but in view of the huge quantity of ganja seized in this case, it would not create much difference for assessing the 'commercial quantity.'

Even though P.W.4 stated to have handed over the gunny bags containing ganja to the Inspector-in-Charge of Kharavel Nagar Police Station and the Malkhana in-charge of Kharavel Nagar Police Station received the gunny bags as per the direction of the Inspector-in-Charge on the date of occurrence and kept it till next day when P.W.4 again received the same back but neither the Inspector-in-Charge nor Malkhana in-charge of Kharavel Nagar Police Station has been examined nor the Malkhana register has been seized and produced in Court to substantiate the prosecution case that the seized ganja was kept in safe custody after seizure till it was produced before the Court. In case of **Sinic Patricia –Vrs.- State reported in (1994) 7 Orissa Criminal Reports 277**, it is held that it is for the prosecution to establish and cover the entire path by adducing cogent, reliable and unimpeachable evidence that the seized articles were properly sealed and there was no chance of tampering with the packets during the retention of those packets at the police station and the seized articles were very articles produced before the Magistrate for sending them to the Chemical Examination.

P.W.4 is the Officer who conducted search and seizure and he also investigated the matter and submitted prosecution report finding prima facie case against the appellants. In case of **State by Inspector of Police –Vrs.- Rajangam reported in (2010) 15 Supreme Court Cases 369,** it is held as follows:-

> "8. The short question which falls for consideration of this Court is whether P.W.6 who registered the crime could have investigated the case or an independent officer ought to have investigated the case.
>
> 9. The learned Counsel appearing for the accused submitted that the controversy involved in this case is no longer res integra. In **Megna Singh v. State of Haryana 1995 CriLJ 3988** , this Court has taken a categorical view that the officer who arrested the accused should not have proceeded with the investigation of the case. The relevant paragraph reads as under:

> 4. ...We have also noted another disturbing feature in this case. P.W.3, Sri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.
>
> 10. The ratio of Megna's case has been followed by other cases.
>
> 11. In another case in **Balasundaran v. State 1999 (113) ELT 785 (Mad),** the Madras High Court took the same view. The relevant portion reads as under:
>
> 16. Learned Counsel for the appellants also stated that P.W. 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W. 5, according to the prosecution, was present with PWs 3 and 4 at the time of search. In fact, P.W. 5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W. 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W. 5 was the person who really investigated the case. P.W. 5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also, the investigation is bound to suffer and as such the entire proceedings will be vitiated.
>
> 12. In this view of the legal position, as crystallized in Megna Singh's case (supra), the High Court was justified in acquitting the accused."

In view of the principle decided by the Hon'ble Supreme Court in case of Rajangam (supra) case, P.W.4 should not have investigated the case as he conducted search and seizure of the contraband articles.

The contentions were raised by the learned counsels for the appellants that even though the samples were handed over to P.W.4 on 13.06.2008 by

the Court but P.W.4 kept the samples with him and produced it at the S.D.T & R.L. on 17.06.2008 and therefore the chance of tampering with the same cannot be ruled out. P.W.4 has stated that the samples were handed over to him in the evening hours on 13.06.2008 and thereafter there were three Government Holidays for which he kept the samples with him and produced it on 17.06.2008 at the S.D.T. & R.L. The samples were received at the S.D.T. & R.L. on 17.06.2008 and the seals on the sample cartoon and seventeen numbers of sample envelopes were found intact and identical with the specimen impression of the seal given on the forwarding memo. Therefore, the submissions of the learned counsels for the appellants which is based on surmises and conjectures cannot be accepted.

The contentions were raised by the learned counsels for the appellants regarding non-seizure of original of Ext.14 which was the full report in compliance of section 57 of the N.D.P.S. Act. P.W.4 has stated that on the next day of seizure, he intimated the Commissioner of Excise in Form No.C-4 regarding the search, seizure and arrest of the appellants in connection with the case as required under section 57 of the N.D.P.S. Act. Any arrest or seizure made under the N.D.P.S. Act has to be reported to the immediate official superior of the person making such arrest or seizure within forty-eight hours and a full report indicating all the particulars of arrest or seizure is envisaged under section 57 of the N.D.P.S. Act. Such a report is the safeguard to prevent any concoction or fabrication regarding arrest or seizure at a later stage. This is one of the external checks which not only protects the interest of the accused but also put forth before the Court the initial case of the prosecution.

On perusal of Ext.14 which is in Form No.C-4, it indicates that in the column No.5, 6, 7 and 8 where name and address of the witness, points to prove, whether personally detected or on information and order of superior officer are required to be mentioned here have not been filled up. Similarly on the reverse side of C-4 where date and hour of submission of report, explanation of delay, if any in submission, date of receipt of the report in Excise Superintendent's office and brief history of the case are required to be mentioned and date have been left blank. No endorsement of Excise Commissioner regarding receipt of the report and date is available in Form No.C-4. Nobody has been examined from the office of Commissioner of Excise to prove the receipt of such report. The copy of the report which was sent to the Office of Commissioner of Excise has not been seized.

Thus I am of the view that Ext.14 is not a full report as envisaged under section 57 of the N.D.P.S. Act and a reasonable doubt is created regarding submission of such report in the office of Commissioner of Excise.

9. In view of the glaring inconsistencies in the evidence of prosecution witnesses, non-compliance of provisions under section 100(4) of Cr.P.C., sections 52 (3) and 57 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, non-examination of relevant witnesses, non-production of brass seal in Court and other suspicious features as discussed above, I am of the view that it would be very risky to uphold the impugned judgment and order of conviction.

10. Accordingly, Criminal Appeal No. 210 of 2010 filed by appellant Prasanta Kumar Behera and Criminal Appeal No. 213 of 2010 filed by appellant Dinabandhu Moharana are allowed. The impugned judgment and order of conviction and sentence passed by the learned Trial Court is hereby set aside and the appellants are acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellants who are in jail custody shall be released forthwith if their detention is otherwise not 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 and necessary action.

Appeals allowed.

2016 (II) ILR - CUT-178

S. N. PRASAD, J.

O.J.C. NO. 1385 OF 1996

GAJENDRA PRASAD DAS ……..Petitioner

.Vrs.

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

SWATANTRATA SAINIK SAMMAN PENSION SCHEME, 1980 – CLAUSE 4, 9

Freedom Fighters pension – Benefits granted in favour of the petitioner cancelled on the ground that he has not furnished required official records in support of his claim – Hence the writ petition – Petitioner became eligible to receive pension basing on the certificate issued by co-prisoners as well as on the recommendation made by the committee constituted by the State Government – Petitioner was not

communicated as to which document he has not furnished – There is also no such condition in the scheme that in case of submission of certificate from co-prisoners, the non-availability certificate is to be furnished by the claimant – Authorities have illegally taken away the right of the petitioner by passing a perfunctory order in a mechanical manner which is liable to be set aside – Though it is the proper course to remit the matter back to the authority, this Court considering the fact that the petitioner is now 90 years old and he may not further wait for the fruits of his claim, is not inclined to remit the matter – Held, direction issued to release all consequential benefits in favour of the petitioner. (Paras 4 to 7)

Case Laws Referred to :-

1. A.I.R. (39) 1952 SC 16 : Commissioner of Police, Bombay Vrs. Gordhandas Bhanji.
2. (1978) 1 SCC 405 : Mohinder Singh Gill and Another Vrs. The Chief Election Commissioner, New Delhi and Ors.
3. (2010) 7 SCC 678 : East Coast Railway and Another Vrs. Mahadev Appa Rao and Others.

For Petitioner : M/s. A.S.Nandy & A.K.Singh
For Opp. Parties : Mr. Prabhas Ch. Panda, Addl.Govt.Adv.

Date of hearing : 27. 04.2016
Date of judgment: 27.04.2016

JUDGMENT

S. N. PRASAD, J.

This writ petition is against the order dtd.27.12.1995 passed by the Under Secretary to Government, Finance Department whereby and where under the benefit of State Freedom Fighters Pension has been cancelled for want of requisite documentary evidence in support of claim.

2. The brief facts of the case of the petitioner is that he had participated in the Freedom Struggle in 1942 movement and was engaged in underground activity from November, 1942 till January, 1945 and was acting under the able guidance of eminent Freedom Fighters like Banamali Babu, Ex-member of Parliament, Prahallad Rai Lath, Ex-Member of the Orissa Legislative Assembly of Sambalpur and Daya Nanda Satpathy, an ardent Freedom Fighter.

In pursuance to the notice published in Daily Newspaper, i.e. The Samaj dtd.1.5.1985, the petitioner had submitted his application accompanied

by relevant documents in support of his case for grant of Freedom Fighter Pension. The application contains the Personal Knowledge Certificate given in recognition of the petitioner's active participation in the National Freedom Struggle by the celebrated Freedom Fighters of his time as enclosed in Annexure-1, 2 & 3 and thereafter the case of the petitioner was considered by a committee constituted in terms of order passed by the State Authorities and thereafter the petitioner was found to be eligible to get the benefit of Freedom Fighter Pension and accordingly the same was allowed vide order passed in this regard on 4.5.1989.

The benefit was paid up to 30.10.1992, thereafter a show cause notice was issued on 30.10.1992 with a further order by keeping the pension in abeyance, the petitioner has submitted due reply before the authorities but according to the petitioner without considering the entire facts and without going into the fact that the petitioner had submitted relevant documents before the committee which was recommended by Government, the order has been passed on 27.12.1995 cancelling the benefit.

The petitioner has challenged the order of cancellation on the following grounds:-

(i) As per requirement the petitioner has submitted his application along with the certificate submitted by the co-prisoners, as would be evident from Annexure-1, 2 & 3.

(ii) The petitioner's case was placed before the duly constituted committee and the committee after taking into consideration various documents submitted by the petitioner has recommended his case for grant of benefit under Freedom Fighter Pension to the tune of Rs.300/- and he has started getting the benefit from the State Exchequer, but without appreciating the fact the authorities have issued show cause notice on 30.10.1992 stating therein that the petitioner has not furnished official records in support of jail suffering. But which is the said record, that is not stated in the show cause.

(iii) The petitioner has replied giving therein the facts that the petitioner has submitted the personal knowledge certificate of two renowned Freedom Fighters but the authorities without appreciating this aspect of the matter has passed a very non-speaking order, hence the same is not sustainable.

Learned counsel for the petitioner has also demonstrated that the petitioner is also eligible in view of the Swatantrata Sainik Samman Pension Scheme, 1980 and relying upon the provision as contained in clause 9(b)(ii)

which stipulates a condition that certificate from veteran freedom fighters who had themselves undergone imprisonment for five years or more if the official records are not forthcoming due to their non-availability, according to the petitioner the certificate from the veteran freedom fighters have been submitted because the official records were not available and it is the duty of State Authorities to provide official records, since the authorities are the custodian of the same and if the records are not available the petitioner cannot be put at loss.

It has been submitted that the letter dated 13th April, 1982 as contained in Annexure-D/3 is also in favour of the petitioner since the same also stipulates a pre-condition of eligibility that the abscondence should be established from the official documents available with the State Government in the form of a judgment arrest warrantor any other executive order, declaring a person an absconder.

On these grounds the order passed by the authorities is assailed.

3. Opposite party – State has appeared and filed counter affidavit vehemently opposing the claim of the petitioner. It has been submitted by the learned counsel representing the opposite party – State that there is no infirmity in the decision taken by the authorities for the reason that as per the scheme the provision has been made making a person eligible to get the benefit of pension which is provided under clause no.4(b) of the Swatantrata Saomol Samman Pension Scheme, 1980 which stipulates a condition that a person who remained underground for more than six months provided he was:

1. a proclaimed offender; or
2. one on whom an award for arrest / head was announced, or
3. one for whose detention order was issued but not served.

It has further been submitted that the provision has also been made regarding method of proving the claims as provided under clause no.9(b) which is being reproduced herein below:-

"**9.(b)(i).** Documentary Evidence by way of Court's / Government's orders proclaiming the applicant as an absconder announcing an award on his Head, or for his arrest or ordering his detention.

(ii) Certificates from veteran freedom fighters who had themselves undergone, imprisonment for five years or more if the official records are not forthcoming due to their non-availability."

On the basis of these conditions it has been contended that the petitioner has only submitted the certificate issued by the co-prisoners, as would be evident from Annexure-1, 2 & 3 and the same is admitted case of the petitioner that on the basis of which the committee has recommended the case of the petitioner, but subsequently it was found that the petitioner has not furnished the official records in support of the claim and accordingly the benefit has been suspended with a direction to the petitioner to satisfy the authority, however the petitioner has given its reply but the authorities have not found it satisfactory and accordingly the claim has been rejected vide order dtd.27.12.1995 (Annexure-12).

According to the opposite party – State there is no infirmity in the decision taken for the reason that if anybody wants benefit under a scheme, he is supposed to fulfill all the eligibility condition as provided under the scheme since not been fulfilled as stated above, the authorities have examined the matter and after providing opportunity of being heard, the benefit extended has been recalled, hence there is no infirmity in the decision taken.

It has further been contended by placing reliance upon the communication dtd.13th April, 1982 which contains a pre-condition of eligibility which also corroborates the condition given in the scheme and the basis upon which the committee has recommended the case of the petitioner.

4. Heard the learned counsels for the parties and perused the documents available on record.

The fact which is not in dispute is that the Government of Odisha has taken a policy decision to extend benefit of Freedom Fighter pension to such persons who have fought for the nation during the time of Freedom Struggle by adopting the Freedom Fighter Pension Scheme, 1972 issued by the Government of India and subsequently renamed as Swatantrata Sainik Samman Pension Scheme, 1980.

From perusal of the said scheme which is on record it is evident that the said scheme has been formulated to extend the benefit of pension to such persons who have fought for the nation which contains eligibility condition as would be evident from Clause no.4, for ready reference the same is being quoted herein below:-

"**4. Who is eligible:**

For the purpose of grant of Samman Pension under the Scheme, a freedom fighter is:-

(a) A person who had suffered a minimum imprisonment of six months in the mainland jails before independence. However, ex-INA personnel will be eligible for pension if the imprisonment / detention suffered by them was outside India.

(b) The minimum period of actual imprisonment for eligibility of pension has been reduced to three months in case of women and SC / ST freedom fighters from 1.8.1980.

EXPLANATION:

1. Detention under the order of the competent authority will be considered as imprisonment.

2. Period of normal remission up to one month will be treated as part of actual imprisonment.

3. In the case of a trial ending in conviction, under-trial period will be counted towards actual imprisonment suffered.

(b) A person who remained underground for more than six months provided he was :

1. A proclaimed offender; or
2. One on whom an award for arrest / head was announced, or
3. One for whose detention order was issued but not served.

Xxxxxxxxxx xxxxxx xxxxxxxxx"

It is further evident that the method of making application has also been provided as also the method to prove the claims have also been given by proving the claim by producing evidence in this regard which condition contains in clause no.9, for ready reference the same is being quoted herein below:-

"**9. How to prove the Claims (Evidence Required):**

The applicant should furnish the documents indicated below which ever is applicable:

(a) IMPRISONMENT DETENTION ETC.:

Certificate from the concerned jail Authorities, District Magistrates or the State Government, in case of non-availability of such certificates, co-prisoner certificates from a sitting M.P. or M.L.A. or from an Ex-M.P. or an Ex-M.L.A. specifying the Jail period (Annexure-1 in the application form).

(b) REMAINED UNDERGROUND:

(I) Documentary evidence by way of Court's / Government's orders proclaiming the applicant as an absconder announcing an award on his Head, or for his arrest o ordering his detention.

(II) Certificates from veteran freedom fighters who had themselves undergone, imprisonment for five years or more if the official records are not forthcoming due to their non-availability.

Xxxxxxxxxx xxxxxxxxxxx xxxxxxx"

It is evident from clause 4 and clause 9 that a participant in the freedom struggle is said to be entitled for getting the benefit under the scheme who remained underground for more than six months provided that he was a proclaimed offender or one on whom an award for arrest / head was announced or one for whose detention order was issued but not served. While on the other hand in clause 9 it has been provided that the documentary evidence by way of court's / Government's orders proclaiming the applicant as an absconder announcing an award on his Head, or for his arrest or ordering his detention and in case of non-availability of such certificate, certificate from veteran freedom fighters who had themselves undergone imprisonment for five years or more if the official records are not forthcoming.

It further transpires from the order passed in favour of the petitioner extending the benefit that the matter of petitioner was scrutinized by the committee constituted in this regard by the State Government in pursuant to the resolution No.17643/F dtd.23.4.1962, No.299442/F, dtd.27.7.1971, No.9454/F, dtd.8.3.1984, No.10202/F, dtd.3.3.1986 and No.53867/F, dtd.3.11.1987 the case of the petitioner was considered by the Freedom Fighters Pension Committee to grant pension of Rs.300/-. The said order has been passed by the authority on being recommended by the committee and the committee has recommended on the basis of co-prisoner certificate submitted by the petitioner which has been annexed as Annexure-1, 2 & 3. From perusal of Annexure-1, 2 & 3 it is evident that the certificate has been given by co-prisoner who has certified that the petitioner is a bona fide freedom fighter and has participated during the freedom struggle and also found involved in underground activities during the period from November, 1942 to January, 1945. The benefit has been extended almost for about more than three years, thereafter a show cause notice has been issued on 30.10.1992 asking the petitioner to give reply as to why the benefit extended

in his favour regarding freedom fighter pension will not be recalled since the same has been passed without furnishing any official records in this regard and simultaneously the benefit has been suspended by a separate order issued in this regard on 30.10.1992 (Annexure-7).

The petitioner has submitted his reply stating therein that the petitioner has submitted certificate issued by co-prisoners but the authorities have taken a decision on 27.12.1995 cancelling the benefit granted in his favour which was communicated by the Under Secretary to Government to the petitioner.

The opposite party – State has taken ground that the petitioner has not furnished the Jail Suffering certificate or even in absence of jail suffering certificate he ought to have given the non-availability certificate and as such the benefit granted in his favour was not in consonance with the scheme, hence the same has been cancelled.

From hearing the learned counsels for the parties and after going through the records it is evident that the petitioner has been extended benefit on the basis of the certificate given by the co-prisoners after having recommended his case by the committee constituted by the State Government, while the opposite party – State claims that the required document was not furnished, hence the Government has reviewed its decision.

In the light of this now question which is for paramount consideration is that the sole ground taken by the opposite party – State is that the required document has not been furnished by the petitioner and that is the reason show cause notice has been issued. But the show cause notice does not contain which document petitioner has not furnished as because in the show cause only it has been stated that the petitioner has not furnished the official records. From perusal of the scheme the official records means that a beneficiary supposed to produce a certificate of proclaimed offender or an award of arrest or an order of detention and in case of non-availability of these documents a non-availability certificate is to be produced if the same is not available in the official records.

Now the question arises that the State Authorities is the custodian of the official records and the petitioner has furnished the certificate given by the co-prisoners and as such the petitioner is fulfilling the condition as provided under clause no.9(b)(ii) which has been quoted herein in above.

The requirement to submit a certificate from veteran freedom fighter will only be given when the documentary evidence is not available and the

certificate should enclose along with the certificate of non-availability of the documents in the official records and as such it can at best be said that the petitioner has not enclosed along with the co-prisoner certificate the non-availability certificate of the documents available on record and for that reason the benefit extended in favour of the petitioner has been rejected. But the foremost consideration would be in this juncture that if the petitioner has not produced the non-availability certificate, can it not be verified by the State Government being the custodian of the Government record. But nowhere in the counter it has been stated that the official records, the documents which was necessary for the petitioner to submit, was not available in the official records.

Further more from perusal of the provision as contained in clause no.9(b)(ii) it is not evident that the non-availability certificate is to be submitted by the beneficiaries in whose favour the decision is to be taken to extend the benefit.

Thus there is no such condition that in case of submission of co-prisoner certificate the non-availability certificate is to be furnished by the claimant.

It is not the case of the opposite parties that the petitioner has not submitted any document rather it is only the case of the opposite party that he has not furnished the relevant documents, however the same has not been disclosed even in the show cause or even in the communication dtd.27.12.1995, hence it is evident that the authorities in a very mechanical manner has taken away the right of the petitioner by passing a perfunctory order in this regard.

So far as the eligibility part of the petitioner is concerned, it is the duty of the State Authority to give specific reason in the show cause by giving specific cause of recall of the decision so that the person in whose favour the show cause notice has been issued will be able to give an appropriate defence reply. But that is lacking and in a very vague way it has been stated in the show cause that the relevant records have not been submitted but what is the relevant records, that is lacking in the show cause notice, however the same has been disclosed in the counter affidavit, likewise even in the impugned order which is not an order rather only a communication of the decision taken by the State Government containing no reasoning therein while the opposite party – State has filed so many affidavits but no order has been annexed in this regard by the State Government disclosing the specific reason.

In sub and substance, what is being gathered from the pleading of the opposite party – State that they are trying to improve the reasoning by way of an affidavit which is not permissible in the light of the judgment in the cases of **Commissioner of Police, Bombay Vrs. Gordhandas Bhanji**, reported in **A.I.R. (39) 1952 SC 16**. The relevant paragraph of the judgment is as under:-

> "9. An attempt was made by referring to the Commissioner's affidavit to show that this was really an order of cancellation made by him and that the order was his order and not that of Government. We are clear that public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently 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 actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

In the case of **Mohinder Singh Gill and Another Vrs. The Chief Election Commissioner, New Delhi and Others,** reported in **(1978) 1 SCC 405** and subsequently reiterated in case of **East Coast Railway and Another Vrs. Mahadev Appa Rao and Others,** reported in **(2010) 7 SCC 678**. The relevant paragraph is as under:-

> "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."

Thus it is settled proposition of law that reason which is not mentioned in the impugned order cannot be developed.

In view of these reasoning it is held that the authorities, in a very perfunctory manner, have taken away the right of the petitioner.

7. In such a situation the proper course for the Court would be to remit the matter before the authority but in peculiar facts of this case and considering the fact that it is a case of benefit to be extended in favour of the freedom fighter who has fought for the nation and given his life without caring for the lives of his dependents and also considering the fact that the

petitioner at the time of filing the writ petition was 70 years old and as such, as on date, he is more than 90 years of age and hence it would not be proper to remit the matter before the authority for the reasons that again he is to wait for an appropriate order regarding his claim and it might be that he may not survive to see the result of the order or take the fruits of his claim, that too for the action of the authorities who have passed a perfunctory order as discussed above, hence taking into consideration these aspects of the matter, this Court is not inclined to remit the matter before the authority.

In view of such situation the writ petition is allowed with a direction to release all consequential benefit in favour of the petitioner within reasonable period, preferably within six weeks from the date of receipt of copy of this order.

Writ petition allowed.

2016 (II) ILR - CUT-188

S. N. PRASAD, J.

O.J.C. NO. 4164 OF 1996

PRABODH CHANDRA PAIKRAY .....Petitioner

.Vrs.

ORISSA STATE ELECTRICITY BOARD (DELETED) GRIDCORPORATION OF ORISSA LTD. & ORS. .....Opp. Parties

DEPARTMENTAL PROCEEDING – Occurrence took place during 1978-82 – Authorities came to learn about the involvement of the petitioner when vigilance enquiry conducted in the year 1980 – Departmental proceeding initiated and memo of charge issued against the petitioner in 1995 – Hence the writ petition – There is inordinate delay of 17 years for initiating the proceeding – If the proceeding will be allowed to continue, the petitioner will be prejudiced as no record is available – Moreover the petitioner has retired from service – Held, the impugned departmental proceeding is quashed. (Para 5)

Case Laws Referred to :-

1. 1998 4 SCC 154 : State of Andhra Pradesh Vrs. N. Radhakrishna
2. (2005) 6 SCC 636 : P.V. Mahadevan Vrs. Md. T.N. Housing Board
3. AIR 1992 SC 1701 : Abdul Reheman Antulay Vrs. V. R. S. Nayak

4. (1998) 9 SCC 131 : Food Corporation of India and Another Vrs. V.P. Bhatia

For Petitioner : M/s. Y.Das, N.C.Mohanty, D.K.Dey, C.R.Satpathy & D.Bhanja

For Opp. Parties: M/s. B.K.Nayak & J.K.Khuntia (O.P.2-4)
M/s. B.K.Nayak(1) & A.Dash (O.P.5)
M/s. B.K.Pattnaik, S.S.Parida & K.Mohanty (O.P.1)

Date of hearing : 06.05.2016
Date of Judgement : 06.05.2016

JUDGMENT

S.N. PRASAD, J.

This writ petition has been filed for quashing the entire departmental proceeding being D.P. No.405 dtd.31.3.1995.

2. The brief facts of the case of the petitioner is that while he was working as Jr. Engineer, Electrical Section No.II, Bhadrak in the year 1995, a departmental proceeding bearing No.405 dtd.31.3.1995 was initiated against the charges by the Chief Engineer-cum Member, Transmission, Distribution and Communication, O.S.E.B.

It has been alleged that during his incumbency as Sub-Assistant Engineer, Rairangpur Electrical Section from 1979-82 under the Executive Engineer, R.E.D., Rairangpur, the petitioner has committed some irregularities as per the report of vigilance enquiry. The allegation is that on the indent No.Nil dtd.23.3.1980 of the S.D.O., Electrical Sub-Division, Rairangpur the petitioner received 3 nos. of tyres with flaps and 3 nos. of tubes for departmental Truck bearing No.ORM-1638 from the stores, sub-deport, Baripada. The said materials have been issued by the store keeper vide issue voucher No.500 dtd.25.3.1980 and the same have been received by the petitioner which were meant for Truck No.ORM-1638 maintained by the Jr. Engineer, Josipur.

It has been alleged that the above materials have neither been entered in the stock account of Rairangpur Section nor issued to Josipur Section.

It has further been stated that on 14.2.1981 the petitioner issued 3 nos. of tyres with flaps and tubes for Josipur Electrical Section against Truck bearing No.ORM -1638 as per duplicate copy of issue voucher No. & date Nil which has been signed and received without date by the S.D.O., Electrical, Rairangpur. The said issue voucher has been seized by the

Inspector, Vigilance, Rairangpur but the quadruplicate copy of the same shows that 4 X 40 watt F.L. Tube (80 nos.) and 40 watt Chock (80 nos.) were indented by the S.D.O., Electrical, Rairangpur for Joshipur section from Balasore Store Unit which has subsequently been struck off and the above tyres with flaps and tubes have been mentioned.

It is ascertained from F.C. Mohanty, Ex-S.D.O., Electrical, Rairangpur that he placed an indent to Balasore stores deport for 80 nos. of 40 watt F.L. tubes and 80 nos. of 40 watt. Chock for Joshipur Electrical Section. As the E.S.O. Joshipur was absent he sent the indent in 5 copies through the E.S.O., Karanjia with his advance signature to have received the materials.

Hence the following charges have been leveled against the petitioner:

(i) Manipulation of official records to serve his pecuniary purpose;

(ii) Misappropriation of Board's money;

(iii) Negligence in duty;

(iv) Gross misconduct.

Accordingly departmental proceeding has been initiated being D.P. No.405 dtd.31.3.1995.

The petitioner immediately after receipt of copy of the minutes of the proceeding has requested the Chief Engineer-cum- Member, T.D.C. to allow him to peruse the relevant records and to take extract there from to enable him to submit his explanation. In response date was fixed directing the Executive Engineer to fix a date for taking extract by the petitioner, but in spite of date having been fixed, no document, which was necessary to put forth his defence has been produced.

The further grievance of the petitioner is that the alleged occurrence is said to have been occurred in the year 1979-82 but for the said irregularities the departmental proceeding has been initiated after lapse of about 17 years and as such the departmental proceeding should not be allowed to be initiated after lapse of such a delay.

He further submitted that it is the right of the Disciplinary Authority to initiate departmental proceeding against an employee but it does not mean that whenever the Disciplinary Authority will think, they will start the departmental proceeding, rather there must be some reasonable time to initiate departmental proceeding and that cannot be said to be initiated after 17 years and as such this writ petition has been filed.

3. Counter affidavit has been filed.

4. Heard the learned counsels for the parties and perused the documents on record.

This writ petition has been filed for quashing the departmental proceeding initiated against the petitioner bearing No.405 dtd.31.3.1995. The sole ground taken for the same is that the disciplinary authority cannot initiate departmental proceeding after lapse of 17 years.

This court vide order dtd.19.4.2016 has directed the officials to come along with original record.

In pursuance to the said order officials are present along with original record and the same has been produced before this court including the vigilance enquiry report.

From perusal of the vigilance enquiry report it is evident that the enquiry was initiated on 25.3.1980 for unauthorized disposal of 3 nos. of truck tyres, tubes and flaps and misappropriation of its costs was taken up by this department. There is no date mentioned as to when the vigilance department has concluded its enquiry.

The case of the opposite parties is that it is on the basis of that vigilance enquiry the departmental proceeding has been initiated and the delay has been caused in its initiation. But from perusal of the vigilance enquiry report it is evident that the first date mentioned in the report is 25.3.1980 and as such it cannot be presumed that the vigilance has taken 17 years in conducting the enquiry. Even assuming that the vigilance enquiry took 15 or 17 years, but on that ground also departmental proceeding cannot be initiated after lapse of more than 15 years.

However, this court vide order dtd.2.7.1996 has stayed the further proceeding of the departmental proceeding.

It is settled that a departmental proceeding if not initiated within time, there is no justification to continue the same. The settled principle of law is that even if the departmental proceeding has been initiated and if it takes more than 10 years time, then also the departmental proceeding is not worth to be continued, but the thing which is to be seen is that as to whether delay has been attributed to the delinquent employee or the department, certainly if the delay in conclusion of the departmental proceeding is attributable to the delinquent employee, the D.P. cannot be quashed merely on the ground of delay, but if delay is not attributable to the delinquent employee, then certainly the D.P. has to be quashed. This rule has been

settled by the Hon'ble Apex Court in the case of **State of Andhra Pradesh Vrs. N. Radhakrishna, 1998 4 SCC 154** wherein at paragraph 19 it has been held as follows:

> "19. It is not possible to lay down any pre-determined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the court has to take into consideration all relevant factors and to balance and weight them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. if the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse consideration."

This settled proposition has again been reiterated by Hon'ble Apex Court in the case of **P.V. Mahadevan Vrs. Md. T.N. Housing Board, (2005) 6 SCC 636.**

In these two judgments facts related are with respect to delay in conclusion of departmental proceeding and Hon'ble Apex Court after taking into consideration the facts of those cases have been pleased to come to a

proposition of law that if there is inordinate delay in conclusion of departmental proceeding and the delay is not attributable to the delinquent employee, then the departmental proceeding has to be quashed, but if the delay in conclusion of departmental proceeding is attributable to the delinquent employee the departmental proceeding will not be vitiated.

In case of State of Andhra Pradesh Vrs. N. Radhakrishna (supra) even the accountability has been vested upon the authority who has been conferred power to initiate departmental proceeding and if any delay is being caused on their part, they are also liable to penalized by initiating proper proceeding under the Discipline and Appeal Rule.

The facts of this case is little bit different since the petitioner has challenged the very initiation of the departmental proceeding, i.e. as to whether the departmental proceeding initiated after lapse of 17 years will be allowed to be initiated when the authorities were knowing about the irregularities way back in the year 1980.

In this respect reference may be made to the judgment rendered by Hon'ble Apex Court in case of **Abdul Reheman Antulay Vrs. V. R. S. Nayak, AIR 1992 SC 1701** wherein it has been held that Right to speedy trial of an accused if infringed the departmental or judicial proceeding shall be quashed.

In the case of **State of Madhya Pradesh Vrs. Bani Singh and Another, 1990 (Supp) SCC 738 t**aking into consideration the fact of the said case wherein the irregularities which were the subject matter of enquiry is said to have been taken place in between the year 1975-77 and the authorities have came to know about the said irregularities in the month of April, 1977 but waiting for 12 years the departmental proceeding was initiated and Hon'ble Apex Court have been pleased to take into consideration that there is no satisfactory explanation for inordinate delay in issuing the charge memo and as such the departmental proceeding has been directed to be quashed.

In the case of **Food Corporation of India and Another Vrs. V.P. Bhatia, (1998) 9 SCC 131**it has been held that undue delay in initiation of departmental proceeding may cause prejudice to the employee concerned in defending himself and, there, the courts insist that departmental proceeding should be initiated with promptitude and should be completed expeditiously. The question as to whether there is undue delay in initiation of disciplinary proceedings or whether they are being unnecessarily prolonged has to be considered in the light of the facts of the particular case.

5. Now so far as the fact of this case is concerned, the alleged occurrence took place in between the year 1978-82 and vigilance enquiry was also directed to be conducted and in the year 1980 itself the authorities had came to know that there is some involvement of the petitioner in the irregularity but they have kept silent fairly for a long period of 17 years and thereafter only in the year 1995 memo of charge has been issued along with this departmental proceeding, impugned in this writ petition and it is not the case of the opposite parties that they were not knowing about the involvement of the petitioner in the irregularities in the year 1980 and the vigilance enquiry was going which has taken long time in its conclusion, rather from perusal of the enquiry report which has been produced by the officials of the opposite party who are present in the court along with record, it is evident that the vigilance has initiated its enquiry in the year 1980 and thereafter the report has already been submitted, however the report does not contain any date, rather there is only reference of one date, i.e.25.3.1980, as such the involvement of the petitioner regarding irregularities was surfaced in the year 1980 itself but no decision was taken by the authorities at that time and they have waited for 15 years from the year 1980, thereafter departmental proceeding has been initiated.

The Hon'ble Apex Court has been pleased to laid down the proposition that merely on the ground of delay in initiation of departmental proceeding it would not be proper to quash the proceeding rather each and every case has to be seen on its own facts and if it is found that there is unnecessary delay in initiation of departmental proceeding, the departmental proceeding has to be quashed by the court of law.

Considering this proposition of law, when the fact of this case will be compared, it is evident that the departmental proceeding has been initiated after lapse of 17 years from the date of alleged occurrence when the authorities have already came to know about the occurrence way back in the year 1980 itself, as would be evident from the vigilance enquiry report. Due to such inordinate delay if at this stage the departmental proceeding will be allowed to continue, the petitioner will be prejudiced for the reason that the learned counsel representing the opposite parties as also the officials present have submitted that no record is available only except the record which is available is the vigilance enquiry report, as has been perused by this court, then also it would not be proper in the ends of justice to direct the authority to continue with the departmental proceeding since being the custodian of record the authorities have not kept the relevant document s which are

necessary in the instant departmental proceeding in safe custody and if this court would direct to continue with the departmental proceeding, no purpose would be served in absence of any valid document and in that situation the petitioner being a delinquent employee will highly be prejudiced as has been submitted by the learned counsel for the petitioner that now the petitioner has already retired from service and as such it would also not be just and proper for this reason also since the departmental proceeding has been initiated in the year 1995 and since then the petitioner is in the agony of pendency of the departmental proceeding and if after retirement again the departmental proceeding will be allowed to be continued, that too in absence of relevant document, the petitioner will again be prejudiced, further that is not the purpose of initiation of departmental proceeding, rather the purpose of departmental proceeding is to conduct an enquiry in order to reach to truth and the truth will come only on the basis of relevant document but when the document itself is not available, it cannot be expected that a fair departmental proceeding would be done.

Taking into consideration the facts of this case and the ratio laid down by the Hon'ble Apex Court, in my considered view there is no justification to direct the opposite parties to continue with the departmental proceeding in peculiar facts of this case and accordingly the writ petition deserves to be allowed and according allowed, in the result, the Departmental Proceeding No.405 dtd.31.3.1995 is quashed. Accordingly, the writ petition is allowed.

Writ petition allowed.

2016 (II) ILR - CUT-195

K. R. MOHAPATRA, J.

F.A.O. NO. 75 OF 2015

NAVIN DAS & ANR. ……..Appellants

.Vrs.

SMT. RANJITA SINGH ……..Respondent

(A) TORTS – Suit for damages – Plaintiff-respondent brought the suit, for defamation of her husband and father-in-law – Maintainability of the suit questioned as the plaintiff is not the person defamed – Record reveals that some of the news items relate to the family

members of the plaintiff and not confined to her husband or father-in-law – Moreover by virtue of marital relationship, the husband and wife acquire such a status in the society that defamation against one necessarily has its effect on the other – Held, the suit filed by the plaintiff-respondent is maintainable. (Para 7)

(B) CIVIL PROCEDURE CODE, 1908 – O-39, R-1 & 2

Suit for damages for defamation – Alongwith the suit plaintiff-respondent made an application under O-39, R-1&2 C.P.C. to restrain the defendants-appellants from publishing defamatory news items in their newspaper against her husband and father-in-law – Trial Court allowed the application – Hence this appeal on the ground that three golden principles for grant of injuction not satisfied – In this case pleadings in the plaint suggest that the plaintiff has reasons to be defamed for the news items, so she has a prima facie case in her favour – So far as irreparable loss is concerned the defendants submitted that the suit being for damages and the same is quantified, the plaintiff would not suffer irreparable loss if interim injuction is not granted, rather the defendants being the owner and editor would suffer irreparable loss if the impugned order is not set aside as the freedom of the newspaper guaranteed under Article 19(1)(a) of the Constitution of India is curtailed – Such submission of the defendant was objected by the plaintiff that public image of a person cannot be weighed or compared with amount of compensation or damages and right guaranteed under Article 19(1)(a) of the Constitution has its own limitation and subject to restrictions under Article 19(2) of the Constitution – So the plaintiff would suffer irreparable loss if the impugned order is set aside – So far as, balance of convenience is concerned, learned Civil Judge has not completely restrained the defendants from publishing any news relating to the husband and father-in-law of the plaintiff but only restrained from publishing any defamatory and malicious news items and has nicely balanced the comparative inconvenience and mischief that would be caused to the parties while passing the impugned orders – So, balance of convenience leans in favour of the plaintiff – Held, the impugned order passed in favour of the plaintiff needs no interference.

(paras 8 to 14)

Case Laws Referred to :-

1. AIR 2007 Delhi 9 : Ratinand Balved Education Foundation Vs.Alok Kumar
2. 2012 SC 1727 : Maria Margarida Sequeria Fernandes and Others Vs. Erasmo Jack de Sequeria(Dead) through L.Rs.
3. AIR 2005 Orissa 78 : Smt. Laxmi Dei and another etc. Vs. Shyam Sundar Hans and etc.

4. 2010 (1) ILR-CUT-713 : Xavier Institute of Management, BBSR Vs. Swapna Harrison
5. 36(1970) CLT 940 : Padmalochan Choudhury Vs. Nirakar Patel
6. AIR 2008 SC 681 : Magna Publishing Co. Ltd. & Ors. Vs. Shilpa S.Shetty

For Appellants : Mr. D.C.Mohanty, Sr.Advocate
M/s. D.R.Mohapatra, S.R.Mohapatra & K.K.Jena

For Respondent : M/s. A.K.Mohapatra, S.J.Mohanty, A.K.Mahana, A.Mishra & A.Parija.

Date of Judgment: 29.01.2016

JUDGMENT

K.R. MOHAPATRA, J.

Order dated 27.12.2014 passed by the learned 2nd Addl. Senior Civil Judge, Bhubaneswar in I.A. No. 496 of 2014 allowing an application under Order 39 Rules 1 and 2 read with Section 151, C.P.C. and restraining the opposite party-appellants from publishing any statement with malice, which is defamatory in nature, against the petitioner-respondent's husband and father-in-law in their newspaper "Satya-ra Swara Nirbhay" till final disposal of the suit, is under challenge in this appeal.

2. Civil Suit No. 7240 of 2014 has been filed claiming punitive and compensatory damages amounting to Rs.10.00 crores and to declare the news items published in the newspaper, namely, "Satya-ra Swara Nirbhay" tarnishing the image of the plaintiff's father-in-law and her husband to be defamatory and libelous and for permanent injunction. The plaintiff (respondent herein) in the plaint contended that she is the wife of Sri Pranab Kumar Balabantaray, a sitting Member of Odisha Legislative Assembly (M.L.A.) and is also the daughter-in-law of Kalpataru Das (now dead), a former Member of Parliament (Rajya Sabha). The said Kalpataru Das was also the former Cabinet Minister being a member of the Odisha Legislative Assembly during the period from August, 2012 to 12.02.2014. Both of them are social workers and tried their level best to work for welfare of the public at large. Both of them also hold high reputation in the State of Odisha as well as in the political domain of the State. The defendant No.1 is the Editor, Printer and Publisher and defendant no.2 is the owner of the newspaper, namely, "Satya-ra Swara Nirbhay". While the matter stood thus, there were some news reports regarding illegal allotment of lands and houses under discretionary quota by the Development Authorities of Cuttack and

Bhubaneswar against plaintiff's father in-law and her husband. After publication of such news items, plaintiff's husband surrendered the flat allotted in his name on moral ground. Taking such advantage, the defendants published various offending news items by giving a different colour to it which grossly damaged the social reputation, prestige and dignity of her family including her father-in-law and husband. The news items and articles were portrayed in a way which were extremely derogatory in nature and were deliberately added with colour so as to create a negative image of the plaintiff's father-in-law, husband and other family members. Those were also deliberately worded and designed to give negative slant to the truth so as to present a completely distorted image of plaintiff's father-in-law and husband. She also gave certain illustration of such news publication in the plaint. Hence, the suit was filed for the aforesaid relief. Along with the plaint, the plaintiff filed a petition under Order 39 Rules 1 and 2 C.P.C. with a prayer to restrain the defendants (appellants herein) from publishing any defamatory news items on libelous material which would tarnish the image of plaintiff's husband, father-in-law as well as other family members.

3. The defendants filed their objections refuting the allegations made in the plaint as well as in the interim application. They contended that the petition is not maintainable both in fact and law. They also contended that the plaintiff has no *locus standi* to file the suit as well as the interim application as there has been no defamatory and libelous imputation against her. A person who is alleged to have been defamed has only the right to maintain such a petition and the suit as well. It is a right in *personam* and not in *rem*. They further contended that no defamatory articles were published in the newspaper against the husband and father-in-law of the plaintiff. The news items published are based on fact. When Sri Pranab Balabanta Ray and Sri Kalpataru Das had not filed any suit, it can be said that they are not aggrieved of such news publication. Thus, the suit at the instance of a third person is not maintainable so also the interim application. Not a solitary condition for grant of temporary injunction has been satisfied in the case. Thus, the interim application is not maintainable and the same is liable to be dismissed.

4. The learned trial court considering the rival contentions of the parties allowed the application restraining the opposite party-respondents from publishing any statement with malice, which is defamatory in nature, against the plaintiff-respondent's husband and f ather-in-law in their newspaper

"Satya-ra Swara Nirbhay" till disposal of the suit. Being aggrieved by the said order, this appeal has been filed.

5. Mr. D.C. Mohanty, learned Senior Advocate appearing on behalf of the appellants submitted that a relief of interlocutory injunction can be granted subject to satisfaction of three golden principles which include the question of maintainability. Thus, the plaintiff-respondent has to establish a prima facie case that gives rise to a triable issue. In the instant case, the suit being one of defamation, a person who is alleged to have been defamed, has the right to file a suit claiming damages. This is a right in *personam* and not in *rem*. Thus, the person aggrieved has only *locus standi* to maintain a suit for defamation. It affords no right to any relative, friend of family members, as the case may be, to step into the shoes of the person, who is alleged to have been defamed. None else other than the person aggrieved can maintain a suit in the representative capacity. The nature of pleadings and the relief sought for clearly reveal that the plaintiff has filed the suit for compensation for publication of news items and articles against her husband as well as father-in-law in the newspaper of the defendants-appellants, which were allegedly defamatory and libelous in nature. Thus, she claims compensation for the alleged defamation of her husband and father-in-law. Neither of them has filed any suit or complaint against such publications. None of the news items published relates to the plaintiff-respondent. Thus, she is no way aggrieved or defamed by such publications. In support of his case, he relied upon the case of ***Ratinand Balved Education Foundation Vs. Alok Kumar***, reported in AIR 2007 Delhi 9 and submits that before granting an order of injunction, the trial court ought to have gone into the question of maintainability of the suit to satisfy itself with regard to existence of a *prima facie* case. As respondent has no *locus standi* to maintain the suit nor there is any cause of action for the plaintiff-respondent to file the suit, no *prima facie* case is made out. In addition to the above, this being a suit for damages and the damage having been quantified, the plaintiff-respondent cannot be said to suffer irreparable loss, if the prayer for injunction is not granted. As the first two ingredients to get an order of injunction are not satisfied, balance of convenience does not lean in favour of the plaintiff-respondent. The learned trial court has miserably failed to appreciate the same which resulted in gross miscarriage of justice. The defendants-appellants being the owner and editor of a newspaper have the freedom of speech, expression and profession. Any order of injunction would amount to curtailment and infringement of such constitutional right. In view of the impugned order passed, the defendants-appellants have suffered

irreparable loss as their constitutional right of freedom of speech, expression and profession has been curtailed. Thus, the impugned order is *per se* bad in law.

Referring to the decision in the case of ***Maria Margarida Sequeria Fernandes and Others Vs. Erasmo Jack de Sequeria(Dead) through L.Rs.***, reported in 2012 SC 1727, Mr. Mohanty submitted that grant or refusal of an injunction in a civil suit is the most important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the defendant. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness.

Relying upon the decision in the case of ***Smt. Laxmi Dei and another etc. Vs. Shyam Sundar Hans and etc.***, reported in AIR 2005 Orissa 78, Mr. Mohanty submitted that discretion vested in the court like any other discretionary power can be exercised in accordance with reasons and sound judicial principles. It requires the highest degree of satisfaction of the Court before exercising discretion of granting an order of injunction. Further, referring to the decision in the case of ***Xavier Institute of Management, BBSR Vs. Swapna Harrison***, reported in 2010 (1) ILR-CUT-713, it is submitted that the main prayer and the interim prayer being the same, the learned Court has erred in law in granting such an interim prayer. The impugned order lacks adherence of basic principles of law laid down/settled as above and it has been passed in a routine manner and in excess of jurisdiction vested in the learned trial court and that too in favour of a person, who does not have any semblance of right or *locus standi* to file a suit. He also referred to several other decisions which canvas the ratio that an action for defamation can only be instituted by a person who is defamed and not by others, including family members, relatives and friends etc. He further submitted that the news items contextually are statement of facts and pressed as a canvas to portray a picture and serve the people by bringing the facts to their knowledge for public good in the matters of public importance without fear or favour. Thus, he prayed for setting aside the impugned order.

6. Mr. Mohapatra, learned counsel for the respondent, on the other hand, supporting the impugned order submitted that the impugned order is just and proper and the same does not call for any interference by this Court.

The trial court has taken note of all aspects of the matter involved while passing the impugned order. All the three ingredients required for granting an order of injunction have been satisfied in this case. A bare perusal of the news items as well as the pleadings of the parties would go to show that the news reports which were filed along with the plaint are scandalous, libelous and defamatory in nature. It can be safely said that the plaintiff-respondent has a prima facie case since the suit has been admitted for trial. The learned trial court while passing the impugned order has ensured two aspects, firstly to ensure that no other libelous or defamatory news items are published against the plaintiff-respondent and secondly to ensure that the right of publishing news items by the defendants-appellants are not curtailed to uphold their freedom of speech and expression as guaranteed under Article 19(1)(a) of the Constitution of India. While assessing the principle of comparative mischief caused to the plaintiff, the learned trial court found that the comparative mischief would be more and there would be damage to the reputation of the plaintiff-respondent's family, if the defamatory and libelous news items are allowed to be published against them. Loss or damage of such reputation cannot be compensated in terms of money. Thus, the trial court has not completely restrained the defendants-appellants from publishing any news item against the plaintiff-respondent's husband, father-in-law and family members. It has only restrained them from publishing any defamatory and libelous news items. The impugned order has been rightly passed to have an orderly and civilized society and to ensure that the rule of law prevails in the society, which is one of the prime objectives of the whole legal system in the country. The defendants-appellants are not completely restrained from publishing news items against the plaintiff-respondent's husband, father-in-law and other family members, which are based on facts and evidence.

7. Replying to the question of maintainability of the suit, Mr. Mohapatra submitted that the contention raised to that effect is not correct and the same is baseless. The plaintiff-respondent herself is a person aggrieved and has approached the Court for certain relief which she is entitled to under law. The news items published would give a definite impression that the image and reputation of the plaintiff-respondent's family as a unit as well as the members of the family as individuals, has been tarnished and imputed by publication of such news. Relying upon a decision in the case of ***Padmalochan Choudhury Vs. Nirakar Patel***, reported in 36(1970) CLT 940, Mr. Mohapatra submitted that by virtue of the mortal relationship, the

husband and the wife acquire such a status in the society that defamation against one necessarily has its effect on the other.

Mr. Mohapatra further submitted that the main thrust of the argument of the learned counsel for the appellants was with regard to *locus standi* of the plaintiff for filing of the suit and maintainability of the suit. The appellants had filed a separate application under Order 7 Rule 11 C.P.C. raising such question, which was rejected. Against the said order, a Civil Revision is at present pending before this Court. Thus, the same should not be a subject matter of adjudication in this appeal. The right to freedom of speech and expression which flows from Article 19 (1)(a) of the Constitution of India is not an absolute right and the same is subject to the rider as provided under Article 19(2) of the Constitution of India which provides that nothing in sub-clause (a) of Clause-1 of Article 19 shall affect the operation of existing law, or prevent the State from making any law insofar as such law imposes reasonable restrictions on the exercise of the right conferred under the said sub-clause in the interest amongst other, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. Thus, no fault can be found with the impugned order. He further submitted that the decision cited with regard to *locus standi* of the plaintiff-respondent for filing of the suit is not applicable to the present case. Thus, he prayed for dismissal of the appeal with cost.

8. On perusal of the news items reproduced in the plaint, it is apparent that most of the news items/publications are relating to either the husband and/or the father-in-law of the plaintiff-respondent. But, there are some publications, more particularly, the news items published on 2nd August, 2014 as referred to in paragraph-24 of the plaint, publication dated 3rd August, 2014 referred to in paragraph-25 of the plaint as well as publication dated 5th August, 2014 referred to in paragraph-27 of the plaint, relate to the family members of the plaintiff-respondent. In that view of the matter, it cannot be said that the publication in the news paper was only relating to the husband and father-in-law of the plaintiff-respondent. Mr. Mohanty, learned Senior Advocate submitted that the plaintiff has not prayed for any damages for the alleged libelous and defamatory news published against her. She has only sought for compensation/damages for publication of libelous and defamatory news items against her husband and father-in-law. Thus, she has no *locus standi* to seek for such a relief. In support of his contention, he relied upon a decision in the case of *Ratinand Balved Education Foundation (supra)*. The said decision is not applicable to the case at hand, because, the

purported defamatory statements were allegedly made against some members of the Executive Board of the plaintiff-society and there was no such statement published against the plaintiff-society. In the instant case, the purported news items were published against the husband, father-in-law and family members of the plaintiff. Thus, I feel that the ratio decided in the case of *Padmalochan Choudhury (supra)* as relied upon by Mr. Mohapatra, learned counsel for the respondent will throw some light to address the issue involved. In paragraph 4 of the said decision, this Court held as under:-

> "4. There seems to be consensus of judicial opinion that in a case where the wife is defamed particularly touching upon her character, the husband is the aggrieved person. This is more or less on the basis that by marital relationship the husband and the wife have such a status in the society that defamation against one necessarily has its effect on the other…."

As rightly pointed out by Mr. Mohanty, learned Senior Advocate, the issue involved in the decision referred to (supra) relates to the maintainability of a complaint filed by the husband of the victim-wife for alleged commission of offence under Section 500 IPC. But, I don't find any reason to confine the principles decided in criminal proceedings only. The principle laid down is equally applicable to the Civil Suits filed for damages and compensation for defamation. Be that as it may, when the question of maintainability is sub-judice before this Court, I don't want to delve into that issue further. Undoubtedly, there are pleadings in the plaint which suggest that the plaintiff has reasons to be defamed for the news publication. However, the veracity of such contention cannot be gone into at this stage, which can only be adjudicated by adducing cogent and convincing evidence by the parties to this suit. At this stage, therefore, it can be unhesitatingly said that the plaintiff-respondent has a prima facie case, as she has a fair question to be raised at trial.

9. The next question, therefore, arises for consideration is whether the plaintiff-respondent would suffer irreparable loss, if the order of injunction is not granted. Mr. Mohanty, learned Senior Advocate submitted that the suit is for damages and the same is quantified. Thus, it cannot be said that the plaintiff-respondent would suffer irreparable loss, if the order of interim injunction is not granted. She can be adequately compensated if she succeeds in the suit. On the other hand, the defendants-appellants would suffer irreparable loss, if the impugned order is not set aside and is allowed to continue. He strenuously urged that the fundamental right of freedom of

speech and expression guaranteed under Article 19 (1)(a) of the Constitution of India has been curtailed without any justifiable reason. Hence, the impugned order is not sustainable.

10. Mr. Mohapatra, on the other hand, submits that the news items published have already tarnished the image and reputation of the husband and father-in-law as well as the family members of the plaintiff-appellant and she has already sought for damages for such publication. In the event, the impugned order is set aside, it would amount to give a license to the appellant to publish defamatory and libelous news items which would cause irreparable loss to the respondent and her family members. Moreover, learned Civil Judge has not prevented the appellants from publishing any statement which is true and fair. The appellants are also not prohibited from making any bona fide comments as well as statements for the interest of the public. They are only restrained from publishing any statement, which is defamatory and libelous in nature. The right guaranteed under Article 19(1)(a) of the Constitution of India has its own limitation and always subject to the restrictions of Article 19(2) of the Constitution. Thus, the defendants-appellants would not suffer any loss, much less any irreparable loss, if the impugned order is allowed to continue.

The reputation and public image of a person cannot be weighed or compared with amount of compensation or damage. The relief of damage and/or compensation has been claimed for the alleged tort committed by the defendant by publishing defamatory or libelous news items. Thus, it is very difficult to accept the submission of Mr. Mohanty to the effect that the plaintiff-respondent would not suffer irreparable loss if the order of injunction is refused, as she (the plaintiff) has claimed compensation in terms of the damages. If the submission of Mr. Mohanty is accepted, then it would result in issuing a license to the defendants-appellants to publish defamatory and libelous news items and articles by making payment of compensation for the injury she has suffered to her reputation and public image. Thus, while endorsing the findings of learned Civil Judge, I am of the view that the plaintiff-respondent would suffer irreparable loss, if the impugned order is set aside.

11. The eminent jurist, late Nani A. Palkiwala in an article ‘The Fourth Estate’ in his book, “We the Nation” has very nicely described the role of Press and Media. I would like to quote a few lines from the said article, which is as follows:-

> "Freedom is to the press what oxygen is to the human being; it is the essential condition of its survival. To talk of a democracy without a free press is a contradiction in terms. A free press is not an optional extra in a democracy."

Our Constitution also guarantees right to freedom of speech and expression under Article 19(1) (a). But, the right conferred and the freedom guaranteed is subject to the restrictions imposed under Article 19(2) of the Constitution. The same read as follows:-

> 19. Protection of certain rights regarding freedom of speech etc.
>
> (1) All citizens shall have the right
> (a) to freedom of speech and expression;
>
> xx xx xx
>
> (2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence
>
> (3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause
>
> (4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause…"

Thus, the defendants-appellants do not have any right to publish news items and articles which is defamatory in nature and is opposed to decency and morality. In the aforesaid backdrop, the case of respective parties has to be assessed to determine the balance of convenience. Every citizen including the Press has the right of freedom of speech and expression. But the right conferred and the freedom guaranteed is subject to the restriction and /or

qualification provided under Article 19(2) of the Constitution. Learned Civil Judge has not completely restrained the defendant-appellants from publishing any news item relating to the husband and father-in-law of the plaintiff-respondent. He has only restrained the defendants-appellants from publishing any defamatory and malicious news item in their newspaper against the plaintiff's husband and father-in-law. Thus, learned Civil Judge has fairly and nicely balanced the comparative inconveniences and mischief that would be caused to the parties while passing the impugned order. Thus, the impugned order needs no interference on this score.

12. A close scrutiny of the impugned order makes it clear that the learned Civil Judge has aptly addressed the issue of the right of the Press/newspaper guaranteed under Article 19(1) (a) of the Constitution and at the same time has given due weightage to the inconvenience that would be caused to the plaintiff-respondent if libelous and defamatory news items are published. Thus, learned Civil Judge without interfering with the fundamental right of speech and expression of the appellant as guaranteed under Article 19(1)(a) of the Constitution of India has only restrained them from publishing any news item which would be malicious and defamatory. Accordingly, the balance of convenience has been rightly held to lean in favour of the plaintiff-respondent.

13. Injunction is an equitable relief. The Court while deciding/adjudicating an application for interim injunction must see that by grant or refusal of the order of temporary injunction, the equity is not disturbed. As rightly argued by Mr. Mohanty relying upon the decision in the case of ***Maria Margarida Sequeria Fernandes and Others*** (supra) as well as the decision in the case of ***Smt. Laxmi Dei and another etc.*** (supra), grant or refusal of an order of injunction in a Civil Suit is the most vital stage. Due care, caution, diligence and attention must be bestowed by the Judicial Officers and Judges while exercising such discretion, as it becomes a nightmare for the party against whom the order of injunction is passed to get it vacated or modified, if situation so warrants. At the same time, the Court cannot be a silent spectator to the injustice being perpetuated in the garb of adhering to the principles of law. In the case at hand, the defendants-appellants cannot certainly claim that they have freedom of expression and/or publication of news item against the plaintiff and her family members, which are defamatory or malicious in nature. Thus, the impugned order is equitable one. In a decision in the case of ***Magna Publishing Co. Ltd. & Ors. Vs. Shilpa S.Shetty,*** reported in AIR 2008 SC 681, the Hon'ble Apex

Court, while dealing with a matter relating to grant of interim order of injunction in a suit for defamation, held that while granting leave to appeal, the prayer for grant of interim relief was refused and the impugned order was operative. Thus, the Hon'ble Apex Court without interfering with the impugned order of injunction directed for early disposal of the suit. In the instant case, no interim order has been passed by this Court while issuing notice in the matter of admission. In other words, the impugned order continues to be operative till date. Thus, the interest of justice would be best served, if a direction is issued to dispose of the suit early.

14. Taking into consideration the discussions made above, I find no reason to interfere with the impugned order. Hence, the appeal stands dismissed. However, the learned Civil Judge (Senior Division), Bhubaneswar is directed to dispose of the suit expeditiously, if there is no other impediment. Parties are also directed to co-operate with the court for early disposal of the suit. In the circumstances, there shall be no order as to costs. L.C.R. be sent back immediately.

Appeal dismissed.

2016 (II) ILR - CUT-207

K. R. MOHAPATRA, J.

F.A.O. NO. 47 OF 2016

M/S. SAI CONCRETE PAVERS PVT. LTD, VISAKHAPATNAM .....Appellant

.Vrs.

NATIONAL ALLUMINIUM COMPANY LTD, KORAPUT .....Respondent

CIVIL PROCEDURE CODE, 1908 – O-43, R-1(r)

Appellant, while filing a petition U/s. 9 of the Arbitration and conciliation Act, 1996 for interim Protection, made an application under O-39, R-1 & 2 C.P.C. to restrain the respondent from invoking the bank guarantee, and another petition under O-39, R-3 C.P.C. for ad-interim order of injuction by dispensing with issuance of notice to the respondent showing urgency in the matter – Application under O-39, R-3 C.P.C. was rejected – Hence this appeal under O-43, R-1(r) C.P.C. – Maintainability of the appeal questioned – Right of appeal is not

inherent but is a creature of the Statute – No appeal lies against an order rejecting an application under O-39, R-3 C.P.C – In the other hand order passed under O-39, R-3 C.P.C not being an order under O-39, R-1 or 2 is not appellable under O-43, R-1(r) – Moreover section 9(1)(ii)(d) of the Act empowers the Court to make any interim arrangement including that of injuction or appointment of receiver – Thus, an order making or rejecting an application for ad-interim injuction is essentially an order U/s. 9 of the Arbitration and Conciliation Act, 1996 and against that order, appeal lies U/s. 37 of the said Act – Held, the present appeal under O-43, R-1(r) C.P.C. is not maintainable, hence dismissed.

(Paras 7,8)

Case Laws Referred to :-

1. 2010 (I) OLR 867 : Presidency Exports and Industries Ltd. Vs. E. Shipping Private Ltd & Ors.
2. AIR 2000 SC 3032: A.Venkatasubbiah Naidu Vs. S.Chellappan & Ors.

For Appellant : M/s. S.S.Rao, B.K.Mohanty & R.Biswal
For Respondents : Mr. Manoj Mishra, Sr. Advocate
M/s. Tanmay Mishra, P.K.Das & S.Mishra

Date of Hearing : 04.03.2016
Date of disposed of : 04.03. 2016

ORDER

K.R. MOHAPATRA, J.

This appeal has been filed assailing order dated 18.01.2016 passed by the learned District Judge, Koraput-Jeypore in I.A. No. 1 of 2016 arising out of C.M.A. No.1 of 2016.

2. The appellant filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') (CMA No.1 of 2016) praying for an interim protection by restraining the respondent from liquidating /enforcing the bank guarantee offered by the appellant through IDBI Bank, Vishakhapatnam, issued through Karur Vysya Bank Ltd., Seetammadhara, Vishakhapatnam and for other reliefs. Along with the petition under Section 9 of the Act, the appellant also filed a petition under Order 39 Rules 1 and 2, CPC praying *inter alia* to restrain the respondent from invoking the bank guarantee till disposal of the CMA. Along with the petitioner under Order 39 Rules 1 and 2, CPC, i.e., I.A. No.1 of 2016, the appellant also filed a petition under Order 39 Rule-3 to pass an ad-interim order of injunction by dispensing with issuance of notice to the respondent showing urgency in the matter. That petition being rejected, the appellant has come up with this appeal.

3. By order dated 28.01.2016, this Court, while issuing notice on admission in appeal, directed that there shall be no invocation of bank guarantee of the appellant/petitioner till the next date (in Misc. Case No.71 of 2016). The said order is continuing till date. It would be apt to mention here that while issuing notice in the matter, this Court has kept open the question of maintainability of the appeal to be raised at the time of hearing. Thus, the respondent/opposite party on its appearance raised the question of maintainability of the appeal at the outset, which is taken up for consideration.

4. Heard Mr.S.S.Rao, learned counsel for the appellant and Mr.Manoj Mishra, learned Senior Advocate assisted by Mr.Tanmay Mishra, learned counsel for the respondent-Company.

5. Mr.Rao, learned counsel for the appellant placing reliance upon paragraph-11 of the decision of the Hon'ble Supreme Court in the case of ***A.Venkatasubbiah Naidu Vs. S.Chellappan and others***, reported in AIR 2000 SC 3032 contended that order passed either refusing or granting an application under Rule-3 of Order 39, CPC is appealable one. Mr.Rao further submits that there are two provisions under the Act, namely, Section-9 and Section 17 of the Act, which enable either the Court or the Arbitrator to pass interim orders or make an interim arrangement. Section 9 of the Act empowers the Court to pass interim orders or make interim arrangement in contemplation of an arbitral proceeding. Though the provisions of Section 9 of the Act deals with entertaining an application for interim measure it does not make any provision as to how the interest of the aggrieved party is to be protected before the petition under Section 9 of the Act is taken up on merit. Thus, the application filed for injunction can only be entertained under the provisions of Order 39 Rules 1 and 2, CPC and not otherwise. Thus, the appeal against the said order is maintainable before this Court.

Right of appeal is not inherent one. It is a creature of the statute, and should be considered on interpretation of the relevant provision. Thus, it is to be examined as to whether the appellant has a statutory right to prefer an appeal against rejection of an application under Order 39 Rule-3, CPC. On a plain reading of Section 104 as well as Order 43 Rule-1, CPC, which provides an appeal against order does not include an order of rejection of an application under Order 39 Rule-3, CPC.

Law is no more *res integra* on this issue. This Court in a decision in the case of ***Sri Rabindra Kumar Mohanty Vs. Smt. Sujata Mohapatra*** (FAO No.86 of 2012 disposed of on 10.07.2015) relying upon *A.Venkatasubbiah*

Naidu (supra) as well as decisions reported in 1989 (II) OLR 455 and AIR 1993 (Orissa) 78 held as under:-

> "6. In view of the discussion made above and the law laid down (supra), I have no hesitation to hold that an appeal is maintainable as against an ex parte ad interim order of injunction as provided under Order XLIII Rule (1) (r) C.P.C., but not against the order refusing to exercise power under Order 39 Rule 3 C.P.C….."

Thus, it can be unhesitatingly held that no appeal lies against an order rejecting an application under Order 39 Rule-3, CPC.

6. Mr.Mishra, learned Senior Advocate for the respondent submits that the impugned order is essentially an order under Section 9 of the Act and is not an order under Order 39 Rules-1, 2 or 3, CPC. He drives attention of this Court to the relevant provisions of Section 9 of the Act, which would be profitable to be reproduced here under:-

> "**9. Interim measures, etc., by Court**.— (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court:-
>
> (i) xx xx xx
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:-
>
> (a) xx xx xx
>
> (b) xx xx xx
>
> (c) xx xx xx
>
> (d) interim injunction or the appointment of a receiver;
>
> (e) such other interim measure of protection as may appear to the Court to be just and convenient,
>
> and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.
>
> (2) xx xx xx
>
> (3) xx xx xx"

Mr.Mishra, thus submits that in view of the scope of Section 9 of the Act it can never be said that I.A. No.1 of 2016 was filed under Order 39 Rules- 1 and 2, CPC. Though it is nomenclatured as such, it can only be treated as a petition under Section 9(1)(ii)(d) and (e) of the Act. Thus, an appeal against

the impugned order would only lie under Section 37 of the Act and not otherwise. He also relied upon a decision of this Court in the case of ***Presidency Exports and Industries Ltd. Vs. E. Shipping Private Ltd. and others***, reported in 2010 (I) OLR 867. In the aforesaid decision, this Court taking into consideration the provisions under Section-9 and Section 37 of the Act, and also relying upon different case laws, came to a categorical conclusion at paragraph-8, relevant portion of which is quoted below:-

> "….. In the present case, the prayer of the petitioner in the Court below was to injunct the opposite parties from removing /re-shipping the cargo in question stored at Paradip Port. In the impugned order an ad-interim order of status quo in respect of the said cargo was passed. The provisions quoted above do not envisage the appeal can lie only against the final order passed under Section 9 of the Act. Accordingly, it is held that the appeal is maintainable."

7. Section 9(1)(ii)(d) of the Act empowers the Court, namely, the District Judge to make any interim arrangement including that of injunction or appointment of receiver. The language employed in Section 9 of the Act, more particularly the words "and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it" makes it clear that the Court shall have the same power to make any order in any proceedings under Section 9 of the Act. Thus, an order making or rejecting an application for ad-interim injunction is essentially an order under Section 9 of the Act only and not otherwise. Further, the scope and ambit of the Act does not empower the District Judge to entertain any application beyond the scope of this Act, be it an application under Order 39 Rules-1 and 2 or 3, CPC. Even if such an application is filed the same can only be considered to be an application under the provisions of Section 9 of the Act.

8. Learned counsel for the parties made arguments at length on merits of the case relying upon different case laws of the Hon'ble Supreme Court. This Court does not feel it prudent to delve into the merit of the case at this stage which can be effectively gone into at the time of hearing of the petition under Section 9 of the Act. Thus, in view of the discussions made above, this Court holds that the appeal under Order 43 Rule-1(r), CPC is not maintainable and the same is accordingly dismissed.

Interim order dated 28.01.2016 passed in Misc. Case No.71 of 2016 stands vacated.

While parting with the order, this Court must record its note of appreciation for able assistance of Mr.Tanmay Mishra, learned counsel for the respondent for adjudication of the appeal.

Appeal dismissed.

2016 (II) ILR - CUT-212

K. R. MOHAPATRA, J.

MISC. CASE NO. 244 OF 2015
(ARISING OUT OF L.A.A. NO. 47 OF 2015)

PITAMBAR SAHOO ……..Petitioner/Claimant

.Vrs.

ANGUL-SUKINDA RLY. LTD., GAJAPATI NAGAR, BHUBANESWAR ……..Opp. Party/Appellant

(A) LAND ACQUISITION ACT, 1894 – S.3(b)

"Person interested" – Who can be said to be a "person interested" as defined U/s. 3(b) of the Act ? The definition is not exclusive but inclusive in nature and must be liberally construed so as to embrace all persons who may be directly or indirectly interested either in the title to the land or in the quantum of compensation. (Para 8)

(B) LAND ACQUISITION ACT, 1894 – S.3(b)

Whether the Opp.Party-Appellant i.e. Angul-Sukinda Railway Ltd. is a "person interested" within the meaning of section 3(b) of the Act and the appeal filed by it U/s. 54 of the Act is maintainable ? In this case the land has not been acquired either at the requisition of or for the benefit of the Opp.Party but for the benefit of East Coast Railways for "Angul Duburi-Sukinda Road New B.G.Rail Link Project" – However in view of the terms and condtions of the agreement between the Ministry of Railways and the Opp.party-company, it is manifest that the compensation for land acquisition has to be paid by the opp.party – Since East Coast Railways and Ministry of Railways are not impleaded as parties to the award made by the reference Court U/s. 18 of the Act, the Opp.party has a right to challenge the same in appeal U/s. 59 of the Act – Held, the opposite party-company is a "person interested" within the meaning of section 3(b) of the Act and the appeal filed by him U/s. 54 of the Act is maintainable. (Paras 10,11,12)

Case Laws Referred to :-

1. AIR 2015 SC 2908 : Peerappa Hanmantha Harijan (D) by L.Rs & Ors. – V- State of Karnataka
2. AIR 1980 SC 1118 : Himalaya Tiles & Marble (P) Ltd. -V- Francis Victor Coutinho (dead) by L.Rs.
3. AIR 1995 SC 724 : U.P.Awas Evam Vikas Parishad -V- Gyan Devi (Dead) by L.Rs. & Anr.
4. AIR 1995 SC 1004 : M/s. Neyvely Lignite Corpn. Ltd. -V- Special Tahsildar (Land Acquisition), Neyvely & Ors.
5. AIR 2002 SC 1598 : Director of Settlements, A.P. -V- M.R.Apparao
6. (1996) 6 SCC 44 : Union of India & Ors. -V- Dhanwanti Devi & Ors.
7. 2015 (12) SCALE 227 : Poonam -V- State of U.P. & Ors.
8. AIR 2002 SC 817 : Abdul Rosak & Ors. -V- Kerala Water Authority & Ors.

For Petitioner : M/s. N.Panda-I, M.K.Panda & S.Mazumdar
Miss S.Mishra, Addl.Standing Counsel
For Opp. Party : M/s. S.K.Dash, A.Dhalasamantra, B.P.Dhal, S.Das & A.K.Otta

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Date of Order: 29.04.2016

ORDER

K.R. MOHAPATRA, J.

This is an application filed by the claimant-respondent No.1 (for short 'the petitioner') assailing the maintainability of the appeal at the instance of the appellant, namely, Angul-Sukinda Railway Limited, Bhubaneswar (for short 'the Opposite Party').

2. It is contended in the misc. case that basing upon a requisition made by East Coast Railways through its Chief Engineer (HQ/CQ), Bhubaneswar, the State Government issued notification under Section 4 (1) of Land Acquisition Act, 1894 (for short 'the Act') for acquisition of the land for Angul-Duburi-Sukinda Road New B.G. Rail Link Project at the instance of the Union of India/Ministry of Railways. The opposite party is neither the Requisitioning Authority nor has undertaken any liability as per the notification/declaration under the Act for payment of compensation to the claimant and as such, it is neither a beneficiary nor a person interested to sue or to be sued for the purpose of determination of compensation under the provisions of the Act. The opposite party has no *locus standi* to file the appeal and leave granted to the opposite party by this Court by order dated 16.11.2015 to present and prosecute the appeal is opposed to the provisions of Section 50(2) of the Act.

The opposite party is neither a 'local authority' as defined under Section 3 (aa) of the Act or nor a 'Company' under Section 3 (e) of the Act for whom the land has been acquired. The opposite party is also not a 'person interested', who is required to be noticed under Section 20 of the Act and thus, it has no right either to apply for a reference to the Court for determination of compensation or to prefer and maintain an appeal under Section 54 of the Act. SRO No. 1074 dated 14.05.1955 has been issued in exercise of power conferred on the Union of India by Article 258 (1) of the Constitution of India. In the said S.R.O., the Government of Odisha has been entrusted to act for and on behalf of the Central Government in relation to acquisition of land for the purpose of Union of India. The opposite party has been entrusted to carry out the project work. Thus, the status of the opposite party is not more than an allottee/lessee or contractor on the basis of concession agreement under Annexure-1 to the petition. The opposite party cannot step into the position of East Cost Railways or Government of Odisha on the basis of concession agreement for execution of the project work under Public Private Partnership (PPP) mode. The Special Land Acquisition Officer has been provided with fund to pay compensation for acquisition of the land. The East Coast Railways for which the land has been acquired has the knowledge of such award of compensation and in many cases, has intimated the Special Land Acquisition Officer for payment of decreetal dues/compensation. Hence, the petitioner contended that the appeal at the instance of the opposite party is not maintainable and prayed for allowing his prayer holding the appeal not maintainable.

3. The opposite party filed its counter affidavit refuting the allegations made in the petition. It is contended that the petition is not maintainable either in law or on fact. Upon a reference being made under Section 18 of the Act, the learned Civil Judge (Senior Division), Kamakhyanagar determined the market value of the acquired land which is impugned in the present appeal. The Government of Odisha issued a notification vide Notification No. 26720 dated 7.7.2010 under Section 4 (1) of the Act for acquisition of the land for execution of Augul-Duburi-Sukinda New B.G. Rail Link Project which was required for Steel and Thermal Sector in the State. Land was acquired for East Coast Railways by the State Government. The project is to be carried out under the Public Private Partnership (PPP) mode adopted by the Ministry of Railways, where the State of Odisha is the major stake holder, two other Private Sector Undertakings have taken the burden to the extent of 32% in the Special Purpose Vehicle (SPV). The opposite party is a Company

registered under the provisions of Companies Act, 1956. As per the terms of a concession agreement executed between Ministry of Railways and the Opposite Party, the latter (the opposite party) has been entrusted with the responsibility of raising the funds for the project and also the corresponding duty not only to pay compensation amount for acquisition of land for the project but also to pay the amount for laying the railway track to Rail Vikash Nigam Ltd. (RVNL). In other words, the opposite party is required to pay compensation as per the terms of the agreement. Thus, the Opposite Party is a person interested in the said acquisition. However, neither the East Coast Railways nor the Opposite Party was impleaded as party to the reference. In that view of the matter, the opposite party has presented the appeal with the leave of this Court and the East Coast Railways have also its concurrence in the matter of decision to prefer the present appeal (Annexures-2 and 3 to the counter affidavit). The opposite party is virtually interested in the quantum of compensation as SPV, for which it squarely comes within the definition of 'person interested' under Section 3 S.C 3(b) of the Act. Refuting the allegations made by the petitioner to the effect that it was a mere allottee/lessee or contractor, the opposite party submitted that it is bound by the concession agreement, as aforesaid, to pay compensation and as such, it being a person interested is entitled to a notice under Section 20 of the Act and also has a *locus patentee* to participate in the proceeding before the Court of Reference as well as to maintain the appeal before this Court. It is further contended in the counter affidavit that in compliance of the terms of agreement, the opposite party has placed the funds with the Executive Engineer (Con.)/RVNL Projects for the Chief Engineer (Con)-II, East Coast Railways, Bhubaneswar against their requisition and in turn the same has been deposited by the East Coast Railways before the Special Land Acquisition Officer and to substantiate the same, the appellant/opposite party-Company relied upon Annexures-4 and 5 series. Thus, it is contended that this Court has rightly granted leave to present and maintain the appeal by the opposite party before this Court and prayed for dismissal of the petition being devoid of any merit.

4. Section 54 of the Act deals with appeals from the award passed by the Court of reference. It prescribes that subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall only lie against any proceedings under the Act to the High Court from the award, or from any part of the award of the Court.

Section 3(d) of the Act postulates that the 'Court' means a Principal Civil Court of original jurisdiction, unless the appropriate Government has appointed a Special Judicial Officer within any specified local limits to perform the functions of the Court under this Act. The impugned award being passed by the Court of reference is amenable to appellate jurisdiction of this Court under Section 54 of the Act. The land in question was acquired on the requisition dated 25.1.2010 of the East Coast Railways through its Chief Engineer (HQ & CQ), Bhubaneswar for Angul-Duburi-Sukinda Road New B.G. Rail Link Project. SRO No. 1074 dated 14.5.1955 reveals that in exercise of power conferred under Clause (1) of Article 258 of the Constitution, the President of India under the said SRO entrusts the Government of Odisha including few other States with their consent, to discharge the functions of the Central Government under the Land Acquisition Act, 1 of 1894 (for short 'the Act') in relation to acquisition of land for the purposes of the Union within its territory. Thus, the State of Odisha being empowered under the said SRO acquired an area of Ac.18.600 decimals of land under Section 4(1) of the Act vide Notification No. 26720 dated 7.7.2010 for the aforesaid project. The declaration under Section 6 of the Act in respect of the acquired land was made vide OEG No.1808 dated 5.8.2011. Subsequently, on 21.5.2013, possession was handed over to the East Coast Railways to carry out the project.

5. It is pertinent to mention here that in the interregnum, on 14th May, 2010, an agreement called 'Concession Agreement', was executed between the Ministry of Railways, Government of India and the opposite party to set up a suitable framework under which the opposite party can undertake all the activities connected with Development, Financing, Design, Construction, Operations and Maintenance of the Project. By virtue of the said agreement, the opposite party took up the project work. Clause-2.1 of the Concession Agreement stipulates that the scope of the Project shall include the performance and execution of all activities relating to Development, Financing, Design, Construction, Operations and Maintenance of the Project by the opposite party in accordance with the provisions of the said agreement. As per the terms of the said agreement, a lease agreement was also executed on the very same day to enable the opposite party to carry out the project. The project work was carried out on PPP mode and the State of Odisha was the major stakeholder. Two other Private Sector Undertakings have also taken the burden to the extent of 32% in the Special Purpose Vehicle (SPV). As per the terms of the Concession Agreement, the opposite party has to raise

funds to carry out the Project including payment of compensation for acquisition of the land for the Project.

6. Mr. Panda, learned counsel for the petitioner strenuously urged that the opposite party is neither a Requisitioning Authority nor has undertaken any liability as per the notification/declaration under the Act for payment of compensation to the claimants. Moreover, the land has not been acquired for the benefit of the opposite party. As such, it is neither a beneficiary nor a person interested. It is further contended that the opposite party is a Company which has been entrusted with the responsibility only to implement the project and do the needful incidental thereto. Thus, it has no right to be heard either for determination of compensation or in that case has no *locus standi* to prefer an appeal against such determination. It being an allottee/lessee/contractor under an agreement is not entitled to notice under Section 20 of the Act nor it has a vested right to be heard as provided under Section 50(2) of the Act. In support of his case, Mr. Panda relied upon a decision in the case of ***Peerappa Hanmantha Harijan (D) by L.Rs and others –v- State of Karnataka***, reported in AIR 2015 SC 2908, wherein the Hon'ble Supreme Court at paragraph-57 held as follows:

> "57. The reliance placed upon the provisions of Sections 50(1) and (2) of the L.A. Act, also are not applicable to the case on hand for the reason that Section 50 of the L.A. Act applies to the acquisition of land in favour of a Company by the State Government by following the mandatory procedure contemplated under Part-VII of the L.A. Act and relevant Rules framed for that purpose. Therefore, the claim made by the Company that it has got every right to participate in the proceedings for determination and re-determination of the market value of the acquired land and award of compensation passed by the Land Acquisition Officer or Deputy Commissioner or before the Reference Court or the Appellate Court is wholly untenable in law and therefore, the submissions made on behalf of the Company cannot be accepted and the same is rejected.

Relying upon the case law (supra), Mr.Panda submitted that the claim of the opposite party to give him an opportunity of hearing for determination of compensation is wholly untenable in law. Thus, the opposite party has no *locus standi* either to take part in the proceeding for determination and/or re-determination of the compensation or to prefer an appeal before this Court.

7. Mr. Dash, learned counsel for the opposite party, on the other hand, refuting the contention raised by Mr. Panda, submitted that the said decision is not at all applicable to the case at hand. The facts involved in the said case were that the land was acquired by the State of Karnataka in exercise of its power under Section 28 of the Karnataka Industrial Areas Development Act, 1966 (for short 'the KIAD Act'). The said acquisition was done for the purpose of an establishment of Industry at the instance of Karnataka Industrial Areas Development Board. Subsequently, M/s. Rajashree Cement Works, a unit of M/s. Ultra Tech Cement Ltd. made a proposal to the State of Karnataka to set up a cement manufacturing plant and applied for acquisition and allotment of 1187 acres and 5 guntas of land for that purpose. Accordingly, the Company entered into an agreement with the State Government and KIADB and the land was allotted in favour of the Company as per the provisions of the KIAD Act and the regulations made thereunder. In a reference under Section 18 of the Act, the Company was not made a party. Thus, M/s. Ultra Tech Cement Ltd. through its unit M/s. Rajashree Cement Ltd. filed a writ petition questioning the correctness of the award of compensation on the ground that they are necessary party to the reference and were not noticed in the said proceeding. Ultimately, the matter came up before Hon'ble Supreme Court. The Hon'ble Supreme Court in the aforesaid decision has examined the question as to whether the company was a beneficiary of the acquired land either under the provisions of KIAD Act or under the Land Acquisition Act in the facts and circumstances of the said case. The procedure of allotment of the land to the Company in the said case is completely different than that is under consideration in the case at hand and thus, taking note of different provisions of the KIAD Act, the Hon'ble Apex Court held that the Company is neither a beneficiary nor a person interested which entitles it for a notice or to participate in the proceeding for determination of the compensation. Thus, Mr. Dash, learned counsel for the opposite party submitted that the said decision is not at all applicable to the case at hand. On the other hand, he relied upon a decision in the case of ***Himalaya Tiles and Marble (P) Ltd. –v- Francis Victor Coutinho (dead) by LR's***, reported in AIR 1980 SC 1118. More particularly, he placed reliance at paragraphs-7 and 13 of the said decision which reads as follows:

> "7. It seems to us that the definition of 'a person interested' given in Sec. 18 is an inclusive definition and must be liberally construed so as to embrace all persons who may be directly or indirectly interested either in the title to the land or in the quantum of compensation. In the

instant case, it is not disputed that the lands were actually acquired for the purpose of the company and once the land vested in the Government, after acquisition, it stood transferred to the company under the agreement entered into between the company and the Government. Thus, it cannot be said that the company had no claim or title to the land at all. Secondly, since under the agreement the company had to pay the compensation, it was most certainly interested in seeing that a proper quantum of compensation was fixed so that the company may not have to pay a very heavy amount of money. For this purpose, the company could undoubtedly appear and adduce on the question of the quantum of compensation.

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13. Thus, the preponderance of judicial opinion, seems to favour the view that the definition of 'person interested' must be liberally construed so as to include a body, local authority, or a company for whose benefit the land is acquired and who, is bound under an agreement to pay, the compensation. In our opinion, this view accords with the principles of equity, justice and good conscience. How can it be said that a person for whose benefit the land is acquired and who is to pay the compensation is not a person interested even though its stake may be, extremely vital? For instance, the land acquisition proceedings may be held to be invalid and thus a person concerned is completely deprived of the benefit, which is proposed to be given to him. Similarly, if such a person is not heard by the Collector or a Court, he may have to pay a very heavy compensation which, in case he is allowed to appear before a court, he could have satisfied it that the compensation was far too heavy having regard to the nature and extent of the land. We are, therefore, unable to agree with the view taken by the Orissa High Court or even by the Calcutta High Court that a company, local authority or a person for whose benefit the land is acquired is not an interested person we are satisfied that such a person is vitally interested both in the title to the property as also in the compensation to be paid therefore because both these factors concern its future course of action and if decided against him, seriously prejudice, his rights. Moreover, in view of the decision of this Court referred to above, we hold that the appellant was undoubtedly a person interested as contemplated by S. 18(l) of the Act. The High Court, therefore, committed an error in throwing out

the appeal of the appellant on the ground that it had no locus to file an appeal before the Bench." (*emphasis supplied*)

The aforesaid view has been reiterated in the decision in the cases of ***U.P. Awas Evam Vikas Parishad –v- Gyan Devi (Dead) by L.Rs. and another etc. etc.***, reported in AIR 1995 SC 724 and ***Union of India –v- Sher Singh and others***, reported in (1993) 1 SCC 608. Also in a decision in the case of ***M/s. Neyvely Lignite Corpn. Ltd. –v- Special Tahsildar (Land Acquisition), Neyvely and others***, reported in AIR 1995 SC 1004, a wider interpretation was given scope of Section 50(2) of the Act. It has been held at paragraphs-11 and 13 as follows:

> "11. It is true that Section 50(2) of the Act gives to the local authority or the company right to adduce evidence before the Collector or in the reference under Section 18 as it was specifically stated that in any proceedings held before the Collector or the Court, the local authority or the company may appear and adduce evidence for the purpose of determining the amount of compensation. However, it has no right to seek reference. Based thereon, the contention is that the limited right of adduction of evidence for the purpose of determining the compensation does not carry with it the right to participate in the proceedings or right to be heard or to file an appeal under Section 54. We cannot limit the operation of Section 3(b) in conjunction with sub-section (2) of Section 50 of the Act within a narrow compass. The right given under sub-section (2) of Section 50 is in addition to and not in substituting of or in derogation to all the incidental, logical and consequential rights flowing from the concept of fair and just procedure consistent with the principles of natural justice. The consistent thread that runs through all the decisions of this Court starting from Himalayan Tiles case (AIR 1980 SC 1118), is that the beneficiary, i.e., local authority or company, a co-op. society registered under the relevant State law, or statutory authority is a person interested to determine just and proper compensation for the acquired land and is an aggrieved person. It flows from it that the beneficiary has the right to be heard by the Collector or the Court. If the compensation is enhanced it is entitled to canvass its correctness by filing an appeal or defend the award of the Collector. If it is not made a party, it is entitled to seek leave of the court and file the appeal against the enhanced award and decree of the Civil Court under Section 26 or of the judgment and decree

under Section 54 or is entitled to file writ petition under Article 226 and assail its legality or correctness. When the award made under Section 11 of the Collector is vitiated by fraud, collusion or corruption, the beneficiary is entitled to challenge it in the writ petition apart from the settled law that the conduct of the Collector or Civil Judge is amenable to disciplinary enquiry and appropriate action. These are very valuable and salutary rights. Moreover in the language of Order1 Rule 10 CPC, in the absence of the beneficiary who ultimately is to bear the higher compensation, no complete and effectual determination of binding just and proper compensation to the acquired land would be made. So it is concomitantly a proper party if not a necessary party to the proceedings under Order1 Rule 10 CPC. The denial of the right to a person interested is in negation of fair and just procedure offending Article 14 of the Constitution.

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13. If there is no right of hearing or appeal given to the beneficiary and if the State does not file the appeal or if filed with delay and it was dismissed, is it not the beneficiary who undoubtedly bears the burden of the compensation, who would be the affected person? Is it not interested to see that the appellate court would reassess the evidence and fix the proper and just compensation as per law? For instance the reference court determined market value at Rs.1,00,000 while the prevailing market value of the land is only Rs. 10,000. Who is to bear the burden? Suppose State appeal was dismissed due to refusal to condone the delay, is it not an unjust and illegal award? Many an instance can be multiplied. But suffice it to state that when the beneficiary for whose benefit the land is acquired is served with the notice and brought on record at the stage of enquiry by the Collector and reference court under Section 18 or in an appeal under Section 54, it/they would be interested to defend the award under Section 11 or Section 26 or would file an appeal independently under Section 54 etc., against the enhanced compensation. As a necessary or proper party affected by the determination of higher compensation, the beneficiary must have a right to challenge the correctness of the award made by the reference court under Section 18 or in appeal under Section 54 etc. Considered from this perspective we are of the considered view that the appellant-Company is an interested person within the meaning of Section 3(b) of the Act and is

also a proper party, if not a necessary party under Order 1 Rule 10 of the CPC. The High Court had committed manifest error of law in holding that the appellant is not a person interested. The orders of the High Court are accordingly set aside."

The ratio is equally applicable to the 'person interested'.

8. On a close reading of the aforesaid decisions, it emanates that the definition under Section 3(b) of the Act is not exclusive in nature. On the other hand, it is an inclusive definition and must be liberally construed so as to embrace all persons who may be directly or indirectly interested either in the title to the land or in the quantum of compensation.

It is the trite law that the decision of a Court should not be read like an enactment of the Parliament. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which judgment was delivered. The law which will be binding under Article 141 of the Constitution would, therefore, extend to all observations on points raised and decided by the Court in a given case (See ***Director of Settlements, A.P. v. M.R. Apparao***, reported in **AIR 2002 SC 1598**). Further, in the case of ***Union of India and others Vs. Dhanwanti Devi and others***, reported in (1996) 6 SCC 44, while discussing about the binding effect of a decision or precedent under Article 141 of the Constitution, it is held as follows:-

"9. Before adverting to and considering whether solatium and interest would be payable under the Act, at the outset, we will dispose of the objection raised by Shri Vaidyanathan that Hari Krishan Khosla case is not a binding precedent nor does it operate as ratio decidendi to be followed as a precedent and is per se per incuriam. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates—(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found

> therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi."

Keeping in view the aforesaid principles laid down, the applicability of the case laws cited by learned counsel for the parties has to be read.

9. In the case of *Himalaya Tiles and Marble (P) Ltd. (supra)*, Section 4(1) notification was made at the instance of the requisition of the appellant therein, namely, Himalaya Tiles and Marble (P) Ltd. for acquisition of additional land for purpose of the Company (the appellant therein). *U.P.Awas Evam Vikas Parishad's case (supra)* (for short 'the Board') the question arose as to whether the Board has a right to appear in the acquisition proceeding before the Collector and the reference Court and adduce evidence for the purpose of determining the amount of compensation. In the said case, Section 55 of the U.P. Act provides for acquisition of land. It lays down that such acquisition may be made under the provisions of the Land Acquisition Act as amended in its application to Uttar Pradesh and further provides that Land Acquisition Act for that purpose shall be subject to the modification specified in the Schedule to the U.P. Act. The Board was constituted under

Section 3 of the U.P.Awas Evam Vikas Parishad Adhiniyam, 1965 (U.P. Act 1 of 1966). In the schedule to the said Act modifications have been introduced in the provisions of the Land Acquisition Act. Clause-(i) has been added to Section-3, whereby the 'local authority' has been defined to include the Board. The Board in exercise of its power under Section-28 of the said Act (analogous to provisions under Section 4 of the Act) issued notification for acquisition of law for a Scheme known as "Trans-Yamuna Housing and Accommodation Scheme'. Further, a notification of declaration under Section 32 of the said Act (analogous to provision under Section 6 of the Act) was also issued. However, the Board was neither impleaded as a party in the reference before the Tribunal or in the appeals before the High Court. In the aforesaid backdrop, the aforesaid question arose for consideration, which was answered in the affirmative in favour of the Board.

Likewise, in the case of M/s *Neyvely Lignite Corpn. Ltd. (supra),* the entire controversy hinged around interpretation of Section 3(b) and Section 50(2) of the Act, as to whether the appellant therein is a person interested either to be impleaded as a party to the pending references under Section 18 of the Act to lead evidence, contest the reference or, if the compensation is enhanced, to file an appeal in the High Court under Section 54 of the Act. While dealing with the reference made by two Hon'ble Judges of the Hon'ble Supreme Court, the question that was framed for consideration at paragraph-5 of the decision, which is as follows:-

> "5. The question, therefore, is whether the appellant for which benefit the land is acquired is a "person interested" within the meaning of Section 3(b) of the Act……"

Thus, in all the aforesaid cases relied upon by Mr.Dash, learned counsel for the opposite party, the question, more or less, for determination was whether the Company, or the Board (local authority), for whose benefit the land was acquired has a right to participate in the acquisition proceeding before the Collector, reference before the Court or Tribunal, and in that case maintain an appeal before the High Court. In all these cases it has been held in the affirmative.

But, the case at hand is little different than those referred to above. Admittedly, in the instant case, the land has not been acquired either at the requisition of or for the benefit of the opposite party. The land was acquired at the requisition of and for the purpose and benefit of the East Coast Railways for 'Angul Duburi-Sukinda Road New B.G. Rail Link Project'.

Concession and lease agreements were executed with the opposite party (Company) to execute the said project. Thus, the question that arises for consideration is whether the opposite party can be armed with the provision of Section 50 of the Act to claim for impleadment as a party to the reference before the Court and for that reason maintain this appeal.

10. Before delving into the issue, it has to be kept in mind that the right of being impleaded as a party and the right of opportunity of hearing as provided under the Act are statutory right and not a common law right. Further, in a decision in the case of ***Poonam Vs. State of U.P. and others***, reported in 2015 (12) SCALE 227, Hon'ble Supreme Court held as follows:-

> "17. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. The principle of audi alteram partem has its own sanctity but the said principle of natural justice is not always put in strait jacket formula. That apart, a person or an authority must have a legal right or right in law to defend or assail."

Thus, it is abundantly clear that the principles of *audi alteram partem* cannot always be put in a straight jacket formula. A person or any authority must have a legal right or a right in law to defend or assail to ask for compliance of the principles of natural justice. The term 'Company' as referred to in Section 50 of the Act only includes a Company for whose benefit the land has been acquired. At this stage, it may be profitable to refer to a decision relied upon by Mr.Dash in the case of ***Abdul Rosak and others Vs. Kerala Water Authority and others***, reported in AIR 2002 SC 817. The factual backdrop of the said case law had its origin from a notification under Section 4(1) of the Act dated 19.07.1981 made by the State of Kerala for acquisition of land for the benefit of the public Health Engineering Department of the State Government. Subsequently, declaration under Section 6 of the Act was made. Thereafter, Collector (Land Acquisition) initiated proceeding for assessment of the compensation payable and award was made on 15.06.1986. The reference at the instance of the claimants for enhancement of compensation came to be decided in different awards by the Court in between 1989 to 1991. The peculiarity in this case is that in the interregnum, State of Kerala on 01.04.1984 through an executive order constituted 'Kerala Water Authority' as a statutory Corporation. For that purpose, Kerala Water Supply and Sewerage Act, 1986 was given retrospective operation with effect from

01.03.1984 declaring Kerala Water Authority to have been constituted under the Act. It succeeded to all the liabilities of Public Health Engineering Department of the State Government. In that capacity, State of Kerala and Kerala Water Authority preferred appeals before the High Court assailing the award in the references. The question arose as to whether Kerala Water Authority has any *locus standi* to prefer any appeal. Relying upon the Constitutional Bench decision in the case of *U.P.Awas Evam Vikas Parishad (supra)*, the Hon'ble Supreme Court in paragraph-7 of *Abdul Rosak (supra)* held as follows:-

> "7. Shri T.L.V. Iyer, the learned Senior Counsel for the claimant-appellants has submitted that Kerala Water Authority is the successor of Public Health Engineering Department of the State Government, and bound by the proceedings conducted by or against the State Government and, therefore, the Constitution Bench decision does not have any applicability to the facts of the present case and the High Court ought not to have set aside the awards and remanded the cases to the reference court. We find it difficult to subscribe to the view so forcefully canvassed by the learned Senior Counsel for the appellants. KWA came into existence as a statutory corporation on 1-4-1984. It may be said to have succeeded to the liability incurred by the State Government so far as the quantum of compensation awarded by the Collector is concerned but so far as the enhancement in the quantum of compensation is concerned, it will be a liability of KWA incurred by it after its coming into existence and, therefore, to the extent of enhancement, the authority was certainly entitled to notice and right to participate in the proceedings before the reference court leading to enhancement of compensation."

The aforesaid case laws make are certainly distinguishable on facts. But the consistent view in all the aforesaid case laws makes it abundantly clear that the definition of a 'person interested' is inclusive in nature. It should be interpreted liberally to embrace all persons, local authority, Company and Cooperative Society created under any enactment, who may be directly or indirectly interested either in the title to the land or in the quantum of compensation, depending upon facts and circumstances of each case. In the case at hand, the opposite party-Company comes into picture by virtue of Concession Agreement.

11. The Concession Agreement executed between the Ministry of Railways and the opposite party-Company reveals that the parties have

agreed for setting up a suitable framework under which ASRL (the opposite party) can undertake all activities connected with development, finance, design, construction, operation and maintenance of the project. 'Concession' defined as the authorization granted by the Authority granting concession to the concessionaire (opposite party) to develop, finance, design, engineer, procure, construct, operate and maintain the project Railway and to exercise and/or enjoy the right, power, benefit, privileges, authorization and entitlement as set out in the agreement during concession period. In order to appreciate the rights and obligation of the opposite party with the agreement, relevant clauses as quoted here under have to be gone into

"**4.1 Grant of Concession**

MoR hereby grants Concession to ASRL, in accordance with the provisions of this Agreement."

"**4.2 Rights of ASRL**

The Concession hereby entitles ASRL, inter-alia, to the following:

a. to exercise all the rights and authority vested in the Concessionaire under this Agreement;

b. to have the exclusive right and authority during the Concession Period to implement the Project;

c. the right to Commercial Exploitation;

d. the right to develop Additional Facilities in the Project Area;

e. the right to quote special tariff rates for freight traffic moving within the Project Railway i.e. where origin and destination both are on the Project Railway in terms of the policy instructions issued by MOR from time to time. However, any special tariff rates applicable on other than the Project Railway shall require prior approval of MOR;

f. the right to receive from MoR its share in accordance with the rules of inter-railway apportionment of earnings, of the tariff collected from the freight traffic originating, terminating and moving on the Project Railway, including haulage charges collected from container operations, after deduction of Operations and Maintenance costs, in accordance with the Project Related Agreements."

Clause 4.3 (j) reads as follows:

"**4.3 Obligations of ASRL**

Subject to this Agreement and Applicable Laws, ASRL hereby undertakes to do the following:

xx xx xx

j. indemnify MoR against all actions, suits, claims, demands and proceedings and any loss or damage or cost of expense that may be suffered by MoR on account of anything done or to be done by ASRL in connection with the performance of its obligations under this Agreement;"

11. From a conjoint reading of the aforesaid terms and conditions of the agreement it is manifest that the compensation for land acquisition has to be paid by the opposite party. Neither the Ministry of Railways nor the East coast Railways for whose benefit the land has been acquired has shouldered any liability for the same. In view of the above, the submission of Mr.Panda to the effect that the opposite party was only a lessee under the lease agreement and has no say in the matter of determination of the compensation, cannot be accepted. The lease agreement was executed between the parties to work out the terms and conditions of the Concession Agreement. Thus, the opposite party has a right more than that of a lessee or a contractor as alleged by Mr.Panda. In view of the above, it necessitates the Court to have a close reading of the case of *P.H. Harijan (supra)*. In the said case, the land was acquired under the provisions of KIAD Act. The land was acquired by the State Government at the instance of KIADB under Section 28 (1) of the Act, 1966. The said provision is *pari materia* to Section 4(1) of the L.A. Act. Section 30 of the said Act provides that the provision of L.A. Act shall *mutatis mutandis* apply in respect of holding enquiry and to pass award determining the compensation for acquisition of land by the Deputy Commissioner. In paragraph-33 of the *P.H. Harijan (supra)*, Hon'ble Supreme Court held as under:

"33. ….In view of the above statutory provisions of the KIAD Act, the provisions of Sections 11, 18 and 30 of the LA Act are applicable for the purpose of determination of just and reasonable compensation of the acquired land payable to the landowners either by the Deputy Commissioner or Reference Court."

12. Taking into consideration different provisions of the lease agreement and relevant clauses of regulations framed under KIAD Act, Hon'ble Supreme Court held as follows:

"50. In the instant case, a perusal of the provisions of the lease agreement executed between the parties referred to supra and Regulation 10 clauses (a), (c), (d) and (e) of the KIADB Regulations

> make it abundantly clear that the Company is only the allottee/lessee of the acquired land and as per Clauses 5(a) and (b) of the lease agreement referred to supra, the premium indicated in the lease agreement in respect of the allotted land in its favour represents the tentative cost of the land. It has been further specified in the lease agreement that in the event of the lessor incurring the payment of amounts to the landowners over and above the awards made by the acquiring authority by virtue of awards passed by the competent court of law in view of the provisions of the Land Acquisition (Amendment) Act, 1984 in respect of demised premises or any part thereof, the same shall be met by the lessee within one month from the date of receipt of communication signed by the Executive Member or any other officer authorised by the lessor. In view of the above conditions of the lease agreement, neither KIADB nor the Company can contend that the acquisition of the land involved in these proceedings is in favour of the lessee Company. Therefore, the Company is neither a beneficiary nor an interested person as claimed by them in terms of Section 2(11) of the KIAD Act or under Section 3(b) of the LA Act as per which, "person interested" includes all persons claiming an interest in compensation to be made on account of the acquisition of land under the KIAD Act and that a person shall be deemed to be interested in the land if he is interested in an easement affecting the land. It is necessary to examine Section 3(b) read with Section 9 of the LA Act, which deals with notice to persons interested and Section 11, which deals with enquiry and award to be passed by the Deputy Commissioner/Land Acquisition Officer."

Thus, the Company/lessee was only the allottee/lessee to the acquired land as per the Clause 5(a) and (b) of the Lease Agreement. It further specified in the lease agreement that in the event the lessor incurring payment of the amounts to the land owners over and above to the award made by the acquiring authority by virtue of the award made by the competent Court of Law in view of the provisions of the Land Acquisition (Amendment) Act, 1984 in respect of the demise premises or any part thereof, the same shall be made by the lessee. Thus, the status of the opposite party in the instant case cannot be equated with that of the lessee (M/s Rajshree Cement) as the opposite party is under obligation liable to raise funds, execute the project work, pay the compensation to the land owners and to execute all other things as agreed upon by it in the Concession Agreement. Neither the East Coast Railways nor

the Ministry of Railways had undertaken any liability for payment of compensation. Moreover, Clause 4.3(j) of the Concession Agreement made the opposite party liable to indemnify Ministry of Railways against all actions, suits, claims, demands and proceedings and any loss or damage or cost of expense that may be suffered by MoR on account of anything done or to be done by ASRL in connection with the performance of its obligations under this Agreement. One who is under obligation or is liable to indemnify against all actions suits, claims, demands and proceedings has a right to be heard in it. In view of the above, it can be safely said that the opposite party has a right to be heard in the matter following the principles of *audi alteram partem.* It has become more expedient when neither the Ministry of Railways nor the East Coast Railways have been impleaded as a party to the reference. In addition to the above, the East Coast Railways have also its concurrence in the matter of preferring an appeal before this Court by the opposite party as evident from Annexures- 2 and 3 to the counter affidavit. Thus, taking into consideration the facts and circumstances of the case and the discussions made above, it can be safely said that the East Cost Railways for whose benefit the land has been acquired and the opposite party-Company will be defenceless, if the opposite party is not permitted to file an appeal and thus the statutory right provided under Section 54 of the Act will be redundant. Thus, it is held that the opposite party-Company is a 'person interested' within the meaning of Section 3(b) of the Act and can present and maintain an appeal under Section 54 of the Act.

13. Accordingly, the Misc. Case being devoid of any merit stands dismissed.

Aplication dismissed.